

WIPO



AVP/IM/03/4 Add.

ORIGINAL: English

DATE: May 12, 2004

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

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AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES

Geneva, November 6 and 7, 2003

STUDY¹ ON TRANSFER OF THE RIGHTS OF PERFORMERS TO PRODUCERS
OF AUDIOVISUAL FIXATIONS - CONCLUSION

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¹ The views expressed in the Study are those of the authors and not necessarily those of the Member States or the Secretariat of WIPO.

² Charts prepared with the assistance of Yu Cao, Columbia Law School LL.M., 2001, JD expected 2004.

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I. PREFACE

Note on Methodology

This document is the second of a two-stage study addressing domestic and private international law rules concerning the transfer of rights of performers in audiovisual works. The first stage presented an analysis of domestic and private international law in France and the United States of America, as well as under relevant multilateral treaties. The first stage included a questionnaire addressed to local experts, in order to develop responses to the same questions in different countries. Subsequently, experts from Egypt, Germany, India, Japan, Mexico and the United Kingdom provided analyses of their domestic and private international law rules concerning ownership and transfer of audiovisual performer's rights.

We wish to recognize of the authors of those national reports, and thank them for their efforts: Mr. Hassan Badrawi, Egyptian Ministry of Justice, Cairo; Dr. Silke von Lewinski, Head, Department of International Law, Max Planck Institute for Intellectual Property, Munich, Germany and Ms. Dorothee Thum, Attorney-at-Law, Munich, Germany; Mr. Pravin Anand, Anand and Anand, New Delhi; Professor Masato Dogauchi, Professor of Law, University of Tokyo, Faculty of Law, Tokyo and Mr. Tatsuhiro Ueno, Professor of Law, Graduate School of Law, Seijo University, Tokyo; Dr. Juan Ramón Obón León, Mexico, D.F.; Professor Hector MacQueen, Director, HRB Research Centre for Studies in Intellectual Property and Technology Law, School of Law, University of Edinburg, Edinburgh, United Kingdom and Dr. Charlotte Waelde, Co-Director, AHRB Research Centre for Studies in Intellectual Property and Technology Law, School of Law, University of Edinburgh, Edinburgh, United Kingdom.

In this report, we undertake two tasks: to present a summary and comparison of the national reports, and to offer our conclusions synthesizing those comparisons. We determined that detailed tables summarizing the relevant responses offered the format most conducive to comparison of national laws. The questionnaire is also reproduced for ease of reference. We are extremely grateful to Yu Cao, Columbia Law School LLM class of 2001, JD expected 2004, for his prolific assistance in preparing the tabulations. Our conclusions regarding the synthesis of the national reports are presented below.

Observations and Conclusions Regarding Domestic Neighboring Rights and Contracts Law

Audiovisual performers' rights in the countries studied divide roughly into two categories: (1) countries having a developed system of neighboring rights that constitute exclusive rights and/or remuneration rights independent of contract; (2) countries in which audiovisual performers' protections (to the extent they exist) are essentially creatures of contract. In the first group are France, Germany, Japan, and the United Kingdom. In the second group are Egypt, India, Mexico, and the United States of America. (It may be noteworthy that the first group consists largely, albeit not exclusively, of members of the EU, whose 1993 Rental Rights directive includes obligations regarding performers' rights; the second group includes no EU members.)

In the first group, neighboring rights protections may supplement or override contractual arrangements. In the second group, the principal right which may be asserted "against the world" (*opposable à tous*) is the right to authorize the fixation and incorporation

of the performance in an audiovisual work; any rights the performer enjoys thereafter must be negotiated by contract with the producer. This appears to be the case in India, and, as a practical matter, in the United States of America. To the extent a United States of America audiovisual performer might be considered a co-author of the work (the characterization of U.S. performers' rights is in fact unclear), she will not in practice enjoy a property right, because her contribution to the work will almost inevitably be deemed "for hire", in which case all rights will vest in the producer.

On the other hand, moral rights may be assertible, regardless of contracts to the contrary, even in countries lacking a developed neighboring rights regime (e.g., Egypt); conversely, the availability of moral rights may be uncertain in some countries with neighboring rights (e.g., United Kingdom).

It is important to emphasize, however, that countries in which audiovisual performers' rights are contract-based do not necessarily as a result provide less protection in fact. Comparison of three countries in which performers appear to be well remunerated illustrates different ways of achieving the goal of effective protection. In France, domestic law imposes a high degree of formality and specificity on transfers of performers' rights. By organizing the rules in advance of the transfer, French authorities appear to anticipate that a properly drafted contract will result in an appropriate level of remuneration to performers. By contrast, German law does not impose contractual formulations, it looks to the ultimate result. Rather than dictating the structure of the transfer as French law does, German law allows performers to seek a modification of the contract if the performer is not in fact receiving fair compensation. Finally, the United States of America system looks to the bargaining process to produce fair results. Rather than mandating contractual formality (apart, perhaps, from requiring a writing signed by the performer), the United States of America relies on the relatively even negotiating power of unionized performers in their collective bargaining arrangements with producers.

The distinction between neighboring rights-based performers' rights, and contract-based performers' rights will be particularly relevant to the analysis of private international law rules regarding transfers of rights.

Observations and Conclusions Regarding Private International Law

The principal differences in the treatment of transfers of rights concern the relative domains of neighboring rights law and of contract law. Despite the classic formula reiterated in several of the national reports – whether the right is transferable at all goes to the substance of the right (*le fond du droit*); whether the transfer was properly effected goes to the law of the contract – there appears to be considerable uncertainty regarding the classification of a given question. That is, it is not clear, for example, whether a question regarding the form or contents of a contract should be deemed a matter of the substance of the right, or a matter of contract law. One objective way of distinguishing form from substance might be to determine whether the applicable neighboring rights law incorporates the formal requirements into the text of the statute; this appears to be the approach followed by United States of America courts with respect to transfers of copyright. We recognize, however, that the effect of this approach would be to reduce the domain of the law of the contract. It is therefore not certain that member states would subscribe to this proposal.

Worse, even within the categories “law of the substantive right” or “law of the contract” the choice of law rule differs in the countries surveyed. If the issue is classified as one of substantive right, the question remains whether the law governing the transferred right is the law of the country of the audiovisual work’s origin, or the law of the country of exploitation. The “country of exploitation” is itself subject to different interpretations, as the national reports reveal: it may be the country from which a communication to the public originates, the country or countries in which the communication is received, or both. The latter variations on “country of exploitation” create considerable complexity. But the “country of origin” designation presents other difficulties. Unlike copyright, a multilateral treaty does not provide for neighboring rights a generally recognized definition of country of origin. The following are all possible: country of first fixation (often applied to phonograms); country/countries of the performers’ residence/s; country of the producer’s effective business establishment. The country of first fixation may not be meaningful for audiovisual works, because it may not be clear what is the object of the first fixation. In addition, the criterion may be too manipulable to furnish a neutral criterion. There may be too many countries of performers’ residence (even if the criterion is limited to featured performers) making this criterion too unwieldy. The country of the producer’s establishment has the merits of simplicity and close relationship to the work, but might be considered too producer-oriented.

With regard to the “law of the contract”, this should be a simpler rule, especially if the contract designates the applicable law, but several national reports observe that, in matters of form, the law of the place of conclusion of the contract may govern. In an era of pervasive travel and online contracting, making the country of conclusion of the contract a point of attachment seems rather obsolete.

We also note that, with respect to those countries in which audiovisual performers’ rights are essentially creations of contract, the distinction “law of the substance/law of the contract”, a distinction which these countries may apply with respect to transfers of copyright, does not make very much sense in the context of performers’ rights: in those countries, there is no substantive performers’ rights law conferring exclusive rights and/or remuneration rights.

In practice, however, even as to these countries, the distinction may reappear by virtue of the private international law principle that the forum applies its law to characterize the claim. As a result, if, for example, the performers in an Indian film that is exploited in France bring a lawsuit in France demanding remuneration for modes of exploitation in France not specified in their contract with the Indian producer, a French court would first inquire whether the contract’s specificity is a matter of substantive neighboring rights law, or of contract law. Under French law, the alienability of a right is a question of substantive law. Opinions are divided as to whether the conditions under which a right may be alienated (specificity of grant) are also a question of substantive law. If the latter characterization prevails, the French court therefore would rule that the law applicable to the substance governs. The French court would next determine whether that law is the law of the country of origin (India, we will suppose), or the law of the country of exploitation, France. It appears that the French choice of law rule designates the law of the country of exploitation (receipt of the communication). French law, which requires specifying modes of exploitation, would, under this analysis, apply to the Indian contract, with respect to exploitations in France, even though in India there is no right to remuneration for each mode of exploitation.

In addition, in neighboring rights countries, the law of the foreign contract may also be disregarded by virtue of local mandatory rules (“*lois de police*”) which apply locally whatever

the foreign points of attachment (e.g., France and Germany), or by application of local rules of “*ordre public*”.

By contrast, in countries in which the right is purely contractual, it would seem that local courts would hold that the law of the contract applies, including for works originating in neighboring rights countries. The national law that governs contracts made regarding works originating in neighboring rights countries will include substantive neighboring rights protections. Thus, the forum will rule the foreign neighboring rights law applicable. Moreover, it is unlikely that contract-based countries would find that application of a foreign neighboring rights law violates local mandatory rules (by hypothesis, there are no such rules because the right in those countries does not derive from a statute) or *ordre public*.

These combined scenarios suggest, on the one hand, that neighboring rights regimes may often apply to all performers (regardless of the country of origin, however defined) with respect to exploitations occurring in neighboring rights countries, because the courts of these countries may deem their substantive rules applicable, either by virtue of the classification of the issue, or by virtue of mandatory rules or *ordre public*. On the other hand, the substantive rules of neighboring rights countries may also apply to performers whose contracts are governed by the law of a neighboring rights country, even with respect to exploitations occurring in contract-based countries.

