CHAPTER 4
THE PROTECTION OF THE PERFORMER IN FRANCE AND THE EUROPEAN UNION

Objective of the Chapter: The chapter seeks to explore the means adopted by a country sternly believing in Author's Rights to protect performers' interests. It reveals the three-pronged means employed to protect the performer. The chapter studies the path breaking European union initiatives both to apply as well as harmonize protective mechanisms in the digital age providing solutions and model for the future for protecting the performers' rights while at the same time creating the convenience of smooth exploitation of the performance.

The Evolution of Performers' Rights in France

The performers', in particular actors in France had suffered socially, economically and politically for centuries. The secondary status that was accorded to them slightly improved only in the eighteenth century with the Declaration of the Rights of Man. It is significant that the Declaration of the Rights of Man and the law of December 1789 gave the actors along with Jews, the protestants and executioners access to all civil and military occupations and made them eligible for election. It was only in 1849 that Concile de Sessions relieved them from excommunication. It is pertinent to note that laws had emerged with respect to employment contracts generally.¹ Performers' were brought under the regime of service contract incorporated in the Labor Code and in the Social Security Code.² The highlight of which was that every contract in which either the natural or legal person secures the services of the performer for remuneration for the purposes of his or her production was deemed to be a service contract.³ The presumption subsists whatever the manner and amount of remuneration or whatever may be the description made in the contract. This is so even if the performer retains the

² *Id.*, p.392.
³ This is particularly so when the person does not carry on the activity that is the subject matter of the said contract or terms implying his registration in the register of commerce.
freedom of expression or if he is the owner of all the equipments and he employs one more person and also if he takes part personally in the performance. In other words, the status of an employee has been cast upon the performer under the labor code. This has enabled them and the professional bodies to organize the exercise of their rights obtained under contracts and have enabled the Courts to protect such rights by reference to the general law.

Some of the significant highlights of the French Service Contract had been that union membership has been never a sine qua non for the grant or for withholding the benefit under the collective agreements. Further there could not be derogation from the collective agreements though a higher bargain could be sought. There are two articles in the Labor Code that concerns the artistic performers. The provision stipulates that any contract where by the artist is engaged either by a physical person or by a legal entity would be presumed to be an employment contract. Several benefits accrue to the artist from this presumed status in the like of social security benefits. Secondly this has necessitated confining the use of their performances to a determined activity. The labor code requires the proceeds of the secondary uses to be provided to the performers. It specifically mentioned that the remuneration owed to the artist should not be considered as a salary when performance is exploited without the physical presence of the artist. The provisions in the labor code also served to support the courts in their attitude towards the performers when they were fighting for justice against unauthorized exploitation.

Much has been granted to the performers' by means of the courts' generous interpretation of the law. In this context it is important to note that even copyright law had developed mainly through the Court pronouncements based on skeletal enactments of 1791 and 1793. From identifying Moral Rights to drawing distinctions between reproduction of the work and the right to perform the work or

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4 Id., p 393.
6 L-762-1 of the Labor Code Id., p.175.
7 L-122-9 of the Labor Code. Ibid.
8 Ibid. L-762-2 of the Labor Code.
fair use doctrines and conveyances. In fact the 1957 Act could be said to have codified preexisting case law on such issues such as moral rights, economic rights and proportional representation. Even extension to secondary transactions was initiated through the Courts in France, in the absence of civil rights for a major part of the century; the performers were protected through contract and tort laws. For instance, no mention was made of performers’ in the 1957 Act. Though the facet of the Act that all creations of the mind could be eligible to protection and the non-exhaustive list of works and authors would have in all likelihood made performers as well eligible for protection. The reason being that the authors and the producers feared a possible reduction in their remuneration and also conflicts between the rights of performers’ and the authors.

**The Courts and the French Performer**

**Recognition of Economic Rights**

Historically, it is significant that all judicial decisions except one that preceded the coming into force of the law of 11th March 1957 had specified that the performer have no Droit de Auteur. The courts relied on the Civil Code to interpret contracts, as the Copyright Act of 1957 was silent with respect to performers explicitly. Difficulties surface in interpreting the contract when the terms are silent or unclear. There are instances where in the court has pronounced the judgment against the performer in such circumstances. These appear to have been without reference to the reality presented by the civil code rules. Articles 1163, 1162 and 1135 of the Civil Code have commonly been used to support the performer. Thus the civil code has clearly stipulated that a most restrictive interpretation of the contract needed to be attempted. The

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10 Id., p.Fra-11.
11 However certain features existed in the copyright law of France that perhaps would have been traditionally conducive to even performances being eligible for protection. Writing was not made a sine qua non for protection and even works that were rendered orally could be protected. Even in cases were it had been required, it only enhanced the evidentiary value. Id., p.16.
12 Tribunal Civil Seine March 1903, Gazette Du Palais 1903.1.468- cited in Stewart, op.cit, p.392.
14 In case of doubt the agreement is to be interpreted against the one who has undertaken the obligation.
15 Agreements bind the parties not only to what is expressed, but also to all the consequences which equity, custom or the law give to the obligation according to its nature.
courts have gone in search of the professional practices to read into the meaning to be appended to the ambiguous contract. The courts found contradictory findings as to what was professional usage. The prevalence of collective agreements that stipulated the need for further remuneration from exploitation contributed to the finding of professional usages in favor of the performer. Thus it was a combination of the general civil law and the professional usages that led to securing the performer against unauthorized exploitation.

Protection Against Third Party Exploitation

In the subsequent years, the French Courts granted performers' the right to oppose the unauthorized fixation and exploitation of their performances. The reason for such a development in France is purely historical and based on philosophical underpinnings. Commercial reasons never really influenced continental civil law developments. Freedom of contract was skeptically viewed and it is generally accepted that the law should intervene to protect the weaker party to a contract. The Civil Code through 1382 comes to the rescue of the performer by stipulating that a person in the absence of a contractual relationship uses or reproduces an artist's performance would be liable. The performer was provided relief in two significant decisions. Even the statement by the exploiter that the exploitation would inadvertently help the performer was not enough to defend him against the application of the article. The recourse of unjust enrichment was also a recognized means if the other avenues did not help the performer.

It is significant that the courts have not found anything in the French practices where in the silent agreement or ambiguous agreement passes over all the rights of exploitation to the producer. This was investigated in a case to understand whether the company had the right to use the sound tape of a movie without the authorization of the actress. Cass.Civ. (1st ch.), 1/30/74, Orane Demassis v. Compagnie Mediterraneenne du Film, J.C.P., 1974,IV, 92. Cited in Callebaut, op.cit., p.170.


