CHAPTER 5

COLLECTIVE BARGAINING AND ADMINISTRATION OF PERFORMERS' RIGHTS IN AUDIOVISUALS

Objective of the chapter: The chapter endeavors to explore the means adopted by the performers and industry interests in the three most prolific film making and rights conscious countries to implement and administer the rights and obligations of the performers. The intellectual Property ingredient being accepted in their collective bargained contracts as well as in their statutes, it provides lessons at managing these rights in the future in India. It also aids in pointing to factors that are absent in the Indian entertainment industry while planning for any intellectual property based paradigm in India for the future. It is pointed out that agreements referred to in this chapter have been entered into a particular point of time but these are subject to periodical revision in these countries. However the analysis draws on the major characteristics displayed by these agreements.

An Overview of the Residual System and the Benefits to the Performer

The status of the performer was to a great extent enhanced by the opening up of a new channel of remuneration based on the reuse of the contributed work.¹ The concept of residuals commenced in the entertainment industry in different parts of the world quiet early as an offshoot of collective bargaining process. In the United States and in several western countries securing royalty and residual rights based payments became a feature in the agreements brought about by the unions and producers with the aim of securing better returns to the artists. Every contributor ranging from artists to directors and musicians have a residual laced agreement with the producer interests in media that includes theatrical, radio,

¹ Robert W. Gilbert, "Residual Rights Established by Collective Bargaining in Television and Radio," 23 Law & Contemp. Probs. 102 (1954). The practice of residuals can be seen to have occurred in the film and the sound record industry in the early part of the century around the 1930's.
television and today the Internet as well. The highlight of the residual earnings has been that even without any proprietary interest in the programs, the performer receives compensation, as it is an output of contractual bargains. Even during the time when the performers or others such as the directors never had any statutory or common-law rights in the affixation after their initial payments the bargain had a concept of residuals that kept pouring in the returns. Another highlight is that even if the individual contract entered into doesn't contain a provision regarding the residuals, the benefit of residuals arises to him under the canopy of the collective bargaining agreement. Residuals represent extra compensation for services rendered by the recipients in the course of their employment, in addition to their basic wages, salaries or fees.

The residual agreement helps the majority of artists who cannot bargain individually. It helps the producer in that he does not have to spend time crafting contracts with each performer as the collective deal works to the benefit of the performer. Most significantly it brings in a form of profit sharing and deferred payments until the costs have been recovered. This reduces the costs and the risks while at the same time opening up revenues from new outlets of entertainment. The residuals percolate from the reuse or re-exploitation or the reruns of the works into which the artist has contributed. The residuals from such usages usually are calculated from the percentage of their wage rate, salary or fee applicable to the type of services or period of employment for which the participating employee was engaged. The residuals for the reruns can be based on the geographical terrain or even without any limits though the rates are commonly based on the place of exploitation. Care is taken to see that clauses are incorporated so that all future technological changes in the mechanical means are covered (both audio as well as video portions of the broadcast

\[\text{2 The class of economic benefits derived by their membership has been loosely referred to as residual rights.}\]

\[\text{3 Id., p.103.}\]

\[\text{4 Ibid.}\]


\[\text{Available at <http://www.WIPO.int/documents/en/meetings/2003/avp_im/pdf/avp_im_03_3a.pdf> as on 26th December 2004.}\]
material). The organizations representing the residual beneficiary do not cater indiscriminately to all the artists. Classifications are made be with reference to actors or writers or directors. For instance extras are not entitled to residual payments. Even sale or transfer of the rights would not take away the rights of the beneficiary from a third party who comes to acquire the title. An assumption agreement becomes sine qua non to be entered into with the producer. The individual agreement can only be better than the residual agreement and cannot be derogating from it disadvantageously. Both musicians and the actors into their residual contracts have specifically incorporated limitations on the type of use and on the number of uses as well as the periods of use. Incidental uses are also strictly regulated and limitations are cast on them. In order to guarantee the payment of the residuals, security for the payment of the residuals have to be executed by the producers with which the talent guilds enter into any agreement. The aforementioned assessment of the residual system points out to the massive change in the economic and consequent social status that it has brought to the performer in particular the audiovisual performer the world over. The mode of reuse and the rates may vary but the overall character of the residual payment will remain with these substantial administrative safeguards.

Collective Bargaining Practices in the United Kingdom

In the United Kingdom, performers’ are treated as self-employed or as independent contractors for taxation purposes and therefore are entitled to separate rights. In other words they are not exempted from the purview of rights by bringing them under the canopy of being employed. The producers

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7 Id., p.114.  
8 Id., p.115.  
9 Id., p.117.  
10 See Id., p.121 for an overall assessment. It is important to note that this assessment has been done around the time of the inception of the residual system in the United States.  
11 The performers’ rights granted to the performer under the 1988 act does not exempt a performer from the purview of rights owing to the employer-employee relationship or by a categorization into a commissioned work category.  
have to negotiate with the performer as to the manner in which the rights would be dealt with by the performer. This is a wonderful amalgam of separate platforms of protection to realize an effective intellectual property rights security for the performer. In spite of this independent personality, the labor law in Great Britain bestows on the performer, the eligibility to be a member of a trade union. This enables him to negotiate with the producers much more efficiently than he would have otherwise done singularly or individually.\(^\text{13}\)

The need to join a trade union is optional on the part of the performer and there is no compulsion that only a member of a union can be engaged artist in an audiovisual. However, a serious performer best exercises the option of taking the membership, as the membership in the trade union would make him amenable to enjoy the benefits of collective agreement entered into with the producers by the trade union. By agreeing to be a member, the performer is bestowing on the union the right to negotiate on behalf of him all the minimum terms and the manner in which the rights granted to him by the law need to be exploited. While the trade union cannot compel any one to be a member of the union and be subject to its terms, it can be strict on the members so that in the post membership period the obligations of the contract are unfailingly adhered. It is important to note that no rights are handed over to the trade union or needs to be transferred to the trade union for its due administration.\(^\text{14}\) The rights therefore still vest with the performer despite his membership in the trade union that decides only on the standard terms for dealing with those rights.\(^\text{15}\)

Despite the standard agreement, the performer still has to individually enter into a separate contract with the producer. Any deviation from the standard terms for lesser benefit is disallowed by the trade union\(^\text{16}\). They cannot deviate from the terms set down by the organization. Any alteration in the wake of exceptional circumstances can only be rendered with the prior sanction and notice of the trade union. The performer can negotiate for more favorable terms than what has

\(^{13}\) Ibid.

\(^{14}\) Ibid.

\(^{15}\) Therefore the trade union does not behave as a collecting society as in the latter case the rights are vested with the collecting society to be dealt with on behalf of the performer. However in the collective agreements entered into by Equity, the trade union of actors, the transfer if rights including any future rights and uses are crucially tied to the existence of a collective agreement and a standard individual contract and under these agreements the future uses cannot be assigned.

\(^{16}\) Ibid.
been agreed upon between the producer and the trade union. This safeguards
the performer from contracting out of the terms agreed upon by the trade union
with the producers.

*The Representative Character of Equity*

The Equity\(^{17}\) is the sole representative of the performing artists' as a trade union
in negotiations with the producers. It represents actors, singers, dancers, variety
and circus artists, stunt performers' and walk on and supporting artists (also
known as extras) as well as a number of non performer groups that include
choreographers, stage managers, theatre directors, designers and theatre and
film fight directors. The membership is open to foreign performers as well\(^{18}\). The
Equity covers the issue of rights in all the new technologies that are exploiting the
performances including through the Internet (web medium).

*The Ambit of the Agreements*

The Equity enters into major agreements for films, television, radio and the
Internet.\(^{19}\) The range and content of these agreements are illustrative of how
incisively and meticulously the British legal and labor system are seeking to
earnestly safeguard the rights of the performing artist. Some of the significant
clauses in these agreements are as follows-

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\(^{17}\) The equity was formed in 1930 by actors working on the London stage and over the years has
become representative of the diverse interests in the entertainment industry. It's membership is
around 35000.

\(^{18}\) <http:/lwww.equity.org.uk/start.htm> as on 1\(^{st}\) January 2005.

\(^{19}\) <http:/lwww.equity.org.uk/start_ftvr.htm> as on 1\(^{st}\) January 2005. BBC Agreement for Main and
Walk On Artists, ITV Agreement for Main and Walk On Artists, PACT Agreement for Independent
Television Productions for Main and Walk On Artists, PACT Agreement for Cinema Film
Productions (Main Part Artists only), TAC Agreement for Main and Walk On Artists working on
Welsh Language Independent Television Productions, BBC Radio Agreement 1998, BPI Pop
Video Agreement, BPI Gramophone Recording Agreement (non-classical), BPI Gramophone
Recording Agreement (classical), Electronic Arts Interactive Media Agreement, Radio
Independents Organization Agreement, Central Office of Information Fillers agreement, National
Film and Television School Agreement, BBC On Line Agreement. Guidelines for use include
Radio Commercials (recorded by radio stations) Rate Card, Radio Commercials (recorded by
agencies) Rate Card, Guidelines for Classical Public Concerts, Non-Broadcast Video Guidelines,
Guidelines for Educational Publishing, Guidelines for Performances on CD-ROMs and other
Interactive Media Devices, Guidelines for Spoken Voice Cassettes for Language and Educational
Use, Dubbing Guidelines for Members working on TV commercials made solely for the USA
Concert and Session Singers' Rate Card and a Guide to Walk On rates.
The Copyright Consent Clause

A very important component of the individual contracts entered between the performers with the producer is the qualified copyright consent clause. The United Kingdom collective contracts concerning the performers' contain standard consent clauses that form part of the individual contracts signed by the performers' with the producers. The consent draws a link with the right granted to the producer and the rights reserved in terms of the agreement between the producer and the trade union acting on behalf of the performers.20

Remuneration Model

In order to gain an understanding of the remunerative possibilities embellished in these contracts and its broad characteristics, a perusal of the major agreements between the Equity and the producers would be rewarding.21 Besides the minimum rates for daily work for the different categories either of the two options can be exercised: - a percentage of income from all sources once the initial investment in the film has been recouped, or to be shared among the performers on a points system or a percentage of gross receipts from sales to television broadcasters and from sales of videos and DVD's22, to be shared among the performers on a points system.

Payments for Secondary Uses

Complementing these aforementioned provisions with respect to basic payments the performer will receive a percentage of the profit from the film by the producer according to a criteria and formula agreed upon. Accordingly the receipts from

20 Katherine Sand. op.cit., p.12. For example in the Equity/TV agreement the copyright clause runs thus: the agreement requires that the artist consents to the use of his rights as follows- "I agree to and give every consent necessary under The Copyright, Designs And Patents Act, 1988 or any amendment to or replacement there of for the use worldwide of my performance but only as provided for in the main agreement and in any other agreement current sat the time of such use between the companies and equity in relation to any means of distribution now known or herein after developed". Similarly the PACT /Equity television production agreement states as follows, "the artist grants all consents under the Copyright, Designs and Patents Act, 1988 or any statutory modification or reenactment thereof for the time being in force which the producer may require for the making and use of the production subject to the restrictions on use of the production contained in the agreements".

21 Katherine Sand. op.cit., p 13 (the rates with the maximum percentage limits of the residuals is also provided, <http://www.equity.org.uk/content/629.htm > as on 15 January 2005.

22 This is in line with the Screen Actor's Guild agreement.
the film from opportunities such as sales to television and sales of video and DVD's are to be shared among the performers' according to a points system. Thereby ensuring that performers' share both the risks and the success of the film being made.

A Pivotal Distinction

A distinction is made between the large budget and the small budget films. For large budget films, performers' will receive a residual payment — i.e. a subsequent and ongoing payment as the film proceeds through and profits from various markets—which is based on a percentage of the performer's original salary. The Performers will then receive payments based on the extent of their participation in the film.

Payments for Secondary Uses for Low and Very Low Budget Films

Very significantly the agreement postulates a categorization between low budget films with a budget of less than 3 million pounds and very low budget films that have budgets of one million. This distinction in turn provides the producers with different payment options and recognizes very different conditions in producing low budget films as distinct from large productions. The secondary payments to actors are also agreed on the basis of this difference. The use fees are calculated on the basis of a basic daily wage rate. The basic daily rate is a minimum payment and the use fees are calculated as percentages of that rate. Other payments and fees are not included within this calculation. Equity's agreement recognizes the fact that producers of low and very low budget films may not have the logistical ability to pay performers' on an ongoing basis once the film is released and therefore they can pre-purchase the rights they need to be able to guarantee finance for the film up-front. The performer then receives additional payments that are percentages of the basic salary (up to a maximum of 280%). These percentages recognize the difference in value of various uses and markets around the world and are included here in illustration of those values. The pre-
purchase percentages up to the 280% maximum reflect the differing values placed upon the markets. 23

Regulation of Working Conditions

Besides the elaborate provisions with regard to residuals, the agreement provides for regulation of working conditions. Besides providing for the minimum wages it lays down the rates payable for overtime work. A strict deadline is provided for the payment to be made and if that were defaulted then penalty would have to be incurred by the producer. Payment should be on a weekly basis and due by Friday of the week following that in which work is done. Penalty payment would be imposed on default.

Artists and Others on Television

The Agreement Between Equity And The Producers Of Television programs have been categorized on the basis of the character of the programmer. Thus there is a specific agreement with BBC24, The Independent Television and the PACT (Producers Alliance for Cinema and Television)25. A feature of these agreements ranging from films, television to the Internet is the prevalence of minimal payments complemented by residual fees. At times the minimal payments include a particular kind of use for a particular period or for within a particular geographical extent. The residual fees are based on the kind of uses, technology, duration and extent of geographical application. The content of the agreements varies with different modes of productions and applications. Further the beneficiaries of protection that is the performers of different categories do not always beget the same treatment in these agreements. Thus it can be seen that while back ground performers, walk-ons and singers might be eligible for the

23 Katherine Sand, op.cit., p.14. For instance for the purpose of theatrical use (i.e., playing in cinemas) USA/Canada 37.5%, Rest of World (including the UK) 37.5%, UK Television Rights (excluding Theatric & Videogram), UK Network Terrestrial television 20% UK Secondary television 5%, USA Rights (excluding Theatric & Videogram), U.S. Major Network 25%, U.S. Other than a Major Network 10% U.S. Pay television 20%, Rest of the World Television Rights including pay, cable and satellite (excluding world theatric, world videogram and all UK and USA rights), Rest of World 10%, Videogram 90%.
24 See <http://www.equity.org.uk/content/541.htm> as on 1st January 2005, the agreement as drawn up on August 16th 2002. Inferences are based on agreements entered into on this date.
repeat fees in BBC, they are not so eligible in ITV productions. An analysis of these agreements reveals the factors taken into account to arrive at the right repeat fee structure.

Highlights of BBC Television Agreement

Repeat Fees or Residuals

Besides provision for the basic wages and additional payments for overtime, provision is made for the payment of residuals in tune with reuse and repeats of the program. Normal repeats fee are 80% of the residual basic fee for programs made within two years. The agreement also covers old repeats being shown in peak and off-peak hours. There are also special arrangements for repeats going out two times in the week and for school programs. Overseas Sales and sales to the UK Secondary Market (e.g. UK) also carry a royalty. There is a 17% royalty of the sales price obtained by the BBC divided amongst the performers. In the case of the first sale to the UK secondary market a £50 advance is paid. Walk-ons and Supporting Artists are also eligible to qualified residuals for repeats\(^{26}\). For older programs there is an enhancement. Those engaged under this part of the agreement do not carry additional fees for overseas sales etc.

