

Introduction to the Comparative Entertainment Law

Dr. István Harkai

Institute of Comparative Law and Legal Theory

Time required for reading, including the .ppt files and solving the relevant tasks: 45 minutes

I. Introduction

During the course the participants will be familiarized with the several actors of the entertainment industry (performing artists, music publishers, producers of cinematographic works, radio and television organizations, authors of creative audiovisual softwares) and all the international and European legal instruments in the field of copyright and related rights as well the right of publicity. The theoretical frameworks will be filled with practical experience through international and European court cases with the relevant international and European contractual practices with special regard to the different license agreements.

After completing the course the participants should be able to separate the different actors and their legal and economic interest of the creative industry, the overlaps between works of the copyright holders and other achievement created by the related rights holders, and last but not least the legal provisions regarding the different actors of the creative industry.

1. Performers

Performing artist reproduces, makes perceptible, and creatively disseminates authors' works. Their achievement, the performance itself, is subject to protection both under international and European copyright law. Their creative and economic investment might be in conflict with the copyright holder of the used work. It is called the *accumulation of economic rights*.

This particular overlap might easily be detected in case of dance. A dance can be based on a choreography or improvisation. In the first case the choreographer herself chooses the way of development of the choreography that is going to be put on the stage by the performing dancer, who also put his creative effort and personal interpretation into the piece. In the position of the choreographer the performing dancer and the directing choreographer might merge, so that the dancer himself can easily be considered the copyright holder of the choreography, if his input is creative enough. Performing artist can not only be a dancer but a singer or an actor, whose performance makes the author's work perceptible to the public.

As the performing artists also put their creative and usually economic effort into the creation of a performance, the international community granted them some specific recognition regarding their economic and moral interests. The economic rights of performers, which are enlisted in an exhaustive table below, covers the most typical forms of uses. The first step in exploiting the performance is to fix an unfixed performance. If the performance is fixed, copies have to be made, so the interest of making copies is protected by the right of reproduction. In the next phase, the copies have to be disseminated to the public, which can take place as a hard copy in a physical format, or as a digital copy. The later type of copy can be disseminated by exercising the right of making available to the public, which falls under

the scope of the broadly defined communication to the public right. This specific right is relevant in such ways of dissemination, as the broadcast or communication to the public by wire. These type of non-copy uses does not necessary fall under the scope of making available. These acts are usually carried out by radio stations or television organizations.

2. Expression of Folklore in the International Copyright Regime

Some subject matters used by the creative industry are excluded from the circle of protection. Expression of folklore is such a controversial field of intellectual property. On one hand it is beyond doubt that every expression coming from a different group of indigenous people living in one particular geographical region constitutes an inexhaustible source of elements which later can be exploited by authors and other related right holders. On the other hand, one of the essential elements of copyright protection is that there should be an identifiable connection between the author and its work. In case of folklore it is almost impossible to identify the original resource of one given piece of work, not to mention the fact that elements of folklore descend from generation to generation.

In the international copyright literature folklore known as a traditional culture, intangible cultural heritage of indigenous people, which can be divided into three groups: genetic resource, traditional knowledge, expression of folklore. From time to time, due to the initiation of typically former colonial countries, the international legislator was about to adopt a proper protection for folklore.¹ These initiations haven't led to any significant result so far, due to the fact that the main problem with defining the expressions of folklore as copyright protected subject matters is that the author is unidentifiable, unknown, therefore there is no one who could be held as author of the given work. These subject matters developed for hundreds of years and inherited from generation to generation. The basic elements which are required to be fulfilled for the sake of protection are missing in case of the expression of folklore.

Tests, questions and selected case law:

Performers in the International and European Copyright Regime

1. Which international treaties and conventions regulate the rights of performers?
2. Name at least three economic rights granted to performers in the InfoSoc Directive!
3. Is it possible that a performance might get copyright protection? If yes how?
4. What is the difference between limitations and exceptions in case of copyright and related rights?
5. Why fixation is important in case of performances?
6. What is the relation between the Rome Convention and the WPPT?
7. Can an unfixed performance be broadcasted to the public? Does it require authorization of the rightholder?
8. Why folklore cannot be protected?
9. How can someone who interprets expression of folklore be protected?
10. Please describe the steps taken by the international community in the protection of folklore!

Selected case law:

Holland v. Vivian Van Damn Productions Ltd. [1936–45] MacG. Cop. Cas. 69 (Ch. D.)

¹ London, 1960; Brazzaville, 1963; Stockholm, 1967; Tunis Model Law of 1976; 1982 Model Provisions Against Illicit Exploitation; UNESCO Recommendation, 1989; WIPO-Intergovernmental Committee, 2015.

Keller v Electronic Arts, No. 10-15387, 2013 WL 3928293 (C.A.9), (July 31, 2013).
Hart v Electronic Arts, No.: 09-cv-5990 (FLW)
SABAM v. Scarlet C-70/10
Promusicae v. Telefónica C-275/06
C-265/19. Recorded Artists Actors Performers Ltd v. Phonographic Performance (Ireland) Ltd., Minister for Jobs, Enterprises and Innovation, Ireland, Attorney General.

Recommended readings:

1. Megan Richardson - Sam Ricketson (Ed.): Research Handbook on Intellectual Property in Media and Entertainment, Edward Elgar, Cheltenham, 2017.
2. Ruth Towse - Christian Handke (Ed.): Handbook on the Digital Creative Economy, Edward Elgar, Cheltenham, 2013.
3. Pascal Kamina: Film Copyright in the European Union, Second Edition, Cambridge University Press, Cambridge, 2016.
4. Ruth Towse (Ed.): Copyright in the Cultural Industries, Edward Elgar, Cheltenham, 2002.

Economic Rights of Performers in the International and European Copyright Regime:

	Rome Convention ²	TRIPS Agreement ³	WPPT ⁴	Beijing Treaty ⁵	2001/29/EC InfoSoc Directive	2006/115/EC Rental Directive	98/83/EEC Satellite Directive	2011/77/EU Term Directive
Fixation of unfixed performance	Art. 7.1. (a)-(c)	Art. 14.1.	Art. 6. (ii)	Art. 6. (ii)	Art. 2	Art. 7.1.		
Reproduction of a fixation of performance	Art. 7.1. (a)-(c)	Art. 14.1.	Art. 7.	Art. 7.	Art. 2.			
Broadcast./Comm. to the Public	Art. 7.1. (a)-(c)	Art. 14.5.	Art. 6. (i); Art. 10.	Art. 6. (i); Art. 10-11.	Art. 3.	Art. 8.1.; 9.1.	Art. 4.1.	
Righth of Distribution			Art. 8.	Art. 8.		Art. 9.		
Right of Rental			Art. 9.	Art. 9.		Art. 3.1.		
Limitations and Exceptions	Art. 15.		Art. 16.	Art. 13.	Art. 5.1. a)-b); Art. 5.2. a)-m)			
Term of Protection	20 years – Art. 14.		50 years – Art. 17.					50 years (1)

This teaching material has been made at the University of Szeged, and supported by the European Union by the project nr. EFOP-3.6.2-16-2017-00007, titled Aspects on the development of intelligent, sustainable and inclusive society: social, technological, innovation networks in employment and digital economy. The project has been supported by the European Union, co-financed by the European Social Fund and the budget of Hungary.



² International Convention for the Protection of Performers, Producers and Broadcasting Organizations. Rome, 1961.

³ Agreement on Trade-Related Aspects of Intellectual Property Rights.

⁴ WIPO Performance and Phonograms Treaty.

⁵ Beijing Treaty on Audio-Visual Performances. Beijing, 2012.