General Appreciation

We have prepared this report in anticipation of renewed efforts to achieve an international treaty on audiovisual performers’ rights. We understand that a prior attempt failed, ostensibly on account of the delegates’ failure to agree on a choice of law rule governing transfers of rights in audiovisual performances. Our analysis leads us to some skepticism regarding the effectiveness of any choice of law rule, even if one could be agreed-upon. We have envisioned four scenarios to explain our skepticism.

1. The treaty would fix a choice of law rule characterizing all rules relevant to transfers as matters of contract, and then would direct application of the law of the contract. This solution would have the merit of uniformity and predictability. But the designated law may be overridden by local mandatory rules or *ordre public*, unless the treaty also limits their application to extreme cases. (This may be a trend in multilateral choice of law treaties.) However, local neighboring rights norms may increasingly be characterized as mandatory; this is the case in Germany, by virtue of the law of 2002, and in France through the combination of the Codes of Intellectual Property and of Labor relations.

2. The treaty would characterize all rules relevant to transfers as matters of substance, and would further designate the law of the country of the work’s origin (defined as the country of the producer’s effective establishment) as the law applicable to transfers. This too would simplify and enhance predictability. But the forum’s mandatory rules and *ordre public* remain a problem.

3. The treaty would characterize all rules relevant to transfers as matters of substance, and would further designate the law of the country/countries of the work’s exploitation (receipt of work) as the law applicable to transfers. This would mean that the laws of each country of exploitation would determine the validity and scope of the transfer.

This would alleviate the problem of mandatory rules, because these would be incorporated in the applicable laws. But this approach would greatly complicate exploitation.

4. The treaty would maintain the distinction between law of the contract and law of the substance of the right, but would define what matters fall under each heading. The treaty might further provide that, presumptively, matters concerning the scope of the transfer are governed by the law of the contract. We will not endeavor to articulate what the division between the domains of the contract and of the substantive law should be, particularly, as the national reports indicate, it is not at all clear, even as a matter of domestic law, what constitutes “validity and effects” and what constitutes “substance and alienability”.

As a result, we are inclined to conclude that designating a choice of law rule, even were agreement possible, will not resolve the essential difficulties. On the one hand, the solution is likely to be too complex and unpredictable. On the other hand, simpler solutions may prove unpalatable to performers, because they will tend to favor application of laws chosen by producers. (“Chosen”, either as a matter of contract, or by virtue of the producer’s selection of the country of its business establishment.) It would be easier to resolve questions of applicable law if the process of substantive harmonization were more advanced.

II. QUESTIONNAIRE TO NATIONAL EXPERTS

Part I

Substantive Rules Governing the Existence, Ownership and Transfer of Audiovisual Performers' Rights

I. NATURE AND EXISTENCE OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Characterization of Audiovisual Performers' Rights

1. Does your national law characterize the contribution of audiovisual performers as coming within the scope of:

- a. Copyright
- b. Neighboring rights (explain what in your country "neighboring rights" means)
- c. Rights of personality
- d. Other (please identify and explain)

B. Scope of Rights Covered

1. Do audiovisual performers enjoy exclusive economic rights?

- a. Fixation
- b. Reproduction
- c. Adaptation
- d. Distribution of copies, including by rental
- e. Public performance; communication to the public
- f. Other (please describe)

2. What is the duration of performers' exclusive rights?

3. Do audiovisual performers enjoy moral rights?

- a. Attribution ("paternity")
- b. Integrity
- c. Divulcation
- d. Other (please describe)

4. What is the duration of performers' moral rights?

5. Do audiovisual performers have remuneration rights?

- a. Are these in lieu of or together with exclusive rights? (Please explain)
- b. Describe the rights to remuneration that audiovisual performers have.

6. Are audiovisual performers' rights subject to mandatory collective management?
 - a. Which rights?
 - b. Which collective management associations; how do they work?

II. INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Who is the initial owner?

1. In your country, is the performer vested with initial ownership?
2. Is the performer's employer/the audiovisual producer so vested?
3. Is a collective so vested?
4. Anyone else? Please explain.

B. What is owned?

1. Is the performer the owner of rights in her performance?
2. Is she a co-owner of rights in the entire audiovisual work to which her performance contributed?
3. Other ownership? Please describe.

III. TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

A. Legal provisions regarding contracts

1. Does the copyright/neighbors rights law, or other relevant legal norm set out rules regarding transfers of rights?
2. Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighbors rights.
3. Must the transfer be in writing?
4. Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?
5. Must the writing be signed by the performer? By the transferee?

B. Transfer by Operation of Law

1. Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?
2. Expropriation
3. Bankruptcy
4. Divorce; community property
5. Intestacy
6. Other (please explain)

C. Irrebuttable Presumptions of Transfer

1. Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?
2. What rights does the transfer cover?
3. If fewer than all rights, please identify and explain which rights are transferred and which are retained.

D. Rebuttable Presumptions of Transfer

1. Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer's rights?
2. What rights does the transfer cover?
3. If fewer than all rights, please identify and explain which rights are transferred and which are retained.

E. Contract Practice

1. If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?
2. Do these provisions appear in collective bargaining contracts?
3. In individually negotiated contracts?
4. What rights do these provisions transfer? Please describe.

F. Limitations on the Scope or Effect of Transfer

1. Does copyright/neighbors rights law or general contract law limit the scope or effect of transfers? Please indicate which law is the source of the limitation.
2. Do these limitations concern:
 - a. Particular rights, e.g., moral rights
 - b. Scope of the grant, e.g., future modes of exploitation
 - c. Other (please describe)
3. Do audiovisual performers enjoy a legal right to terminate transfers of rights?
 - a. Is this termination right transferable?
 - b. Waivable?

Part II

International Private Law Rules for Determining the Law Applicable to Transfer of Audiovisual Performers' Rights

Note to national experts: This portion of the questionnaire requests that you describe the response that your country's private international law rules would supply to the following questions. In other words, we are seeking to learn about your domestic private international law rules with regard to the matters referenced below.

In addition, please indicate clearly the extent, if any, to which your national private international law rules as to the law applicable to the ownership and transfer of audiovisual performers' rights differs from your national private international law rules as to the law applicable to the ownership and transfer of rights under copyright.

I. LAW APPLICABLE TO DETERMINE INITIAL OWNERSHIP OF AUDIOVISUAL PERFORMERS' RIGHTS

A. What country's (countries') copyright/neighbors rights law determines whether the granting performer initially owned the rights transferred:

1. The country of origin of the audiovisual work?
 - a. If so, how does your country's law determine what is the country of origin of the audiovisual work?
 - b. By reference to Berne Conv. Art. 5.4?
 - c. By reference to the country having the most significant relationship to the work's creation or dissemination?
 - d. Other? Please describe.
2. The country of residence of the performers? In the event of multiple countries of residence, the country in which the majority of featured performers resides?
3. The country designated by (or localized to) the contract of transfer?
4. Each country in which the work is exploited?
5. When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others), how is the substantive copyright or neighbors rights law underlying the initial ownership of the rights determined?
 - a. with reference to the country from which the communication originates?
 - b. or with reference to the country or countries in which the communication is received?

II. LAW APPLICABLE TO TRANSFERS OF RIGHTS

A. Transfers by operation of law

1. Does your country's law or case law give local effect to a transfer by operation of a foreign country's law?
 - a. by expropriation
 - b. bankruptcy
 - c. divorce; community property
 - d. intestacy
 - e. other (please explain)

B. Transfers effected by contract

1. When a contract grants the right to communicate or make an audiovisual work available via a transmission from one country to another (or others); is the substantive copyright or neighboring rights law underlying the grant determined:
 - a. with reference to the country from which the communication originates?
 - b. or with reference to the country or countries in which the communication is received?
2. What law governs issues going to the *scope and extent* of a transfer:
 - a. The (single) law of the contract?
 - b. The substantive copyright/neighboring rights laws of the countries for which the rights are granted?
3. What law governs issues going to the *validity of the form* of a transfer:
 - a. The (single) law of the contract?
 - b. The substantive copyright/neighboring rights laws of the countries for which the rights are granted?

C. The Role of Mandatory Rules and *Ordre Public*

1. Do mandatory rules (*lois de police*) automatically apply local law to local exploitations made under a foreign contract?
2. Describe the instances in which mandatory rules apply to transfers of rights by audiovisual performers.
3. Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/*ordre public*?
4. Describe the instances in which the *ordre public* exception applies to invalidate transfers of rights by audiovisual performers

III. SUMMARY CHARTS COMPARING NATIONAL REPORTS

A. PART I

SUBSTANTIVE RULES GOVERNING THE EXISTENCE,
OWNERSHIP AND TRANSFER OF
AUDIOVISUAL PERFORMERS' RIGHTS

- (a) Nature and Existence of Audiovisual Performers' Rights

Question I-A-1:**Does your national law characterize the contribution of audiovisual performers as coming within the scope of:**

| | Copyright | Neighboring Rights | Rights of Personality | Other | Notes and Comments |
|----------------|------------------|---------------------------|------------------------------|--------------|--|
| Egypt | | √ | | | |
| France | | √ | | | Neighboring rights provisions in Copyright Act. |
| Germany | | √ | | | Neighboring rights provisions in Copyright Act. |
| India | | √ | | | |
| Japan | | √ | | | Neighboring rights provisions in Copyright Law. Performers can be authors of a cinematographic work. |
| Mexico | | √ | | | |
| United Kingdom | | | | | The answer explicitly points out that the characterization is far from clear. |
| United States | | | | | No generally accepted understanding of the characterization of audiovisual performers' contributions as yet. But for convenience purposes the US law entries treat audiovisual performances as possible subject of both copyright and of the right of publicity. |

Question I-B-1:**Do audiovisual performers enjoy exclusive economic rights?³**

| | Fixation | Reproduction | Adaptation | Distribution of Copies, Including by Rental | Public Performance; Communication to the Public | Other | Notes and Comments |
|---------|-----------------|--------------|------------------|---|---|-------|---|
| Egypt | No ⁴ | No | No | No | No | | The answer provides that performers' rights do not apply to the fixation of performances included in audiovisual fixations, unless otherwise agreed. |
| France | Yes | Yes | Yes ⁵ | Unclear ⁶ | Yes | | |
| Germany | Yes | Yes | No | Yes | Yes | | |
| India | | | | | | | No definitive answer. The answer refers to Question A-1 above, which only indicates that performers lose their rights once they consent to the incorporation of the performance to a cinematography film but does not identify what those rights are. |

[Table continued on next page]

³ Answers to this question suggests that when answering yes or no, some experts are looking at the performers as outside of the audiovisual fixation context, which usually gives an answer of yes to all the rights except adaptation, whereas other experts are looking solely at the context where the performer gives consent to the incorporation of his/her performance into an audiovisual fixation, which generates a negative answer.

