STUDY ON THE AUDIOVISUAL LEGAL FRAMEWORK IN LATIN AMERICA

PART 3: THE LEGAL TREATMENT OF FOREIGN AUTHORS OF AUDIOVISUAL WORKS

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I. INTRODUCTION[3]

1. There is global consensus, reflected in the relevant international conventions, that authors of audiovisual works deserve to be adequately protected. Nevertheless, this consensus is not as broad when it comes to how these authors should be remunerated for the exploitation of their work. On occasion, this prompts authors of audiovisual works to argue that they do not receive equitable remuneration. This problem, commonly reported,[4] can also be seen in Latin America and, with some exceptions, may also appear in the jurisdictions covered in this study: Argentina, Brazil, Costa Rica, Ecuador, Peru and Uruguay.[5]

The problem is even more acute when works are exploited in markets other than that of their State of origin, simultaneously or successively. By no means is this situation exceptional. In recent years, the audiovisual market has seen a rapid transformation with the advent of digital technologies and online services. While traditional windows of exploitation and national opening

[2] Studies available at: : https://dacatalogue.wipo.int/projects/DA_1_3_4_10_11_16_25_35_01

[3] This work has been carried out based on interviews with the following experts: German Gutierrez (ARGENTORES, Argentina), Eduardo de Freitas (AGADU, Uruguay), Ramiro Rodriguez (SENADI, Ecuador), Federico Duret (UNIARTE, Ecuador), Paula Siqueiros (GEDAR, Brazil), Ana Grettel Coto (Costa Rica), Martin Moscoso (Peru), Fernando Zapata (Colombia), Maria Mateo (SGAE, Spain), Leonardo de Terlizzi (CISAC). I wish to express my gratitude to all of them. Any comments or inaccuracies are the sole responsibility of the author.

[4] Xalabarder, R. (2018*), International legal study on implementing an unwaivable right of audiovisual authors to obtain equitable remuneration for the exploitation of their works*, CISAC, p. 3., available at https://www.cisac.org/Media/Studies-and-Reports/Publications/AV-Study/AV-Study.

[5] An analysis of the national and international regulatory framework applicable to the exploitation of audiovisual works in these countries can be found in Part 2, published together with this study.

schedules remain in force, the immediate availability of audiovisual content worldwide through the internet continues to grow. On-demand video platforms (Netflix, Amazon, HBO etc.) are becoming widespread, and generally offer their services internationally. At present, all types of content can be accessed free of charge, in exchange for advertising, under subscription or pay-per-view systems, which has raised the question of how much longer traditional models of exploitation can last.[6]

While it is true that the production of audiovisual works requires major investments and entails high risks,[7] the exploitation of content without geographic limits brings an exponential increase in revenue that these platforms can obtain by exploiting these productions. It has been alleged that this is not necessarily reflected in an increase in the authors' remuneration proportionate to the increase in the exploitation of their works. The problem is not exclusively limited to the exploitation of digital media. Authors are also not adequately remunerated for the representation of their works in cinemas, on cable television or broadcasting channels, or for the rental of their works. Generally, authors receive a single payment for the transfer of all their rights and in most cases, do not share in the income generated by the subsequent exploitation of the work. [8]

2. The purpose of this study is to examine the reasons that hinder the protection of authors of audiovisual works when they are exploited internationally, and to determine the efficiency of the measures implemented by national copyright systems to enhance this protection.

As will be discussed in the following section, the representatives of authors identify two main reasons: the differences between national intellectual property laws and the ease with which platforms can circumvent the rules protecting authors in contracts when the relationship takes on an international nature.

The measures implemented in the legal systems under analysis to protect authors of audiovisual works, will be addressed in section III. Collective management organizations or entities (hereafter CMOs) play an important role in this respect. Nevertheless, they are not present in all States examined in this study. A second element of protection introduced in some legislations involves the adoption of a mere right to remuneration for the reproduction and public communication of audiovisual works, that is non-waivable and subject to mandatory collective management.

Before providing explanations, it should be noted that this paper focuses on authors of audiovisual works, although many of the conclusions could be analogically applied to other right holders, such as performers.

II. DIFFERENCES BETWEEN LEGISLATIONS AND THE INTERNATIONAL EXPLOITATION OF THE AUDIOVISUAL WORK

3. Intellectual property laws differ, in that each of them responds to the legislative policy objectives of their country, as well as the socioeconomic circumstances and unique traditional cultures. In general, a distinction is drawn between civil law systems (authors' rights) and common law jurisdictions (copyright).

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[6] Now the question is at what point will these services dominate the audiovisual market to the detriment of traditional audiovisual broadcasting business models.
[7] HUGENHOLTZ, P. B., POORT J., (2020), "Film Financing in the Digital Single Market: Challenges to Territoriality", IIC, vol 51, pp. 167 – 186.
[8] XALABARDER, R (2018), p. 10.

These legislative differences are even more pronounced when it comes to the regulation of audiovisual works. The reason for this lies in the complexity of the production and exploitation of this category of works, owing to several factors:

a) Its production requires input from various people who make different contributions of a creative, technical, commercial or entrepreneurial nature. As a result, the audiovisual production gives rise to multiple objects of protection (audiovisual work, performances, audiovisual recording) and multiple rights holders (authors, performers and producers).

b) Its production also requires a major investment from the producer, and its exploitation is subject to high risks, as it may be difficult to foresee in advance if the work will be commercially successful, and therefore, if it will generate income.[9]

c) In turn, the audiovisual production and its different elements (soundtracks, scripts, etc.) can be exploited in various ways, and unlike other categories of works, in a range of markets.

Depending on the importance that each State places on the interests of the various persons involved in the production and exploitation of the audiovisual work, regulation will vary, giving rise to significant differences in national legislations.[10] For clarity, these differences can be divided into two groups: those referring to authorship and original ownership of the work; and those related to the content of audiovisual authors' rights and how these may be influenced by contracts.[11]

4. International conventions guarantee a certain degree of harmonization of these legislations, and a scope of basic protection for authors outside of their country of origin. Nevertheless, they are not effective in overcoming obstacles arising from these legislative differences for the exploitation of audiovisual works and the protection of authors abroad.[12] This is due to the difficulty of overcoming the territoriality principle which permeates the regulation on the subject matter, and justifies the adoption of the conflict of laws rule *lex loci protectionis* (law of the country where the protection is claimed) to determine the law applicable to cases of international exploitation of works.