The criteria to be satisfied were — the enrichment of the defendant, the impoverishment of the artist, the correlation between the two, the absence of legal justification for the enrichment, the absence of fault of the artist and the lack of any other recourse. Ibid.
Moral Rights

There was tremendous consciousness regarding moral rights pertaining to performers through case law even before the Copyright Act had made advances. Though the performer was never granted an equal status with the authors, the French nonetheless granted them quiet early in the absence of special provisions in contracts of employment and collective agreements two important rights, a moral right and a right to remuneration. The Courts recognized it before 1957 on the ground that every individual is entitled to respect for his personality, honor and reputation. This was so as early as 1931. Even minute transgressions with respect to honor of the artist was not spared. Even a wrong mention that a live performance was a recorded performance invoked the moral right of the artists. The high state of refinement of this right is evident when one perceives the subtle variations in which this right has been upheld. Some of the instances were when it was recognized by the courts that the artist had the right to the use of a pseudonym. The right of integrity that safeguarded the work from being altered and modified without the consent of the artist was also emphatically observed. Subtle variations even with respect to quality of the recording from the original would suffice to constitute a violation and remedy granted to the performer. The courts in several instances have also deprecated denaturisation of the work by mis-attributing and incorporating elements into the plot without the knowledge or consent of the actors.Instances like for instance where in the pornographic material was incorporated into the film or the character turned out to be at variance from the brief given prior to the shoot was found to violate the right of

22 Pascal Kamina, op.cit.,p.289. For instance advertising cuts and film colorization led to exploration of common-law torts such as passing off, defamation and ingenious falsehood. 23 State Council, 11/20/31, Franz, s., 1932.2.62. Callebaut, op. cit., p.179. 24 Seine. Civ.Trib. (3rd ch.), 2/19/55, Francine v. Franco-London du Film, J.C.P., 1955.11.8678. Id., p.180. 25 Soc. Urania Records v. Furtwangler's heirs, this right was upheld when the record for broadcasting was found to be of less quality than that of the original produced for commercial distribution. Ibid. It is important to note that the decision was set down by the Cour de Causation, which is the highest court in France and the decision acted as a binding precedent for the other courts. See also Paul Edward Geller, Melville B. Nimmer, International Copyright Law and Practice, Vol.1, Lexis Nexis, San Francisco (2002), p. Fra-133. 26 Paris, Civ Trib.,(17th ch.),4/20/77, Alers v. Unia,S.,1977,510. Callebaut,op. cit.,p.180.
the performer.27 A very significant right—the right of divulgation or the right to publish was also granted to the performer. The lack of trust in the production standards28 or need for better standards of quality29 could be enough reason for the artist to restrain the show. A very arbitrary right to correct their own show or retract their performances is also recognized provided the artist indemnifies the producer.

It is noteworthy that during the ensuing period the Court's refused to acknowledge the rights of the performer as being at par with the authors. However in the absence of special provisions in the contracts of employment and in the collective agreements two important rights—a moral right and a right to remuneration were recognized. A moral right was recognized prior to 1957 law in France on the premise that every individual is entitled to respect for his personality, honor and reputation.30 The Court's also laid down that a non-use of a recorded performance also would constitute a possible breach of contractual provisions.31 It was also laid down that all violations couldn't be treated as injury to moral rights violations but needed to be construed as violations of a tort or a contractual nature.32 In short the genesis of copyright recognition can be said to have evolved from labor welfare based on standardized labor or service contracts. The process was aided by the non—institutional bodies for the collection and distribution of royalties for the primary and secondary uses of their

29 Seine, Civ. Trib. (1st ch.), 7/7/38, Huguenot v. Dufrene, Gaz.Pal., 1938,676. Refusal by the actor to play his part as the production was found unsatisfactory Ibid.
30 1931 Conseil d'Etat —Conseil d' Etat 10 November 1931; Sirey, 1932 2.62. Tribunal Civil de la Seine (3rd Chamber) 23rd April 1937, Jurisclasseur Periodique 37 II 247, Sirey, 1938 2.57.

performances. Since the enactment of the law 70.643 of 17th July 1970, the decisions of the Court proliferated. In order to secure the lot of the performers' even non-use of the recorded performances came to be considered as violations of their rights.33.

The French Intellectual Property Code provides the performer with strong moral rights provisions and these include the right to paternity and the right to integrity. The right is inalienable as well as imprescriptible. Quiet significantly, the right does not end either with the life of the performer or with the cessation of his economic rights and is to be enjoyed by the heirs of the deceased performer.34

This is a feature of striking difference from the approach of the Copyright System with regard to the moral rights of the performer. It has been seen that the French respect for the performers' moral rights prevailed even prior to the expression of the same in the Intellectual Property Code. The courts had upheld the right to attribution, distortion and even non-use of the performance rendered by the performer. It is expressly prescribed that the performer shall have a right to his name, capacity and performance. It is an unqualified right granted to the performer. The right is an explicit grant complemented by its attribute of inalienability and imprescriptible character. It is noteworthy that the right does not carry any durational limit and is transmissible to his heirs. The transmission to the heirs happens upon the death of the performer in order to protect the performance as well as the memory of the performer. This encompasses both the right to paternity as well the personal honour of the performer and his reputation.35 No distinction between the audio and the audiovisual performances has been prescribed in this regard.

One of the later reflections of this right was in the Rostropovich case36, in which the performer, a famous cellist, protested against the use of his performance in a film soundtrack. The director of the film, Boris Godunov, had used the music by

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33 Ibid.

34 Article L212-2 of the Intellectual Property Code, France. A performer shall have the right to respect for his name, his capacity and his performance. This inalienable and imprescriptible right shall attach to his person. It may be transmitted to his heirs in order to protect his performance and his memory after his death.

35 Article L212-2 says that 'A performer shall have the right to respect for his name, his capacity and his performance. This inalienable and imprescriptible right shall attach to his person. It may be transmitted to his heirs in order to protect his performance and his memory after his death.

modifying its volume level and added some sounds to the soundtrack of the music. The sounds included spitting by the priest, of some one urinating and the gasps of a woman. These were found to be derogatory from the standpoint of the performer-Rostropovich. The tribunal justified the locus standi of the musician as it felt that the interpolation of some sounds could indeed harm the right of the performer particularly if the performer is famous. In consequence the tribunal ordered the insertion of a disclaimer. Even when there has been a conflict between the moral rights of the author and the moral rights of the performer, the courts in France have tried to evolve a balance of interests as is evidenced in the Rostropovich decision.37

Personality Rights

In the long line of cases the personality of the performer was protected as any one else's. The mere fact of making use of a performance, unauthorized or unremunerated cannot alone be regarded as causing injury to the performers' personality but should involve contractual or tortious liability on the part of the user. A person was entitled to forbid the use of his performance for any other purpose other than the one for which he has authorized. In other words by 1974, the Courts had evolved their own norms. The performer was free to determine the use that is to be made of his performance. He determined the scope of the contract-express qualifications were needed to restrict the agreements. Any subsequent use without authorization constituted breach of contract or tort as the case may be.