⁴ Outside of the audiovisual context, however, performers have all the rights listed under Egyptian law.

⁵ Adaptation right not expressly recognized, but given effect through the reproduction right and other economic rights.

⁶ No express recognition of distribution and rental rights; some scholars consider these rights as coming within the "*droit de destination*"; this right, however, is not enunciated in the Code of intellectual property. The 1992 EU Rental Rights Directive requires member states to implement distribution (Art. 9) and rental rights (Art. 2) for performers; France has not transposed this part of the Directive.

[Table continued from previous page]

| | Fixation | Reproduction | Adaptation | Distribution of Copies, Including by Rental | Public Performance; Communication to the Public | Other | Notes and Comments |
|----------------|-----------------|---------------------|-------------------|--|--|------------------|---|
| Japan | Yes | No ⁷ | No | Yes ⁸ | Yes | Yes ⁹ | |
| Mexico | | | No | | | | The answer indicates that the other rights exist under Mexican law. However, there is a presumption of transfer of these economic rights to producers. |
| United Kingdom | Yes | Yes | No | Yes | Yes | | Non-property rights are those against bootlegging under UK laws. <i>Note:</i> It is a right against infringement of the film and may not necessarily be in the scope of the discussion. |
| United States | Yes | Yes | Yes ¹⁰ | Yes | Yes | | |

⁷ With the exception for film soundtracks

⁸ The right of rental only covers “commercial phonograms” for a period less than 12 months after their first sale, after which the performer will only enjoy a remuneration right for the following 49 years.

⁹ There are court cases indicating the acceptance of the concept “right of publicity”. However it is not commonly accepted and there is no Supreme Court case on the “right of publicity” as yet.

¹⁰ Copyright includes an adaptation right (e.g., for derivative works). In the case of publicity right, the contracts often cover derivative works.

Question I-B-2:

What is the duration of performers' exclusive rights?

| | Fixation | Reproduction | Adaptation | Distribution of Copies, Including by Rental | Public Performance; Communication to the Public | Other | Notes and Comments |
|----------------|--|--------------|------------|---|---|---|---|
| Egypt | | | | | | | 50 years to all performers' rights ¹¹ |
| France | | | | | | | For all rights, 50 years after the rendering of the performance |
| Germany | - | - | - | 50 years after initial release of fixation | 50 years after initial public communication of fixation | If no release or public performance of fixation within 50 years of performance, then 50 years after performance | |
| Japan | 50 years | - | - | 50 years | 50 years | Unclear for the right of publicity | |
| India | | | | | | | 50 years, only applicable to non-audiovisual performers |
| Mexico | | | - | | | | 75 years ¹² |
| United Kingdom | | | - | | | | 50 years |
| United States | For the fixation rights of live musical performers: Section 1101 of the Copyright Act does not specify a term of this right; In the case of copyright: the term will be 95 years after the publication of the audiovisual work; In the case of publicity right, the duration depends on the laws of the respective states. | | | | | | |

¹¹ This apparently addresses the context where the performer has not consented to the incorporation of his/her performance to an audiovisual fixation.

¹² Information in the answer seems to be confusing in regards to the duration of performers' rights (75 years) vis-à-vis the duration of protection of an audiovisual work (which is 50 years) (it is argued that there arises a question whether performers' rights should exhaust at the end of the duration of the audiovisual work). If the performer's rights are presumed to have been transferred is there still this issue?

**Question I-B-3:
Do audiovisual performers enjoy moral rights?**

| | Attribution | Integrity | Divuligation | Other | Notes and Comments |
|---------|--------------------|-------------------|--------------------------|------------------|---------------------------|
| Egypt | Yes | Yes ¹³ | Not Addressed in Answer. | | |
| France | Yes | Yes | Unclear ¹⁴ | | |
| Germany | Yes | Yes | No ¹⁵ | No ¹⁶ | |
| Japan | Yes | Yes | No ¹⁷ | - | |
| India | No | No | No | No | |
| Mexico | Yes | Yes | No | | |

[Table continued on next page]

¹³ To the best of the expert's knowledge, no claim against infringement of this right has ever been made; no labor-related or contractual provision exists which could make this right effective.

¹⁴ No explicit recognition, but some scholars derive a moral right of divuligation from the performer's economic right of communication to the public.

¹⁵ Possible be protected as violation against general personality right.

¹⁶ The right of withdrawal does not apply to performers who conclude a contract with a film producer on their participation in the production of an audiovisual work.

¹⁷ Possible to be protected as personal right under civil law.

[Table continued from previous page]

| | Attribution | Integrity | Divulgation | Other | Notes and Comments |
|----------------|--------------------|------------------|--------------------|--------------|---|
| United Kingdom | No | No | No | No | |
| United States | Unclear | Unclear | Yes | | The US laws lack a consistent and clearly defined regime of protection for moral rights. The “equivalents” of protection under federal and state laws may approximate the Berne Convention <i>6bis</i> protection requirements. ¹⁸ |

¹⁸ While Section 43(a) of the Lanham Act had long been perceived as the primary source of attribution rights under the US law (see the Final Report of the Ad Hoc Working Group on the Adherence of the USA to the Berne Convention, reprinted in 10 Colum. VLA JL&ARTS 513, 549 (1986)), the recent case *Dastar v. Twentieth Century Fox*, 539 U.S. 23; 123 S. Ct. 2041 (2003), casts serious doubt on the continued availability of Sec. 43(a) as a source of moral rights protection.

Question I-B-4:

What is the duration of performers' moral rights?

| | Attribution | Integrity | Divulgateion | Other | Notes and Comments |
|----------------|--|------------------------------|---------------------|--------------|---|
| Egypt | Perpetual | Perpetual | - | | |
| France | Perpetual ¹⁹ | Perpetual ²⁰ | - ²¹ | | |
| Germany | 50 years after performance or for life, whichever is longer. ²² | Same as under "Attribution." | - | - | Multiple performers: the date of death of last survivor relevant for calculation. |
| Japan | Expires at death. ²³ | Same as under "Attribution". | - | - | |
| India | - | - | - | - | Not applicable. |
| Mexico | | | | | The expert infers a duration of 75 years. |
| United Kingdom | - | - | - | - | Not applicable. |
| United States | | | | | Not clearly defined. ²⁴ |

¹⁹ Art. L 212-2 does not state that performers' moral rights are perpetual (compare Art. L 121-1, declaring perpetuity of authors' moral rights), but the duration of performers' rights set out in L 211-4 applies only to economic rights.

²⁰ See note above.

²¹ If the right of divulgateion derives from the right of communication to the public, then, logically, it is coterminous with that right (50 years from rendering of performance); this linkage of moral to economic rights is, however, abnormal in French law, and thus suggests that performers have no moral right of divulgateion.

²² But in no case shorter than the economic rights.

²³ Prohibition against certain infringement acts may last for-ever.

²⁴ For example, assume if a performer's right of attribution is sought for protection through the state law right of publicity. The duration of the right of attribution will thus vary across the various states. See Question B-2 above.

Question I-B-5: Do audiovisual performers have remuneration rights?

a. Are these rights in lieu of or together with exclusive rights?

| | In Lieu of Exclusive Rights | Together with Exclusive Rights | Notes and Comments |
|---------|--------------------------------------|--|--|
| Egypt | | | The answer cites a provision but has not identified whether these rights are in lieu of or together with exclusive rights. ²⁵ |
| France | For private recording. | For rental and cable retransmission. | |
| Germany | Most belong to this category. | For rental and cable retransmission. | |
| Japan | For private recording. ²⁶ | For broadcasting of fixed performance. | |
| India | Unclear | Unclear | Audiovisual performers may exert common law rights under a right of publicity theory, the contours of which are yet unclear. |
| Mexico | | | Mexican law establishes extensive remuneration rights. However, the answer has not identified which are in lieu of exclusive rights and which are not. |

[Table continued on next page]

²⁵ Pursuant to the provision the performer has a right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes of broadcasting or communication to the public, unless otherwise agreed.

²⁶ Based on the limitation of the right of reproduction, therefore considered “in lieu of”.

[Table continued from previous page]

| | In Lieu of Exclusive Rights | Together with Exclusive Rights | Notes and Comments |
|----------------|---|--|---|
| United Kingdom | The right to equitable remuneration where the performer transfers (or is presumed to transfer) her rental right in a film or sound recording to the producer. | The right to claim equitable remuneration where a commercially published sound recording of a performance (but not a film) is played in public or communicated to the public otherwise than by being made available to the public mentioned in 182CA(1). | |
| United States | | | The law does not provide for equitable remuneration to audiovisual performers. But many guild agreements provide for compensation (“residuals”) similar to equitable remunerations. ²⁷ |

²⁷ “Residuals” are additional compensations paid for the repeated use of the audiovisual program (the performer’s services). In that sense it appears that residuals should be regarded as together with the compensations paid for the transfer of exclusive rights by performers, which are usually a fixed amount paid not in relation to the frequency of use of the program.