[9] Hugenholtz, P. B., Poort J., (2020), p. 169.

[10] Saiz García, C. (2002), *Obras audiovisuales y derechos de autor*, Madrid, Thomson Aranzadi, p. 26.

[11] In relation to the object of protection, based on the broad concept of cinematographic work, as defined in the Berne Convention (art. 2.1: "cinematographic works to which are assimilated works expressed by a process analogous to cinematography"), all the jurisdictions examined in this study guarantee the protection of all categories of audiovisual works. There is also a standardized regulation regarding the term of protection (70 years), although the system for calculating this period varies between countries: in some cases from the death of the last author (Costa Rica, Uruguay), in others from the publication of the work (Brazil, Ecuador Peru). Argentina is the exception to the rule, in that the term of the protection is 50 years after the death of the last author. There are also no significant differences that may affect the international exploitation of audiovisual works with respect to the regime of exceptions. Apart from Peru, none of the countries include an exception to the right of reproduction for private use (in Peru there is even an exception for public communication within a private sphere). The Code of Intellectual Property of Ecuador includes a long list of exceptions and a generic exception for "fair uses" which, in any case, must respect the three-step rule. It is also worth mentioning that Ecuadorian legislation provides for compulsory (statutory) licenses that may be requested from the national authority for audiovisual works that are not available on the national market (in this respect, see Part 2 of this study).

[12] Saiz García, C. (2002), pp. 111 ff.

A. AUTHORSHIP AND ORIGINAL OWNERSHIP OF THE AUDIOVISUAL WORK

5. National regulations on authorship and original ownership of the audiovisual work can be divided into two groups.[13] The first is typical in copyright systems, in which all exploitation rights are concentrated in the natural or legal person acting as producer. Under the doctrine of "work made for hire", this person is considered the author and original owner. This is the system implemented in countries such as the United States, Australia and China. This makes exploitation of the work much easier, as all of the rights are concentrated in the same person.

A second group of countries, following the "authors' right" tradition, classifies audiovisual works as collective or joint works, and all the persons who creatively contribute to the work are considered co-authors. These legislations contain a list of persons who may be considered authors: generally the director, the scriptwriter and the composer of the music created specifically for the audiovisual production. However, the persons included in these lists may vary from one legislation to another. These regulations include a rebuttable presumption according to which these authors grant the producer the exclusive transfer of exploitation rights over the work. This is intended to facilitate the exploitation of the work by concentrating all the rights in one person.

6. Intellectual property laws in Latin America, particularly those in the countries covered in this study, belong to the second group. In principle, this makes the exploitation of the work easier in various countries in the region. Nevertheless, two types of problems may arise.

On the one hand, since the lists of persons who may be considered authors are exhaustive, a person could be recognized as an author in one country, but not in another. For example, in Argentina a composer is only considered an author if the work is a musical film. In Argentina and Costa Rica, the producer is considered co-author, and therefore, receives the same treatment as the author of the audiovisual work. [14] However, the illustrator of drawings of an animated audiovisual work is not granted the same status in these countries. In other words, this person is considered author, but not of the audiovisual work, a recognition that the illustrator does receive in the legislations of the other countries examined in this study. Finally, in Peru, Ecuador and Uruguay, the author of the audiovisual work is considered to be author of the pre-existing work, which is not the case in the other legal systems.[15]

To give a hypothetical example, a Uruguayan illustrator of drawings of an animated audiovisual work is considered an audiovisual author in his/her country, and therefore has a mere right to remuneration. However, the illustrator will not be granted this status in Argentina, therefore his/her rights are not subject to mandatory collective management. In turn, an Argentinian producer, since he/she is not recognized as an author in Uruguay, does not have the mere right to remuneration for the exploitation of his/her works in this country.

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[13] However, as stated by A. González Gozalo, it is possible to find "hybrid systems". González Gozalo, A. (2001), *La propiedad intelectual de la obra audiovisual*, Granada, Comares, pp. 102-1123.

[14] In both cases, it is understood that only the producer who is a natural person may be considered co-author. In this regard, see tables of legislation in Argentina and Costa Rica. Part 2: The legal framework of the audiovisual sector in the digital environment.

[15] A comparison of these legislations can be found in Part 2: The legal framework of the audiovisual sector in the digital environment.

7. On the other hand, the relationship between these legislations and the jurisdictions under the copyright system is also problematic. When Latin American authors enter into contracts with producers from the United States or other countries under the copyright system, problems arise. Generally, such contracts, which normally contain standard content, establish that the authorship and original ownership of the rights over works correspond to the producer. These contracts may also include a choice of law clause from the producer's country of residence to ensure this country's contractual regulations, particularly, the "work made for hire" doctrine, are applied.

In these cases, the question arises as to whether persons considered as authors under the law of their country of origin (from the authors' rights system) lose this status because they have renounced authorship under a foreign law (from the copyright system) that allows them to do so.

According to the "work made for hire" doctrine, the answer would be no.[16] Contracting parties to the audiovisual production have the freedom of contract to regulate the contractual aspects of the relationship, but not the intellectual property aspects. In other words, the contract cannot determine who is considered author or original owner of the work. This is a matter to be determined by the law governing intellectual property law, i.e., the *lex loci protectionis*. This is expressly established in article 14bis.2(a) of the Berne Convention, which will be referred to later.[17] This implies that if the work has been exploited in various countries, the regulations of each of those countries shall determine who is considered author or original owner of the audiovisual work. The same applies to the determination of the creations that are eligible for protection, or of the content of the right of exclusivity: these are all matters to be determined by the *lex loci protectionis*, not by the law of the contract (*lex contractus)*.