Labor Law and the Performer

Articles I-762-1 and I-762-2 of the Labor Code would govern the authorization and the remuneration derived from it. This amounted to recognition that the contract relating to artists performance is presumed to be a labor contract either in individual or common to several artists performing the same number or
participating in the same performance. The law No.60-1186 of 26th December 1969 enumerated on a non-exhaustive basis that they were to be regarded as entertainment artists. It established a presumption that was virtually impossible to rebut that the performers' are to be employed under a service contract even when the said performer does not carry on the activity of the said contract on terms implying the registration in the register of commerce. The written authorization of all the performers' was required for group performances.

The performers' rights can be said to have found statutory expression in the Statute of France in 3rd of July 1985. The 1985 code was influenced by the agreements and had also borrowed from the prevailing system. Where it has not been possible to sign the special agreement or the amending agreement some employers took the precaution of stating in the individual contracts of employment that they reserve for the future, the right to exploit the services of the performer in certain ways or by particular means of utilization or reproduction, subject to the conditions of such collective agreements, special agreements or amending agreements as the case may be.

Even though ancillary performers have been excluded from the definition under the 1985 Act nevertheless it is important to note that ancillary performers did beget protection under the Labor Code. The beneficiaries of the law are those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts. It is important to note that under the law of 1985, there was a presumption of transfer of the performers' right to the producer that the contract shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer. Such contract will contain separate remuneration for each mode of exploitation. The 1985 code was regrouped and adapted to the needs of the new technological environment in 1992 and was called as the French Intellectual Property Code.

38 Id., p.395.  
39 Stewart, op.cit.,p.392.  
40 Id., p. 391. Thus until 1985 a copyright oriented program cannot be found. It was only by the amendment in 1985 that the performer was granted a neighboring rights status.  
41 Stewart, op.cit.,p.393.  
42 Though the agreements already specified supplementary remuneration for each mode of exploitation of a television work but no agreement was reached within the fixed term in the cinema field.  
The aforementioned genesis of French performers rights points out the multi-pronged approach devised to protect the performers without compromising on the administrative convenience of exploitation. Despite theoretical constraints like questions of quantum of originality that the French were faced with in granting rights to new entities in the context of the rights enjoyed by the traditional entities a semblance of protection was extended to the performer.

Legal Status of the French Performer Today

Employee Status Maintained

One of the major highlights of French law has been the fact that fundamentally the performer has been considered to be an employee under the French law. Though independent contracting is allowed this is a rare occurrence. This is also starkly different from the British approach where in it is made sure that there is no confusion with respect to the status of the performer as an independent person. The performers' status in France is determined by the collective bargaining agreements and by the statute law that includes the authors' rights law as well as the labor law.

Traditional Rights Safeguarded

The safeguard clause has been enjoined in the Intellectual Property Rights Code (adopted in the year 1993) there by safeguarding the traditionally recognized authors rights from the novel extension covering related rights.

Definition of the Term 'Performer'

The French law makes a qualitative distinction with respect to the performers' in the audiovisual. It appears to be because of the multitude of performers' in the

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44 The Articles L-212-3, L-212-4 and L-212-5 bear abundant testimony to this.
46 L-Art.211-1. Neighbouring rights shall not prejudice authors' rights. Consequently, no provision in this Title shall be interpreted in such a way as to limit the exercise of copyright by its owners.

audiovisual production. The French law has sought to resolve this issue by making or attempting a subtle distinction between interpreting and performing artists on one hand and artists considered as complementary in the professional practices. Only the interpreting artists are considered as eligible entities under the French intellectual property rights code that is those who act sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety circus or puppet acts. The definition is broader than that in the Rome convention. The exclusion of ancillary performers has been found to create difficulties as practices were of little guidance. The courts have pursued diverse criteria to infer whether the actor was ancillary or not. If the role is essential then it has been inferred that the performer is not ancillary. In another instance duration and importance of the character was taken into account. The courts even relied on the quantum of originality to make this distinction. Thus, the definition of the term performer is narrow and a closed one with specific reference to literary and artistic works and a specifically enumerated list of those unconnected with literary or artistic works. This distinction is reflected in the labor code provisions as well. The value of artistry is attributed to a performer who speaks not less than 13 lines. The complementary artists should claim that they have made an artistic contribution if they have to be provided the same privileges.

47 Article L212-1 of the Intellectual Property Code says that "Save for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts." <http://www.legifrance.gouv.fr/html/images/english.gif> as on 10th January 2004.


49 Cass.Civ.I, 6 JULY 1999 (Telema C. Leclaire), juris –date no. 003057, Comm. comm. Elec. 1999, comm. No 42, note Caron J.C.P. 1999, IV, 2661, D.1999 Inf.rap.213 cited in ibid. This has also been criticized on the ground that originality was never a requirement for protection of neighboring rights.

Need for Written Authorization

French law has granted the performers' the whole scope of rights and the exclusive nature of these rights has been tempered by making their exercise partly conditional on labor legislation. In the French law the rights of performers' are intertwined with the collective labor agreements. The law requires that the agreement between the performer and the exploiter of his performance should be written. The written authorization shall be required for fixation of his performance, its reproduction, and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and the images have been fixed.

French Intellectual Property Code

Exclusive Rights Enjoyed by the Performer

Under French Intellectual Property Code, performers' are granted exclusive rights to authorize: (1) The fixation of their performance; (2) the reproduction of the fixed performance; (3) The communication to the public of the fixed performance; and (4) the separate use of the sounds or images of their performances where both the sounds and images have been fixed. This provision is complemented by the provision in Article L.762-1 of the labor law, according to which an employment contract must be individual. The contract may, however, be made for several performers' in cases where several artists are employed for the same performance or musicians belonging to the same orchestra. In such cases, it is important to note that the contract must mention the name, and specify the individual salaries, of each performer. One of the artists may sign this contract on behalf of other artist presupposing that he has a mandate from them to do so.


52 According to the law, "[t]he performer's written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and images have been fixed. Pascal Kamina, Film Copyright in the European Union, Cambridge University Press (1st edn. -2002), p. 357."Such authorization and the remuneration resulting there from shall be governed by Articles L. 762-1 and L. 762-2 of the Labor Code, subject to Article L. 216-6 of this code. Article L. 212-3.
This presupposition shows the inclination to ease the mode of exploitation particularly when there is more than one performer involved in the same performance.