Question I-B-5: Do audiovisual performers have remuneration rights?

b. Describe the rights to remuneration that audiovisual performers have

| | In Lieu of Exclusive Rights | Together with Exclusive Rights | Notes and Comments |
|----------------|--|--|---|
| Egypt | | | Not categorized. See the preceding chart. |
| France | Most economic rights are deemed exclusive rights, but private recording exception provides remuneration for private copying in all media. | Same as German response, see below. | |
| Germany | (1) Broadcasting; (2) communication to the public of the performance by means of a fixation; (3) public communication of broadcast; (4) communication of performance which has been made available to the public in the meaning of Art. 10 of WPPT; (5) public lending; (6) statutory rights of remuneration provided for as compensation for limitations of exclusive rights. | (1) Rental: in addition to the exclusive rental right. Remuneration from renter where they have granted a rental license to the producer. (2) Cable retransmission: in addition to the exclusive right of cable retransmission. Remuneration from the cable distributor, after having licensed the exclusive right to a broadcasting organization or to a phonogram or film producer. | |
| Japan | Remuneration for private recording of digital recording. | Remuneration for broadcasting and rebroadcasting of fixed performances. | AV performers not qualified to receive remuneration for rental and broadcasting of commercial phonograms. |
| India | | | See the preceding chart. |
| Mexico | | | Very extensive but not categorized in the answer. See the preceding chart. |
| United Kingdom | | | See the preceding chart. |
| United States | | See notes and comments. | Mainly residuals paid under union agreements. Amount paid is calculated in relation to the media and frequency of use of the audiovisual product. |

Question I-B-6: Are audiovisual performers' rights subject to mandatory collective management?

a. Which rights?

| | Rights subject to Mandatory Collective Management | Notes and Comments |
|---------|--|---|
| Egypt | By law, no right subject to such management. | Not forbidden to use such mechanism through the collective management associations by way of authorization. |
| France | The exclusive right of simultaneous, unaltered and complete cable retransmission. | Applies only to communications emanating from an EU Member State. |
| Germany | <ol style="list-style-type: none"> 1. The exclusive right of simultaneous, unaltered and complete cable retransmission;²⁸ 2. The statutory remuneration right for cable retransmission; 3. The statutory remuneration rights for public lending and for rental in the circumstances under 5.b of the reply to the questionnaire; 4. All statutory remuneration rights under Part 1 Section 6 of the Copyright Act, see 5.b of the reply to the questionnaire. | A number of rights are described as “can be transferred in advance only to a collecting society, and cannot be waived”, and thus characterized as being subject to mandatory collective management. See page 8 of the reply from Germany. |
| India | No right subject to such management. | |
| Japan | Right to claim compensation for private recording. | |
| Mexico | No right subject to such arrangement. | But may be arranged through contractual authorization. |

[Table continued on next page]

²⁸ Except those rights which are asserted by broadcasting organizations in respect of their own broadcasts.

[Table continued from previous page]

| | Rights subject to Mandatory Collective Management | Notes and Comments |
|----------------|--|--|
| United Kingdom | No right subject to such management. | Maybe assigned to collecting societies to enable it to enforce the rights on behalf of performer. ²⁹ <i>Compare</i> , with the situation under German law. The performers in the UK and Germany both can assign the right to remuneration only to a collecting association, but the UK experts characterized it <i>not</i> subject to mandatory collective management while the German experts had an opposite characterization. |
| United States | No right subject to such management. | |

²⁹ Performers have a right to receive equitable remuneration where a commercially published sound recording of the whole or any substantial part of a qualifying performance is played in public or included in a broadcast or cable program service.

Question I-B-6: Are audiovisual performers' rights subject to mandatory collective management?

b. Which collective management associations; how do they work?

| | Collective Management Associations and How They Work | Notes and Comments |
|----------------|---|---|
| Egypt | The Egyptian Association of Authors, Composers and Publishers; the Egyptian Association of Scenario Authors; the Actors' Association and the Musicians' Association. | Not seem to be exhaustive list. |
| France | SPEDIDAM: administers rights of non featured performers. ADAMI: administers rights of featured performers. | |
| Germany | The " <i>Gesellschaft zur Verwertung von Leistungsschutzrechten</i> ", GVL, administers the rights of phonogram producers, audio performers and audiovisual performers. It is obliged to conclude contracts with performers regarding the rights administered by GVL, to distribute the revenues from administration of performers' rights according to clear, pre-established rules, to provide the annual financial statement, and so on. | |
| India | From the answer it is unclear whether any such association exists; it suggests there is none. | In general contours of performers' rights are yet to be developed by jurisprudence. |
| Japan | Society for the Administration of Remuneration for Video Home Recording (SARVH). SARVH is a voluntary non-profit organization to collect and distribute compensation for digital video home recording for the sake of copyright owners, performers and producers of phonograms. SARVH has "the authority to deal, on behalf of the owners of the right and in its own name, with juridical and non-juridical matters in regard to the right to claim compensation for private recording". | |
| Mexico | National Performers Association. Mexican Society of Music Performers. Performers Society. | |
| United Kingdom | The British Equity Collecting Society (BECS), which deals with rental remuneration payable to performers in respect of the rental of a sound recording or a film by way of the exercise of the rental right to equitable remuneration. | |
| United States | Screen Actors Guild (SAG), American Federation of Musicians (AFM), American Federation of Television and Radio Artists (AFTRA), to name some leading organizations. | These organizations are labor unions, not collective management associations. |

A. PART I

(b) Initial Ownership of Audiovisual Performers' Rights

Question II-A-1 to II-A-4:

Who is the initial owner (who is vested with initial ownership)?

| | Performer | Performer's Employer/ Audiovisual Producer | Collective | Anyone Else | Notes and Comments |
|----------------|-------------------|---|-------------------|--------------------|--|
| Egypt | | | | | No answer to this question from the Egyptian expert. |
| France | Yes | No | No | No | |
| Germany | Yes | No | No | No | |
| India | Yes ³⁰ | Yes to the producer for the fixation of an audiovisual performance. | Not applicable. | Not applicable. | |
| Japan | Yes | No | No | No | |
| Mexico | Yes | Yes to the producer for the fixation of an audiovisual performance. | No | | |
| United Kingdom | Yes ³¹ | No | No | Not applicable. | |
| United States | Yes ³² | No ³³ | No | | |

³⁰ Only in connection with live performance.

³¹ With exceptions before the commencement of the Copyright and Related Rights Regulations in 1996.

³² As a matter of the right of publicity. However, this does not mean initial ownership of her performance in the audiovisual work, but only in her performance.

³³ In this Chart we consider the ownership scenario under works made for hire a transfer by operation of law rather than initial vesting of ownership.

**Question II-B-1 to II-B-3:
What is owned?**

| | Is the Performer the Owner of Rights in Her Performance? | Is the Performer a Co-Owner in the Entire Audiovisual Work to which Her Performance Contributed? | Other Ownership? | Notes and Comments |
|----------------|--|--|---|--|
| Egypt | | | | No explicit answer in the reply. But the categories of persons listed as eligible to be co-authors of an audiovisual work do not include performers. |
| France | Yes | No ³⁴ | Moral rights in the performance. | |
| Germany | Yes ³⁵ | No | Yes, moral rights in her performance. | |
| India | Yes, as long as it is not incorporated in an audiovisual work. | No | Not applicable. | |
| Japan | Initial owner of all rights in her performances. | Maybe, depending on whether she may be regarded as having contributed to the creation of that work as a whole by virtue of her own creativity. | | |
| Mexico | No, if the performer has concluded the contract for an audiovisual production. | No | Yes to non-waivable right to remuneration or royalty. | |
| United Kingdom | Yes | No | Not applicable. | |
| United States | Yes | No ³⁶ | | |

³⁴ In theory, the performer could in certain circumstances be considered a co-author of the a/v work, but the question has never been raised.

³⁵ In the performance of a work or of an expression of folklore, and in her artistic participation in the performance.

³⁶ If the audiovisual performer's contribution is copyrightable, he or she would be a co-author of the audiovisual work. However, this ownership right – if it exists – is inevitably transferred to the producer.

A. PART I

(c) Transfer of Audiovisual Performers' Rights

**Question III-A-1 to III-A-5:
Legal provisions regarding contracts**

| | Existence of Legal Norms Setting out Rules regarding Transfer?³⁷ | Rule of General Contract Law, or of Copyright or Neighboring Rights Law³⁸ | Must the Transfer Be in Writing? | Must the Terms of the Transfer be set Forth in Detail?³⁹ | Must the Writing be Signed by the Performer? By the Transferee? | Notes and Comments |
|---------|--|---|---|--|--|--|
| Egypt | Egyptian Law on the Protection of Intellectual Property Rights. | Unclear from the answer. | Yes | Yes | Unclear from the answer. | All answers seem to relate only to authors. Unclear if performers are treated alike. |
| France | Yes | Code of Intellectual Property and general contract rules in Civil Code. | Yes | Yes ⁴⁰ | Yes | |
| Germany | Yes, including Copyright Act, Civil Code/BGB. | See left column. | Yes only in respect of future performances. ⁴¹ | No, there is no explicit obligation to do so. ⁴² | Yes only in respect of future performance, by both parties. | |

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³⁷ This question reads in full: Does the copyright/neighboring rights law, or other relevant legal norm set out rules regarding transfer of rights?

³⁸ This question reads in full: Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighboring rights.

³⁹ This question reads in full: Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?

⁴⁰ The Code of Intellectual Property does not so require, but court decisions do.

⁴¹ General civil law determines the specific requirements of written form and the consequence of the lack thereof, namely the consequence that the contract is null and void.

⁴² But absent specified details of the term, the “rule on the purpose of grant of exploitation rights” may come into play to determine the scope of rights involved. For the right to equitable remuneration, the law provides for default rules absent determination by the parties.