Therefore, independent of what is written in the contract, the person who has contributed to the creation of the work shall be considered author in all countries in which the work is exploited, if it is considered as such under the law of that country.

B. THE CONTENT OF RIGHTS OVER THE AUDIOVISUAL WORK AND HOW IT IS AFFECTED BY THE CONTRACT

8. In general, all legislations in Latin American countries, and in particular those examined for this study, grant all economic rights to the author or original owner of the audiovisual work, including the right to make the work available on the internet.[18] Nevertheless, it is important to point out some differences.

9. First, in Argentina, exclusive rights over the audiovisual work are subject to mandatory collective management. The corresponding CMO (the General Society of Authors of Argentina (Argentores) for scriptwriters, Argentinian Cinematographic Directors (DAC) for Directors, Argentine Society of Music Authors and Composers (SADAIC) for composers of scores[19]) have

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[16] Goldstein, P. / Hugenholtz, P. B. (2010), *International Copyright: Principles, Law and Practice*, OUP, Oxford, p. 130; Desbois, H, Françon A, Kéréver, A.,(1976) *Les conventions internationales du droit d'auteur et des droits voisins*, Dalloz, Paris, p. 152.

[17] As A. González Gozalo explains, insofar as it was a matter of conflict, the Stockholm Conference decided to avoid a substantive regulation of the issue and opt for this conflict of law rule that gives full freedom to the Member States to attribute ownership of the audiovisual work to whomever they deem appropriate. González Gozalo (2013), "Arts. 14 y 14 bis", in Bercovitz Rodríguez-Cano, R (Coord.), *Comentarios al Convenio de Berna*, Madrid, Tecnos, 1137-1213, esp. 1180. Also available: Rycketson, S. / GINSBURG, J. (2005), *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Oxford University Press, para. 7.32.

[18] This is despite the fact that Brazil has not yet ratified the WCT.

[19] Since 2004, SADAIC ceased to receive the right of public communication for music included in audiovisual works, as a result of a court decision. ('Sociedad Argentina de Autores y Compositores w/ Andesmar S.A.CSJN, *S. 129. XXXVII*, 23 March 2004').

a legal monopoly over the exploitation of rights. Consequently, the producer must negotiate the transfer of rights with these organizations. As a result, authors are in a stronger position in that they are no longer required to negotiate under inferior conditions with producers, and to give up their rights in exchange for a lump sum. The negotiation is carried out in accordance with the standard contracts drawn up by the CMO, so that the authors' remuneration is guaranteed.[20] At the same time, users must also pay to use the works of these entities, based on the prices established by the government.

The inalienable nature of the rights and their mandatory collective management are two important aspects of this regulation. Unlike Argentina, Brazil introduced the collective management of exclusive rights, but it is understood that authors can waive all of their rights by contract.[21] If this interpretation is confirmed, the measure would be less effective since the CMO, in order to request remuneration for the exploitation of the work, would be required to prove that the author reserved such rights in the contract with the producer. In this case, the author would not be in a better position as the producers could still force authors to waive all of their rights and the collective management would lose its effectiveness. Similarly, the measure would not benefit authors of the works whose exploitation is governed by contracts which are already in force, in which the producer retained all the rights. The management of rights over these works could not be transferred to a CMO unless the contract was amended.

Despite the benefits of the Argentine law, it is limited: mandatory collective management only concerns the exploitation of rights within the territory of Argentina. This means that authors are protected for the exploitation of their rights in Argentina. But when it comes to transferring exploitation rights over the work for other countries, the freedom of contract applies, so producers can impose their own conditions and request, for example, the transfer of all rights.

In turn, these legislative differences are detrimental to producers since they must take into account that, although the author has transferred all of their rights to them, the exploitation of the work in Argentina must be authorized by the relevant CMO. This situation may lead to conflict between producers and users, since the users may consider that once they have paid the producer, they do not have to make any further payments to use the work.

10. Second, in addition to exclusive rights, some national legislations, grant the author a mere right to remuneration for the public communication of the work that is non-waivable and subject to mandatory collective management. This is the case in Uruguay, [22] which introduced this right for scriptwriters and directors in December 2019, although the remuneration has not yet been collected.[23] Ecuador also provides for this mere right to remuneration but only for renting the work and for its display in public places with an entry fee.[24] Peruvian law recognizes a mere remuneration right for the transfer of the performance to a different medium, but it appears that it is not being implemented.[25]

[20] The standard contract drafted by Argentores can be consulted here (in Spanish only): https://argentores.org.ar/cine/contrato-tipo-cinematografico/
[21] See the Table on Brazilian legislation that accompanies this study.
[22] It has also been established in other countries in the region such as Colombia and Chile.
[23] Given that the law is recent, AGADU currently only administers this right in relation to authors of a musical work.
[24] Art. 154 paragraphs 5 and 6, Organic Code of Social Economic Knowledge, Creativity and Innovation (COESC). In Ecuador, as well as in Peru, Costa Rica and Brazil, this right is established for producers and audiovisual artists.
[25] In this connection, see part 2: The legal framework of the audiovisual sector in the digital environment.

The non-waivable and mandatory character of this right implies that the transfer of rights by the author to the producer does not affect it. As in the previous case, although the producer has no obligation to pay these royalties, conflictual situations may arise with the users of the work: the contract entered with the producer for the exploitation of the work does not exempt them from paying royalties in exchange for this right in countries where it is recognized.

Furthermore, the mere remuneration right is limited: it is calculated exclusively on the basis of the exploitation of the works in the territory of the State whose legislation establishes it, not in relation to the exploitation of the work internationally.

11. Third, the scope of the presumptions of assignment of rights to the producer varies from one legislation to another. In Uruguay, Costa Rica and Peru, the assignment involves all economic rights over the cinematographic work, while in Ecuador the assignment concerns some of these rights (in particular, those pertaining to reproduction, distribution and public communication), since the exploitation of the work in any other form (e.g. transformation) would require authorization from the authors. This is also the case in Brazil, whose legislation considers the assignment as non-exclusive and is granted for the exploitation of audiovisual works in their main means of exploitation (which implies the need to consider each case separately).[26] It should be noted that these presumptions only come into play in the absence of any agreement providing otherwise, making it more necessary, if possible, for producers to use standardized model contracts to establish a uniform system for the international exploitation of the work.