**Norms for Presumptive Transfer of Rights**

In order to ensure that the producer holds all rights relative to the audiovisual work in their hands, the French authors' rights law provides for the assignment of performers' rights to the producer of the audiovisual fixation by signing a production contract. According to the law the signature of a contract between the performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer. It should be noted that the same presumption is not applicable with regard to the sound recordings. The law further provides that this contract shall lay down separate remuneration for each mode of exploitation of the work.

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

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53 Article L-212-4 of the Intellectual Property Code, France.
54 *Ibid*.
55 There have been several court cases regarding interpretation of requirement for a written agreement as a pre-condition for the presumption rule to enter into effect. These court cases have dealt with the rights of musicians to the soundtrack of the film, and the outcome of different cases has been somewhat different. The final say with regard to these issues lies with the French *Cour de Cassation*.
56 Article L-215-1. This is specifically spelt out only with respect to the video gram producers. This provision vindicates the rights of the video gram producer to assert that he does not fall into a separate category from that of the audiovisual producer or creator of the audiovisual work.
Transfer Accompanied by a Fair Compensation

However, this assignment of rights is compensated for within the law itself, which contains a complex regulatory framework to ensure that a performer receives fair compensation for all further uses of her fixed performance. Accordingly, the contract between the performer and the producer must specify a separate remuneration for each mode of exploitation of the work.57 The remuneration may be determined either in the individual contract or in a collective agreement. If neither the individual contract nor a collective agreement mentions the remuneration for one or more modes of exploitation, the law refers to the common tariffs established in each sector under specific agreements between the employees' and employers' organizations representing the profession.58 Moreover, the Author's Rights law (Art. L212-6) provides that Article L762-2 of the Labor Code shall only apply to that part of the remuneration paid in accordance with the contract that exceeds the bases set out in the collective agreement or specific agreement.

Broadcasting and Communication to the Public

While with respect to the audiovisual a presumptive transfer of right operates and administers the exploitation in various modes, a different arrangement works with regard to the performer in the phonograms. When a commercially published phonogram is either exploited via broadcasting or simultaneous integral cable retransmission or through the means of communication to the public neither the performer nor the producer can oppose the same but they are entitled to a remuneration based on the revenue from the exploitation.59 The remuneration is to be equally shared between the performer and the producer. The contractual arrangement regarding the remuneration is similar to that pronounced with respect to audiovisuals in that collective organizations shall enter into agreements. The users would have to make available the precise program of

57 Article L. 212-4 of the Intellectual Property Code, France  
58 Article L-212-5of the Intellectual Property Code, France.  
uses and other documentation. In the absence of agreements the state sponsored committee that will decide and lay down the rates by a majority vote.

**Difference Between Salary and Remuneration Stressed**

The French law emphasizes the difference between the initial salary paid and the consequent remuneration received from the exploitation of the recording so that there is no confusion or passing off between one and the other. This means that part of the remuneration received by performing artists for the sale or other exploitation of the recording of their performance after their physical presence is no longer required is not considered part of their initial salary for the performance but as remuneration from the sale or exploitation of the recording. Whether this remuneration is considered as complementary to salary, that is, as a salary or as copyright remuneration, would be determined in the following manner:

First of all, three conditions laid out in the law must be satisfied: there must be a recording of the performer's performance; the remuneration must be paid relative to the sale or exploitation of the recording even when the physical presence of the performer is not required for the exploitation of the recording. Depending on the fulfillment of these three conditions, the remuneration paid for the performer may or may not be considered as a salary. According to Article L-762-2 of the Labor Code the remuneration is not regarded as a salary if it is in no way determined as a function of the initial salary paid for the production of the performance and its recording, but only relates to the monies received from the exploitation of the recording. Thus, the determination of the remuneration may not in any way, even indirectly, relate to the initial salary and it must also be derived directly from the sale or exploitation of the recording. In all other cases the remuneration forms part of the performer's salary.

**Old Contracts – New Uses in France**

The law regulates the status of contracts concluded prior to entry into force of the

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60 Article L-214-3 of the Intellectual Property Code, France.
Law. According to Article L.212-7 contracts concluded prior to January 1, 1986, between a performer and a producer of audiovisual works or their assignees should be subject to the preceding provisions [of the law] in respect of those modes of exploitation, which the parties have excluded. It is further provided that the corresponding remuneration shall not constitute a salary. This right of remuneration shall lapse at the death of the performer. In practice this means that if the old contract had excluded certain modes of exploitation, the remuneration for performers' shall be calculated according to the new law for these modes of exploitation. After the death of the performer the right of remuneration for these modes of exploitation cease to exist.

Mandatory Application of Agreements

The law further provides that 'the provisions of the agreements referred to in the preceding Articles may be made compulsory within each sector of activity for all the parties concerned by order of the responsible Minister'. In practice the only exception to this arrangement is of collective bargaining agreements for musicians. The Minister of Culture has made the collective bargaining agreement relating to performers' rights in the film production mandatory. The collective bargaining agreement for television has also been extended by the Minister of Labor to cover non-represented parties as well. If the parties are not able to reach an agreement with regard to assigning performers' rights to the producer and with regard to remuneration for each mode of exploitation as required by the law, the law provides for a judicial process for establishing the level of remuneration. In case the contract or the collective agreement does not

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63 According to Article L.212-9 of the law: "[f]ailing agreement concluded in accordance with Articles L212-4 to L212-7, either prior to January 4, 1986, or at the date of expiry of the preceding agreement, the types and bases of remuneration for the performers' shall be determined, for each sector of activity, by a committee chaired by a magistrate of the judiciary designated by the First President of the Cour de cassation and composed, in addition, of one member of the Conseil d'Etat designated by the Vice President of the Conseil d'Etat, one qualified person designated by the Minister responsible for culture and an equal number of representatives of the employees' organizations and representatives of the employers' organizations. "The Committee shall take its decisions on a majority of the members present. In the event of equally divided voting, the Chairman shall have a casting vote. The Committee shall decide within three months of the expiry of the time limit laid down in the first paragraph of this Article. "Its decision shall have effect for a duration of three years, unless the parties concerned reach an agreement prior to that date." (foot note cont'd next page)
mention remuneration for one or several other modes of exploitation, the remuneration has to be determined by reference to the schedules established under the specific industrial agreement concluded in each sector of activity.\textsuperscript{64}

\textbf{THE E.U. DIRECTIVES AND THE PERFORMER IN THE EUROPEAN UNION}

The European Commission Directives have the force of law and therefore the countries that are part of the European union do not have much option but to apply the Directive within a time frame after its promulgation in the European Union. Therefore it is significant that the European block including the United Kingdom and France discussed before are determined by these Directives. The developments in Europe with regard to harmonization of copyright and neighboring rights in the face of digital revolution have been significant.\textsuperscript{65} The significance in analyzing the changes therein lies in the fact that prior to the initiation of the harmonization measures the European block consisted of an amalgam of countries composed of divergent copyright systems.\textsuperscript{66} In preparation of these changes the normative value played on the copyright and policies particularly with respect to audiovisual and authorship underwent a change.\textsuperscript{67}

\textsuperscript{64} Article L212-5 says that where neither a contract nor a collective agreement mention the remuneration for one or more modes of exploitation, the amount of such remuneration shall be determined by reference to the schedules established under specific agreements concluded, in each sector of activity, between the employees' and employers' organizations representing the profession.