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| | Existence of Legal Norms Setting out Rules regarding Transfer?⁴³ | Rule of General Contract Law, or of Copyright or Neighboring Rights Law⁴⁴ | Must the Transfer be in Writing? | Must the Terms of the Transfer be Set Forth in Detail?⁴⁵ | Must the Writing be Signed by the Performer? By the Transferee? | Notes and Comments |
|--------|--|---|---|--|---|--|
| India | No law setting out rules regarding transfers of performers' rights. | General contract law. ⁴⁶ | Yes ⁴⁷ | Yes ⁴⁸ | Yes. ⁴⁹ No requirement of the transferee's signature. ⁵⁰ | Answers not applicable to audiovisual performers. |
| Japan | Yes | Copyright law. | Unclear under the law. | Unclear under the law. | Unclear under the law. | "Transfer" under Japanese law means assignment only; does not include license. Hence license is not discussed. |
| Mexico | Yes | Copyright law. | Yes | Yes | By both parties. | |

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⁴³ This question reads in full: Does the copyright/neighboring rights law, or other relevant legal norm set out rules regarding transfer of rights?

⁴⁴ This question reads in full: Please indicate if the rule is a rule of general contract law, or is a rule specified in the law of copyright and/or neighboring rights.

⁴⁵ This question reads in full: Must the terms of the transfer be set forth in detail, e.g., as to the scope of each right and the remuneration provided?

⁴⁶ Only relates to non-audiovisual performers.

⁴⁷ Only relates to non-audiovisual performers.

⁴⁸ Only relates to non-audiovisual performers.

⁴⁹ Only relates to non-audiovisual performers.

⁵⁰ Only relates to non-audiovisual performers.

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| | Existence of Legal Norms Setting out Rules regarding Transfer? | Rule of General Contract Law, or of Copyright or Neighboring Rights Law | Must the Transfer be in Writing? | Must the Terms of the Transfer be Set Forth in Details? | Must the Writing be Signed by the Performer? By the Transferee? | Notes and Comments |
|----------------|--|---|--|---|--|---|
| United Kingdom | Copyright Designs and Patents Act (CDPA) of 1988, as amended. | Specified in the CDPA. | <p>Property Rights:: a. Writing is required of assignment and exclusive license; b. Assignment of property rights in relation to future recordings:: unclear whether “writing” is necessary, though performer needs to sign; c. Unclear for non-exclusive licenses; likely not required.</p> <p><i>Non-Property Rights</i> A performer may enter into an exclusive recording contract. Nothing is said if such a contract needs to be in writing.</p> | <p><i>Non-Property Rights:</i> Permissible but not a must.</p> | <p>a. Assignment, exclusive license, and agreement for the future recording of a performance:: writing and signing of performer required;</p> <p>b. No reference to any signing requirement of the transferee.</p> | <p>a. The law inclines to find performers’ implied consent to the transfer of rights.</p> |

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| | Existence of Legal Norms Setting out Rules regarding Transfer? | Rule of General Contract Law, or of Copyright or Neighboring Rights Law | Must the Transfer be in Writing? | Must the Terms of the Transfer be Set Forth in Detail? | Must the Writing be Signed by the Performer? By the Transferee? | Notes and Comments |
|---------------|---|--|--|--|---|---------------------------|
| United States | Yes | Specified in the Copyright Act. | If the performer is a co-author, the transfer of exclusive rights under copyright requires writing. ⁵¹ For the right of publicity, there is no consistent rule across the states. | In general the law is silent but it is prevalent contract practice to specify the terms of transfer. | Transfer of exclusive rights under copyright must be signed by the author. Unclear whether transfer of Sec. 1101 fixation rights must be signed by the performer. For transfer of publicity rights, the requirements depend on state law. | |

⁵¹ A transfer of fixation, transmission and distribution rights under the federal musical performers' right under Sec. 1101 of the Copyright Act requires the consent of the performers for the transfer but is silent on whether the consent must be in writing.

Question III-B-1 to III-B-6:

Existence of legal disposition for the transfer by operation of law and forms in which it takes.

| | Existence of Legal Disposition in General⁵² | Expropriation | Bankruptcy | Divorce/ Community Property | Intestacy | Others | Notes and Comments |
|---------|---|---|--|---|--------------------------|--|---|
| Egypt | “Same previous answer”. ⁵³ | Unclear from the answer. | Unclear from the answer. | Unclear from the answer. | Unclear from the answer. | Not addressed. | The answers are addressing choice of law rules. (?) |
| France | No specific provisions concerning performers. | Very unlikely. | Economic rights can be part of the bankrupt’s estate. | No | Yes | | |
| Germany | Yes | Theoretically possible but remote to reality. | Only claims to remuneration or income earned from the exercise of rights may become property of the bankrupt’s estate. ⁵⁴ | No transfer by operation of law in these cases. | Yes ⁵⁵ | Yes in the case of a merger. ⁵⁶ | |
| India | No such legal dispositions. | - | - | - | - | - | |

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⁵² This question reads in full: Are there legal dispositions transferring either the performer’s exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?

⁵³ Not clear whether “previous answer” is relevant.

⁵⁴ However, the full extent thereof may be questionable in cases where the remuneration right can be transferred only to a collecting society for administration or where it cannot be waived. Also, remuneration obtained through collecting societies has been decided [by court?] as not being subject to judicial execution and, as a consequence under German law, cannot become part of the bankrupt’s estate.

⁵⁵ The exclusive rights and remuneration rights are inheritable and pass on by law to the heirs upon death of the performer under the general rules of civil law.

⁵⁶ But the respondents consider that the legal basis for a merger is a contract.

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| | Existence of Legal Disposition in General ⁵⁷ | Expropriation | Bankruptcy | Divorce/ Community Property | Intestacy | Others | Notes and Comments |
|----------------|--|--|--|---|---|---|--------------------|
| Japan | No provisions particularly related to legal disposition of performers' rights. ⁵⁸ | - | - | - | - | - | |
| Mexico | Only in copyright law. ⁵⁹ | Unclear from the answer. ⁶⁰ | No express provision in this regard. | The answer suggests that transfer is likely. | The answer suggests that transfer is likely. | | |
| United Kingdom | Yes | The answer only suggests possibility. | Property right may be transferred. ⁶¹ | Possible under the law of equitable sharing between husband and wife. ⁶² | Yes, following the normal rules of intestate succession. ⁶³ | Possible in the case of a bequest, subject to certain conditions. | |
| United States | No | No ⁶⁴ | Yes | Unclear for copyright. Yes for publicity rights. | Yes for copyright. ⁶⁵ Unclear for publicity rights. ⁶⁶ | | |

⁵⁷ This question reads in full: Are there legal dispositions transferring either the performer's exclusive rights, or a share of the income earned from the exercise of her exclusive rights, or from the receipt of remuneration rights?

⁵⁸ To which general rules shall apply (no detailed explanation regarding this in the reply).

⁵⁹ The transfer of the non-waivable rights of remuneration or royalty may be transferred *moris causa*.

⁶⁰ The expert considers that publication by the government, which is made without the rights holder but in light of "public usefulness", is of the nature of expropriation.

⁶¹ The answer also addresses the case of non-property rights.

⁶² No concept of community property in the UK.

⁶³ The answer also addresses the case of non-property rights.

⁶⁴ Not aware of such case under the right of publicity.

⁶⁵ See e.g., *Sinkler v. Goldsmith*, 623 F. Supp. 727 (1986), at 730 (where intestate succession to copyright ownership was acknowledged).

⁶⁶ No examples found in California.

Question III-C: Irrebuttable Presumptions of Transfer

1. Does the employment relationship between the audiovisual performer and the producer give rise to an irrebuttable transfer of the performer's rights?
2. What rights does the transfer cover?
3. If fewer than all rights, please identify and explain which rights are transferred and which are retained.

| | Employment Relationship Giving Rise to Irrebuttable Transfer of Rights? | Rights Transferred | Rights Retained | Notes and Comments |
|---------|---|---|-----------------|--|
| Egypt | No ⁶⁷ | - | - | |
| France | Unclear | If presumption is irrebuttable, all economic rights would be transferred. | | Presumption applies only so long as contract provides distinct remuneration for each mode of exploitation. |
| Germany | No irrebuttable transfer at all. | - | - | |
| India | Not envisaged by law. ⁶⁸ | - | - | |
| Japan | No such presumption by law. ⁶⁹ | - | - | |
| Mexico | No | - | - | |

[Table continued on next page]

⁶⁷ The answer seems to indicate that there is an irrebuttable presumption that the performer shall be the owner of all economic rights other than what he has explicitly assigned.

⁶⁸ It can only be effected through contract.

⁶⁹ Rights may be transferred by contract.

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| | Employment Relationship Giving Rise to Irrebuttable Transfer of Rights? | Rights Transferred | Rights Retained | Notes and Comments |
|----------------|--|---------------------------|------------------------|---------------------------|
| United Kingdom | No | - | - | |
| United States | Probably No. ⁷⁰ | | | |

⁷⁰ The works for hire doctrine only applies to matters in the nature of copyright. For this doctrine to apply, performers' contributions must in the first place be characterized as copyrightable, which remains an open question. In any event the transfer is not irrebuttable because the employer can transfer the copyright back to the authors.

Question III-D: Rebuttable Presumptions of Transfer

1. Does the employment relationship between the audiovisual performer and the producer give rise to a rebuttable transfer of the performer’s rights?
2. What rights does the transfer cover?
3. If fewer than all rights, please identify and explain which rights are transferred and which are retained.

| | Employment Relationship Giving Rise to Rebuttable Transfer of Rights? | Rights Transferred | Rights Retained | Notes and Comments |
|---------|--|--|---|--|
| Egypt | The answer suggests that no such presumption exists. | - | - | |
| France | Yes | All economic rights. | | Presumption applies only so long as contract provides distinct remuneration for each mode of exploitation. |
| Germany | Rebuttable transfer exists but not because of employment relationship. ⁷¹ | Exclusive rights of fixation, reproduction and distribution (including rental), and the rights of making available and broadcasting. ⁷² | Exclusive right of communication by screen, loudspeaker or similar technical devices; Any of the remuneration rights listed in I.B.5. ⁷³ Moral rights are not subject to this presumption. | “Employment” might need to be defined. |
| India | Not envisaged by law. ⁷⁴ | - | - | |

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⁷¹ Rather, it is the fact that the performer concludes a contract with a film producer regarding his or her participation in the production of an audiovisual work, whether or not this is an employment contract.

