

Introduction to the Comparative Entertainment Law

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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. Problems caused by digital technology with regard to performers

Digital technology means the *creative destruction* in the field of copyright and related rights. Digital technology triggered the development of new dissemination models, such as digital marketplaces, where consumers can “buy” protected contents. This is a segment of copyright law and related rights which is going to be discussed in details in later chapters, but now, we have to analyze another digital technology which might cause a threat to the performing artists. This technology is the well-known motion capture technology, that is used on a wide scale in the contemporary entertainment industry. Motion pictures produced by film producers rely on digital technologies not only to create worlds which are only existent in the fantasy or imagination of the creators, but they also create characters, which are personalized by flash and blood actors, but on the screen the actor behind the digital avatar cannot be seen. The contribution of the performer is still significant, but only in the sense of his/her movements, gestures, or other specific features, which might not be recognized by an average consumer. The technology can take over the place of the actors. A vivid example to this is the well-known Star Wars universe, where characters were revived in recent episodes. The actors of those characters, on the other hand, have already passed away. But their lookalike is still exploited by the producers of the motion picture.

Digital technology is also used on a wide scale in computer games, where in-game-videos are made to entertain more the gamers. In these in-game-videos the scenes were played with performing actors, so the relevance of related rights is high. As actors who are playing in digital creations are performers, the basic elements of the law on performers, as it was introduced in the previous chapter, is also relevant.

2. 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.

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 right holder?
8. How can digital technology affect the role of performers in the motion picture industry?
9. Is it possible that the creators of that specific software that visualize a digital character take over the place of the performing artists as performers?

Selected case law:

Holland v. Vivian Van Damn Productions Ltd. [1936–45] MacG. Cop. Cas. 69 (Ch. D.)
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 ¹ | TRIPS Agreement ² | WPPT ³ | Beijing Treaty ⁴ | 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) |

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¹ International Convention for the Protection of Performers, Producers and Broadcasting Organizations. Rome, 1961.

² Agreement on Trade-Related Aspects of Intellectual Property Rights.

³ WIPO Performance and Phonograms Treaty.

⁴ Beijing Treaty on Audio-Visual Performances. Beijing, 2012.