12. Fourth, all countries examined in this study grant, to a greater or lesser extent, moral rights to all categories of authors of the audiovisual work and establish their inalienable, non-waivable and non-transferable nature. The exception would be Costa Rica, which only affords these rights to the director.[27] The legitimacy to enforce these rights varies from one jurisdiction to another. In some countries, the exercise of these rights is attributed exclusively to the director (Brazil) or jointly with the producer (Brazil, Peru and Uruguay, unless otherwise provided).[28] This condition may pose an insurmountable obstacle in the hypothetical case that a producer and the authors who are not directors wish to assert their moral rights over the audiovisual work as a whole – that is, not in relation to each of their contributions – in multiple States. They could be authorized in some countries, but not in others.

C. INTERNATIONAL EXPLOITATION OF AUDIOVISUAL WORKS AND *LEX LOCI PROTECTIONIS*

13. The legislative differences discussed above do not create problems in such (exceptional) cases in which the work is exploited exclusively in the country of origin. Conflict arises when the work is exported to other countries. In these cases, as it is known, the protection of authors is based on four principles provided for in international treaties:

(a) Minimum standard of protection (art. 5.1 and art. 19 BC, art. 1.1 TRIPS). However, as mentioned, the harmonization of minimum standards established by international treaties is not sufficient to avoid the problems arising from legislative differences.

[26] Art. 81., Part 2: The legal framework of the audiovisual sector in the digital environment.
[27] However, the producer is required to mention all authors of the audiovisual work in the credits, which, although imperfect, constitutes an acknowledgment of their paternity right.
[28] This comparison is taken from Part 2: The legal framework of the audiovisual sector in the digital environment.

(b) The territoriality principle (art. 5.2 BC), according to which intellectual property laws of a specific country only apply to the protection and exploitation of the intellectual work in the territory of said country.

(c) The principle of national treatment (art. 5.1 BC and art. 3.1 TRIPS), which requires contracting States of international conventions to accord to authors of original works from other contracting States the same treatment that it accords to its own nationals.

(d) The principle of independence (art. 5.2 BC), which ensures that the protection of a work is not dependent on the protection it may have in its country of origin.

All of these principles suggest that the conflict of laws rule to be applied when the work is exploited internationally is *lex loci protectionis* or the law of the place for which protection is claimed. As provided for in article 5.2 of the Berne Convention ("*[…] the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.*") and in national and supranational systems of private international law.[29]This conflict of laws rule also implies that when the work is exploited by various States, the law of each State is applicable for the exploitation of the work in its territory.[30]

14. Some States have offered different conflictual solutions to regulate particular issues related to this exploitation. In Belgium, for example, determining the original owner of the intellectual property right is governed by the law most closely linked to the law of the country of origin,[31] a solution which avoids applying multiple laws. Similarly, on more than one occasion, jurisprudence in France[32] and the United States [33] opted for the application of the law of the origin of the work to resolve the same matter. Lastly, article 67 of the Greek Copyright Law stipulates that the applicable legislation is that of the State in which the work is first made lawfully accessible to the public for all matters except the protection of the work.[34]

These solutions benefit the international exploitation of the works in that the person who is considered author in the State of origin does not lose that status when the work is exploited in other countries. Nevertheless, policy coherence issues may arise from the fact that matters closely related to the ownership of a right and its protection are governed by different laws. Likewise, these conflict of law rules create legal uncertainty and increase users' information costs, since the authorship and ownership of the exploited works in a national market would be laid down in the law of origin of each one of them.[35]

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[29] In the European Union, Art. 8.1 R. Rome II

[30]The possibility in certain systems of private international law to file a claim in defense of copyright in a State other than the one where the work is exploited or the information produced, should lead us to consider that art. 5.2 determines as applicable the law of the State *for which* protection is claimed, and not the law of the State *where* protection is claimed. López-Tarruella, A (2013, "Art. 5", n Bercovitz Rodríguez-Cano, R (Coord.), Comentarios al Convenio de Berna, Madrid, Tecnos, pp. 393 ff, esp. 432.

[31] Art. 93 The Code of Private International Law of Belgium: "*Les droits de propriété intellectuelle sont régis par le droit de l'Etat pour le territoire duquel la protection de la propriété est demandée. Toutefois, la détermination du titulaire originaire d'un droit de propriété industrielle est régie par le droit de l'Etat avec lequel l'activité intellectuelle présente les liens les plus étroits. Lorsque l'activité a lieu dans le cadre de relations contractuelles, il est présumé, sauf preuve contraire, que cet Etat est celui dont le droit est applicable à ces relations*".

[32] Judgment of the Court of Cassation 7 April 1998, "SAAB Scania c. Soc. Diesel Tecnic", RIDA, num. 177, p. 255.

[33] "Itar-Tass News Agency vs. Russian Kurier Inc.", 153 F.3d 82.

[34] The text can be consulted here https://www.wipo.int/edocs/lexdocs/laws/en/gr/gr001en.pdf

[35] Fawcett, J / Torremans, J. (2011), *Intellectual Property and Private International Law*, Oxford, OUP, pp. 345 ff.

15. For these reasons, the solution generally accepted worldwide is *lex loci protectionis,* despite the problems it creates. Furthermore, as previously mentioned, article 14.2(a) of the Berne Convention rejects any other solution when determining the law applicable to the original ownership of the audiovisual work: "*ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed*." [36]

16. Undoubtedly, the legislative differences and the application of *lex loci protectionis* means that the protection of authors may be problematic when the work is exploited in a country other than that of its origin. For example, let's consider the case of a Uruguayan scriptwriter of a film that has great commercial success across Latin America. Although the scriptwriter would be considered the author in all of the countries included in this study, he/she will receive a mere remuneration for the exploitation of the work in his/her country of origin, but not for its exploitation in countries such as Peru or Ecuador, where the same right is not recognized.