⁷² Except broadcasting from a lawfully fixed performance where the fixation has been released or lawfully made available to the public.

⁷³ Regarding rental, cable retransmission, public lending, broadcasting of certain fixations, communication to the public of fixed performances, communication to the public of performances which have been broadcast and made available to the public, and those regarding private reproduction and other remuneration rights in the context of limitations. The presumption applies only where there is doubt as to the scope of grant.

⁷⁴ Rights may be transferred by contract.

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| | Employment Relationship Giving Rise to Rebuttable Transfer of Rights? | Rights Transferred | Rights Retained | Notes and Comments |
|----------------|--|--|---------------------------------------|--|
| Japan | No such presumption by law. ⁷⁵ | | | |
| Mexico | Yes | Exclusive rights of fixation, reproduction, communication to the public, public performance, exhibition, cable transmission, broadcasting, subtitling and dubbing. | The right to remuneration or royalty. | |
| United Kingdom | No ⁷⁶ | - | - | “Employment” might need to be defined. |
| United States | Unclear ⁷⁷ | | | |

⁷⁵ Rights may be transferred by contract.

⁷⁶ The presumption does not arise from employment relationship but contract, and it only concerns the rental right in relation to the film arising from the inclusion of a recording of his performance of the film.

⁷⁷ This too remains an open question, although a delegation of the USA to the WIPO proposed that a rebuttable presumption of transfer was supported by the performers and producers in the US, which suggests a practice of rebuttable presumption of transfer. See WIPO Standing Committee on Copyright and Related Rights Report, May 11, 1999, paragraph 20, at http://www.wipo.org/eng/meetings/1990/sccr_99/sccr2_11.htm.

Question III-E: Contract Practice

1. If the transfer of audiovisual performers' rights is not effected by a legal presumption, are there standard contractual provisions?
2. Do these provisions appear in collective bargaining contracts?
3. In individually negotiated contracts?
4. What rights do these provisions transfer? Please describe.

| | Existence of Standard Contractual Provisions? | Appear in Collective Bargaining Contracts? | Appear in Individually Negotiated Contracts? | What Rights Do These Provisions Transfer? | Notes and Comments |
|---------|---|--|--|---|--------------------|
| Egypt | Seems to be misunderstanding of the question. ⁷⁸ | See the left column. | See the left column. | See the left column. | |
| France | Yes | | | | |
| Germany | Yes ⁷⁹ | Yes ⁸⁰ | Yes ⁸¹ | Usually very broad. ⁸² | |
| India | No | - | - | - | |
| Japan | No ⁸³ | - | - | - | |

[Table continued on next page]

⁷⁸ Pursuant to the answer the “standard contractual provisions” seems to mean that “the agreement shall be in writing and shall contain an explicit and detailed indication of each right to be transferable with the extent, purpose and the duration and the place of exploitation of the transfer”.

⁷⁹ In the film industry, most agreements are standardized.

⁸⁰ Collective agreements mostly contain provisions on the grant of performers’ rights.

⁸¹ Individual contracts mostly contain explicit provisions on the grant of performers’ rights.

⁸² Sometimes accompanied by agreements on separate royalties for repeated broadcasting.

⁸³ The answer reads “[t]here are no standard contractual provisions which cover all the individual contracts”.

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| | Existence of Standard Contractual Provisions? | Appear in Collective Bargaining Contracts? | Appear in Individually Negotiated Contracts? | What Rights Do These Provisions Transfer? | Notes and Comments |
|----------------|--|---|--|---|---------------------------|
| Mexico | No ⁸⁴ | Such contracts may have standard provisions. | The answer is unclear regarding whether standard provisions exist. | Rights inherent in or relating to the exploitation of audiovisual works in the various appropriate media. | |
| United Kingdom | Yes | Yes ⁸⁵ | Yes and often producers seek broad grant of rights. | For the collective agreements the performer is generally required to give every consent for the purpose of the agreement. ⁸⁶ But the answer does not mention individually negotiated contract. | |
| United States | Yes | Depends ⁸⁷ | Yes | Guild agreements usually specify the grant of rights compatible with the media covered by such respective agreements, which individually negotiated agreements usually seek the grant of all of performer's rights in all media throughout the world in perpetuity. | |

⁸⁴ From the answers to the subsequent questions, this answer appears to only relate to the copyright law.

⁸⁵ Three of the main contracts are: Cinema Films Agreement between Producers Alliance for Cinema and Television and Equity of 11 March, 2002 (Cinema Films Agreement); Television and Equity of 1 April, 2002 (Television Production Agreement); Main Agreement and Walk-ons Agreement between the ITV companies and Equity of 1 April, 2002 (Main Agreement).

⁸⁶ The Cinema Films Agreement specifies that the time of grant of rights is in perpetuity. But it is unclear from the description of the other two agreements whether there is a time limit.

⁸⁷ Some collective bargaining contracts contain such provisions, e.g., the SAG Basic Agreement, but some do not, e.g., the AFTRA Television Agreement (in which case the grant of rights is clearly inferable).

Question III-F: Limitations on the Scope or Effect of Transfer

1. Does copyright/neighbors rights law or general contract law limit the scope or effect of transfer? Please indicate which law is the source of the limitation.

| | Existence | Copyright Law/Neighbors Rights Law | Contract Law | Notes and Comments |
|---------|---|------------------------------------|--|--|
| Egypt | Yes | Yes ⁸⁸ | Unclear from the answer. | |
| France | Yes | No, see notes and comments. | Civil code provides rules applicable to interpretation of all contracts. | Not in text of CPI, but courts have interpreted performers' grants narrowly, similarly to grants of copyright. |
| Germany | Yes | Yes ⁸⁹ | Yes | |
| India | Not applicable to audiovisual performers. | - | - | |
| Japan | Yes | Yes | Yes ⁹⁰ | |

[Table continued on next page]

⁸⁸ The answer indicates that a transfer by the performer shall be in writing and contain an explicit and detailed indication of each right to be transferred with the extent and purpose of transfer and the duration and place of exploitation. However, it seems that the answer describes a requirement of form for the validity of contract, rather than limitations on the transfer.

⁸⁹ Statutory remuneration rights subject to mandatory collective administration and/or can only be transferred to a collecting society. The performer cannot transfer his or her "performer's right" as a whole. Whether the performer can transfer her individual exclusive rights is controversial.

⁹⁰ Public order and good morals.

[Table continued from previous page]

| | Existence | Copyright Law/Neighboring Rights Law | Contract Law | Notes and Comments |
|----------------|--|--|---------------------|---|
| Mexico | No such limitations. Limitations only exist in regards to the possibility of waiving the right to remuneration or royalty. | | | There are limitations on performers' rights, but not regarding the transfer. |
| United Kingdom | Yes | Yes (the CDPA). | Yes ⁹¹ | [Some of the limitations discussed under this question might be more suitable for the next question]. |
| United States | In most cases, no. | Statutory termination right (applicable to transfer of copyright in works other than works made for hire; but most a/v works likely to be for hire). | No | |

⁹¹ The limitations, however, appear to concern capacity to contract, rather than exercise of particular rights. For example, English and Scots law both have rules restricting the contractual capacity of minors, the insane and the intoxicated.

Question III-F: Limitations on the Scope or Effect of Transfer

2. Do these limitations concern:
- a. particular rights, e.g., moral rights;
 - b. scope of the grant, e.g., future modes of exploitation; and
 - c. others (please describe)?

| | Particular Rights | Scope of Grant | Others | Notes and Comments |
|---------|---|---|-------------------------|--------------------|
| Egypt | Moral rights inalienable. | No answer to this question. | Determined by contract. | |
| France | Moral rights inalienable. | Courts read grants to be limited to rights expressly transferred. | | |
| Germany | a. Statutory remuneration rights and exclusive cable retransmission right under certain sections; ⁹² b. Moral rights and performer's rights as a whole, and possibly also the individual exploitation rights; ⁹³ c. All economic rights of the performer. ⁹⁴ | Regarding the written form and the kind of performances (non-specific future performances). ⁹⁵ | | |

[Table continued on next page]

⁹² Concerning the limited transferability (only to collecting societies) and the mandatory collective administration.

⁹³ Concerning the non-transferability.

⁹⁴ Concerning several provisions of the Copyright Act, including but not limited to the rule of interpretation and the rule concerning contract validity.

⁹⁵ Concerning, for example, the rules of interpretation and contract validity.

[Table continued from previous page]

| | Particular Rights | Scope of Grant | Others | Notes and Comments |
|----------------|--|---|---|--|
| India | - | - | - | Not applicable to audiovisual performers. |
| Japan | Moral rights inalienable. | Unclear whether rights are presumed to be preserved by performer absent particular reference in contract for transfer, but likely no such presumption for performers. | The public order and good morals of the Civil Code may be a limitation on the scope or effect of transfers. | |
| Mexico | Waiver of right to a royalty Silent on performer's moral rights. | Future modes of exploitation reserved to performer absent express contractual provision. | | |
| United Kingdom | Right to equitable remuneration. ⁹⁶ | No | - | |
| United States | For copyright; The statutory termination right, if applicable, but derivative works already created under the authorization of the terminated rights may continue to be exploited under those terms. | No | | Under the Copyright Act, the invalidation of involuntary transfer of copyrights may also be seen as limitation of the effect of transfer but performers might not qualify for that protection. |

⁹⁶ Right to equitable remuneration where rental right is transferred may not be assigned by the performer except to a collecting society for the purpose of enabling it to enforce the right on his behalf. The right to equitable remuneration arising from the exploitation of a sound recording may not be assigned by the performer except to a collecting society for the purpose of enabling it to be enforced.