Equity-PACT Television Production Agreement\(^{27}\)

The Artist shall be paid an engagement fee of not less than £424 for the first day worked in each and every consecutive seven-day period whilst on first call to the producer. The engagement fee, which acquires non-theatric rights and the first UK Network Transmission, is negotiable and should reflect the Artist’s status, role

\(^{26}\) While the supporting Artist receives - £73.60 and the walk on £91, both a nine-hour day, only the walk-on receives repeat fees, which are 100%, and if a further broadcast in the same week is 50%.

\(^{27}\) Artists are engaged under the Equity/PACT Television Production Agreement where a broadcaster i.e. BBC1, BBC2, ITV, C4 and C5 commissions an independent producer, the agreement is also used by non-UK production companies and broadcasters i.e. American producers. The current Agreement (dated 2002), provides the minimum terms and conditions for all artists (including actors, singers, dancers, voice-over-artists, stunt performers’ and stunt coordinators) employed in productions commissioned by and produced primarily for exhibition on television and shall apply irrespective of the source of finance, means of production or of ultimate use.
and length of engagement in the production. In addition to the engagement fee(s), which includes the first day worked in any consecutive seven-day period, the Artist shall be paid a non-negotiable production day payment of £47 for each subsequent day worked beyond the first.\textsuperscript{26} At the time of contract the Artist shall receive a compulsory pre-purchase of Rest of the World rights excluding all UK and USA uses at a rate of 35\% of their aggregate earnings, which will cover a period of seven years. The PACT Agreement contains provisions for regional productions, the Artist is engaged in the same manner as above but the minimum regional engagement fee is £106. In addition to the engagement fee any days worked beyond the first, within a seven consecutive period, the Artists shall receive a production day payment of £47. There are a number of methods of engagement available within the Agreement i.e. nominated periods, unspecified periods, eight weeks or more continuous engagement; there are also specific provisions for one-day only engagements. In appropriate cases artists receive multi-episodic fees, based on their original engagement fee. The working day is based on ten hours with one hour for unpaid lunch break; any hours worked in excess of these hours will attract an overtime payment.

\textit{Repeat Fees Structure}

The Agreement contains an additional use fee structure; repeat fees are a percentage of the Artists aggregate earnings.\textsuperscript{29} The Agreement contains provisions for an out of time escalator for older productions being repeated. Artists receive a share of a 17\% royalty for sales of productions to UK cable, satellite and digital channels. Significantly, Voice over Artists receive a minimum session fee of £153 for a four-hour session, the repeat structure is applicable on such engagements. Similarly, Singers performing out of vision receive a minimum session fee of £153 for a three-hour session; again the repeat structure is applicable on such engagements. Stunt co-coordinators receive a daily fee of £470 and/or a weekly fee of £18.80. Stunt performers’ receive a daily fee of £353 and/or a weekly fee of £1412. The repeat structure is applicable on such

\textsuperscript{26} Example of Work over a consecutive seven-day period, 2 days Engagement fee plus a production day at £47, 6 days Engagement fee plus five production days at £47.

\textsuperscript{29} For example for the 2\textsuperscript{nd} UK transmission 55\%, 1\textsuperscript{st} USA Network 75\% and USA PBS 15\%.
engagements, except that the 35% rest of world payment is incorporated in the Artists original fee(s). The Equity/PACT Walk-on and Background Artists Agreement provides for the terms and conditions for the engagement of such Artists anywhere within the UK (but outside of a radius of 40 miles from Charing Cross). A walk-on Artist shall receive a day rate of £86, where appropriate the walk-on Artist shall receive multi-episodic, night rate and repeat payments. A Background Artist shall receive a day rate of £64.10. It is significant that amongst the different categories who are entitled to basic and repeat fees, the background Artists are not to be entitled to any repeat fee payments.

Details of ITV Agreement

Program Fees and Repeat Fees

In addition to the attendance day payments artists receive a negotiable Program Fee for each episode of a program that they appear in. This fee covers one transmission on UK terrestrial television. The program fee is structured to reflect where the program is broadcast. The program fee pays for one broadcast on stations covering up to 25% of the ITV Network. A program broadcast on the whole of the ITV Network (100%) is four times the program fee. Repeat Fees based on the artists program fee are paid for UK terrestrial broadcasts; these are enhanced for older productions. Artists receive a share of a 17% royalty for UK cable, satellite and digital channels, overseas and video sales. Singers performing out of vision receive a minimum session fee of £108.80 for a three-hour session with overtime paid at £31.00 per hour. Payment of the session fee provides for one terrestrial transmission in up to 25% of the ITV Network. An additional payment of £63.00 allows payment across the whole of the ITV Network. Repeat fees are paid at 100% of the original total recording fees and the original network payment if appropriate. Voice over artists can be engaged in

30 A walk-on Artist shall mean an Artist who is required to exercise their professional skills in relation to a cast actor and/or in close up to camera and be required to impersonate an identifiable individual and/or speak a few unimportant words which shall not have an effect on the overall script or outcome of the story.
31 Background Artist shall mean an Artist who appears in vision (other than members of the public in actuality scenes) who shall not be required to give individual characterization or speak any dialogue except that crowd noises shall not be deemed to be dialogues in this context.
32 The minimum fee is £87.50.
33 A minimum of £350.00.
a number of ways. However, there is no mention of any repeat fees. Stunt Performers’ and Co-coordinators receive a minimum daily rate. Stunt coordinators normally receive a higher daily rate than that paid to stunt performers’. For engagements of one day only to work on one program there is a minimum payment of twice the negotiated daily rate. There are three categories of Walk-on Artists under the ITV Agreement with varying wage rates. No mention is made of eligibility for repeat fees.

It is significant and of note that the categories eligible for repeat fees under the BBC or the PACT agreement do not find mention under the ITV agreement. Thus the performers’ under the Independent Televisions own program productions are not provided repeat fees in the same scale and class as the performers’ in the productions of PACT or the BBC.

Guidelines - Productions Specifically for the Internet

In step with the changing technological possibilities ushered in by the digital media, Equity and the Personal Managers’ Association have issued guidelines to performers’ working on projects specifically for the Internet. There appears to be no guidelines so far evolved with respect to adaptation or transmission of film and television programs on the Internet. The recommended artist’s fees, which allow producers to show the work on the Internet for up to 6 months on one UK website, are as follows: a Daily Rate of £100 for working days of up to ten hours (including 1 hour meal break). A Weekly Rate of £500 for five working days. Overtime is paid at one fifth of the Daily Rate. The Wardrobe fee has been fixed at £50 for up to four hours. Rehearsal/ read through £50 for each day or part thereof. ADR £50 for up to 2 hours. If the producer wishes to extend the 6 months limit or show the work on more than one website then there are additional fees to be paid. There are also other payments to be paid for other uses. Special rules apparently have not been published regarding the usage of audiovisual productions meant for theatre or television or video through the Internet streaming media. But the saving of the right of the trade union to bargain for and extend its jurisdiction to present and future technological possibilities of

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exploitation keeps the jurisdiction for collective bargaining and terms of contract open.

It is noteworthy that even voice over artists have been streamlined by these agreements. With respect to these categories it is important to note that the scale of minimum payments encompasses the repeat uses as well. Thus with a single down payment, the producer purchases the rights of either the specific application of the dubbed voice or gets to use it for a particular period of time or gets to use it in a area. Particular rights for specific minimum payments have been set down in the tariffs table. The valuation of the artist is measured according to the number of words and the kind of situations he has to manage.

*Equity Members' Pension Scheme*

This scheme allows Equity members to invest for the future and is the only scheme into which the BBC, ITV, PACT and TAC companies, BBC Radio and West End theatre producers plus The Royal National Theatre, The Royal Shakespeare Company, The Globe and Disney (UK) Theatrical pays. Equity members who sign up to the scheme have the personal pension in their name and hold all the policy documents.

**Collective Administration of Performers' Rights in the United Kingdom**

*Audio Rights*

The administration of audio rights in recorded audio performances of the performers' in the U.K. are entrusted for administrative purposes to two organizations called PAMRA (Performing Artists Media Association) and the other AURA UK (Association of United Recording Artists). PAMRA was set up in the year 1995 in anticipation of the proposed law by which the performers' in the sound recordings were to be eligible for royalty payment upon broadcast or performance of the record in public. This law reached the public space in the year

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35 <http://www.equity.org.uk/content/947.htm> as on 1st January 2005. The agreement also deals with payments for rendering multi episodic work.

36 *ibid.*
1996(December 1996). The membership of the organization is open to both citizens and non-citizens of the United Kingdom who have a commercially released recording. Performers' are divided into the following categories for the purposes of administration and distribution: non-featured performer, featured performer, contracted performer, and other featured performer. PAMRA in association with PPL collects the income generated from the broadcast of commercially released recordings from broadcasters and public performance venues which is shared between the record companies and the performers' who have contributed to the recordings. The distribution system only pays out on tracks that have received airplay. There is only one distribution scheme in operation in the UK and it applies to all performers' whether featured or non-featured (session players). The arrangement of granting PAMRA the representation of the performer is beneficial to the performer because PAMRA has a team of specialists working in the realm of complicated royalty claims with an in-depth knowledge of musical copyrights in the national as well as international terrain. The management is tuned in on the play lists of broadcasters and public performance venues and therefore there is no default as the trail of the record is always followed by the collecting society anywhere in the world. This is facilitated because of the understanding reached with sister

This may be because they are citizens of a qualifying territory or because, though ineligible as performers' themselves (for example they may be a US national or resident) they recorded some of their tracks in the UK.
39 Ibid. Commonly known as session musician or singer. A performer who has been engaged for a fixed period of time, specifically to make one or more recorded backing performances which subsequently are included in the sound recording or whose performance is included in a sampled sound recording.
40 Ibid. all performers' who do not fall within the non-featured category as described above are treated as featured performers'. The interim distribution scheme provides for two categories of featured performers'.
41 Ibid. A Featured Performer who is bound by an exclusive agreement entered into directly or indirectly with the record company producing a recording, to perform on it but excluding agreements to do session work.
42 Ibid. This includes those who are not either non-featured or contracted performer, Guest artists or non-contracted members of a featured band or artist, fall into this category
44 Since 1996 PAMRA has succeeded in signing exclusive agreements with Japan (CPRA) and Switzerland (SWISSPERFORM) and reciprocal agreements with Austria (LSG), Belgium (URADEX), Canada (ACTRA), Croatia (HUZIP), Denmark (GRAMEX), Estonia (EEL), Germany (GVL), Greece (APOLLON), Republic of Ireland (RAAP), Italy (IMAIE), Malaysia (PRISM), Mexico (ANDI), The Netherlands (SENA), Poland (STOART), Romania (CREDIDAM), Russia (ROUPI) and Spain (AIE). Between 1997 and 2004 PAMRA secured over £7.5 million in overseas revenue from these agreements.
societies across the world in other countries. It does not charge the members additionally for the overseas services. The team working in this regard are also experts in account management that maintains a state of transparency in its management of the performers' accounts. A major highlight of PAMRA has been the fact that there is absolutely no joining fee and the functioning is streamlined or supported by indirect means of apportioning the proceeds from the U.K royalties -9.5% of the total proceeds as administration fees. The organization works alongside key lobbying groups both in the United Kingdom as well as in the international zone for effective representation of the members' interests. The close rapport and interdependence that is required between the performers' organizations and the producers and the other factors is reflected in the initiative for new ties and bonds in this respect.

The performers' forum was formed in the year 2001 bringing together all the diverse performers' organizations in order to interact with the Phonographic Performance Limited. This has been reflected in the new scheme of unifying the collection and distribution of UK and overseas royalties into a single service

The PAMRA also has a user friendly method of the performer being communicated the play list and exploitation and remuneration from the same.

**Distribution Policy of the Society**

Under the distribution policy of the society, distribution to featured performers' and non-featured performers' is to be treated separately and only one

The claims are automatically registered with overseas societies where operational agreements are in place, ensuring up to date, global coverage. All foreign equitable remuneration collected through the bilateral reciprocal agreements is paid through without deduction and payments are not subject to withholding tax in the country of origin. PAMRA agreements enable to access overseas societies' play lists. PAMRA search these both by computer as well as manually to find income for our members. This allows it to proactively correct any track information where performers' are incorrectly credited. PAMRA has been a key player in designing and developing a track based exchange system known as SIREX, but also actively uses the SCAPR exchange format known as SDEG in order to maximize revenue for UK performers' by using all technological exchange mechanisms in use by each society.

46 *Ibid.* Since the beginning of 2004 PAMRA has begun the process of transferring its existing agreements and negotiating all new agreements with overseas societies through the Performers' Forum. This 'single pipeline' will take care of the collection and distribution of overseas revenue for all UK performers.

contribution per track would be recognized for each performer\textsuperscript{48}. The two reserve funds previously established - one for featured performers’ and one for non-featured performers’ will be maintained by taking a small percentage (fixed at 5% for revenue year ending November 1999) of the revenue allocated to each relevant track at the time of distribution. These funds will be used to meet certain claims, e.g. where a performer subsequently proves his/her performance on a recording whose play was not reported to PPL. The percentage to be retained will be reviewed from time to time. It is intended that, where feasible, performers’ on a given track, where they all agree, may decide how they want their revenue to be shared and must then notify their agreement to PPL\textsuperscript{49}. The agreed distribution rules are applied to all performers. If a performer does not agree to the rules or how they have been applied, he/she can bring the issue to a Mediation Committee. This does not, however, affect a performer’s statutory right to make a reference to the Copyright Tribunal. The distribution rules provide that the featured performers’ will be allocated 65% of the performer revenue allocated to a track, except where the conductor is the only featured performer, e.g. on a symphonic work, the conductor’s allocation will be 32.5%. Allocation is on a per capita basis but a contracted featured performer shall be allocated double the share received by each other featured performer. The balance (35% or 67.5%) is allocated to a non-featured performers’ fund. Non-featured performers’ are paid from this fund according to how many performers’ are on the track and on an agreed range of percentage shares. It is also carefully provided that Interest accrues to all undistributed performers’ allocations. The minimum payment level to an individual performer is £25. Money allocated to the performer from all sources will be held on account until it reaches this minimum level (by the addition of subsequent allocations and interest), when payment will be made.