The opposite case may also occur i.e. an author may be protected or receives more beneficial treatment abroad than in the State of origin of the work. This is owing to the principle of independence: although a Peruvian director does not receive proportional remuneration for exploitation of the work in his/her country, he/she will be entitled to compensation for its exploitation in Uruguay and Argentina. Likewise, a person who grants authorship of the work to the producer in a contract governed by Californian law (United States), will continue being considered author (and therefore will be protected) in Peru, Brazil and Argentina, that is, the States in which the authorship is non-transferrable. In these cases, the principle of national treatment supports the *lex loci protectionis* rule.

However, the legal acknowledgment of the protection of the foreign author in these cases does not, in itself, guarantee its practical effectiveness. In order for authors to receive an amount of money as proportionate remuneration for the exploitation of their work, it is necessary to set up cooperation mechanisms that necessarily involve CMOs. These mechanisms shall be referred to in the last section of the study.

III. RULES FOR THE PROTECTION OF AUTHORS IN CONTRACTS WHEN THE AUDIOVISUAL PRODUCTION IS INTERNATIONAL

17. Legislative differences arising from the territoriality principle do not only concern authors. They also concern producers because the audiovisual production may involve authors based in different States. Furthermore, generally the producer's objective, reflected in the contract, will be to exploit the resulting work in various States. To overcome obstacles arising from the legislative differences, producers use model contracts which standardize the terms and conditions of the production and exploitation of the work, irrespective of the markets where it is produced.[37]

18. In principle, the use of model contracts by producers cannot be criticized. In fact, it should be welcome insofar as it unifies, to a certain extent, the legal system applicable to the

[36] In this respect, as explained by A. González Gozalo, the States of the Berne Union may adopt *lex originis* in their national legislations to determine any type of work except audiovisual works. In the latter case, art. 14.2(a) BC prevails. (González Gozalo (2013), p. 1196).
[37] R. XALABARDER (2018), 20.

international exploitation of the work, thus favouring the emergence of a regional audiovisual market from which many groups may benefit (its own authors, national television channels, end consumers, all persons who work for audiovisual producers etc.), and may culturally enrich the region.[38]

But these contracts could become problematic when they include clauses which undermine the interests of authors and do not guarantee remuneration proportionate to the actual exploitation of the work. Associations representing authors often use the example of "buy-out" clauses. In exchange for a lump-sum remuneration, the author transfers exploitation rights over the work to the producer in any known or unknown form, for the whole world and for the duration of protection. These clauses make it much easier for the producer to exploit the work in different national markets, in any form, and over time, as there is no need to negotiate with the authors again. Nevertheless, authors have reported that these clauses could be unfair: if the work is successful, authors will not benefit even if the success is owing to their creative input.[39] This situation may be especially unfair at present, since digital media offers the possibility to exploit the work internationally, increasing its potential for success, with little added cost.

19. Collective bargaining through trade unions or management entities may help to alleviate these issues. But this requires powerful trade unions representing authors, which is only the case in a handful of common law countries such as the United States.[40] The CMOs may play an important role in this respect, either by negotiating with producers on behalf of the authors, or by supporting authors in such negotiations by promoting model clauses that guarantee adequate protection of their interests. For example, some CMOs provide their clients with model clauses whereby authors reserve certain exclusive rights, the management of which may subsequently be assigned to CMOs, known as "carve-out" clauses. Nevertheless, it appears there are no trade unions, author associations or CMOs in the region with sufficient bargaining power to impose such clauses on producers.

Argentina is an exception. Insofar as the exclusive rights of audiovisual authors are subject to mandatory collective management, production companies must negotiate directly with the CMOs based on model contracts. Nevertheless, as previously mentioned, even in this case, when the production company is foreign or the contract provides for the exploitation of the work abroad, the negotiation takes places between the author and the producer.

20. A second way to avoid prejudice to the author is to establish rules on the assignment of rights to protect the author as the weaker party in these transactions. These rules are common in jurisdictions in the authors' right system; but not in those under the copyright system, whereby it is considered that assignments of rights are governed by the freedom of contract principle and general contract rules.[41]

All jurisdictions covered in this study belong to the copyright system, although there are some differences in their regulations. There are laws that require the contract to expressly mention each of the forms of exploitation transferred[42] (reserving for the author those that are not), or that

[38] Part 2: The legal framework of the audiovisual sector in the digital environment.
[39] XALABARDER, R. (2018), p. 3.
[40] XALABARDER, R. (2018), p. 13.
[41] Von Lewinsky, S. (2008), *International Copyright and Policy*, OUP, pars. 3.70-3.72.
[42] Art. 89 of the Legislative Decree 822 of Peru; arts 167 and 168 of the COESC of Ecuador.

prohibit the transfer of rights over future works,[43]or over forms of exploitation that do not exist at the time the contract is signed.[44] In Uruguayan Law, article 32 indicates that the producer does not exploit the work, the author or his/her successors may require that the producer do so, and if after one year the producer does not comply, the author will recover his/her rights.[45] Other laws establish that the term of the assignment of rights is limited in time: 10 years according to Brazilian law, [46] or 15 following the death of the author under Uruguayan law.[47]

21. The problem with these rules is that the protection afforded to the author falls apart from the moment the contract of the audiovisual production takes on an international character. Even if these rules are mandatory (that is, they cannot be derogated by contract), the introduction of a foreign choice of law clause will mean these rules are not applied. Instead, the rules for protection of the author of the chosen law, if any, will be applied. If that law belongs to the copyright system, the protection simply disappears.