Question III-F: Limitations on the Scope or Effect of Transfer

a. 3. Do audiovisual performers enjoy a legal right to terminate transfers of rights?

| | Existence | Termination Right Transferable? | Termination Right Waivable? | Notes and Comments |
|----------------|---|---|------------------------------------|--|
| Egypt | The answer suggests that a right to terminate a transfer is only available if the contract so provides. | Not addressed. | Not addressed. | |
| France | No | | | |
| Germany | Yes ⁹⁷ | The answer to this question seems to be absent. | No ⁹⁸ | |
| India | No | - | - | |
| Japan | Only in the sense of termination of contract, as a matter of contract law. | Not addressed | Not addressed. | |
| Mexico | No information in the law. | | | |
| United Kingdom | No | - | - | |
| United States | Only if performers' contributions are considered copyrightable and not works made for hire (unlikely). | | | If performers' contributions are copyrightable, the answers to the two questions of the left two blocks would be no. |

⁹⁷ Only in the context of Sec. 40 CA, the parties of a contract regarding the grant of rights in a future performance may terminate the contract after five years after conclusion of the contract (Sec. 40(1) CA). **However**, the experts follows with that there are no termination rights regarding the transfer/grant but only the general civil law rules on the termination of contracts apply otherwise.

⁹⁸ The right under Sec. 40(1) CA to terminate a contract on the grant of rights in future performances cannot be waived.

B. PART II

INTERNATIONAL PRIVATE LAW RULES
FOR DETERMINING THE LAW APPLICABLE TO
TRANSFER OF AUDIOVISUAL PERFORMERS' RIGHTS

- (a) Law Applicable to Determine Initial Ownership of Audiovisual Performers' Rights

Question A: What country's (countries') copyright/neighbors rights law determines whether the granting performer initially owned the rights transferred.

| | Country of Origin of Audiovisual Work | Country of Residence of Performers | Country Designated by (or Localized to) the Contract of Transfer | Each Country in which the Work is Exploited | Notes and Comments |
|---------|---|------------------------------------|--|---|--|
| Egypt | The answer appears to suggest this category. ⁹⁹ | | | | |
| France | | | | Recent decision of <i>Cour de cassation</i> ¹⁰⁰ concerning phonograms indicates that the law of the country of exploitation applies. | Scope of this decision is unclear, therefore it is not yet advisable to state clearly that the law of the country of origin or of the contract has no application. |
| Germany | No | No | No | Yes. ¹⁰¹ | |
| India | Likely, ¹⁰² by reference to the most significant relationship. | | | | |

[Table continued on next page]

⁹⁹ The answer is not directed to each of the questions. Rather, there is a citation of provisions of law mainly to determine who can be qualified as nationals of a member state of the WTO. The answer notes that the provisions follow Art. 5.4 of the Berne Convention. (However, the question of initial ownership of performers is NOT addressed).

¹⁰⁰ *Cass. Ire civ.* Dec. 9, 2003 (as yet unpublished).

¹⁰¹ There has not been a case involving audiovisual performers yet, but as to copyright the law is clear and distinct. Application of the law of the country-of-protection results in the application of the law of each country in which the work is exploited. The dominant opinion of German commentators supports this application of the country-of-protection rule to the question of initial ownership and has always supported it, for the rights both of authors as well as audiovisual performers.

¹⁰² It is noted that the rules of private international law are not well developed under Indian law.

[Table continued from previous page]

| | Country of Origin of Audiovisual Work | Country of Residence of Performers | Country Designated by (or Localized to) the Contract of Transfer | Each Country in which the Work is Exploited | Notes and Comments |
|----------------|--|---|--|---|--|
| Japan | No | No | No | Yes ¹⁰³ | |
| Mexico | Unclear from answer. | Unclear from answer. | Unclear from answer. ¹⁰⁴ | No | It is Mexican law that determines. ¹⁰⁵ |
| United Kingdom | Maybe, and if so the performer's nationality would determine the country of origin. However, it is complicated and no universal recognition. | Maybe ¹⁰⁶ | Maybe ¹⁰⁷ | Maybe | No cases in the UK on this issue and comments are inferred. |
| United States | Source country for copyright; Unclear for the right of publicity. | Yes for the right of publicity (appears to be the choice of law rule most often applied). | Possibly | Possibly | No uniform choice of law approach among the states regarding the right of publicity. |

¹⁰³ “It is thought in Japan that among Berne Convention countries copyright/neighborhood rights are born and exist in each country at once when and after such rights are vested in one of the countries party to Berne Convention”.

¹⁰⁴ The answer refers to the national treatment provisions under Mexican law. However, this does not seem to address the question.

¹⁰⁵ The answer refers to the question II-A-1 in Part I, “in your country, is the performer vested with initial ownership” and consequently, this answer seems to be referring to performers of Mexican nationality only. The categories listed in the questions appear to be criteria for consideration, but no clear answer.

¹⁰⁶ Copyright cases indicate that the law of the place where the right existed was looked to in order to determine whether the right could be assigned, and who could assign the right. However, it was the law of the contract that determined whether the assignment was valid.

¹⁰⁷ That would be determined by the Rome Convention on the Law Applicable to Contractual Obligations, which was enacted into UK law in 1990. Pursuant to the Rome Convention, the parties may choose the country, and in the absence thereof, the court will identify the system of law with which the contract has the closest connection.

B. PART II

(b) Law Applicable to Transfers of Audiovisual Performers' Rights

Question A: Transfers by Operation of Law

1. Does your country's (statute) law or case law give local effect to a transfer by operation of a foreign country's law?

| | Expropriation | Bankruptcy | Divorce; Community Property | Intestacy | Other | Notes and Comments |
|---------|--|---|--|---|--------------|---|
| Egypt | Appears to be yes. | Unclear from the answer. ¹⁰⁸ | Unclear from the answer. ¹⁰⁹ | Appears to be yes. ¹¹⁰ | | |
| France | Probably not. | Yes | Yes | Yes | | |
| Germany | No unless binding international treaty stipulates otherwise. | In principle yes. | In principle yes. | In principle the law of the deceased performer's nationality. | | |
| India | Law unclear. | Law unclear. | Law unclear. | Law unclear. | | "The decision will turn on the paramount consideration Indian courts when dealing with private international questions, i.e., public interest". |
| Japan | Yes | Yes | Yes | Yes | | General recognition if certain conditions are satisfied. ¹¹¹ |

[Table continued on next page]

¹⁰⁸ The answer is not conclusive.

¹⁰⁹ It appears, though, the law of the state to which the husband belongs at certain time points would apply. But the answer does not give a conclusive reply.

¹¹⁰ The answer is not conclusive.

¹¹¹ "According to Japanese lawyers' view in general, an act of a foreign state is to be recognized in principle if, *inter alia*, such foreign country has jurisdiction over the person or property affected by such act and the result of such acts is not against the due process and the public order of Japan".

[Table continued from previous page]

| | Expropriation | Bankruptcy | Divorce; Community Property | Intestacy | Other | Notes and Comments |
|----------------|----------------------|--------------------------------------|--|--|--------------|--|
| Mexico | Yes | Yes | Yes | Yes | | Provided that such transfers do not contravene the provisions of Article 8 of the Federal Civil Code. ¹¹² |
| United Kingdom | No | Possible ¹¹³ but unclear. | Possible ¹¹⁴ | Yes if the performer was domiciled in the jurisdiction of the law of intestacy at the performer's date of death. | | |
| United States | No | Probably yes. | Probably yes. | Probably yes. | | |

¹¹² This Article reads: “The acts performed contrary to the spirit of the prohibitive laws or those of public interest shall be null and void, except in cases where the law states the opposite”.

¹¹³ “[I]t would appear that the question is whether the status of a foreign trustee is recognized by English law that he acquires a title to the bankrupt’s property in England”. A performer’s non-property rights will not pass on bankruptcy.

¹¹⁴ Less clear as to whether a court would recognize an order transferring the rights if they were vested in both parties as community property. And a foreign decree transferring a performer’s non-property rights on divorce would not be effective.

Question B: Transfers effected by contract

1. When a contract grants the right to communicate or make an audiovisual work available via transmission from one country to another (or others), is the substantive copyright or neighboring rights law underlying the grant determined:
- a. with reference to the country from which the communication originates? Or
 - b. with reference to the country or countries in which the communication is received?

| | Country from which the Communication Originates | Country in which the Communication is Received | Notes and Comments |
|---------|---|--|--|
| Egypt | - | - | The law applicable is the law of the state where the contract is concluded. |
| France | Yes ¹¹⁵ | Yes ¹¹⁶ | Some authorities assert that only the law of origination applies; others that only the law of receipt applies; others that both apply. |
| Germany | Yes | Yes | Principle of the country (countries) of protection. ¹¹⁷ |
| India | Unclear | Unclear | The decision would turn on the question of public interest, as indicated in the preceding question. |

[Table continued on next page]

¹¹⁵ This is clear for transmissions by satellite in the EU.

¹¹⁶ But not for transmissions by satellite in the EU.

¹¹⁷ There is no choosing (or “either/or”) between the laws of those countries. Instead, the laws of all countries possibly affected by the exploitation are relevant, each for the grant of rights within the specific country’s territory.

[Table continued from previous page]

| | Country from which the communication originates | Country in which the communication is received | Notes and Comments |
|----------------|---|--|--|
| Japan | No | Yes | |
| Mexico | Unclear ¹¹⁸ | Unclear ¹¹⁹ | Terms of agreement apply. |
| United Kingdom | Unclear | Likely but only limited to UK performers. | |
| United States | Unclear | Unclear | Different US courts have applied US law in the case of origination and receipt when at least one of these acts occurred in the US. |

¹¹⁸ Not addressed by law.

¹¹⁹ Not addressed by law.