\textsuperscript{65}<http://europa.eu.int/rapid/pressReleasesAction.do?reference=IP/95/798&format=HTML&aged=1&language=EN&guiLanguage=en> as on 15\textsuperscript{th} January 2005. The process began with the Green Paper on Copyright and Related Rights with the onus being on the need for making the legal frame work more confidence inspiring on the information superhighway that already was capable in terms of technology and the infrastructure but only required further investment. Investment in these new inter-active services, such as distance learning, remote health care, audio and video-on-demand and tele-shopping, itself depends on investors being satisfied that a suitable legislative framework exists.


\textsuperscript{67} Julien Rodriguez Pardo, "Highlights of the Origins of the European Union Law on Copyright" [2001] E.I.P.R. 238-240. The European commission had noted that the cultural sector is socio
can be noticed that a framework for improving quality of life of the artist was put in place.

The performers were granted rights both in the sound recordings as well as in the cinematograph or audiovisuals. It was also accompanied by a radical overhaul of the redistribution of authorship in audiovisuals. The conferment of rights was also accompanied by the forging of legal mechanisms and concepts where in the plethora of rights granted in a work could be exploited without any administrative difficulties. It is important to note that all those grounds of opposition that were voiced down the century regarding the grant of rights either to the performers or others were voiced by different interests and countries during the preparation of these Directives as well. One of the worst fears being that the problems associated with exploitation of the works as the grant of several rights would essentially raise obstacles by one or the other of the rights holders.

The economic constituted by people and enterprises dedicated to the production and distribution of goods and cultural provisions. This policy should not be considered as a cultural policy but as an approach to the social and economic problem of the workers. This was stated as early as 1977, Nov 22, l' action communautaire dans le secteur culture. Copyright came to be seen as a social and a workable right and not simply a property based one. The right was due not merely because he owned it but it was the fruit of his labor and it gave him an adequate means of living. Another important feature was the recognition of the audio visual as an important medium of the future. The creation of an audio-visual policy was attempted together to curb the incidence of piracy. The need was to profit both economically and culturally from new audiovisual media. The advent of the new communication technologies also led to the proposition for


69 Executive summary of the Report from the Commission to the Council, the European Parliament and the Economic and Social Committee on the question of authorship of cinematographic or audiovisual works in the Community /* COM/2002/0691 final */ at <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi:celexapi:prod:CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett> as on 25-1-2004. <http://europa.eu.int/smartapi/cgi/sga_doc?smartapi:celexapi:prod:CELEXnumdoc&lg=EN&numdoc=52002DC0691&model=guichett> as on 12-10-2005. In the context of the re-designation of authorship of film authorship it was found by different reports and commissions that the grant of principal directorship would not be an obstruction to the exploitation of the work nor in the checking of piracy or in the unauthorized uses of these works. The reports found no evidence that would substantiate such a fear. Transfer of rights arrangement to the producer countered the complexity that was envisaged either by operation of law or by means of collective or individual contractual arrangements. The contractual freedom also minimizes the difficulties posed by the variations in the laws of the different countries in the European union. Till date these arrangements have not posed difficulties in the administration of rights. The European endeavor was fostered by the growth of channels of exploitation in an information society and the need to meet the management of rights in this context.
Directives introduced and transformed the traditional positions and attitudes towards performers or neighboring rights holders. The finding and the objectives enshrined in the Green Paper on Copyright and Challenge of Technology led to the adoption of five Council Directives of which three pertain to the status of the performers.\(^{70}\)

The Rental and Lending Rights Directive that was adopted and implemented in the year 1996\(^{71}\) provides a higher level of Protection to the performer in the European union. The rental and lending right covered all the works including the neighboring rights holders but with a few qualifications. The Directive maintained that the reproduction, distribution, rental and lending rights are to be proprietary rights. The Directive also granted an equitable remuneration to be paid to the performer for the public performance and broadcasting of recordings of their audio performances. The assignment of rental rights to film and sound producers was also to give them an equitable remuneration. The Directive therefore was way ahead of all corresponding national and international commitments. From the performers stand point it was a substantiation of the resolve to increase the control over his performances in particular post fixation.

Certain other features of this Directive are important to be noted. There is nothing stopping the countries to extend the rebuttable presumption of transfer concept to other exclusive rights provided they are going to be compatible with the international conventions (the Rome convention). The Rome convention it may be recollected speaks nothing against the rebuttable presumption of transfer. However this freedom appears to hint that such an arrangement envisaged would be with the mandatory minimum provision of equitable remuneration. More protection than the minimum that is envisaged under the Directive can be implemented by the respective nation states.

The exclusive right to authorize or prohibit rental and lending is provided to the performer in respect of the fixations of his performance. The author, the


phonogram, producer and the film producer are also vested with a similar right\(^\text{72}\) It is important to note that with respect to the performer no discrimination is shown between the performer in the audio and the performer in the audiovisual. The highlight is the presumption of transfer of the rental right in case of performer in a film production. The performer would be considered to have transferred subject to contract to the contrary.\(^\text{72}\) However this transfer has an effect only if it is accompanied by equitable remuneration to be paid by the producer or his transferees.\(^\text{74}\) The intent is to guarantee the remuneration for the performer and assuring the producer of fluidity of exploitation. The equitable remuneration is an avenue of remuneration that can never be waived by the performer. This secures the performer from the unfair bargaining contracts where in market forces would seek a waiver from the weak performers. Considering the non-extinguishable nature of the equitable remuneration rights, provision is made so that the only transfer can be made to a collecting society. The member states had been given the freedom to decide to extent of regulation of these collecting societies and the mandate as to from which the remuneration has to be collected.\(^\text{75}\)

The same concern with regard to rental is not seen in regard to lending of performers performances. The remuneration has been maintained for the authors alone. Further there is no strict mandate that there cannot be derogation from the lending right. Derogation from the lending right is allowed subject to the condition that the authors are provided remuneration. Besides the rental and lending right, the Directive grants the performer and others the right to fixation of their performances and the right of reproduction of the fixations.