22. To ensure that the rules for protection of the author cannot be evaded through the choice of a foreign law, States may choose to make this regulation internationally mandatory. This means, it must be expressly established that such rules safeguard an interest that is fundamental to the jurisdiction in question and are therefore applicable even if the parties have chosen a foreign law.[48]

An example of this can be found in article 32 of the Uruguayan law mentioned above, which stipulates the public order aspect of the provision.[49] However, the provision does not establish its spatial scope of application, that is, to which international contracts it applies. Although this scope may be implicitly deduced from its purpose and content, it is preferable to stipulate it explicitly, to avoid legal uncertainty arising from the difficulty in determining the applicable rule in specific cases.[50]

For example, section 32(a) of the German Copyright Act regulates the author's right to seek judicial review of the lump-sum remuneration provided for in the contract if it does not correspond to the actual exploitation of the work. Section 32(b) stipulates the mandatory application of this provision if, in the absence of a choice of law, the law applicable to the contract is German law or, otherwise, if the contract refers to acts of exploitation to be carried out in the territory of Germany.

[43] Art. 167 COESC. Art. 51 of Law No. 9.610/98 of Brazil stipulates that the term of the assignment of the author's rights in future works may not exceed five years.
[44] Art. 167. II COESC.
[45] Art. 32.
[46] Art. 81.1
[47] Art. 33.
[48] The concept of international rule can be found in art. 9.1 of Regulation 593/2008 on the law applicable to contractual obligations (Rome I): "*Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract* […]". Also see art. 2543 of the Civil and Commercial Code of Argentina.
[49] "This provision is subject to public order, and the acquirer may only avoid it for reasons of force majeure or fortuitous event not attributable to him."
[50] This could be the case, for example, in art.47 of the Intellectual Property Law of Spain which regulates the action for review of unfair regulation. In view of the purpose of the rule (to protect the interests of authors) and the fact that art. 55 establishes the non-waivable nature of this power, it can be argued that it constitutes a mandatory law that would be applicable even when the law applicable to the contract is foreign. Hernández Rodríguez, A (2002), *Los contratos de edición en Derecho internacional privado español*, Granada, Comares, pp. 101 ff.

23. In any event, making the rules for the protection of authors internationally mandatory does not in itself ensure their effectiveness. First, it requires authors to claim their rights before a court of law, which entails significant costs which they normally cannot afford on their own. They should therefore be assisted by CMOs or professional associations.

Second, this court of law would usually be foreign. In addition to a choice of law clause, these contracts usually include a choice of court agreement, which normally assigns jurisdiction to those in the producer's State of domicile.[51] In this case, it is important to bear in mind that the rules protecting the author are considered mandatory laws by the State that enacts them, but may not be mandatory for the State before whose courts the claim must be brought. As one might expect, if the designated courts are in a State under the copyright system, said courts will have trouble making internationally mandatory rules of a third State prevail over the regulation provided by the law designated by the contract.

In principle, this also arises in cases where the model contract includes an arbitration clause: generally, the arbitrators shall give precedence to the autonomy of the will of the parties, expressed in the contract. Only in cases where there is a risk of making an award that is considered void or not recognized in the State where it is to be enforced could the arbitrators take these rules into consideration.[52]

24. The only way to ensure the enforcement of these rules is by establishing a jurisdiction rule that cannot be derogated by contract whereby the author is authorized to bring a claim before the courts of the country of origin of the work. To the best of our knowledge, no such rule exists in any system of private international law. It does not seem to be the right solution as it would contravene the principle of freedom of contract, may be seen by producers as overprotection of national authors, and may discourage them from starting audiovisual projects in the country that establishes it.

25. The final reason why it is not considered appropriate to use internationally mandatory rules is that their proliferation would hinder the international exploitation of the works. Since they cannot be derogated by contract, an audiovisual producer wishing to exploit the work internationally would not be able to harmonize the exploitation system by contract, as he/she would need to take into consideration the existing policy laws in each of the States in which the work will be exploited. The increase in information costs and resulting legal uncertainty could discourage producers from exploiting their productions in a regional market. The advantages of creating such a market would therefore be lost.

IV. MEASURES FOR THE PROTECTION OF FOREIGN AUTHORS OF AUDIOVISUAL WORKS

26. Having reviewed the reasons why the author may not be protected when the audiovisual work is exploited on an international level, this final section aims to review the

[51] In some cases, major production companies operate in the region through subsidiaries established in certain States. In these cases, contracts normally grant jurisdiction to the courts of the State where the subsidiary is established; or, as explained below, arbitration clauses are established.

[52] That is because, considering that the rules of protection for authors form part of the content of a jurisdiction's public policy, the arbitral award may be voidable on the ground of annulment relating to conflict with public policy; and may not be enforceable in a foreign country on the ground of refusal of conflict with public policy, as set out in Article VII of the 1958 New York Convention.

measures which are being implemented on a national level to alleviate this problem. These measures involve cooperation between CMOs from different countries, and legislative endorsement, in some cases, of a mere right to remuneration for the exploitation of the audiovisual work.

1. THE ROLE OF COLLECTIVE MANAGEMENT ORGANIZATIONS

27. By and large, collective management organizations play a fundamental role in ensuring the protection of authors.[53] In particular, they are essential in ensuring the author is remunerated for the exploitation of the work in foreign countries whose legislations provide for this right.

In Latin America, these institutions are deeply rooted in the music industry. This is not the case in the audiovisual industry. Except for Argentina, where ARGENTORES (scriptwriters) and DAC (directors) have been well-established for some time, management organizations for authors of audiovisual works have appeared only recently. This is the case for AGADU in Uruguay; UNIARTE in Ecuador; and GEDAR (scriptwriters), MUSIMAGEM (composers), DBCA (directors) and ABCA (animated films) in Brazil. Only two of the countries under review (Peru and Costa Rica) have no CMOs for audiovisual works, although it cannot be ruled out that they could be set up in future.

Experience shows that the emergence of these CMOs depends largely on the development of the national audiovisual market, and the generation of a critical mass of persons who decide to join them to defend their rights. The specific features of each national market also mean that these CMOs may exclusively represent authors or include other right holders. This is the case in Ecuador, where UNIARTE represents authors and audiovisual performers, and may also be the case in other countries.[54]

28. The formation of these CMOs is not only driven by this critical mass made up of national audiovisual authors. Their formation is also thanks to interest from foreign CMOs, as it makes it easier to protect the interests of their clients when the audiovisual work is exploited abroad. It is therefore not surprising that it was foreign CMOs that drove the creation of these entities in other States. This has been the case in the past in relation to the management of other rights with the Spanish companies EGEDA or SGAE.