Question B: Transfers Effected by Contract

2. What law governs issues going to the scope and extent of a transfer:

- a. The (single) law of the contract?
- b. The substantive copyright/neighboring rights laws of the countries for which the rights are granted?

| | Law of the Contract | Substantive Copyright/Neighboring Rights Laws of the Countries for which the Rights are Granted | Notes and Comments |
|---------|--|---|---|
| Egypt | - | - | Law of the state where the contract is concluded. |
| France | Governs the conditions of validity and the effects of the contract. | Governs the content and the duration of the rights transferred; according to most authors, also governs the transferability of a right. | |
| Germany | Yes regarding: Territorial scope of transfer; Duration of transfer; Possible termination; Whether a specific right is included in transfer; General questions regarding the interpretation of a contract. | Yes regarding: Transferability of right; Whether a bona fide purchase is possible; Whether in case of multiple transfers the priority principle applies or some other principle applies. | |
| India | Likely, regarding whether the grant was effectively made. | Likely, regarding whether the right can be granted at all. | |
| Japan | Yes to contractual matters (validity and effect of the contract of transfer). | Yes to the proprietary aspect of the copyright. | |
| Mexico | - | - | Agreement of wills; (?) <i>Lex Fori</i> . |

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| | Law of the Contract | Substantive Copyright/Neighboring Rights Laws of the Countries for which the Rights are Granted | Notes and Comments |
|----------------|--|---|--|
| United Kingdom | Yes regarding the essential validity of the contract and its effects. ¹²⁰ | Yes regarding defining the rights created under its own law, deciding if the right may be assigned in part as to locality, duration or scope. | |
| United States | Yes to contractual matters. ¹²¹ | Yes to substantive copyright law matters. ¹²² | The contours of these questions are not yet clearly defined under the US laws. It is not always clear what are contractual matters and what are substantive copyright/neighboring right matters. |

¹²⁰ The answer does not further explain what “effects” means.

¹²¹ See e.g., the *Bartsch* line of cases, interpretation of the scope of the rights granted was deemed a question of state contract law.

¹²² In *Corcovado v. Hollis Music*, 981 F.2d 679 (2nd Cir. 1993), the same federal appellate court of the US ruled that the question of what language is required effectively to grant renewal rights is a matter of substantive copyright law of the US. In that case, the court upheld the application of the law of the US, even though the grant had been made in a contract between Brazilian parties who had chosen Brazilian law to govern their deal.

Question B: Transfers Effected by Contract

3. What law governs issues going to the validity of the form of a transfer:

| | Law of the Contract | Substantive Copyright/Neighboring Rights laws of the Countries for which the Rights are Granted | Notes and Comments |
|---------|--|---|--|
| Egypt | - | - | Law of the country in which the contracts are concluded, or the law applicable to their substantive provisions, or law to which the domicile of the contracting parties is subject, or to their common national law. |
| France | Yes ¹²³ | <i>Lex fori</i> determines whether the issue is one of contractual form (law of contract applies), or whether it goes to the substance of the right (law of country of protection applies.) | |
| Germany | - | As exceptions to the general rule: The law of the country of protection applies to the questions whether a contract needs, in order to be valid or to be exercised against third parties, to be registered in a public register. | General rule of international private law applies, mainly involving places of contracting. |
| India | Likely ¹²⁴ | Unclear from the answer. | |
| Japan | Either the law of the contract or the law of the place where the contract is made. | - | |

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¹²³ But questions of form can be governed by the place of conclusion of the contract.

¹²⁴ It is likely the law of contract will determine whether the grant was effectively made.

[Table continued from previous page]

| | Law of the Contract | Substantive Copyright/Neighboring Rights laws of the Countries for which the Rights are Granted | Notes and Comments |
|----------------|---|--|--|
| Mexico | - | - | Federal Copyright Law dictates that the contract must be in writing for validity purposes. |
| United Kingdom | - | - | Valid if contract satisfies the formal requirements of the Rome Convention, ¹²⁵ or of the law of the country where it is concluded ¹²⁶ , or the law of one of the countries if the parties are in different countries. |
| United States | The law of the place where the contract is made, unless form is considered substantive copyright/neighboring right law. | See left column. | See the <i>Corcovado</i> case in the chart for the preceding question. Again it is not always clear when form will be considered a substantive copyright/neighboring right matter. |

¹²⁵ Whether the parties are in the same country or different countries.

¹²⁶ When the contracting parties are in the same country.

Question C: The Role of Mandatory Rules and *Ordre Public*

1. Do mandatory rules (*lois de police*) automatically apply local law to local exploitations made under a foreign contract?
2. Describe the instances in which mandatory rules apply to transfer of rights by audiovisual performers.
3. Do local courts, having initially identified the applicability of the law of the foreign contract, nonetheless apply local law on grounds of public policy/*ordre public*?
4. Describe the instances in which the *ordre public* exception applies to invalidate transfers of rights by audiovisual performers.

| | Do Mandatory Rules Apply to Local Exploitation under a Foreign Contract? | Description of Application of Mandatory Rules to Transfer of Rights | Do Local Courts Apply Public Policy despite Initial Identification of Applicable Law? | Description of <i>Ordre Public</i> Invalidating Transfer | Notes and Comments |
|--------|---|---|--|---|---------------------------|
| Egypt | The answer appears to be no. ¹²⁷ | Rules on the scope of transfer and formal requirements of contract. ¹²⁸ | Yes | Examples offered. ¹²⁹ | |
| France | Yes | Rome Convention rules leave room for application of local labor laws (see Report of 4/30/03); Relevant Provisions of Code of Labor Law and Code of Intellectual Property can be considered mandatory (see Report of 4/30/03). | Yes, in theory. | No concrete examples from decisions. | |

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¹²⁷ The governing law is the law where the contract is concluded.

¹²⁸ The audiovisual performer shall be the owner of all economic rights other than what he has explicitly assigned and any authorization by him to exploit any of the economic rights relating to a work shall not mean authorization to exploit other economic rights relating to same work.

¹²⁹ Public order has no specified definition. Examples include the formal requirements for establishing a transfer, as well as the validity of the subject matter of transfer.

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| | Do Mandatory Rules Apply to Local Exploitation under a Foreign Contract? | Description of Application of Mandatory Rules to Transfer of Rights | Do Local Courts Apply Public Policy despite Initial Identification of Applicable Law? | Description of <i>Ordre Public</i> Invalidating Transfer | Notes and Comments |
|---------|--|--|--|---|---------------------------|
| Germany | This question is split into three scenarios and addressed separately. ¹³⁰ | Public interest is the key to classify a regulation to be “mandatory”. For copyright the necessary public interest can be assumed for such regulations which protect the author or performer as the regularly weaker party to contract. ¹³¹ | Yes in principle. ¹³² | No case yet. ¹³³ | |
| India | No ¹³⁴ | Not applicable | Likely | No such instance yet. | |

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¹³⁰ Scenario 1: Application of mandatory rules of German law to a “foreign” contract, if Germany is the country of exploitation. The answer under this scenario is “yes”. Nevertheless, the application of German mandatory rules requires a specific “domestic element” of the case, which justifies German law prevailing over foreign contract law.

Scenario 2: Application of mandatory rules of the law of a foreign country to a “German” contract, if the foreign country is the country of exploitation. The answer under this scenario is “could be”.

Scenario 3 is NOT addressed.

¹³¹ The experts enumerated many provisions of law that are considered to be mandatory rules by the dominant German doctrine, including for example the provisions concerning the claim of the author/performer for equitable remuneration and additional participation of the author/performer, the provision concerning the unwaivable termination right, the rule on the purpose of grant of exploitation rights according to which “if the types of use were not specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract”, as well as the statutory remuneration right for cable retransmission, etc.

¹³² An example was given where a German court may correct a substantially unjust result, which has been caused by application of a foreign law, which itself has been invoked by application of the German rules of international private law.

¹³³ Instances in which the *ordre public* exception might apply to invalidate transfer of rights by audiovisual performers are severe infringements of the performers’ moral rights or confiscations of their rights, i.e., expropriation without any compensation.

¹³⁴ It is a case-by-case situation and public interest is the prime consideration.

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| | Do Mandatory Rules Apply to Local Exploitation under a Foreign Contract? | Description of Application of Mandatory Rules to Transfer of Rights | Do Local Courts Apply Public Policy despite Initial Identification of Applicable Law? | Description of <i>Ordre Public</i> Invalidating Transfer | Notes and Comments |
|----------------|---|--|---|---|--|
| Japan | Yes | No case on audiovisual performers yet but for example mandatory labor law rules will apply. | Yes | No case yet but in the case of contract made under undue influence or other inappropriate situation the application of validating foreign law will be denied. | |
| Mexico | Yes | Art. 121 of the Federal Copyright Law, and Art. 34 and 35 of the Regulations under the Law. | The answer refers to Articles 13 and 14 of the Federal Civil Code but does not give a clear answer. | The answer refers to several articles but does not describe. ¹³⁵ | |
| United Kingdom | Possible | Possible instances: Ownership of performers; Unwaivable right to equitable remuneration. | Yes but only in exceptional circumstances. ¹³⁶ | No case yet ¹³⁷ | |
| United States | No such concept in the field of this study. | | Yes | For an example see Sec. 201(e) of the Copyright Act refusing to give effect to involuntary transfers (except for bankruptcy). | In theory the public policy exception should be of general application but in practice it is not as clear. |

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¹³⁵ Where the provisions of Article 121 of the Federal Copyright Law have been infringed, or where the remuneration for a performer has not been agreed in accordance with Article 117bis of the Federal Copyright Law, and Articles 34 and 35 of the Regulations under that Law, and the provisions of Article 8 of the Federal Civil Code are also applicable to such cases.

¹³⁶ This is pursuant to Article 16 of the Rome Convention. It must be shown that the application of a foreign rule of law is against the forum's public policy. The intention is that Article 16 will only be used in exceptional circumstances.

¹³⁷ Might be invoked by the application of the Human Rights Act 1998, when the application of a foreign law would deprive a UK performer of her/her property right in the UK.