Audiovisual Rights Administration

Depicting an interesting amalgam of collective administration and collective bargaining agreements, the British performers’ trade union in the year 1998

\textsuperscript{48} \url{http://www.pamra.org.uk/distribution_scheme.htm} as on 1st January 2005.
\textsuperscript{49} Performer Share Agreements (PSA): Procedures to offer these facilities are still under discussion.
undertook to commence the administration of rights acquired by the performer through the collective agreements entered into by Equity on behalf of them and to administer the same in their behalf. The collective administration society was called as British Equity Collecting Society\(^5\). It was appointed as the direct agent for collecting the dues of remuneration to the members in accordance with the terms set down in the memorandum of association and articles of association. Remuneration has been defined as any income or remuneration arising or payable to the performer. Performers' Remuneration is defined in the BECS Memorandum of Association. It means any income or remuneration arising or payable to performers’ arising from: The rental of a film recording or a sound recording in the UK by way of the exercise of the rental right or in the alternative by exercising the right of equitable remuneration for rental in the United Kingdom\(^5\) and in any other countries. The rental of film recording, any blank tape levy or other levies on copying media or devices, cable retransmission of programs incorporating their performances and any other right of a similar collective character, which the BECS Board of Management resolves that it should be collected by BECS.\(^5\)

**Income of the Society**

Other than represent the members in the collection of their dues, BECS does not take an assignment of rights from the members allowing the members to retain the individual or collective right to bargain the transfer of certain rights.\(^5\) The members also have the freedom to withdraw at any time from their entrustment to the collecting society. BECS also enters into agreements with other societies where those societies do not have the ability to identify performances individually. In such circumstances BECS would enter into an agreement with the society for the entirety of the British repertoire and then distribute the revenue collected to all performers’ involved whether members or not, without in any manner of discriminating or penalizing non members or non British performers’ who appear

in British fixations. Societies are also expected to take all efforts to identify the performers' of nonmembers and for whom on whose behalf the society holds revenue. To facilitate this objective the society exchanges crucial data with its counterparts in other countries.

Collective Bargaining and Administration in France

One of the major highlights of French law of protection extended to the performer has been the fact that fundamentally the performer has been considered to be an employee under the French law. 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. The safeguard clause has been enjoined in the authors' rights code or the intellectual property rights code adopted in the year 1985 there by safeguarding the traditionally recognized authors rights from the novel extension covering those in the relate rights. The audiovisual performers' in France have been provided with rights to equitable remuneration under the French authors rights law. The following instances invoke the right to equitable remuneration.

Private Copying

Under French author's rights law, remuneration from private copying is instituted as a legal license by virtue of which remuneration is collected from makers and importers of blank audio and video recording media. The remuneration is a compensation for authors, performers' and producers for the loss of income caused by private copying in the music and audiovisual sectors. A commission composed of high-ranking judges; representatives of rights holders and users fix

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54  <http://www.equitycollecting.org.uk/equitycollecting/Distribution.aspx> as on 1 January 2005
55  Article I-762-1 of code du travail- Labor Code France.
56  (Art.211).
57  The remuneration for private copying of videograms is between 0.43 € and 8.80 € per blank commercial recording medium.
the remuneration amounts. The remuneration is collected for rights holders by two agencies: SORECOP and COPIE FRANCE. These agencies represent the three different groups of rights holders such as authors, performing artists and producers. In the audiovisual sector performers’ are represented by ADAMI and SPEDIDAM.

According to Article L. 311-7 of the French Intellectual Property Code, remuneration from private copying in the audio sector is to be divided in the following manner: 50% to authors, 25% to performers’ and 25% to phonogram producers. According to the law the remuneration from private copying in the audiovisual sector is to be divided in the following manner: 1/3 to the authors, 1/3 to the performers’ and 1/3 to the producers. The remuneration is inalienable, which means that right holders may not assign it contractually to another party. Remuneration due to performers’ represented by ADAMI and SPEDIDAM is divided in the following manner: – Audio sector: 50% to SPEDIDAM and 50% to ADAMI. The division in the audiovisual sector is 20% to SPEDIDAM, 80% to ADAMI.

Cable Retransmission

With regard to cable transmission of existing television programs and simultaneous and unabridged re-transmission on cable, there is a collective agreement between the television channels (TF1, France 2 and France 3), ANGOA (a body representing film producers’ associations) and performers’ trade unions (SFA). ADAMI has been appointed by the parties to represent

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58 Société de perception et de répartition de la rémunération pour la copie privée sonore.
59 Société de perception et de répartition de la rémunération pour la copie privée audiovisuelle.
60 Société civile pour l’administration des droits des artistes et musiciens interprètes (ADAMI).
61 Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (SPEDIDAM).
62 Syndicat Français Artistes-interprets (SFA) – French trade union of artistes –interpretes. It was founded in the year 1890. It had collaborated with the British Actors Union to found the International Federation of Actors. It has played a major role in consolidating opinion related to issues with respect to performers in audiovisuals in the European union. It has under its head the all of artiste –interpretes other than orchestra and the instrumentalisits. It is due to the work of SFA that the presumption of wage earning rights, rights of use on recorded work as well as rights related to ownership of authorship have been bestowed on the artistes. ADAMI - the trust company of the rights was created by SFA in the year 1955. (F.N.contd.on next page) See <http://216.239.37.104/translate_c?hl=en&u=http://www.lefcm.org/membres/sfa.html&prev=/searc
performers'. The agreement is administered by ADAMI. The level of remuneration is determined as a percentage of the turnover of the television channel from cable distribution and is distributed individually to performers'. Performers' are compensated for cable retransmission of their performances under collective bargaining agreements as a percentage of the revenues from exploitation. Remuneration is regarded as a supplement to their salary. Performers' do not receive additional remuneration for cable retransmission under author's rights law.

**Individual Standard Agreements**

**Television**

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

**Advertising**

In the realm of advertising, there exists an individual standard agreement. The purpose of the contract is to serve as a model agreement for contracting parties in the advertising sector. The contract is concluded between the performing artist and the production company of the advertisement. In the contract the performer authorizes the advertiser and/or agency to exploit the audiovisual work according to the terms of the contract. The exploitation license of the audiovisual recording covers exploitation in the following media:(1) Television both in France and abroad;(2) Cinema theatre distribution;(3) Cable distribution;(4) Satellite distribution;(5) Broadcasting in a local television network;(6) Broadcasting in a closed television network;(7) Video, CD-ROM; CD-I, Internet exploitation; and (8)...

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63 "Contrat artiste-interprète pour l'utilisation d'enregistrements publicitaires audiovisuels". This contract has been drafted with the participation of representatives of the Syndicat français des artistes-interprètes, ADAMI, l'Union desannonceurs and L'Association des agences de conseils en communication.
use of images or recorded sounds constituting a part of an audiovisual work.\textsuperscript{64} The recommended types of payments in the model agreement are all based on the types and frequency of use (annual lump-sum payments, payments per transmission etc.). No buy-out payments are mentioned in the model contract. It is significant that there is no collective bargaining contracts in France with respect to the field of advertising but the standard individual contracts have been formulated for this area of work for the artist. However there are no such model agreements for the performing artist in films.

Collective Administration of Rights

Collective administration of performers’ rights in the audiovisual sector under French law is divided between collective bargaining agreements negotiated by performers’ and producers’ trade unions on the one hand, and collective administration of certain rights and remunerations by performers’ collecting societies. Performers’ in the audio visual sector in France are almost always working as employees in audiovisual productions and their rights and obligations are thus determined in the first place by collective bargaining agreements and individual employment contracts. The field is marked by three prominent collective bargaining agreements in the audiovisual sector for actors. The oldest of the lot is the Convention collective de travail de la production cinématographique (actors) that dates from September 1967.\textsuperscript{65} It is an annual renewable agreement\textsuperscript{66}. Some of the prominent features of the agreement are as follows.

Ambit of the Agreement

The ambit of the agreement covers producers who are headquartered in France. The Convention regulates the rights of producers and actors for productions of

\textsuperscript{64} According to the model contract remuneration for performers’ should be paid according to the terms of a protocol signed by the contracting parties on 28 April 1986. In practice this has often not been the case.

\textsuperscript{65} In addition there exist three specific collective agreements for musicians. Ms. Mary Saluakannel, Study on Performers’ Contracts and Remuneration Practices in France and Germany, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003, p.11.

\textsuperscript{66} It has been concluded between La Chambre syndicale de la production cinématographique française on the one hand, and Le Syndicat français des acteurs and Le Syndicat national libre des acteurs on the other.
which the producer has its headquarters in France. It applies to all productions taking place in France and its territories, and to French productions taking place abroad. However, this is subject to the condition that it would not be contrary to the law or professional practices of the place where the film is being shot. It also applies to all foreign films or parts of films being shot in France by a foreign producer, regardless of the language of the film. This is significant provision as foreign actors acting in French productions or French actors acting for French productions outside the state would be covered by the terms of the agreement provided the membership norms are fulfilled. The language of the film does not create any exception to this rule.

**Format of Agreement**

One of the fundamental prerequisites of engaging an actor under the terms is that the all engagements of actors must be made through written agreements before work has begun.

**Non-Derogation**

There should not be derogation from the minimum guarantees envisaged in the convention. All individual contracts must refer to the Convention or incorporate it in its totality or in a condensed form. No clause in the individual employment contract may be in contradiction to the Convention.

**Remuneration**

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

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67 Ms. Mary Saluakannel, Study on Performers' Contracts and Remuneration Practices in France and Germany, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7th, 2003, p.11.
68 Art. 9.
Assignment

A most conspicuous omission is that the Convention does not contain any clauses with regard to assignment of rights to the producer\textsuperscript{70}. Though it does provide a safeguard that if the individual employment contract does not stipulate otherwise, the producer has the right to re-assign part or all of its rights. (It can be said that this does carry an element of presumption of assignment). In this case the assignee of rights is liable to the performer for fulfilling the terms of the agreement. The producer or other assignor of rights remains in any case jointly liable to the actors for fulfillment of the contract\textsuperscript{71}.

Authors' Rights Implementation Agreement

The highlight of the second agreement was that its implementation rationale was the execution of the French authors rights law of 1985\textsuperscript{72}.

A Mandatory Agreement

This agreement has been made mandatory by the decision of the Ministry of Culture. Therefore there is no possibility of contracting out of this agreement. The agreement fixes the minimum remuneration to be paid by the producer to the performer that varies according to the purpose\textsuperscript{73}. This salary is subject to revision according to the applicable professional agreements.

Returns Supplemental to the Salary

A distinguishing feature of this agreement from the aforementioned agreement is that, as a supplement to this salary the producer must pay to a collecting society

\textsuperscript{70} Perhaps the reason could be that the French law supplements the silence in this regard. Further this is more of a conventional agreement with labor norms being at the center of the deal. The aspect with respect to secondary uses or extent of assignment has not been given impetus.

\textsuperscript{71} Art. 17.\textit{iibid.}

\textsuperscript{72} \textit{Accord spécifique concernant les artistes interprètes engagés pour la réalisation d'une œuvre cinématographique. In particular sections 19 9art 212-4 and article 20( art L212-5). It was concluded between La Chambre syndicale des producteurs et exportateurs de (\textit{fn.continued}) films français, L'Association française des producteurs de films, L'Union des producteurs de films, on the one hand, and the Syndicat français des artistes interprètes (SFA-C.G.T.) and Syndicat des artistes du spectacle (SY.D.A.S.-C.F.D.T.).}

\textsuperscript{73} According to the 1990 agreement the fee (cachet) must be a minimum of 1,637 FRF or 900 FRF for cinema theatre distribution in public cinemas, 560 FRF for broadcasting, 177 FRF for video distribution for private use.
an amount of two percent of the net returns from exploitation after the film production has broken even. The monies received by the collecting society are distributed to performing artists on a prorata basis with regard to their initial salaries. However a ceiling has been placed on the fees exceeding a particular limit.\footnote{The fees surpassing seven times the current minimum fees, or a daily fee over 11,459 FRF are not, however, taken into account.}

Criteria of Break Even

In order to facilitate the distribution of this revenue a significant criteria needs to be fulfilled. It is only upon a break-even being achieved from the revenues of the film that the return supplemental to the salary needs to be distributed. The film production costs to be taken into account in determining the break-even point of the production. This is rendered by means of a separate ministerial decision\footnote{Ms. Mary Saluakannel, Study on Performers' Contracts and Remuneration Practices in France and Germany, published by WIPO, 2003, presented at the ad hoc informal meeting on audio visual performances held on November 6 and 7\textsuperscript{th}, 2003, p.12.}. Importantly the producer must inform the collecting society about the cost of the film. The producer must deliver to the collecting society the following information about the costs of the film: List of the interpreting artists engaged in the production of the film, the number and the amount of fees (cachets) paid to each performing artist taking into account the eventual maximum amount of fees as defined in Article 1 of the agreement, the amount of net revenues collected by the producer in France for each exploitation mode and the amount of net revenues collected from foreign exploitation\footnote{Ms. Mary Saluakannel, \textit{op.cit.},p.13.}. The information must be produced after six months have passed from the first act of exploitation of the film. The amount of net income and eventual payments need to be paid annually to the Collecting society.

Arbitration Commission

This was established following the mandate of the authors' rights law.\footnote{Article L.212-9 of the Intellectual Property Code.} The objective of the commission is to be a forum before which the parties submit their disagreements with regard to interpretation and application of the agreement. This commission is required to convene within a period of 30 days after the other union has submitted a case to arbitration. In default of the commission not being
convened by the stipulated time, the parties are entitled to take recourse to the competent jurisdiction or forum.

**Artiste's in Television**

The rights of performers' employed in television broadcasts (émissions de télévision) are regulated by a collective bargaining agreement concluded between the unions representing performing artists\(^78\) and French television channels.\(^79\) The Convention regulates the relationship between the employing organizations having signed the contract and performing artists employed for production of television broadcasts.

**Subject Matter and Jurisdiction**

The categories of programs, which are considered as television programs in terms of the Convention, are dramatic programs, programs consisting of reading aloud, programs other than dramatic, lyric or choreographic, lyric programs and choreographic programs.

It is important to note that the satellite transmission of programs is subject to special agreements, forming addendums to the present Convention, between the concerned audiovisual communication organizations and the contracting unions. For all other secondary uses performing artists are entitled to supplementary remuneration as agreed in an annex to the Convention.\(^80\) Besides other rights provided to the artist the agreement provides remuneration for secondary uses of the programs. It covers regional and national rebroadcast of television programs. Importantly the secondary remuneration is not dependent on the break-even devised with respect to films (discussed earlier) rather it is a complement to the

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\(^78\) Convention collective nationale 1992-12-30 des artistes-interprêtes engagés pour des émissions de télévision. L’Institut national de la communication audiovisuelle (INA), L’Union syndicale des producteurs de programmes audiovisuels and La Société Pathé-télévision on the other hand (hereinafter the Convention).

\(^79\) Le Syndicat français des artistes-interprêtes, Le Syndicat des artistes du spectacle, Le Syndicat national libre des acteurs and Le Syndicat indépendant des Artistes-Interprêtes.

\(^80\) An agreement (Accord “Salaires”) was concluded on 20\(^{th}\) July 2002 between the employers’ and employees’ (performers’) organizations fixing remuneration for secondary uses, national and regional re-broadcasting of television programs and for cable and satellite transmission of television programs.
salary and is calculated as a percentage of the net income of the producer. The percentage that is to be taken into account is set down by a legal mechanism. The producers' net income is taken to be the gross revenue reduced by a lump sum of the 20% of the total covering the cost of assignment of the rights. It is noteworthy that digital media uses like pay per view and video on demand is like wise remunerated as included under secondary uses. The Convention includes special provisions with regard to retransmission of recordings of events, which means broadcasting an event either directly or by delayed television broadcast. Performers' are remunerated for these retransmissions under the conditions specified in the Convention.

It is important to note that a few uses are included automatically as having been consented for exploitation by the performer upon the receipt of the initial salary. For instance the first analogue broadcasting on national territory and the simultaneous retransmission of this broadcast by one of the means of transmission covered by the agreement.