These common interests also account for the emergence of supranational associations such as the Latin American Audiovisual Authors Societies Federation (FEESAL), [55] which is the driving force behind the creation of these CMOs in countries where they do not yet exist. The creation of these international bodies should be welcomed as it promotes cooperation between CMOs, ultimately benefiting the authors.

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[53] Xalabarder, R. (2020), "*La remuneración equitativa de los autores audiovisuales mediante un derecho de remuneración irrenunciable de gestión colectiva*", in C. Saiz García / R. Evangelio Llorca, *Propiedad intelectual y mercado único digital*, Valencia, Tirant lo Blanch, pp. 475-510, esp. 489.

[54] Peru is an example of how the market affects the constitution of CMOs. The general rule has long been that directors set up their own production companies to produce films. Therefore, both right holders were the same persons, meaning it was not necessary to establish two CMOs. For a time, EGEDA (producers) was also intended to include audiovisual authors, although this was eventually abandoned.

[55] Information available at https://www.fesaal.org/?lang=en

29. Collaboration between CMOs is conveyed very simply through reciprocal representation agreements. To the best of our knowledge, these agreements have a similar structure in that they are based on a model contract from the International Confederation of Societies of Authors and Composers (CISAC) which, although it is no longer sponsored by CISAC, is still used in the region.

30. Establishing a CMO in any State is an advantage for authors from that country, even if the national legislation does not grant them adequate protection. This is because the cooperation between CMOs will enable these authors to receive remuneration for the exploitation of their works in foreign countries. For example, scriptwriters represented by GEDAR still do not receive remuneration for the exploitation of their works in Brazil. Nevertheless, thanks to the reciprocal representation agreement with DAC, they do receive remuneration for the exploitation of their works in Argentina. Likewise, Brazilian authors represented by GEDAR are entitled to a mere right to remuneration under Uruguayan law thanks to the agreement that this organization could reach with AGADU.

These examples show: (a) the respect that States and CMOs accord to the national treatment principle, insofar as they distribute royalties to authors who are nationals of foreign countries that do not grant loyalties to authors of the CMO's nationality; (b) the effectiveness of the principle of independence laid down in the Berne Convention as, thanks to the cooperation between these entities, audiovisual authors may be afforded greater protection in a foreign country than in their own country.

31. Reciprocal representation agreements make it possible to identify the authors represented by each CMO, but it is for each CMO to determine how to calculate the use rate of each author's works in the territory of each State.

This is a difficult task in relation to traditional forms of exploitation (television, exhibition in cinemas), in that trust one must rely on the declarations provided by operators, without the foolproof mechanisms to verify the figures presented. Nevertheless, the digitalization of audiovisual works and the mainstreaming of their exploitation via electronic means facilitates this calculation and its monitoring by CMOs and competent authorities.[56] Lastly, this benefits authors in that they will receive remuneration which more accurately reflects the actual exploitation of their works, and more quickly.

This greater ease in calculating the use of the works in a digital environment, together with the increase in multi-territorial exploitation of audiovisual works, are two strong arguments for CMOs to strengthen their partnership schemes, enabling systems to centralize the collective management of rights at the regional level. In that respect, it is advisable to explore the possibility of implementing a system, similar to the one in the music industry with LATINAUTOR[57], whereby: (a) by means of a one-stop shop, users could jointly negotiate the exploitation of their works for several countries, if they so wished; (b) it would be possible to calculate, in an efficient manner and using the most sophisticated computer systems, the use made of the work by each user in each State and to calculate the royalty corresponding regionally to each author. The system is based on the centralization of the negotiation, but the licenses to be granted remained national

[56] In that regard, please see Part 5: The identification and use of metadata in audiovisual works.
[57] De Freitas, E. (2020), "Latinautor. Los licenciamientos regionales. El rol de las entidades de gestión colectiva manteniendo su jurisdicción en el territorial nacional" (Latinautor. Regional, A. Díez Alfonso (dir.) *Cuadernos jurídicos: Instituto de Derecho de Autor 15 º aniversario*, pp. 223-227.

and are issued by each CMO. The idea is not to adopt a multi-territorial licensing system like that in the European Union.[58]

Adopting this type of centralized management system would favour the emergence of a regional audiovisual market, since those users who so wish could negotiate in a single place the licenses needed for the exploitation of the work in several national markets. In turn, this would benefit authors as the CMOs would have access to computer systems, to which many of them would find it difficult to access individually, to efficiently calculate the use of the works and the proportionate remuneration that would correspond to each of them for each country.

2. THE LEGAL ENDORSEMENT OF A MERE RIGHT TO REMUNERATION IN CERTAIN NATIONAL LEGISLATIONS

32. Despite the benefits arising from the cooperation between CMOs, their limitations cannot go unnoticed in States that do not provide by law for equitable remuneration of national or foreign audiovisual authors for the exploitation of the audiovisual work in their territories.

This situation is increasingly less common. In view of the inefficiency of national contract standards to protect authors, many countries have chosen to introduce a mere right to remuneration for authors of audiovisual works. The most recent example is Uruguay which, as mentioned above, introduced this right in 2019. Among the jurisdictions covered in this study, it is the only one where it is regulated on a general basis. However, it also exists in other legislations in the region, such as Colombia,[59] Mexico,[60] Chile,[61] as well as in Europe, such as Spain.[62] Therefore, in other countries covered in this study, such as Peru and Ecuador, the right is provided for artists and performers.

It cannot be ruled out that, in coming years, the maturity of national audiovisual markets, together with the impetus from national authors of audiovisual works, their representative associations and CMOs, will lead to the introduction of this right in other legislations in the region.