A most significant right is that of broadcasting and communication to the public for both audio as well as the audiovisual performer from the live performances.\(^\text{76}\) But it is a qualified right as regards the performers as the right is only from a live performance. The right does not extend to broadcasts from fixations or from performances already broadcast. An important point to be noted is that no

\(^{72}\text{Art 2(1) of the Directive.}\)
\(^{73}\text{Art 2 (5) of the Directive.}\)
\(^{74}\text{Art 2(7) of the Directive.}\)
\(^{75}\text{Art 4(4) of the Directive.}\)
\(^{76}\text{Art 8(1).}\)
mention is made whether the fixation or the broadcast earlier made needs to be legitimate one or not. This can result in the possibility that all performances broadcast or fixations of performances is susceptible to be broadcast whether or not those have been validly procured in the first instance.

The audio and the audiovisual performers are treated differently in the grant of this right. A reproduction of a phonogram or a phonogram published for commercial purposes if used for the purposes of broadcasting or communication to the public calls for the provision of a single equitable remuneration to the performer and the producer.\textsuperscript{77} The states are asked to ensure that this right is shared between the performers and the producer. The states are endowed with this duty if the performers and the producers have been unable to come to an agreement with respect to this. Therefore with respect to contractual freedom in fixing the remuneration the parties are provided the right and there is no state intrusion but in the absence of that then the state is given the mandate to intervene. Thus sound recording performing artistes can expect a single equitable remuneration for their performances broadcast or affixed for the broadcast and the communication to the public. However it is to be noted that the mandatory need for collecting society or the fiction of a presumption of transfer is not introduced here. Nor the clause on non-waivability hat had been specified with regard to the rights provided with respect to the broadcasting and communication. It is important to note that the right is not termed as broadcasting and communication right perhaps because of its qualified nature. (Unlike the fixation, reproduction and the distribution right). There is no restriction on transferability. Thus even sound recording artistes would be in an uneven bargaining plane as a complete assignment of single remuneration right can negate the utility of these provisions. Thus the consequences and conditions in which single equitable remuneration of the performers rental right functions is vastly different from the manner in which the single equitable remuneration of the performers in the broadcasting and communication right is to be exercised. Further the presumption of transfer with respect to the rental applies only to the performer in the audiovisual. Here for the broadcasting and communication to the

\textsuperscript{77} Art 8(2).
public there is neither a right nor a provision of single equitable remuneration for the audiovisual performer at all.

In the midst of the grant of these rights, it is significant that the Directive makes special mention of the need to take care of the position or status occupied by the copyright holders. It is specifically provided that their status shall not be disturbed by the grant of these rights to the related rights entities. The duration of the rights performers as well as those of the related rights holders has been laid down as being a minimum of twenty years. This is the same as that granted under the Rome convention. Though this is less than the minimum guaranteed under the TRIPS. The countries are free to provide for longer terms.

**Satellite and Cable Retransmission Directive**

The possibilities in trans-border dissemination of programs due to the satellite broadcasting technology and cable retransmission revealed the need for extending the protection already granted to the performers to this sphere as well. This was particularly owing to the fact that the trans-border transmission required the need for assuring the rights of the performers as violations could very well happen across the borders and the identification of liability could emerge as problematic issue. The reasons impelling the formulation of the satellites Directive was that there were differences between European nation states thereby resulting in legal uncertainty. The holders of rights are exposed to the real possibility of exploitation of their rights without payment of remuneration or the situation of individual holders of rights blotching the exploitation of their rights. The legal uncertainty could create problems in the unhindered circulation of programs. It was realized that there was no longer any need for any distinction between communications satellite communication and communication to the public by means of direct satellite. An important question that required an answer was whether broadcasting by a satellite whose signals could be received affects rights in the transmitting country alone or in all countries of reception. Since communication satellites and direct satellites are treated alike for all purposes this legal uncertainty affects all program broadcast in the community by satellite.

78 Art.14.
This is made more complex with the retransmission by cable networks. The cable operators cannot be sure that they have acquired the entire rights program. The acquisition of rights also is bothersome, as parties in different countries are not obliged to refuse without valid reasons. This Directive was considering the importance placed upon the idea of a single audiovisual area laid down in Directive 89/552/EEC. The Directive brought to the fore the need to adapt contracts to the concept of communication to the public via satellites. There was a need to take into account the actual audience, the potential audience and language version. The country and the laws of the country into which the satellite will beam the programs needed to be taken into consideration in order to appreciate the contracts in this regard.

There was need to protect the rights already secured to the performers, phonogram producers and broadcasters in the previous Rental Directive. Particular emphasis was placed on the need to check varied statutory licensing methods in the countries of the union.

The need was to check the practice of broadcasting organizations relocating their activities in order to see to it that divergences were exploited to their advantage. Most importantly from the perspective of performers the remuneration rights granted to them by the prior Directive was to be aligned to the communication to the public via the satellite envisaged by the present treaty. A most noteworthy assertion was that the rights of the performers and other rights holders would extend to cable retransmission thereby opening up an avenue of remuneration through communication to the public. The need to have recourse to a collecting society taking into account the special features of the cable retransmission without affecting the right of cable retransmission which would be still susceptible to assignment. Thus the spirit of conserving the rights of the holders while bringing in administrative convenience is preserved in the Directive. It is also firmly borne in mind that the collective society and administration should not prejudice the contractual freedom for negotiation of the rights. Keeping in mind the competition rules and the abuse of monopoly.
From the performers standpoint the satellite and cable retransmission Directive through its definition of the term satellite and the identification of the point of liability in transmission clearly enhances the rights of the performer and secures their position further. The right and the equitable remuneration there from stands extended to the communication and cable retransmission from broadcasts from satellites. Cable retransmission has been defined by the Directive as meaning the simultaneous, unaltered and unabridged transmission from another member state by wire or over the air including that by satellite of television or radio programs intended for reception by the public. It is important to note that these definitions and clarifications tend to secure the rights of the performers against the new avenues of cross border communication and exploitation. Even a situation of communication to the satellite occurring from a non community state is covered by the criteria of the uplink station being in a member state and in the absence of an uplink station in a member state then the country where in the or the member state where in the broadcasting organization has commissioned the act of communication to the public by satellite shall be deemed to be the occurring state.