Ambit of the Agreement

The Convention is applicable in France and abroad in respect of programs financed and produced entirely by one or more of the employers or at their request. The Convention stipulates in detail the conditions of employment, which must be included in the individual employment contract. According to the Convention the remuneration covers first transmission in France made by an employer having signed the Convention, by every mode of transmission covered by the Convention (broadcasting, cable retransmission...), or once on the French territory, or several times in certain regional or local areas as defined by the Convention. In exceptional circumstances and after having consulted the Unions the Convention may also cover first simultaneous transmission by all means of transmission (broadcasting, cable, collective antennas etc.) If the program is not meant for first transmission by any means of transmission for which the

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81 Ms. Mary Saluakannel, op.cit., p.17.
82 Ibid.
83 Ms. Mary Saluakannel, op.cit., p.17. In addition to this agreement, which replaces in part the addendum 1 of the Convention, The Convention includes seven other addendum fixing remuneration for different kinds of uses of performances by one or more of the employing audiovisual organizations. All this remuneration is supplementary to salaries.
contracting employers are entitled, the contract of the performing artist shall
define the means of permitted television exploitation. The agreement has also
listed a version of permitted exploitation. Non-commercial uses of television
programs are covered by the contractually agreed remuneration.

According to the Convention the restrictions relative to uses mentioned above
need to be communicated to the users, who must agree not to use the recordings
for other than the permitted uses and not to reproduce or re-assign them to a
third party with or without payment. In cases where the parties or performing
artistes do not belong to the contracting unions then the provisions concerning
remunerating authors as specified by the ministry of labor will be applicable. This
guarantees a minimum of security to the performing artist, as the absence of a
collective contract would not make them vulnerable to exploitation. In order to be
protected by the labor law measures or other governmental initiatives the is no
need to be a union member.

Musicians

Three agreements influence the remuneration patterns of musicians’
contributions to films and television. There is an agreement to streamline the
remuneration and work of the musicians in cinematograph films. Besides

84 Article 5.2.2.

85 (a) Use of programs in connection with professional markets, exhibits and events, in which
either of the contracting organizations is represented or television as such is featured (être mise
en valeur);
(b) use of television programs for technical experimentation purposes without communicating
them to the public by normal means;
(c) exceptional use of programs by public interest organizations other than maisons de
la culture, museums and educational establishments—in connection with specific events for the
purposes of raising the knowledge in specific cultural or social sectors under certain strictly
defined circumstances;
(d) Use of programs in exceptional circumstances by French governmental representatives in
connection with events promoting French culture and organized on their own initiative. This use
may not consist of transmission by television channels or exhibition in commercial cinemas.

86 Ms. Mary Saluakannel, op.cit.,p.18 .

87 Convention collective nationale des artistes musiciens de la production cinématographique
(Convention collective nationale 1964-07-02. It is concluded between the Chambre syndicale des
producteurs et exportateurs de films français and the Chambre syndicale des éditeurs de
musique légère on the one hand, and the Syndicat national des artistes musiciens de France et
d’outre-mer (S.N.A.M.) and Syndicat des artistes musiciens professionnels français de Paris et
d’Île-de-France, on the other hand.
stipulating the working conditions including the duration and the remuneration to be paid for the work. It lays down the conditions for further use and lays down the necessity that further use other than that stipulated by the terms of the agreement would essentially require a separate agreement. This collective convention from 1964 regulates the rights of musicians in respect of recording their aural performances or instrumental performances of musical works in connection with cinematographic works intended for world-wide distribution. One of the drawbacks critically noticed in this agreement has been that it has not been extended in its sphere of application to non-parties. Further the exact jurisdictional ambit of the agreement and to what extent it is still being used.

**Commercial Use of Film Music**

There is a specific distinct agreement with regard to secondary use of film Music. The agreement regulates the use of film music for the making of commercial phonograms. If the use of film music for a commercial phonogram exceeds 20 minutes, a separate remuneration is due to the musicians having participated in that recording. The remuneration is paid by the phonogram producer, and is defined as a lump sum depending upon the number of musicians participating in the recording. This agreement is administered by the collecting society SPEDIDAM on behalf of musicians. This agreement too is handicapped by lack of clarity in its application to non-parties and the extent to which it is applied in practice.

The rights of musicians employed to perform in television programs are dealt with in separate collective bargaining agreement. The agreement sets the terms of the basic remuneration (cachet initial), and all complementary remuneration is subsequently calculated in relation to this basic remuneration. The structure of

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88 Remuneration is based on the type, length and time of day of the recording session. The remuneration schedules depend on the type of instruments played.
89 Protocole d’accord concernant l’utilisation secondaire des enregistrements de la musique de films (Protocole d’accord 1960-07-29). This memorandum of understanding is concluded between the same parties as the collective convention for musicians’ rights in film production.
90 Ms. Mary Saluaakannel, op.cit., p.18
91 “Protocole d’accord du 16 mai 1977 modifié par l’avenant du 5 mars 1987 relatif aux conditions d’emploi et de rémunération des artistes musiciens employés dans des émissions de télévision”. The agreement is concluded between the Syndicat national des artistes musiciens (SNAM) and Syndicat des artistes musiciens de Paris et ce la région parisienne (SAMUP). (F.N. Contd.)
remunerating musicians in the agreement is based upon the same principles as the corresponding collective bargaining agreement with actors.

A distinctive format of remuneration is followed for services relating to recording of sound from that followed for television services. For recording of sound the basic recording session shall not exceed 20 minutes, after which a complement of five percent of the basic remuneration for each minute surpassing 20 minutes must be paid to musicians.92

It is noteworthy that the initial salary also covers the grant of rights for a particular extent of initial use. With regard to television services the basic remuneration covers the first broadcast on French territory and over-sea territories and simultaneous cable transmission for the same territory.93 The duration for which the musicians are entitled to this remuneration is for a period of fifty years. It is calculated from the period following the first broadcast. The musicians are entitled to a complementary remuneration for further uses of their fixed performances according to the terms of the Agreement.94 For a complete retransmission of the program musicians are entitled to 25% of their initial payment.95 The musicians are entitled to a supplementary remuneration as agreed between the European Broadcasting Union and the International Federations of Musicians and Actors for licensing the program among Eurovision countries.

A separate tariff policy is in place for commercial uses of the musicians' performances. Musicians are entitled to 37.5% of the net income of the assignment. The remuneration is paid pro rata in relation to the initial remuneration for each musician.96 Musicians are entitled to a supplementary remuneration to be negotiated between musicians' unions and the commercial exploiters of their programs for the following modes of exploitation namely commercial cinema theatre exhibition or video transmission in a cinema,

and on the other hand, the former public sector broadcasting societies, "Télévision francaise 1 (currently TF1)", "Antenne 2 (currently FRANCE 2)", "France régions (currently FRANCE 3)" and l'institut national de l'audiovisuel (INA).

92 Article 4 of the Agreement.
93 Article 17 of the Agreement.
94 Ms. Mary Saluakannel, op.cit., p.19.
95 See Article 18.
96 Articles 20 (exchange of programs) and 21 (other commercial uses).
exploitation in the form of derived rights such as producing a commercial phonogram and commercial video exploitation for entertainment programs.

Non-Commercial Uses of Programs are Covered by the Initial Remuneration

Non-commercial uses are defined in the same manner as in the corresponding collective bargaining agreement for actors. Musicians are paid a certain percentage for the pre-sales of programs to commercial television channels, cable networks, local stations and to TV5. The percentage is based upon the number of spectators or satellite connections, and the number of emissions determined separately for each television channel. A significant feature of distinction between the collective bargaining agreement for actors and the collective bargaining agreement for musicians is that the rights of the latter is not to extend beyond the parties to the agreement. To sum up it can be inferred that the musicians are paid for the use of their performances in television programs separately for each use and all additional payments are supplementary to their salaries and thus include the corresponding social security benefits. Even if this agreement is handicapped by its non extension to non-parties, it seems to be in use by the majority of television channels and thus it acts as an example for remuneration practices for television channels not bound by the agreement.

Agreements Concluded Between Producers and Third Parties

Performing artists are not usually aware of the contracts concluded between producers and third parties. It is the producer of the audiovisual work who is responsible for fulfilling the contract towards performers. The initial producer remains liable even in case she has transferred her rights totally or in part to a third party. Because this principle has not always worked in a satisfactory

97 Ms. Mary Saluakannel, op.cit., p.20.
98 Articles 24-1 and 24-2.
99 Ms. Mary Saluakannel, op.cit., p.20.
100 ld., p.22.
manner, performers' would wish that their rights be transferred to a collecting society for administration on behalf of the producer.101

Collective Administration of Rights by Collecting Societies

The central collecting society administering performers' rights in the audiovisual field is ADAMI.102 In general terms it can be said that ADAMI represents actors who are entitled to a credit in audiovisual productions. This includes both actors and musicians having central roles in audiovisual productions. The other collecting society representing performers' in the audiovisual field is SPEDIDAM,103 representing backstage performers' and other performers' not entitled to credits in the productions. In this connection we should also remember that the French author's rights law also makes a distinction between key actors and supporting actors.

Rights Administered by ADAMI -Remuneration from Secondary Rights

ADAMI has been given mandates from private producers for administering rights in television programs. In the field of cinema ADAMI collects and distributes remuneration for all uses of films in its application of the collective bargaining agreement relative to cinematographic production (l'accord conventionnel cinema). This Convention has been extended to cover all rights holders in film production, including those not represented by the contracting parties. In this connection it is important to note that under the collective bargaining agreement residuals are paid as salaries, which means that they include all social security benefits. Thus residuals paid out as part of salary are more advantageous to performers' than copyright. SPEDIDAM deals with remuneration from private copying, equitable remuneration and general rights or exercise of exclusive rights.104 A most significant highlight of the collective administration pattern has

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101 Ms. Mary Saluakannel, op.cit., p. 35.
102 Société civile pour l'administration des droits des artistes et musiciens interprètes (ADAMI). In total, ADAMI administers over 200 000 individual accounts of right holders
103 Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse
been that any use of the recording other than those envisaged in the agreement would require a fresh written authorization. It also assuredly invokes the right of the performer to the complementary remuneration for the fresh exploitation. For instance when the performances authorized for use in sound records are used for the films and vice versa.\textsuperscript{105} The royalties and remuneration received by the collective administration society is distributed directly between the recipients. The overhead expenditure of the organization is recovered by means of the deduction made of a reserve meant for this purpose.\textsuperscript{106}

The distribution is proportional to the participation in the recordings carried out by the \textit{artiste interpretes}. This is attested by the attendance sheets of the artistes. The distribution is also based on the surveys based on different kinds of music like popular, film and traditional.\textsuperscript{107} With respect to the distribution of equitable remuneration too the participation in the recordings is taken into account.\textsuperscript{108} Further the duration of the diffusion of the sound records and the number of times is also taken into account. In the absence of a statement regarding the diffusion, the amount to be disbursed is calculated according to the participation of the performer in the recordings. Percentages fixed by the board would be multiplied with the recording statistics of the artiste interpretes. Any other uses not covered by the rights of private copying and those of equitable remuneration are administered by SPEDIDAM.

Internet Uses and Collective Agreements - SPEDIDAM

The availability of the music to the public on the Internet in that they are recordings not intended initially for this use constitutes a secondary use. This requires a written preliminary authorization of the SPEDIDAM acting on behalf of

\textsuperscript{105} Ibid.
\textsuperscript{106} The distribution between the recipients (or not associated associates) is carried out during the first quarter following the exercise concerned. A second distribution can intervene in the current of the year.
\textsuperscript{107} Proceeds from private copying.
\textsuperscript{108} See.
the concerned artist-interpreters.\textsuperscript{109} The fact of using such a recording without this authorization is a violation of article L 335-4 of the Code of the Intellectual Property (C.P.I.) and a penal offence punishable with two years of imprisonment and 150,000 € of fine. It is consequently essential to contact the SPEDIDAM before any use of recorded service of artist-interprets on Internet. As an example, the illustration of an Internet site using extracts of recordings disco graphic or video graphic or the offer of remote loading of sound or audio-visual recordings constitutes secondary uses of the services of the artist-interpreters being reproduced on the aforementioned recordings. This entitles all people who interpret in an unspecified way a work considered by the C.P.I. as artist-interpretes.\textsuperscript{110} Authorizations need to be obtained from the SPEDIDAM (Company of Collection and Distribution of the Duties of the Artist-Interpreters of the Music and of the Dance) which has the role of delivering the authorizations necessary for negotiating and of receiving in the name of the artist-interpreters remunerations corresponding to all the uses of their recordings.

The Collective Bargaining and Administration System in the United States of America

Audiovisual Industry

The performers' quest for the betterment of their status in the United States of America began much before the advent of the kinetoscope that revolutionized the world.\textsuperscript{111} It was confined to the performers' and workers in theatres. They had problems that ranged from working conditions to reining in the agents and the production companies. However these past organizational moves made performers' prepared organizationally to meet the contingencies posed by the film

\textsuperscript{109}See,\textsuperscript{10} <http://216.239.39.104/translate_c?hl=en&u=http://www.spedidam.fr/4_utilisateurs/42_musique.htm&prev=lsearch%3Fq%3DSPEDIDAM%26hl%3Den%26lr%3Dfr%26ie%3DUTF-8 > as on 15th February 2005.

\textsuperscript{110}Thus, for example, the musician, the singer, the actor, the dancer, whether they are professional or not, is artist-interprets.

\textsuperscript{111}Thomas Alva Edison invented the machine on the year 1896 but much prior to that organized movements among the theatre actors had commenced. <http://www.sag.org/history/chronos_pages/pre_guild.html> as on 1st February 2005.
medium. These unions received the blessings of the American Federation of Labor through a charter. The producers also began to form themselves into an alliance during this period. The adaptation of these unions to the new media like motion picture industry took place naturally. Other union's connected to the stage were also formed during this period. In the year 1919, Equity was granted recognition and soon it became the representative voice of motion picture principal performers'. Equity was also instrumental in proposing the first model contract for the freelance actors however it was advanced by the Academy of Motion Picture, Arts and Sciences and it was called as academy contract.

The period was marked by reports of abuses at the work place with the extension of working hours with the advent of talkies. The studio system posed considerable hardships on the performers' regarding unsteady working conditions with no scheduled working hours, no turn around and no meal breaks. The contracts were for as long as seven years during which time the actor was not allowed to break the contract. The actor at the end of the seven-year contract would have to renew the contract and would not have much say in that choice considering the weak bargaining position. The studio could even interfere into the actors' personal life and even dominate the political preference of the actor. It was impossible to rebel against the system, as it would pose grave risk for the career. The actors were not able to choose their roles under the studio system. The dominating influence of the studio system even stood as a obstruction to growth of a trade union of the actors which until 1937 the studio and other producer interests refused to acknowledge as representing the actors interests.