33. In general, this right is a mere right to remuneration (non-exclusive), that the author of the audiovisual work enjoys, during the period of protection of the audiovisual work, for any act of exploitation of it. It is non-waivable and non-transferable and is subject to obligatory collective management.[63] The persons obliged to remedy it are the users of the works.

34. The introduction of this right has significant advantages for authors: [64]

(a) The author enjoys this right irrespective of the content of the contract with the producer (it is unalienable) and irrespective of the lump sum or proportionate remuneration that may have been agreed. In that respect, the author's weaker bargaining position is no longer a problem.

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[58] For further information on the European system's adaptation to the reality of Latin America, please see Olarte Collazos, J (2020), *Licencias multiterritoriales en la gestión colectiva del derecho de autor y los derechos conexos: Perspectiva desde la Unión Europea y la Comunidad Andina de las Naciones,* Madrid, Instituto Autor.
[59] Art. 98 of Law No. 23,1982
[60] Art. 26 bis of the Federal Law on Copyright
[61] Law 20.959 of 2016
[62] Art. 90 of the Intellectual Property Law
[63] Among others, see Xalabarder, R. (2018); Mateo Orobia, M (2015), *Derecho de remuneración de autor para la explotación en línea de obras audiovisuales y el sistema español como la mejor alternativa*, Granada, Comares, 2015.
[64] Xalabarder, R. (2020), p. 494

(b) Management by CMOs makes things much easier for authors, as it is these entities that are responsible for their management. Furthermore, the right guarantees a constant and direct flow of remuneration for authors throughout the life of a work, provided that income is generated by its exploitation.

(c) It is a right enjoyed by authors of audiovisual works created after its introduction into legislation and by authors of already existing works. It is not necessary to amend contracts governing the exploitation of already existing works for its authors enjoy this right.

35. In principle, the legal endorsement of this mere right to remuneration also has the advantage that it does not require the amendment of existing or future audiovisual production contracts. That is, its statutory introduction does not require producers to amend their contracts, nor does it require authors to agree to reserve rights. Authors' remuneration remains guaranteed without the need to review or renegotiate production contracts.

However, seeing that the royalty must be paid by users of the works, it stands to reason that there will be changes in the exploitation licenses concluded between users and producers. It is also understandable that users will attempt to negotiate a reduction in the price of the license, justified by the need to address the mere right to remuneration.[65] The potential amendments to be introduced in exploitation licenses could ultimately have repercussions for the authors, who may see a reduction in the lump-sum amounts that producers are obliged to pay them prior to the production of the work as they will share in the income derived from its commercial exploitation.

36. Lastly, introducing this right in different ways in different jurisdictions may create barriers to the international exploitation of audiovisual works, and as a result, hinder the emergence of a regional audiovisual market with the benefits that it would bring.

This problem can be solved if the mere right to renumeration is introduced by way of an international standard (as was the case in the Beijing Treaty for audiovisual performers)[66] or regional standard (as attempted in the European Union). [67] As the right would be established by all countries in the region, the legal system for the exploitation of the work would not vary from one State to another.[68] But creating this supranational standard requires support from the community of audiovisual authors[69] and political will. In that respect, it is worth mentioning that Decision 351 of the Andean Community has not undergone changes since its adoption, and that member countries of the Andean Community have developed this basic standard in different ways: while Colombia has acknowledged this right, Ecuador has done so in a limited manner, while Peru and Bolivia are yet to establish standards of this kind in their national legislations. It is also noteworthy that, despite the large number of bilateral agreements entered by Latin American countries, none of them has addressed the issue. This all suggests that such an international or

[65] The explanation from R. Xalabarder is not convincing, according to which the introduction of the mere right to remuneration also benefits licensees. Remuneration of authors is not an added cost for the licensee, but a partial remuneration through the license of exclusive rights obtained by the producer. As R. Xalabarder points out, whether or not exclusive rights license amounts are deducted depends on the elasticity of the market as well as the agreement between the producer and the operator, XALABARDER, R. (2020), p. 499.

[66] Art. 12.3

[67] In Europe, Article 18 of Directive 2019/790 requires Member States to ensure that "where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration". Paragraph 2 however, grants Member States the freedom to achieve this objective. In that connection, see C. SAIZ (2020), "El principio de remuneración adecuada y proporcionada en la Directiva 2019/790/UE", in C. Saiz García / R. Evangelio Llorca, *Propiedad intelectual y mercado único digital*, Valencia, Tirant lo Blanch, pp. 367 ss.

[68] Part 2: The legal framework of the audiovisual sector in the digital environment.

[69] In this regard, reference should be made to the Mexico Manifesto endorsed by Writers & Directors WorldWide. Available at http://www.writersanddirectorsworldwide.org/mexico-manifesto/

regional standard guaranteeing a harmonized regulation of a mere right to remuneration is, for the time being, hard to achieve.

V. CONCLUSIONS

37. The differences between national copyright regulations means that the author of the audiovisual work is not adequately remunerated for the exploitation of the work in different countries other than that of their country of origin.

This issue is growing owing to the advent of digital platforms, as the scope of exploitation of works is regional, or even global. It is reasonable for these platforms to use standard contracts to bring together the legal system of the production and exploitation of audiovisual works, and thereby, avoid problems that arise from these legislative differences. Nevertheless, these contracts may include clauses that weaken the already inadequate protection of authors when the work is exploited internationally.

38. It is difficult to find regulatory solutions to this issue which satisfy all the interests at stake. On the one hand, national rules for the protection of authors in contracts are inefficient when the production and exploitation of the audiovisual work takes on an international character.

On the other hand, the introduction of a mere right to remuneration in national legislations may benefit authors; but it may require producers to reconsider relations with licensees and make it difficult to exploit the works internationally by creating more legislative differences. This may hinder the emergence of regional audiovisual market. A possible solution to this problem could be to adopt a standard harmonized at the regional or international level, which, at present does not seem likely.

39. Lastly, it is important to note the key role played by CMOs in this scenario involving legislative differences and conflicting interests, to ensure, to the extent possible, that authors have access to an equative remuneration for the international exploitation of their audiovisual works.

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