The interests of the performer as secured by the Rental and Lending Directive and protected by its specific articles stand protected under this Directive covered by the communication to the public by satellite. It is specifically provided that broadcasting by wireless means shall include communication to the public by satellite. The significant point is that the broadcasting and cable transmission has been split into two different activities in the chain of communication. The rights under the Directive are secured in the cable retransmission, which means that the rights of rights holders need to be secured by the cable operators and not by the broadcasting organizations alone. It is noteworthy that the idea of statutory...

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80 Art 1 (d) of the Directive, satellite means any satellite operating in frequency bands which under telecommunications law are reserved for the broadcast of signals for reception by the public or which are reserved for closed point to point communication.
81 Art 1(2)(b) The act of communication to the public by satellite occurs solely in the member state where under the control and responsibility of the broadcasting organization, the program carrying signals are introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth.
82 Art 1 (2) (a) Communication to the public by satellite means the act of introducing under the control and responsibility of the broadcasting organization the program carrying signals intended for reception by the public into an uninterrupted chain of communication leading to the satellite and down towards the earth.
83 Art 1 (2)(d)(0)(b).
84 Art 4(1)(2).
licensing is slowly intended to cease and proper rights need to be administered keeping the collective administration societies to administer on behalf of the performers and others.

It is most significant that the exercise of the retransmission rights can be exercised only through the collecting societies. This is a major divergence from the position from other rights wherein remuneration played a role. Either the individual or the collecting society could be administering it but with respect to the cable retransmission right only the collecting society can exercise the same. It is noteworthy that the right to grant or refuse cable retransmission can be exercised only through a collecting society.

Even where the performer does not transfer his rights to a collecting society, a collecting society that manages rights in the same category shall be deemed to exercise the rights on his behalf. Thus this is a kind of compulsory handover of administration of the right to license. The collecting society can grant or refuse to grant the right. But it will have its own limitations, as that would be governed by rules and supervision by the Copyright Tribunal or other office established for the purpose of scrutiny. In other words with respect to the sound record performers they would not possess the right to refuse or grant the right other than through the collecting society. This is ostensibly to facilitate easy exploitation. This unavoidable delegation of representation with respect to exploitation of rights is unique as it is compulsory imposition of a rights manager on the performer unlike the administration by means of exercise of the volition of the performer.

It is important to note that broadcasting organizations are exempted from this mandatory delegation of responsibility even if the rights of performers and the others have been transferred to the broadcasting organization. Thus the Directive proceeds on a presumption that the broadcasting organization would not stand as an obstacle to making the program available for retransmission. In case of disputes the use of mediators has been proposed. They would look into questions of refusal of consent.
The Duration Directive

The harmonization endeavor covered a very important area in intellectual property protection viz. the duration of protection granted to the copyright and related rights entities. Till this resolve, problems existed with regard to the divergent terms of protection in different countries in the European union. A union without unanimity in this regard would create manifold difficulties in the exploitation of the works and in the freedom to exploit the works. With regard to the performers this not only introduced uniformity among the countries but also initiated the observance of a minimum term of protection from the date of performance and another from the date of publishing. This is radically a different approach, which has the effect of actually increasing the period of protection to somewhere beyond the lifetime of the author in case of published works. The application of this extended protection has not been confined to the performers alone but includes the phonogram producers, film producers and broadcasting organizations. This imparts equal justice to the neighboring rights entities who were until now granted only a fifty year term of protection. This is also an acknowledgement of the creative content and original authorship of the performances akin to those granted to copyright entities. The move accompanies the grant of the right of co-authorship to the Principal Director of the film that is also an acknowledgement of the originality and authorship in the film. The important factor to be noted is that a film had begun to be recognized at two tiers, one at the level of copyright and the other at the level of related rights. In the former the term of protection granted is 70 years after the death of the last of the surviving persons who are designated as coauthors (whether or not the following are listed as coauthors. the principal director, the author of the dialogue and composer of music specially created for use in the cinematographic or audio visual work). The producer on the other hand gets a term of fifty years from the fixation and upon publication a term of another fifty years. The 'naturalization' of the film can be witnessed in this development which until now had been seen as

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86 Article 3 (1) (2) (3) (4).
87 Art 2(1)(2).
88 See Art 2 in comparison to art 3(3).
a technical arrangement or recording. The works in its unpublished and published formats can be seen protected cumulatively for a period of 100 years. This need not really drastically make any change in the term of durations of protection as most of these products of the entertainment industry are today meant for instantaneous consumption and therefore publication occurs within a short period of either the performance or the fixation.

*Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society—Directive 2001*

The Directive of 2001 seeks to amend and consolidate the process of harmonizing the Copyright and Related rights in an information society. It qualifies the afore-detailed three Directives influencing the rights of the performer. It sets out clearly the exact ambit of the terms and the exceptions to the rights including the liabilities of the intermediaries in the distribution of programs.

Besides endorsing the earlier sentiment in the prior Directives concerning the performers, there are great many qualifications useful to the administration of rights in the digital environment. A great deal of discussion went through the proposals while framing the Directive.

The Directive saves the rights provided by the previous Directives. Importantly the Directive through Article 3(2)(a) provides for the performer with respect to their fixations the exclusive right to authorise or prohibit the making available to the public, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them. Thus the on demand online environment is taken note of by the Directive and the performer bestowed with a right. A distinction is not made between the audio and audio visual segment.

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93 Article2 (b)(c)(D).
The most conspicuous provisions are the right of reproduction granted to authors in their works, performers in the fixation of their performances, for phonogram producers, of their phonograms, for the producers of the first fixations of films, in respect of the original and copies of their films and for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite. It is noteworthy that the word reproduction encompasses both temporary as well as permanent reproduction and direct as well as indirect reproduction. Temporary acts of reproduction which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.94

This alleviates the concerns of innocent intermediaries to a great extent who until now without exception would be accused of having infringed by temporary inadvertent reproductions. The clause (b) appears to carry an aura of mystery, as it requires some construction to figure out what is a lawful use without independent economic significance. There is a further enumeration of exceptions to the right of reproduction taking into account the manner of application in the digital medium but these are left to the discretion of the contracting states to opt. But mostly these appear to be the shadows of the exceptions carved out in the existing copyright act.95 The exceptions are also extended to the distribution rights.96 It is specifically mentioned that the exceptions should not conflict with a normal exploitation of the work or other subject matter and should not unreasonably prejudice the legitimate interests of the rightholder.97

The states are obliged to bring in measures to protect the anti-circumvention technological measures undertaken by the rights holder as well as the need to

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94 ibid. Article 5(1) of the Directive, 2001. This had been criticized, as the words independent economic significance was not present together with lawful use. It would have made it difficult to distinguish between a legitimate activity and an act of copyright piracy.
96 Art 5(4).
97 Art 5(5).
protect the rights management information incorporated by the rights holder.\(^{98}\)

The Member States are obliged to provide adequate legal protection against the circumvention of any effective technological measures, which the person concerned carries out in the knowledge, or with reasonable grounds to know, that he or she is pursuing that objective.\(^{99}\) It is significant that knowledge is an important factor in this respect. In the absence of this factor a circumvention is not considered as having been attempted. Member States are also to provide adequate legal protection against the manufacture, import, distribution, sale, rental, advertisement for sale or rental, or possession for commercial purposes of devices, products or components or the provision of services which are (a) promoted, advertised or marketed for the purpose of circumvention of, or (b) have only a limited commercially significant purpose or use other than to circumvent,\(^{100}\) or (c) are primarily designed, produced, adapted or performed for the purpose of enabling or facilitating the circumvention of, any effective technological measures\(^{101}\). Thus secondary infringements in the nature of facilitation and abetment are also taken into account.