112 It was in the year 1864 that William Davidge formed the Actors' Protective Union, formed due to the "long-existing necessity for an equitable status" for actors, along with the wish to establish a standard minimum salary for players, <http://www.sag.org/history/chronos_pages/pre_guild.html> as on 1st February 2005.
113 It as a matter of coincidence that the congress also gave the assent to the formation of labor union during the time when infant organizational efforts were begun among the actors. A significant development was the formation of the Actors Equity Association in 1913. In the motion picture industry, the first union to take shape was the Motion Picture Players Union that represented the extras. In the year 1918.
114 To create a "Theatrical Syndicate". 115 1926. Equity scorned at it as it was very similar to the model that it had been persuading the interests to adopt.
Decisions that Changed the Fortunes of Studios and the Artistes

Two actresses revolted against the oppressive contracts that were enforced by the studios closing their options to sign on different roles and under different banners. The actresses were Bette Louis and Dehaviland. Both rebelled against the severe seven-year bond of contract with a Studio. While the former lost the case but she did cast a heartening precedent with the fight, the latter found a decision in her favor. With this the studio term-contract was opened up for negotiations. It was another Supreme Court decision against Paramount Pictures in the year 1948 that once again brought diluted the domineering stature of studio particularly its monopolist inclinations. In an anti trust suit against paramount pictures the Supreme Court rules that the monopoly from shooting studios to film theatres would require to be broken down and did not quiet fulfill the anti trust legislations. This case not only liberated the production scene as independent producers were able to find space but it also gave freedom the stars to experiment with their service terms. Very significantly from the residual payment point of view, of interest from the angle of intellectual property rights, the first agreements based upon a percentage of gross receipts began with this shift. This change was not without disadvantages. While it benefited the stars it did not provide the old studio remuneration or guaranteed employment tenure under the studio system for the vast majority of non-star contract players.

Audiovisual Performers Organizational Evolution

An important legal development took place in 1935, which made it possible for performers and indeed other workers to organize themselves. The National Labor Relations Act of 1935, known popularly as the Wagner Act was the New Deal

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118 The studio was not willing to release her even after her seven-month period.
120 The advent of television further weakened the studio system.
121 Until the end of the 1940's Performers, and in particular actors enjoyed secure, continuous long-term employment contracts with the studios—which is what is meant when the “Studio System” is referred to. However in the 1940's technological change (the advent of television) and antitrust legislation forced the studios to relinquish control over both production and distribution, and the system was forced to become much more flexible, with studios contracting with independent production companies to make films. As a result, producers came to contract with the actors on a picture by picture basis, and the role of the unions and of agents in negotiating individual contracts became much more important.
122 It was Jimmy Stewart who negotiated to work for a percentage of the gross receipts for the film Winchester '73 made in the year 1950.
legislation designed to protect workers’ rights to unionization. It was after a bitter struggle and a strike call that Screen Actors Guild was finally extended recognition in the year 1937. The first collectively bargained contract was signed between SAG and thirteen producers during the same period. The period was also marked by great economic and political turmoil with the great depression and the war looming over the horizon. This brought about considerable downsizing and salary cuts for the performers and others in the industry that further fuelled the need for an organizational intervention. The guild membership was to be open for all as against the previous ‘by invitation only’ membership of the Academy of Motion Pictures and Arts. The Guild soon proposed a code of fair practices to the industry. It organized strikes and boycotts (even Oscars) in order to drive home its point that existing circumstances were of no help to the performer. The guild became representational of the interests of actors in the industry as the earlier representatives granted its jurisdiction to Screen Actors Guild. 

123 It created the National Labor Relations Board (NLRB), which still functions to enforce the National Labor Relations Act.

124 In the mid-1930s, with the growth of Hollywood, the Screen Actors’ Guild was formed by some of the biggest stars in the business, including James Cagney and Boris Karloff and in 1937, after a threatened strike, the Guild forced the Studios to recognize the union as a bargaining agent, and soon afterwards the first-ever SAG contract was signed.

125 President Montgomery declares Guild recognition “the victory of an ideal.” Thirteen producers sign first SAG Contract, pay minimum $25 per day, $35 for stunts, $5.50 for extras, and portions of the 1935 contract of the Academy of Motion Picture Arts and Sciences become part of the new SAG contract.

126 Six actors Berton Churchill, Grant Mitchell, Ralph Morgan (all three members of Actors’ Equity Council), Charles Miller (Actors’ Equity’s West Coast representative, Kenneth Thomson and his wife Alden Gay meet in the Thomsons’ Hollywood hills home to discuss formation of self-governing organization of film actors in the year 1933. See http://www.sag.org/history/chronos_pages/30s.html as on 1st February 2005.

127 Most significant among these was the Labor-Management Relations Act of 1947 amending the National Labor Relations Act. This legislation, named for its instigators as the Taft-Hartley amendments, restricted the ability of the unions to confine jobs to their own members.

128 Equity, AFTRA and SAG decided to share the television jurisdiction in the year 1940. SAG notched up several firsts in the history of collective bargaining on behalf of Performers in films. It was able to win rights for actors through its first commercials contract in 1953, residual payments for television reruns in 1952 and, in 1960, after a strike, residuals for films shown on television. With the implementation of the Pension and Health Plan, won in the 1960 negotiation, and residual gains. Understanding the needs of the low budget independent filmmakers SAG prepared a contract with special provisions in its contract in relation to the actors. The Screen Actors’ Guild has extended its jurisdiction to the digital sphere also with the contracts being drafted and terms being negotiated with respect to Internet usages of the motion pictures.
Lessons from Audio Performers' Union Struggle for Rights

Some of the organizations such as the American Federation of Musicians (AFM) have been in the forefront of the welfare oriented initiatives. Much prior to the technological advent the organization had prepared and enforced the first wage scales to be observed by troupes of different kinds. They were also in the forefront for copyright reforms particularly for the recognition of performance rights. The new technological developments had pushed the entire lot of performers into other professions. The development destroyed the performing arts at various levels and thousands who were dependent on their talent for sustenance lost their jobs as it affected their revenue from live entertainment. Forced into unemployment they sought refuge in part and full time employment in other fields. The recording musicians worked on a one-time payment alone. Therefore recordings displaced their revenue from live performances. The AFM responded and by the year 1928 one can see minimum wage scale agreements being entered into on behalf of performers in vita phone, movie tone and phonogram records.

The unions attempted to approach the issue from different standpoints. They attempted to pursue a royalty based approach rather than the property based approach that found a set back in the *Whiteman* decision. Their efforts bore fruit in the recording and transcription fund that was established for the welfare of

130 <http://www.afm.org/public/about/history.php> as on 1st February 2005. The organizational efforts of the musicians had begun much before the advent of the affixed media. In the 1800 one can notice the formation of mutual aid societies to help the musician with financial assistance and unemployment and death benefits. The AFM was formed in the year 1896 with Owen Millar as the president. Around 3000 members were represented by this organization at the time of its inception.


132 *Ibid.* Thomas Alva Edison's talking machine changed the fortunes of live performers. This was further dented by the radio broadcasting which had caught on in a big way by the 1920's.

133 <http://www.afm.org/public/about/history.php> as on 15th February 2005. Besides broadcasting, the use of recorded music in films also displaced the performers, as their services were no longer required in theatres during the screening of silent films. In fact with the release of the first talkie the 'Jazz Singer', the performers in the theatres lost around 22000 jobs.

134 Attempts to help live performers' was foiled due to the intercine conflict between the unions concerned and the hostility between them is a continuing incident.

the performing artists. This idea came under criticism and it also exposed the drawbacks in the strategy. The recording companies and the recording artists were to contribute to the trust fund. The reason being that the focus was not to help those who were unfairly exploited in the execution of their contracts but was to provide employment to the unemployed. This caused differences of opinion among the artists and was resented by the recording artists. This eventually led to a rift in the organization. Though unity was restored upon the AFM reversing and making amends for their former policy and providing impetus to the issues of recording artists like royalty payments.

Another highlight of the unionized attempts was the unbreakable unity of the artists' fraternity in the United States despite the fact that instruments of protest like strikes were banned by way of legislation. It is noteworthy that despite this the artists wrested royalty based collective bargaining agreement that has borne the test of time and yielded dividends.

Another important facet of the activities of the union was the sustained pressure they bringing on the government to create a performance and property rights for professional musicians for recorded music. The legislation in 1971 that made the piracy of music a criminal offence was one of the results of things pressure. However it did not elicit the performance right for the musicians or for the sound recorders. Another feature of the organizational work was that there was consistent adaptation to the exploitation by means of new technology and the

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136 James Caesar Petrillo's demands were interesting; it required employment of standby performers when records were used, quotas were to stipulate the amount of recorded music that could be used, restrictions on the use of canned music for various purposes and prohibition on the licensing old films (including sound tracks for performance on television etc.) were some of them. The union did every thing to inhibit the use of recorded music for any thing other than the personal enjoyment in the private homes and an agreement was reached in the year 1943. The artists in fact set upon a vigorous labor action and there was a ban on virtually all recording by union musicians during the period 1942-1944.

137 The Taft- Hartley Act of 1947 announced a complete ban on the use of trust funds used by the union.

138 Lead by Cecil Read, the Musicians Guild of America came into being with a substantial sway over the recording musicians who were the major contributors to the former union. It detrimentally weakened the representative character of AFM.

139 The Lea Act was passed to ban strikes on the 16th of April 1946 and was repealed only in the year 1980.

140 The first collective bargaining agreement was signed with the motion picture industry in the year 1944. Soon there was increasing representation of musicians in the motion picture industry. Considerable emphasis was given to the welfare measures that included disability fund and the constitution of employees pension welfare fund.
business model that was followed in its implementation in the collective bargaining agreements.\textsuperscript{141} Important legislations for the performers such as the Digital Audio Recording Act \textsuperscript{142} and the Audio Home Recording Act\textsuperscript{143} that provided them with royalties from the sale of digital audiotapes and recorders were passed by the diligent follow-up by these organizations.

It is interesting to see some of the instruments that had been forged in order to attend to the problems of the artists such as the Trust Fund and the royalty agreements had attracted much controversy in America even among the artists fraternity. It is pertinent to note that the recording artists had to contribute their royalty payments to the trust fund and this evoked a lot of resentment amongst them. It revealed the fact that charitable machinations never really gave a lasting solution, as it would always have the effect of the earners feeling the pinch while contributing for the cause of the unemployed. The experience in United States with trust funds shows that any dependence on the contributions of those gainfully employed in order to help the underprivileged among the artists would not satisfactorily produce results in the long run.

**Collective Bargaining Agreements and Standard Rates for Performers’ in Audiovisuals**

There is a whole range of very lengthy and detailed collective agreements covering audiovisual production in the US, with varying structures and compensation systems.\textsuperscript{144} The principal players who negotiate to arrive at different contracts for different categories and medium being the Screen Actors Guild\textsuperscript{145}, the American Federation of Television and Radio Artists (AFTRA)\textsuperscript{146},

\textsuperscript{141} For instance as early as 1962 the collective bargaining agreement had been entered into specifically taking into account the needs of the pay-TV. \textless http://www.afm.org/public/about/history.php\textgreater as on 1\textsuperscript{st} February 2005. The same adaptability can be seen in the special rates devised for low budget audio and media recording in 1997. It was not merely the technology but also the business model that influenced the rate pattern.

\textsuperscript{142} 1987.

\textsuperscript{143} 1992.

\textsuperscript{144} Some specific and simplified examples are quoted in this paper for the purposes of illustration—this does not however represent a comprehensive analysis of every agreement.

\textsuperscript{145} (SAG) represents 98,000 performers’ in all categories working in film, television, commercials (jointly with AFTRA), industrial/educational films, as well as interactive (\textit{f.n. contd. Next page}) media, low-budget productions and audiovisual productions made for the Internet. SAG is currently in discussions with AFTRA with regard to uniting and consolidating the two unions.
The American Federation Of Musicians (AFM) from the performers' side and the Alliance of Motion Picture and Television Producers (AMPTP), the American Association of Advertising Agencies (AAAA) and the Association of National Advertisers (ANA) from the producers. In addition to these, a pivotal role is played by talent agents in the US in negotiating performers' individual contracts. Traditionally, the unions have worked very closely with this group. Collective agreements in the US are silent on any questions relating to statutory rights or their transfer per se. These aspects are left to the performer's individual contract. The agreements do, however, address in considerable detail the performers' conditions of work, and the range of minimum compensation mechanisms for primary and secondary exploitation of the performer's audiovisual performance.


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

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

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

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

149 Since 1982, the Alliance of Motion Picture & Television Producers (AMPTP) has been the primary trade association with respect to labor issues in the motion picture and television industry. Producers who sign a contract or letter of agreement with the union in their jurisdiction are called signatories.

150 For more information <http://www.aaaa.org/> as on 16 February 2005.

151 For more information <http://www.aaa.org/> for more information <http://www.ana.net> (as on 16 February 2005) representing over 300 companies which have over 8000 brands.
performers' unions or guilds. Each union negotiates its own basic agreement with the producers' association. This agreement, which covers all workers under its jurisdiction, will typically cover such issues as minimum rates of pay, periods of work, retirement and health benefits, grievance procedures etc. Re-negotiations of the (often very extensive contracts) take place periodically and the agreements are subject to constant and in some cases joint monitoring by the unions and the producers with respect to their implementation. The key element of the system depends on the framework set by the collective agreements for individual bargaining. Union collective bargaining agreements are not contracts between individual performers' and producers. They provide minimums terms for the actual bargaining over performers' individual contracts. The basic agreements allow individuals who have more marketing power than others—the stars—to negotiate additional compensation above the minimum through personal services contracts.

Union Control over the Profession

The American system whereby performers' are compensated via collective bargaining agreements depends on two factors: the first of these is the ability of the unions to control the number of performers' working under their contracts entering the profession, and secondly that of the discipline exercised by the performers' themselves. Following the 1947 Taft-Hartley Act it became more difficult for the unions to restrict hiring to union members. The law dictates that a producer who is signatory to the union's collective bargaining agreement may hire a non-member under a union contract for thirty days. After that time the performer is required to tender the requisite initiation fee and dues to the appropriate union in order to accept any additional union work. In practice

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152 Any performer (with the exception of instrumental musicians) who work on motion picture or television film that is shot on film will work under the Screen Actors Basic Agreement. Television material that is shot on videotape or digital falls under the jurisdiction of both SAG and AFTRA and in certain cases is produced under a separate AFTRA agreement. The performers' covered by the agreement are performers' (actors), singers and dancers (both solo and in groups) stunt performers' and background actors (extras) in specific zones around New York and Los Angeles.


producers can hire non-union members without any significant difficulty, though naturally this is heavily discouraged by the unions.\textsuperscript{155}

\textit{Rule One}

Once a performer becomes a member of the Screen Actors Guild, he/she is bound by the rules of the union. In terms of obligations, 'Rule One' is the most important of these, which states as follows: 'No SAG member shall work as an actor or make an agreement to work as an actor for any producer who has not executed a basic minimum agreement with the Guild which is in full force and effect'. This means in effect that SAG members will not accept any non-union work—indeed there is a system of fines and other measures for those who contravene it. This is a key element in ensuring the signing of collective bargaining agreements by producers.

\textit{Foreign Performers}

Foreign Performers' are entitled to work in the film industry in the United States. They are also amenable to receive the benefit from US Union Agreements. However they have to overcome the hurdles of technicalities and formalities in order to avail the facility. The US Immigration and Naturalization Service (INS) sets the visa requirements for foreign performers' who want to work in the United States.\textsuperscript{156} However once granted permission to work in the US, foreign performers' are treated exactly in the same way as national performers' in terms of union requirements and benefits.