The Directive make the States obliged to provide for adequate legal protection against any person knowingly performing without authority\(^{102}\) (a) the removal or

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\(^{98}\) Art 6(3) explains that the expression "technological measures" means any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts, in respect of works or other subject-matter, which are not authorised by the rightholder of any copyright or any right related to copyright as provided for by law or the sui generis right provided for in Chapter III of Directive 96/9/EC. Technological measures shall be deemed "effective" where the use of a protected work or other subject-matter is controlled by the rightholders through application of an access control or protection process, such as encryption, scrambling or other transformation of the work or other subject-matter or a copy control mechanism, which achieves the protection objective.

\(^{99}\) Art 6(1).

\(^{100}\) Michael Hart, "Proposed Directive for Copyright In The Information Society, Nice Rights, Shame About The Exceptions" [1998] EIPR 169-171. This provision has been criticized by the music industry for being limited to commercially significant purpose or use other than circumvention. It is argued that copyright pirates will amply add commercially significant purposes to the circumvention devices to avoid suspicion. From the performers perspective the concerns of the industry and the performers are synonymous once authorization rights are provided. If the device has a limited commercial significance then the law can check the same but if the commercial significance is more than its utility in being used for circumvention then the inference would be otherwise. Yet another criticism of the provision had been that it would encompass all equipment, which include ordinary personal computers, or consumer electronic equipment. Legitimate equipment makers cannot be expected to make their equipment operate with 3\(^{rd}\) party protection devices of which there might be several.

\(^{101}\) Art 6(2).

\(^{102}\) Art 7(1).
alteration of any electronic rights-management information\(^{103}\) (b) the distribution, importation for distribution, broadcasting, communication or making available to the public of works or other subject-matter protected under the Directive or under Chapter III of Directive96/9/EC from which electronic rights-management information has been removed or altered without authority, if such person knows, or has reasonable grounds to know, that by so doing he is inducing, enabling, facilitating or concealing an infringement of any copyright or any rights related to copyright as provided by law, or of the sui generis right provided for in Chapter III of Directive96/9/EC. It is noteworthy that the element of knowledge is incorporated for the first ground and for the second, both knowledge as well as reason to believe has been incorporated.

It is significant that the protection for technological measures as well as rights management information are qualified by the exceptions permitting fair use under circumstances specified (these are similar to the ones exempting and limiting permissive temporary reproductions). In case the issue of exceptions and limitations are not dealt with between the parties by means of contracts then the state is mandated to take measures in this respect. However it remains vague as to how the anti-circumvention devices can be overcome and qualified use(fair use) identified and filtered through state intervention to be of use to the beneficiary unless there is an effective technology in this regard or the private rights holder is willing to invest and provide time to manage the same otherwise.

Another uncertainty and justified criticism could be on the fact that other than one exception /limitation as regards temporary reproduction with respect to all the rest the states are endowed with the discretion to opt and choose to exempt themselves.

\(^{103}\) Art 7(2) says that for the purposes of this Directive, the expression "rights-management information" means any information provided by rightholders which identifies the work or other subject-matter referred to in this Directive or covered by the sui generis right provided for in Chapter III of Directive96/9/EC, the author or any other rightholder, or information about the terms and conditions of use of the work or other subject-matter, and any numbers or codes that represent such information.
The highlight of the European Directives is that within a time frame the countries of the union are obliged to prepare their laws in tune with the Directives formulated by the European commission. Therefore from the year 2002 the said provisions are fully applicable in Europe. In a short period that has elapsed since its implementation, the Directives along with its constant upgraded and qualified versions have not met with any insurmountable difficulties in implementation. There is a continuous evaluation that is undertaken periodically to assess the effectiveness of the measures.

Among the criticisms pointed out has been the fact that the Directives do not make any propositions to counter the prevalence of standard buy out contracts by which contributors are made to assign their rights commonly. Further nothing is stated regarding the non-transferability of the right of equitable remuneration. The transfer to the collective administration society is only optional. Non-waiver character is only with respect to the enjoyment of the right, it cannot be considered to extend to further transaction of the right granted. Only with respect to cable retransmission there is a deemed entrustment on the collective administration society. Thus this has been left to the nation states concerned. Further the moral rights question has not been addressed so far owing to differences among nation states despite the fact that European Community wished for a WPPT model even at the audiovisual protocol Conference.

**Summing Up the Advantages of the System of Protection in France and European Union**

One of the striking highlights of the French system is the three pronged protection based on labor law, copyright law as well as collective bargaining used for the protection of the performer. It is noteworthy that these are not distinct means but their interdependence is expressed in the statutes concerned. While the labor law provides labor security and welfare benefits, the copyright framework provides for security against unfair exploitation of creative effort. Particularly with respect to audiovisuals the presumptive transfer is qualified by specified need for

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105 See Art. 12.

written agreements with uses and duration specifically inscribed along with the rates for the same separately mentioned. This is in addition to the basic salary that is prescribed for the labor expended by the performer. The scrutiny of labor and copyright administration by the state offices further safeguards against monopoly abuses by the societies formed for the purpose and provides alternatives. The European Commission Directives with its compulsive nature heralds a revolutionary harmonization of performers’ protection in Europe. It provides almost all the rights at par with the WPPT (WIPO Phonograms and Performances Treaty) with the complement of non discrimination against the audiovisual performer. Though the rights are not at par with the audio performer nevertheless it speaks for the audiovisual performer which is in contrast to other international instruments. There is profound impetus on equitable remuneration as well as collective administration with noteworthy limits on the individual administration as well as transferability of the right to a collective administration body. The intent of a fine balance between the rights for the performer and the convenience of commercial exploitation has been effectively realized.