\textsuperscript{155} There are a number of routes into union membership although these differ from union to union. A performer may join the Screen Actors Guild in one of three ways: either by obtaining work as a principal for a SAG signatory producer, or by virtue of membership in an affiliated union or by being hired for at least three days' work as an extra under a union contract. A performer may join SAG's sister union AFTRA on payment of an initiation fee.

\textsuperscript{156} The INS allows performers' who are not US citizens or permanent residents to audition based on any visa, but they must then obtain a very specific visa to actually work on a film, television, or electronic media project, whether the producer is a union signatory or not, in the United States. Production companies, and sometimes talent agents and managers, will often apply for these visas on behalf of the performer concerned. Due to the INS criteria and cost of transportation, living expenses, and legal fees, these visas are typically granted only to major-role principal players.
The Jurisdiction of US Union Agreements

Most of the performers' collective agreements in the US are currently restricted in scope geographically (one exception being the AFM's sound recording agreement). This means that the terms of the agreements apply to performers' contracts made in the US and to situations in which a producer based in the US hires a performer who may then be filmed on location in another part of the world. This is an area of concern to the performers' unions in the light of the increasing amount of production that takes place in foreign countries by US companies operating from subsidiaries established in those countries. In such a situation the terms of the collective agreement do not legally have to be applied to the performer concerned and can potentially undermine observance of the collective agreement. This issue is likely to remain an important point in collective bargaining for the future. In the mean time the unions are engaged in a major effort to enforce the terms of their collective agreements by requiring discipline on the part of their members in not accepting contracts other than those based on such agreements.

Global Rule One

One of the most significant and recently adopted principles of the United States collective organizational philosophy with respect to performers' rights is what is called the Global Rule One—this was introduced in the year 2002. The essence of this call is that no performer member should venture to work with a producer who has not signed a minimum basic agreement with the union guild. This has assumed importance particularly in case of productions that have been shifting offshore in order to escape from the rigors of the SAG contracts. The members are bound to this pledge of working with a producer who is a signatory to a sag union agreement. The reasons that are mooted include the loss of all benefits which a SAG agreement otherwise extends to the members. The pension and health benefits emanate from the percentage of contributions made by the

157 The rule was introduced in the year 2002.
producers to the Screen Actors' Guild. The rule can be waived in select instances where in the SAG considers it proper do so. The application of this rule is with regard to English offshore productions involving members of SAG with non-signatory producers. Punitive sanctions from a SAG trial board are invoked upon deviance from this rule.

Moral Rights

Provisions have been incorporated that seek to secure the right of paternity and the integrity of the performer. The issue of screen credits and depiction for instance in the nude and the rights of the artist with reference with to these situations have been laid down. These are basic minimum provisions and the individual performer can negotiate individually for better results. Typical credit provisions include provisions such as (Extract from AFTRA network code for television programming), 'All persons classified as performers who speak more than five lines...shall receive cast credit, individual and unit respectively...although there are situations in which the unions accept that despite best efforts, credits may not always be possible'. Similarly extract from SAG codified basic agreement says, 'Producer agrees that a cast of characters on at least one card will be placed at the end of each theatrical feature motion picture, naming the performer and the role portrayed. All credits on this card shall be in the same size and style of type, with the arrangement, number and selection of performers' listed to be at the sole discretion of the Producer. All such credits shall be in a readily readable color, size and speed...'

Residual Uses

The most important feature of the US system of performers' compensation and control over secondary use of performances is represented by residuals, which are also referred to as 'reuse fees' or 'supplemental contributions'. These payments may be calculated as a percentage of either the minimum initial payment or the revenue of the producers or distributors for a new market.

158 These could be affected if performer members begin to engage non-union signatory producers.
Payments are ongoing, as long as the audiovisual production continues to be sold to secondary markets.\textsuperscript{159}

It can be argued that the requirement for the producers to pay for secondary uses imposed by the collective bargaining agreements, creates a situation whereby the performers' have control over their "rights" in a way that is analogous to that of other countries where performers' may negotiate compensation on the basis of the transfer of their statutorily-created exclusive rights.\textsuperscript{160} As secondary markets have grown and new markets continue to evolve, the importance of residual payments to actors' total compensation has become increasingly significant. For the majority of performers' in audiovisual productions the system operates via the collective bargaining agreements, which oblige producers to send performers' individual cheques directly to the union or in certain cases to remit funds directly to the performer.\textsuperscript{161} Under the SAG contract the lump sum is divided between the performers' concerned using a points system based on the number of days worked on the particular production. A key feature of the residuals system is that it aims not to disadvantage lower paid actors in relation to their "star" counterparts—a cap is built into the system so that in effect the highest paid performers" secondary use payments help in part to subsidize those whose initial compensation and bargaining power is less.

\begin{itemize}
\item \textsuperscript{159} For example, the Residuals Distribution Formula (Screen Actors' Guild Basic Agreement) shows the following formula demonstrating how residuals are distributed among performers' under one collective bargaining agreement.
\begin{description}
\item [Time units] Each performer is credited with units for the time worked on a production as follows:
\begin{itemize}
\item Each day = 1/5 unit
\item Each week = 1 unit
\end{itemize}
\item Maximum = 5 units per performer.
\end{description}
\begin{description}
\item [Salary units] The salary of each performer is converted to units as follows:
\begin{itemize}
\item Day performer each multiple of daily scale compensation = 1/5 unit
\item All other Performers' each multiple of weekly scale compensation = 1 unit
\end{itemize}
\item Maximum = 10 units per performer.
\end{description}
\begin{description}
\item [Computation] The aggregate of each performers'' time and salary units is applied against total cast units and each performer is paid in the percentage their units represent.
\end{description}
\item \textsuperscript{160} Residual payments date back to the 1950's when the American Federation of Musicians became the first union to negotiate secondary use payments for theatrical films exhibited on television. After a decade of acrimonious negotiation, the payment of residuals became accepted practice throughout the industry in the 1960's although further industrial strife took place in the early 1970's when the new markets of home video, cable and pay-per-view television came into being.
\item \textsuperscript{161} Ms. Katherine M. Sand, \textit{op.cit.}, p. 31.
\end{itemize}
The unions' involvement in the administration of residual payments has given them extensive responsibilities and experience not dissimilar to that of collective administration organizations established by rights-holders both in the US and in other parts of the world. They manage a large amount of data, they disburse very large amounts of money to the precise individuals who have worked on each project, and, as importantly, they monitor and audit the sums received from producers on many thousands of productions each year. It is also worth noting that the unions do not make any deductions from the lump sum received for the process of administration—all the money goes to the performers'. As the entertainment industry has become more complex with ownership of productions passing from company to company, the unions have had to negotiate complex security arrangements to ensure that ongoing residuals obligations continue to be met (including onerous fines imposed on producers for late payments), and to track the accuracy of the sums received from the producers by auditing and other procedures. It is essential to note that in addition to payments for uses; the US performers' unions have negotiated very significant payments by producers for pension and health insurance schemes that are jointly administered by the unions and producers. This huge 'social' element of the collective bargaining system is clearly of immense importance to the individual performer.

Assumption and Security Agreements

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

**New Forms of Exploitation**

A most conspicuous feature of the collective contracts in the United States has been that the way new forms of exploitation are dealt with will differ between collective Bargaining agreements. If there is no agreement as to whether a new use falls within an existing definition within the agreement, the issue will figure in the next round of bargaining between the parties.162

**An Analysis of the Agreements**

From the agreements, it can be discerned that an increasing scale of remunerative minimum of the performers' in the various categories for the next three years has been laid down till a fresh agreement is drawn up.163 The performers' have been very finely categorized into performers' stunt performers', stunt coordinators, airplane pilots, singers, and singers in television, dancers. Further variations can be discerned with respect to the effort that is required including enhancements in case of appearances, hazardous nature of the work and also rehearsals. Very minute care is taken to see that even minor inconveniences from parking lot conveniences, audition test arrangements; rehearsals to the most starkly important residual payments are taken note of and addressed by the agreement. The payments are divided into daily payments and weekly payments criteria. A minimum agreed amount need to be paid to the performer and others involved in the agreement.164 There is an increment to this

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162 Ms Katherine Sand, op.cit., pp.32-33.
163 The Duration of Collective Bargaining Agreements-A collective bargaining agreement applies to all productions made while that version of the agreement is in effect. Therefore, if the agreement is later changed, it will not apply retroactively to earlier productions, unless the parties so agree and specify to that effect in any revised agreement.
164 2001 Contract Summary, Theatrical Motion Pictures And Television, Screen Actors Guild (In House Publication 2001), p.1, Minimum Rates for different categories, see (f.n. continued next page)
every year till the agreement is reviewed and revamped. While there are common provisions for the theatrical and television performers’ there are variations with respect to their conditions and emoluments in certain other respects. For instance on the television a performer executing a major role is to be paid on a different scale different from the others on the basis of the number of hours of the program on the prime time television. This could cushion the performer against the malady of shooting the entire performances in a single day without respect to the popularity of the program. Therefore an hour of episode appearance by an actor is taken to be equivalent to eight days of employment and half an hour is taken to be five days of employment. A "major role" performer has been defined as one who, as a part of his or her contractual arrangement for that employment, negotiates credit at the front of the show or negotiates credit on a separate card, or its equivalent in a crawl, at the back of the show or who negotiates credit in any of the following forms: "Guest Star," "Special Guest Star; "Starring;" or "Special Appearance By." Therefore a major role performer is notified on the basis of the categorization made to him and even guest stars would be amenable to receive the privileges of a major role performer. It is important to notice that the gradation of emoluments are fixed not only according to the hours or days of work put in but also on the manner in which the work is to be finally exploited. It can also be noticed that a categorization is made between those performing solo and in-group. This is noticeable with regard to the singers and their entitlement to emoluments varies according to the situation whether it is a group or a solo performance.

*Interviews- Norms to Engage the Performer*

The performer is safeguarded from arbitrary denial after having been made to spend precious time with a producer and the resultant loss of pay for the day and denial of an alternate employment opportunity. The minimum terms guarantee payment of money if the performer is retained for more than one hour at the time of being called. The same rules apply with respect to performers’ called for

varying durations of engagement\textsuperscript{165}. The contractual security of the performer is secured to a great extent by the mandatory requirement of sign in sheets at the time of interview and audition. Thus not only in the actual engagement for the role but with regard to preparatory stages it self extreme care has been taken in order to immunize the performer from unfair loss pf earnings and contractual certainty. This would intimate the union as to who has finally made it to the casting process and other essentials as to how far the assessment and time has been expended on the effort as all these have different consequences as regards obligations under the general agreement\textsuperscript{166}.

A firm engagement can be said to have been made if there has been a written notice of acceptance, a contract signed by the producer, script is given to the performer with intent to hire him, when the performer is fitted, other than while going through the wardrobe tests, when the performer is actually called or reports all these conditions need not be fulfilled but it appears that fulfillment of some of these would be sufficient indication of the fact of a binding engagement\textsuperscript{167}.

However this is subject to exceptional circumstances where in either party can cancel prior to noon on the day before the work if the call for work has been verbal alone and none of the aforementioned criteria have been fulfilled. If the start date has not been provided, the performer can terminate the agreement in order to accept a bonafide employment from a third party. However the producer has to be given a minimum period for an alternative start date.\textsuperscript{168} It is compulsory for a booking slip to be provided which would indicate the role, guarantee and the salary to be provided to the performer.\textsuperscript{169} The booking slip has to be accompanied by the script prior to the start of the work even if it is an engagement on just the previous day of the work. The booking slip is dispensable if the script or the contract has been previously provided. This points out to the care taken to see that a contractually fool proof status is enjoyed by both the performer as well as the producer. It reveals the (the obvious and the

\begin{flushleft}
\textsuperscript{165} Contract Summary, Screen Actors Guild (2001), p.5.
\textsuperscript{166} Ibid.
\textsuperscript{167} Ibid. The performer (Day, 3-Day TV, Weekly) has a firm engagement, which binds the studio in the following cases: 1. Written notice of acceptance, 2. Contract signed by the Producer, 3. Script is given to the performer, with intent to hire performer, 4. When performer is fitted, other than wardrobe tests, 5. When performer is actually called and agrees to report.
\textsuperscript{168} Ibid.
\textsuperscript{169} Ibid.
\end{flushleft}
remote eventualities) umpteen eventualities that have been taken into consideration while drawing up a standard agreement to secure the performer against unfair practices in the audiovisual industry in the United States.

**Meticulous Documentation Required**

Importantly, care is taken to monitor and document the engagement pattern as the emoluments for the performer is dependent on the data with regard to date, time and pattern of the work rendered. The agreement makes it mandatory for a card to be maintained by the producer. It can be either a production time report or a performers' time card that requires to be signed by the performer everyday. Care has been taken in order to discourage practices such as eliciting the signatures in the blank.\(^{170}\) The producer has to honor the individually negotiated billing as described and which has been agreed upon in the performers' individual contract. The attribution of credit for the performances occurs upon the fulfillment of certain specific circumstances.\(^{171}\) With respect to television one card in the end credits is stipulated. However if the credit has not been negotiated then it is at the producers' discretion. With regard to theatrical films it depends upon the total number of cast. All performers' are entitled to screen credit if the cast is less than fifty. But if the cast is more all of them need not find themselves but only at the end of the film. Even stunt performers' need to be identified but it need not indicate their respective roles. Any default in this regard invokes liquidated damages. In the event of dispute the recourse am provided for through arbitration.\(^{172}\) The performers' efforts and remuneration at looping, retakes and added scenes are considered separate from the remuneration for the photographed work.\(^{173}\)

**The Script in Advance**

The need to be provided with a script in advance is a mandatory requirement.

The script has to be made available 24 hours in advance of a scheduled reading

\(^{170}\) *Id.*, p.8.
\(^{171}\) *Id.*, p.7.
\(^{172}\) If there is a dispute as to the facts, the matter may be submitted for arbitration. All other performers' should contact the Guild. Note: Any such claim must be filed within one year after the first theatrical release or within one year of the first broadcast of a television film.
\(^{173}\) *Id.*, p.12.
or immediately after scheduling an interview. This gives no opportunity to give the cast a surprise either at the time of the shooting or after the same.\textsuperscript{174}

\textit{Contracts}

A performer is secured from being taken by surprise by the terms of any contract. This is realized by the provision that the performer may not be made to sign any contract on the set of the production. However if the performer chooses to do so then he must be provided with an extra copy of the same. Any default in this respect is met with fines and union intervention upon notice.\textsuperscript{175}

Prompt payment- the agreement mandates that payments to the performer must be paid within five days after the services are rendered. Any default from the period prescribed would be met with damages at rupees 10 dollars for each working day to a maximum of 20 working days. This would increase if it were sustained default despite notice from the union.\textsuperscript{176} A responsibility is bestowed on the performer to be responsive to defaults at the earliest and a durational period has been set down within which a claim would have to be made. Importantly residual claims have to be filed within a year.\textsuperscript{177}

\textit{The Residual Scheme and Pattern of Distribution}

Both television pictures as well as motion picture performers' are eligible to residuals upon the fulfillment of certain criteria. When motion pictures are telecast on the television then the producer will have to pay to Screen Actors Guild 3.6\% of the gross receipts from the distribution of theatrical motion pictures to free television or pay television and this shall include welfare and pension contributions. When the theatrical motion pictures are released in videocassette format then the producer will pay the performers' 4.5 \% of the first million dollars and 5.4\% in excess of one million dollars. With respect to telecast over pay television, In return for performer's initial compensation, Producer is entitled to 10

\begin{footnotesize}
\textsuperscript{174} \textit{id.}, p. 4.
\textsuperscript{175} \textit{id.}, p. 6.
\textsuperscript{176} \textit{id.}, p. 12.
\textsuperscript{177} \textit{ibid.} Claims must be filed not later than six (6) months i) after the occurrence of the facts upon which the claim is based or ii) after the employee, Guild or Producer has had a reasonable opportunity to become aware of the occurrence. Residual claims must be filed within one year.
\end{footnotesize}
exhibitions or one year's use, whichever first occurs on each Pay TV system. Thereafter, Producer will pay to SAG 6% of the total worldwide gross. This is calculated in accordance with a formula. The same formula applies to the television residuals also based on the daily scale computed along with a ratio of the same. When television pictures are rerun the performers' beget additional compensation, as the initial remuneration already paid to the performer constitutes payment in full for one run in the United States and Canada alone. A repeat in any city puts a television motion picture into the category as a subsequent run. The subsequent runs are paid under the categorization of network prime time, network non prime time (excluding late night), fox telecast for prime time, syndicated telecasts and foreign telecasts. There is also additional compensation for the foreign telecasts. The compensation is based on a percentage of the minimum earned by the performer and additionally a percentage of the gross earned by the producer over a certain limit. This is based on the duration of the program and the slot in which it is telecast.

Similarly when the television pictures are converted for theatrical release also the producers are to pay the performers' for this right additionally if theatrical

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178 Id., p 15.
179 Id., p 14.
180 Id., p. 13.
exhibition\textsuperscript{182} takes place in either the United States, its territories and Canada, on the one hand, or in a foreign country, on the other hand, the rates shall be i) 100% with respect to the Day Performer's total applicable minimum and ii) with respect to all other performers', the free-lance Performer's total applicable minimum. Theatrical exhibition in both areas requires that performers' be paid 200% of total applicable minimum (100% for each area). The initial payment for exhibition in any one area shall be 150% of applicable minimum (the extra 50% constitutes a non-refundable prepayment against use in the other area). The "total applicable minimum" is the total minimum salary for the period of the performer's employment in the television motion picture. There is a 50% of applicable minimum payment for a limited release of long-form programs to theatrical in specified foreign zones. It is significant to note that the formula is a minimum formula only and the performer may bargain for his individual rate. The Payment has to be distributed 90 days after first theatrical exhibition.

When what has been produced for the television (for free television) is released (on or after July 2001) to basic cable medium, the producers would have to pay to the union for rate able distribution to the performers', a percentage of the distributors gross receipts. The percentages would be inclusive of pension and health contributions. This would be besides the receipts collected from the residuals percolating from the free television broadcasts.\textsuperscript{183}

\textit{Secured Against Reuse}

The producer cannot reuse the photography or the soundtrack of the performer in another picture or medium without separately bargaining with the performer prior to the reuse. A provision that secures the position of the performer from agreeing to a predetermined sum with respect to reuse payments has been incorporated in the agreement.\textsuperscript{184} Such consent cannot be elicited from the performer at all. The reuse would be decided on the basis of the minimum agreed upon contractually per clip or footage filmed in a single day. The reuse payment is required to be

\textsuperscript{182} Ibid.
\textsuperscript{183} Id.,p.16.
\textsuperscript{184}Id.,p.12.
paid within sixty days of exhibition otherwise late payment would result in double
day performer minimum. Any default of the stunt without such a bargain would
result in payment of three times the amount originally paid for the number of days
work covered by the material used.

Assured and Insured

The performers' cannot be held liable or responsible to any resultant damages to
property or for bodily injury done while in the course of employment. A
mandatory insurance coverage would have to be provided for personal injury and
for damage to property. Even stunt coordinators should be held non liable by
being covered by the producers general liability insurance policy.185

Unfair Employment Practices

The problem or rather the tactic of using the multiple work responsibilities or
rotational delegation and exploitation of personnel is sought to be checked by
making it clear that the production staff cannot double up as performers' without
the consent of the guild. However there are certain specific exceptions and those
that cannot be avoided. It invites penalty in the form of specified liquidated
damages if violated.186

Hazardous Activity

The producer is required to elicit the consent of the performer if the performance
that he is asked to perform is hazardous or a stunt activity. Several precautions
need to be taken and specialists need to be resorted in order to execute the stunt
and the union has to be kept informed in case of any untoward engagements of
non-stunt performers'.187

185 ibid.,p.13. Performers' and stunt performers' shall be held harmless, legally, from any claim for
damages for injury or property damage arising out of acts in the course of employment.
Producers must provide coverage for personal injury ($1 million/$2 million) and property damage
($250,000.00). Stunt coordinators shall be held harmless by being covered under the Producer's
General Liability Insurance policy.

186 Ibid. Liquidated damages for violation: $500 day performers', $600 3-day, $800 weekly.

187 Ibid.
Policy of Non-Discrimination

The producers are expected to comply with a policy of non-discrimination on the basis of sex, race, color, creed, national origin, age, marital status, disability or sexual orientation in accordance federal and the state laws. The contract stipulates that the all performers must be given casting access and all effort must be made to include minorities, people with disabilities, women and performers' aged above 40. Break downs need to be furnished to sag where the role demands specific disability. Specificities cannot be asked for unless the role requires the same genuinely.188 The same policy would be continued with respect to doubles for stunt work with the same creed and sex being maintained for the roles.189

Minors

While minors are not discriminated on the basis of remuneration paid to them nevertheless rules and provisions stipulating their welfare and security have been provided in the agreement. This is particularly reflected on the hours of work that is permissible to make the minors work at the sets.

Background Actors

The background actors are treated differently from the day performers' in the SAG theatrical television contracts.190 The agreement is conspicuous by the absence of entitlement to residuals in the contract with respect to background performers'. This is at variance with right to residuals created contractually by means of bargains for the main performers' and the stunt performers'.

Jurisdiction Specific

The contract signed on behalf the SAG and the producers' organizations sternly stipulate that the members of SAG union should not work as background actors

188 Ibid. The Producer cannot ask a performer's marital status, sexual orientation, age, creed, disability, national origin nor ancestry, unless it can be considered a "bona fide" requirement for the role.
on those projects (producers) that have not signed up with the union in the specified respective zones.\textsuperscript{191}

\textit{Minimum Guarantees and Contracting Out}

It is sternly laid down that the members should not work for less than that stipulated in the agreement. Even if the jobs are available beyond those that are specifically mentioned in the agreement and agreed upon between the SAG and the signatory members, the background performers' should not take them up.

\textit{Distinctions Between Back Ground Performers'}

The contract differentiates a background actor on the basis of the specifications required for the role and rates are fixed accordingly.\textsuperscript{192}

\textit{Working Conditions}

It is noteworthy that extreme care is taken in the case of back ground actors with respect to their working conditions in the collective bargaining agreements. Provisions have been incorporated regarding their duration of work which is arranged according to the hour's put in the course of a day, the mode of payment when overtime is rendered and the method of calculating wages in these circumstances. Besides the basic daily wage rates agreed upon by the union, the background actors are entitled to receive additional wages in case of execution of the hazardous work\textsuperscript{193}, wet and smoke work, for body and skull makeup, rehearsals, for the interviews\textsuperscript{194}, wardrobe allowance, personal props\textsuperscript{195}. The regular workday is eight (8) consecutive hours (excluding meal periods).\textsuperscript{196}

\textsuperscript{191 ibid.}

\textsuperscript{192 id.,p.1. They are classified as a general background performer, a special ability background actor, a stand-in background actor, photographic background actor, a double and omnies performer.}

\textsuperscript{193 ibid. Prior intimation has to be provided by the producer regarding the nature of the work to be performed}

\textsuperscript{194 id.,p.3.}

\textsuperscript{195 id.,p.4.}

\textsuperscript{196 id.,p.3. The 9th, 10th, 11th and 12th hours are payable at time-and-a-half in tenths of an hour (6 minute units). Work beyond the 12th hour is payable at double-time in tenths of an hour (6 minute units). Daily wage rate is fixed for 16 hours of work that includes the breaks and the rest.}
Not Entitled to Residuals

Very conspicuously, the background worker is not entitled to residuals that the principal performers' or day performers' are entitled to. The collective bargaining agreement is silent on the issue of their eligibility to residual payments as also right of attribution. Though an elevation or utilization of a background performer to the status of a day performer can raise a claim to the emoluments of a day performer.

Membership

A non-SAG participation in a SAG territory can only last for 30 days after which is compulsory for the nonmember to apply for membership to the union. A non-sag member can be engaged in a sag territory only for a period of thirty days. Beyond that period, the producer will have to pay a penalty to the Screen Actors Union. The performer has to seek the membership of the SAG if he as to continue in the sag territory and avail of opportunities.\textsuperscript{197}

The Moral Right Clause

One reflection of the concern for the moral right to dignity of the background performer is in the provisions relating to nudity. If a scene requires nudity to be exhibited by the background actor then they must be so notified on advance about the same. During the course of the shooting the set must be closed and there should not be any still photography at the site. A violation of this rule enables the actor not to work and to claim the wages of the particular day. A double as a nude is paid at the principle pay rate. However there appears to be no right to credits or in the credits for the performer.\textsuperscript{198}

\begin{footnotesize}
\begin{itemize}
\item Any duration beyond the sixteen hours would be taken as one days pay for each hour beyond sixteen hours
\item \textsuperscript{197} The performers' in this non-member category are called, as must pays.
\item \textsuperscript{198} \textit{Id., p 6}
\end{itemize}
\end{footnotesize}
A Distinction for the Minor

It is specifically spelt out that the minors would not be paid the same rate as the principal background performer in the film or television. Non-payment or late payment by the producer to the performer is met with a late fee imposition. The payments at the most must be paid within a week. Most significantly it is mandatory that the payments are made by cheque alone.

Working Conditions

Documentation

A most critical component is the documentation that is essential in engaging the background performers'. The performers' are made to ensure that proper contracts and vouchers are maintained by recording all the details of their engagement in the work. Care is taken to ensure proper performance of the contract by disallowing taking up of multiple assignments at the same time by the background performer. Any deviation requires the prior sanction of the screen actors' guild. The agreement is a balance of the rights and obligations of the performer. Some of the significant safeguards include the fact that the Background Actor is entitled to a full day's pay for cancellation of an initial work call except if due to illness in principal cast, fire, flood, or other similar catastrophe or national emergency. Elaborate provisions are stipulated in the collective agreement regarding meals, meal allowance, and rest periods during work and overtime payments and wardrobe requirements. Another safeguard against exploitation is his right to ask for wages equivalent to a main performer if he is asked to perform a role that demands such an effort. Thus after recruiting him and paying him the background performers' wages a work of a main

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199 Id., p.6

200 Id., p.6. Advise to members to keep the contract and voucher and the copies of the same.

201 Id., p.10. In the event of such cancellation, the Background Actor will be entitled to a half-check. If the Background Actor is notified of such cancellation before 6:00 p.m. of the workday previous to the work date, the Background Actor will not be entitled to the half-check.
performer cannot be extracted slyly from him. Even with respect to the hiring of background performers', it is specifically underlined that equitable norms and social purposes need to be observed in the endeavor.  

The Commercial Performers' Collective Agreement in the United States of America

The Screen Actors' Guild forges a separate agreement for the principal and the other performers' in the commercials. The agreement is significant in that on a closer scrutiny the agreement has taken into consideration and defined circumstances that have emerged with the challenges posed by the modern technology. It also points out the slightly different manner in which entities such as the extras, stunt workers and the background performers' are treated under the commercials agreement in contrast to the ones earlier cited. It includes provisions on working conditions and safeguards encompassing all sections of the performers' including women, persons with disabilities and minors. The stunt performers' too are similarly secured both with regard to working conditions and with respect to fees and other benefits. The dancers and the extra performers' are also covered.

The Minor in Commercials

It is noteworthy that minors are treated equally with other principal, extra or other performers' with regard to the remuneration. No special rates have been devised.

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203 Id., p.7. For instance it is specifically expressed that no Background Actor shall be hired due to personal favoritism, Rotation of work shall be established to such reasonable degree as may be possible and practical, Producer will not hire a Background Actor who is currently on the payroll of the Producer or any of its hiring, casting or payroll agencies, except upon written waiver by the Guild, no fee, gift or other remuneration shall be demanded or accepted by any person having authority to hire, employ or direct services of Background Actors, non-discrimination: producer will make every effort to cast Background Actors belonging to all groups in all types of roles, having regard for requirements of suitability for the role so the American scene may be realistically portrayed and that the producers agree not to discriminate on basis of geographic residence.

204 <http://www.sag.org/Content/Public/comm_digest2003.pdf> as on first December 2004. These inferences are based on a study of the SAG Commercials Digest, 2003, which is to last for 3 years up to October 29th, 2006. After which it would be reviewed and renewed either with new provisions incorporated or reflecting the changes in the rates and fees to be disbursed.

205 Id., p.24-25. For the working conditions for dancers.

206 Id., pp. 17-20. For employment of Minors (Schedule A.I.AA).
to be paid to the minors. The same rates apply regarding the session fees and the eligibility to residuals or the use fees.

**Formalities Before Contracting**

A standard employment contract is stipulated by the agreement to be used for the engagement of scale performers'. This is required to be executed and submitted to the performer within a reasonable time before production. It is stated that a copy needs to be given to the performer at that time. The performer is vested with the right to counsel the union or his representative before signing the agreement. There are details about the different modes of exploitation that the performance would be subject to and the corresponding remuneration to be availed by them. Some of the practices are noteworthy. Options are to be written on the back of the contract if there are to be rights for the producers in relation to foreign and theatrical / industrial exhibition and on the front of the contract for Internet, dealer and simulcast rights. Very importantly the agreement says that the principal performer may withhold these rights by specifying the same on the contract. However this can be dispensed with if the engagement has been conditioned upon the producer having those rights. This means that unless there is a contract to the contrary specifying conditions in the contract by the performer or saving or retention by the performer, there are no further rights to the performer other than those specified in the agreement.

Under the system envisaged by the terms of the agreement it is incumbent upon the producer to inform the principal performer at the time of the audition and at the time of hiring of the performer about the initial use that is intended (the use and scope) of the commercial. In case the commercial is to be used as a test or test market commercial, the producer must advise the principal performer at the time of audition as well as at the time of hire.

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207 *Id.*, p.1. See section 9 of the agreement between sag and the producers and the terms of the contract agreed upon for the years 2003 to 2006.

208 *Id.*, p.2.


210 *Ibid.* See, Engagement of Principal Performers' -Section 9(a) & (b).

The Exclusivity Clause for You

A check has been placed on the principle of restraint of trade on the performer. Any restraint or exclusivity can be placed on the performer only with respect to accepting employment in commercials advertising any competitive product or service. It is further provided that (in order to protect the performer from unfair bargains) that the performer may agree not to perform in non-competitive commercials upon the payment of due compensation that has been ratably fixed in the agreement. A breach of exclusivity is viewed with grave seriousness and the performer who breaches would be liable for substantial damages.

Categorization in Commercials

Performers' are categorized into principal performers' and extra performers'. They in turn have been categorized into minors, women and persons with disabilities, group performers', dancers, and stunt performers'. For the sake of special provisions applicable to each one of them.

Period of Use of the Commercial

It is important to note that there is a maximum period of use of a commercial, which may be used not more than 21 months after the date of commencement of the first fixed cycle. Where new commercials are created by integration, the maximum period of use is limited to the same period as the original unless the principle performers' consent is obtained for a full new maximum period of use. The performer should notify the producer if he does not show interest in renewal. Such renewal would be disallowed if there has been any default in the payment to be made.

Rates of Remuneration

The performers' both on camera as well off camera performers' are to be paid fees for the sessions that they work for the producer according to minimum rates.

\[^{212}\text{id., p.3. Exclusivity of contract - Section 16.}\]
\[^{213}\text{id., p.22.}\]
A single session for the principal performer is reckoned to be 8 hours. The rates vary between the principal performers' (be they solos or duos), group singers and dancers (3-5), group singers, dancers, speakers 6-8 and the same equation of 9 or more. The rate per head comes down if there are more in a group. It is noteworthy that the arrangement safeguards against fraudulent practices and if a person who has not actually rendered any service to creation of a music track (singers) name was included in the credits supplied then it would be inviting action for fraud and damages.

Residuals from Commercials

Foreign Use

For the use of the commercial on a foreign soil, the performers' contract has to contain a provision sanctioning such use for a period of one year upon the payment of additional compensation in the manner set down or arrived at in the commercials agreement. The segmentation of the additional rates based on the basic session fees is according to the country or zone in America in which the exploitation is intended. Similarly commercials that are translated into another language invoke the terms of the contract to provide 50% of the sessions fees to the performer. The same applies with respect to the producers need to have exclusivity of the performers' services. With respect to use beyond the United States, Mexico and Canada a specific set of rates have been provided. The foreign use can be extended beyond the normal 21-month maximum period of use by paying additional 50% of the foreign use fees. This is subject to conditions. For theatrical and industrial exhibitions a separate tariff table of residuals have been prescribed. For 30-day use, performer is to be paid not less than 100% of his/her applicable session fee. An additional 60% of the applicable session fee is payable for any additional use which occurs beyond the 30th day within the maximum period of use this also takes into account advertisements in

214 Id., p.34.

215 Exclusivity.

216 Ibid.
the format of videocassettes, laser disc, DVD, CD's or such format which the applicable rate would be 320% of the session fees.  

Internet Use

The commercials produced not exclusively for the Internet can be used on the Internet. However the remunerative modalities would have to be subscribed by the users. The commercial can be used for the internet during the normal period for broadcast use for a period of one year at the rate of 300% of the session’s fees. The same rate shall apply to the extended period as well.

Productions Produced for the Internet Alone

However, with respect to the initial use of the commercial made for the Internet itself, there is a striking difference. The same terms of the collective bargaining agreement do not apply to the productions for Internet use. There is an immense freedom of contract, with regard to the terms and conditions, which becomes displaced only when the production for initial Internet use is subsequently made over for use on the broadcast circuit. However the terms of the working conditions of the performer with regard to the commercial contracts in the ordinary course would be applicable to the initial use for the Internet as well. The allowances and damages would be subject to negotiation between the parties. The producers’ commitment towards the pension and health plans remains the same.

Cross Over Uses of Programs Originally Meant for the Internet

Safeguards are provided against usage of programs produced for Internet to any other application. The producer may not use an Internet commercial on broadcast television or in any other medium unless the producer bargains for the right at no less than the rates provided in the collective bargaining agreement applicable to

\[217\] Ibid.

\[218\] Id., p.31.
such use. In the event of broadcast use, producer must pay each performer for Internet use, not less than the difference, if any, between the amount previously paid for Internet use and the amount which would have been payable for use of a broadcast commercial on the Internet. It is important to notice the varying criteria that have been adopted to fairly work the system. It is noteworthy that both the compulsions of the performer and that of the industry have been taken into consideration. An interesting discrimination between diverse means of exploitation—length of use and remuneration from use—has been attempted with respect to the exploitation of the commercials produced under the SAG agreement. A classification based on the kind of television stations and the kind of programs that go into making such an evaluation.

*Cable Transmissions*

Cable transmissions also give rise to residual rights as set down in the agreement. Cable commercial rates are provided for both the cable transmission of broadcast commercials and for commercials produced for cable transmission only. These rates are not applicable to use of commercials on Pay TV systems that do not presently carry commercials. A cable use cycle is 13 consecutive weeks commencing with the first cable transmission on any originating cable network or system. For instance, a cable TV commercial if it is to be used for broadcast TV would require the consent of the performers. Very importantly it must be a prior written agreement that must be given.

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219 *Id.,* p.25. For instance a commercial is deemed to be wild spot if it is broadcast by no interconnected single stations and (a) is used independent of any Program or (b) is used on local participating programs. All other uses of a commercial are considered program use. Compensation for wild spots is for unlimited use within a cycle of 13 consecutive weeks, based on the cumulative total of unit weights for the TV markets in which the commercial is used. Each television market is rated according to the value placed on it.

220 *Id.,* pp.29-30.

221 The compensation to each principal performer for each 13-week cycle of cable use (whether a broadcast commercial or a commercial produced for cable transmission only) is computed by multiplying the applicable unit price by the aggregate unit weight of all cable systems and networks on which the commercial is transmitted. In no event will the compensation be less than the session fee nor more than the price for 2,000 units.
Fair Use Provisions — Waiver of Residuals

Waivers are granted of re-use fees for messages produced and used under the auspices and/or on behalf of various federal, state and local government agencies, non-profit public service organizations, charities and museums which are aired on time granted by the stations or networks. This exception of waiver does not extend to the session fees due to the performer.222 However a safeguard is expressly provided that the producer would have to obtain the consent of the union before seeking the consent of the principal performer.

Extra Performers' in Commercials

However in contradistinction with the rights of principal performers' and extras in theatrical and television, the extra performers' in the commercials are provided variegated residual rights in the use of the commercial. It is specifically provided that no extra performer may be asked to sign up for exclusivity.223 Unless the extra performer is notified at the time of hire that he/she is to be paid on the basis of a 13-week cycle of use, he/she must be paid at not less than the unlimited use rate applicable to the extra performer's classification.224 Any use beyond the initial 13-week cycle of use will require notification and additional payment to the extra performer.225

Commercials for Internet Use

With respect to commercials made for initial use on the Internet, the Producer may bargain freely with the extra performer with respect to compensation.226 The provisions of working Conditions are applicable, except that allowances and liquidated damages are subject to direct bargaining with the performer or his/her agent. In the event of broadcast use of an Internet commercial, Producer shall also pay each extra performer not less than the difference, if any; between the applicable minimums provided in the commercials Contract and the rate bargained and initially paid to the extra performer. Extra performers' hired to work

222 Id., p.33.
223 Id., p.40.
224 Id., p.42.
225 Id.
226 Ibid.
in commercials produced for cable transmission only shall receive the payments that cover use of the commercial for one-year only. Producer may negotiate with extra performers' for the right to use such commercials on cable beyond one year, on terms that are no less favorable.

Restrictions on Use of Commercials; Additional Services

The rights granted to Producer are limited to the right to use, distribute, reproduce and/or exhibit the commercial over television. Producer has the right to use the name and likeness of performer and his/her performance in the commercial in trade publications and reels publicizing the business of the producer provided such reels are not rented, sold or utilized as give-aways.

Use Inconsistent with Purpose

Very significantly the contract also takes into account the additional use to which the performers' efforts would be utilized, while at the same time making way for business expediency. It is provided that no part of the photography or sound track made for a commercial may be used other than in commercials as provided in this Section without separately bargaining and reaching an agreement regarding such use. In case of violations, the principal performer is entitled to damages as provided by the contract or may elect to arbitrate his/her claim or bring an individual legal action to enjoin the use and recover damages as fixed by the court in that action. Any services, including translation, not covered in the contract are subject to bargaining between producer and principal performer.

Holding Fees and Sessions Fees

Quiet significantly the remuneration is based on session fees or holding fees and use fees depending upon the period of exploitation and mode of exploitation. A minimum limit has been spelt out as tariff with respect to both in the

227 Id., p.43.
228 Ibid.
229 Id., p.20.
agreement. If the producer fails to pay the holding fee on or before the date on which it is due, all further right of producer to use the commercial terminates and the performer is automatically released from all contractual obligations. If, during the maximum period of use of a commercial, producer wishes to reinstate a commercial after termination of the right to use it, producer may do so with the written consent of the performer and payment of not less than two holding fees, one of which may not be credited against use.

**Maximum Period of Use**

The maximum period during which a commercial may be used is not more than 21 months after the date of the commencement of the first fixed cycle. Where new commercials are created by integration, the maximum period of use is limited to the same period as the original commercial unless the principal performer's consent is obtained for a full new maximum period of use. If no default in payment exists, the commercial may be automatically renewed for subsequent maximum periods of use unless the performer notifies producer not more than 120 days and not less than 60 days prior to the end of the then-current maximum period of use that he/she does not grant the producer such rights. This points out to the detailed use based bargains, the fee being dependent on the duration of use.

**Impact and Advantages of the Collective Bargaining Initiatives**

A study of the legislations and the collective bargaining agreements in the respective countries (this includes most prolific film producing countries of the world and this has imparted a cultural status to the medium of cinema) shows that the state of performers' status in these countries is tremendously advanced in agreements and execution particularly with reference to the audio visual industry. It can be stated confidently that the performers' status is as secure in audio visual as in the most conventionally and universally recognized performers' rights in the sound recordings. The state of affairs points out to the prevalence of

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21 Id., p.21.
22 Id., p.22.
a mature collective bargaining process either aided by state laws and administrative machinery or in spite of it. It points to the systemic and meticulous manner in which periodic exercises in negotiating fresh drafts are held by the performers’ representatives and the producer interests in the film industry. It also indicates the benefits of organizing into stable trade unions recognized under the labor legislations of the respective countries.

The collective bargaining agreement drawn up reveals the significance attributed to fair practices in the production of films and other audiovisuals and the care taken balance the interests of both sides to secure and safeguard either of them from unfair exploitation. It can be perceived that the minimum guarantees and limits are firmly laid down leaving no circumstance to arise that has not been articulated or taken into account. In which mere discretion of free bargaining between individuals might operate.

The immense value that has been attributed to the performers’ contribution is explicit in the incorporation of provisions that invokes compensation and damages for any unfair exploitation against the terms of the contract. Even the latest technological means of communication has been or intended uses on these media like the internet have been taken into consideration to decide the means of arriving at mutually acceptable mode of exploitation. Besides original use on these new media, care has also been taken for the situations wherein the old affixations would be reused on these new media disseminators. All imaginable prospects of exploitation has been thought of and care taken to meet these eventualities.

In the context of the administration of the rights, it is significant to find a subtle categorization of the performer in the audiovisual. While with respect to minimum conditions of work a broad uniformity can be found in the treatment between them but for certain circumstantial and professional differences but with respect to remuneration for shifts put in as well as for the uses there is definite difference in emoluments. It is important to note that rights accrue to the performer in a work based on literary or artistic works as well as those not so derived. In other words such a distinction has not been insisted upon.

It is of note that fair use provisions have not been explicitly spelt out but there has been incorporated in the contract where in the producer can use the performances without the permission or need to grant use fees to the performer.
This shows that even collectively bargained agreements without the minimum being laid down via any copyright legislation takes care of the public and state interest to have the programs made available in certain circumstances. There are either institutional redressal mechanisms or those instituted but the parties to the collective bargaining agreement. Therefore the provision of easy access to preliminary resolution of the dispute is set in place. The terms and conditions laid down in the contract points out to the confidence nursed by the performers’ s in administering the rights secured by them. It also shows the trust that has been bestowed or the trust that has been inspired by the collective administration societies established for the purpose.

The stern resolve of the unions and the administering agencies is evident in the fact that membership of the union is a sine qua non for acting in the producers films and for securing protection through the terms of the collective contracts. The anxiety to plug circumventions has led to formulation of rules to offshore production engaged by the producers of member performers’. The unions discourage such tendencies and this shows the significance attributed to tactics opened by globalization and the need to respond to it.

It points out that while in countries with legal recognition to performers’ in audio as well as audio visuals there is the intervention by the Copyright Tribunal in the fixation of fair rates of remuneration for the use and different exploitation to which the performance is subject to, in countries with collective bargaining alone as the means it has to be arrived at through negotiations. In either case there is scrutiny as well as flexibility. However the rates of apportionment spelled out in legislations; like the French code makes the minimum guarantee a wee bit inflexible, though at the outset it appears to aid the performer in securing a minimum guarantee. It would have better to have the percentage laid down by the tribunal from rime to time.

It shows that that either the endowment of these rights either through the means of law or means of collective contracts has not deleteriously affected the entertainment industry in those countries and on the contrary has inspired confidence from the performers’ and the aspiring performers’ in those countries. This is testified by the increase in memberships and in the earnings dispersed. Further the cohesive characteristic displayed by the organizations, particularly in the United States, where despite the Screen Actors Guild being the sole
representative of the performers', there has been no rival organization nor litigation questioning its compulsory member stipulation after the thirty-day period. Both the Global Rule One and the compulsory membership stipulation have not yet been seen to disturb the principles of restraint of trade. In order to safeguard the rights of its performers' and the integrity of the purpose of the organization it keeps vigil to see that the performers' don't contract out of the rights that they have realized by either signing up nonmembers or contracting out.

A most significant characteristic has been the social responsibility that has been displayed by these agreements that are not merely instruments laying out the rates and limits of residual payments but cover a wider ambit of welfare. The policy of non-discrimination adopted by Screen Actors Guild, the policy of non-discrimination of children, disabled and the women performers' bear abundant testimony to this. The meticulous manner in which the working hours, rest and wages based on hours put in etc. have been formulated clearly points out the holistic treatment given to performers' rights.

The remunerative pattern and conditions of engagement points to the divergent manner in which performers' are categorized and benefits accorded while there is a tremendous equanimity in several aspects of labor rights enjoyed. Particularly significant is the categorization of the performers' on the basis of being principal performers', walk-ons, stunt performers' or extras upon the fulfillment of some eligible criteria. Extra performers' in most instances are not eligible to residuals (though with respect to commercials a leeway has been provided). Another significant aspect is that in certain instances it can be noticed that even background performers' have been found eligible for residuals or their remuneration has been found impinging upon the length of actual exploitation beyond the minimum Guaranteed. Thus both voice over artists as well singers in audio visuals have been benefited from the repeats (though this is not uniform in all jurisdictions).

The distinction or the stratification between the performers' on this scale appears uniform in France, United States as well as in Britain where in collective bargaining as well as statutory rights have played important roles. Even though variations can be found with respect to the manner of treatment accorded to the stunt performers' who are provided with residual rights in the United States, in
France they might not be the position in order to qualify for the protection under the Intellectual Property Code, though under the labor code they enjoy the same security. In other words the lesson to be learnt from the protection afforded in these countries and the differences maintained is that despite variations there is no section among the performers' who have to survive without some kind of minimum protective cover or the other.