Handbook on Copyright and
Cinematographic and Audiovisual Contracts
CONTENTS

INTRODUCTION ................................................................................................................................................ 4

I. AUTHOR'S RIGHTS AND RELATED RIGHTS .......................................................................................... 5

1. The subject matter of protection and the right holders ................................................................................. 6
   1.1 The subject matter of protection ..................................................................................................................... 6
   1.2 The right holders in cinematographic and audiovisual works ........................................................ 15
       1.2.1 Authors of a film or an audiovisual work ......................................................................................... 16
       1.2.2 Other right holders .................................................................................................................................... 17
   1.3 Beneficiaries of protection (international protection) ....................................................................... 18
   1.4 Term of protection ............................................................................................................................................. 19
       1.4.1. Term of protection of copyright ................................................................................................... 19
       1.4.2 Term of protection of rights in performances ................................................................................ 21

2. Rights in works and performances ..................................................................................................................... 21
   2.1. Overview ......................................................................................................................................................... 21
   2.2. Economic rights ............................................................................................................................................ 22
   2.3. Moral rights .................................................................................................................................................... 24
       2.3.1. Authorship right ........................................................................................................................................ 24
       2.3.2. Disclosure right .......................................................................................................................................... 25
       2.3.3. The right to repent or withdraw a work .......................................................................................... 25
       2.3.4. Right to the respect of the integrity of an author's work .......................................................... 25
   2.4. Exceptions to rights held by authors and holders of related rights ..................................................... 21

II. TRANSMISSION OF AUTHOR'S RIGHTS AND RELATED RIGHTS .............................................. 32

Introduction .......................................................................................................................................................... 33

1. Principles Applicable to all Cinematographic and Audiovisual Contracts ............................................. 36
   1.1. The "Contract" Principle ................................................................................................................................. 37
   1.2. The "Object" of the contract .......................................................................................................................... 37
   1.3. Contract Formation ........................................................................................................................................... 39
       1.3.1. Principles ...................................................................................................................................................... 39
       1.3.2. How to sign a contract without being bound ................................................................................. 41
       1.3.3. Presumption of assignment of rights ................................................................................................ 44
   1.4. Revenue Collection and Rights Management ......................................................................................... 45
   1.5. Choosing the Applicable Law ........................................................................................................................ 48
   1.6. Treatment of Disputes Arising during the Performance of the Agreement .............................................. 49
       2.1. The Preliminary Recitals ................................................................................................................................ 53
       2.2. Characteristics of the sale, transfer or licensing of rights ........................................................................ 55
       2.3. Rights transferred or licensed ...................................................................................................................... 56
       2.4. Compensation .................................................................................................................................................. 62
2.4.1. Form of Compensation ............................................................................................................................ 62
2.4.2. Basis of calculation ................................................................................................................................... 63
2.4.3. Minimum guarantee amount ................................................................................................................ 63
2.5. Rewriting the script .......................................................................................................................................... 70
2.6. Deadline for producing the film ................................................................................................................... 71
2.7. Financial Reporting ........................................................................................................................................... 73
2.8. Credit Titles .......................................................................................................................................................... 74
2.9. Representations and Warranties ................................................................................................................ 74
2.10. Penalty for Non-Performance of the Agreement .................................................................................... 76
2.11. Applicable Law and Dispute Settlement Methods .................................................................................. 78
2.12. The Option Clause ........................................................................................................................................... 79
3. Provisions Specific to Cinematographic and Audiovisual Contracts ............................................................ 80

III. Cooperation between producers ........................................................................................................................ 81
Introduction .......................................................................................................................................................... 82
Advantages of co-productions .............................................................................................................................. 82
1. What is a co-production? ........................................................................................................................................ 83
2. The co-production agreement ........................................................................................................................... 85
   2.1. Overview ............................................................................................................................................................... 85
   2.2. Creating joint property .................................................................................................................................... 87
   2.3. Termination of the agreement during the development phase .............................................................. 89
   2.4. Fulfillment of the obligation to make the financial contributions promised ........................................... 93
   2.5. Precautions regarding the legal qualification of the agreement .............................................................. 95
   2.6. Termination clause ............................................................................................................................................... 96
   2.7. Governing law and settlement of disputes ............................................................................................... 98
INTRODUCTION

This handbook is a contribution towards providing legal assistance in accordance with the strategy behind the ACPFilms support programme. It seeks to provide cinema and audiovisual professionals from ACP countries, as well as their legal advisors, with basic, easy-to-understand information on copyright as well as on contractual agreements in the field of cinema and audiovisual works.

This handbook does not claim to be exhaustive given the extreme complexity of the topic dealt with. Moreover, this handbook is intended for professionals from 79 ACP countries and thus cannot examine the specific features of each of these countries' legal systems. The content in this handbook is therefore based on international treaties and the two main legal systems, of French and Anglo-Saxon origin, which have inspired many different countries' legislations.

Together with this handbook, a customized legal assistance service is available enabling professionals to obtain, directly from the author who is a specialized lawyer practicing in Brussels, legal opinions and advice on matters not covered herein, as well as assistance in drawing up contractual agreements.

With its tree-structured design, this handbook is not intended to be a static tool. It will be further expanded and enriched, as and when customized legal assistance develops, by adding real-life cases examined. The cases will be presented anonymously and in all impartiality, without any personal information disclosed.

It must be recalled that neither the handbook, nor the customized legal assistance provided can replace the assistance that national lawyers may provide in each country. Nevertheless, this handbook can be a supplement to such legal assistance within the framework of a specialized international approach.
I. AUTHORS' RIGHTS AND RELATED RIGHTS
1. THE SUBJECT MATTER OF PROTECTION AND THE RIGHT HOLDERS

1.1 THE SUBJECT MATTER OF PROTECTION

Copyright law protects creative works, as well as certain performances of such works, such as the jobs done by performers, producers of phonograms or films and broadcasters.

- Creative works include, in particular, works of literature, music, graphic art, fine art, photography, cinematography, architecture, choreography, etc.

- The service performed by a performing artist or actor consists of interpreting or performing the work of an author or artist: this is the case for a pianist who plays a piece of music, an actor who reads the lines of a script, a dancer who performs a choreographed work, etc.

- The service performed by the producer consists of ensuring the recording of the performance of the work on a given medium (disk, film, magnetic tape, etc.);

- The service performed by the broadcaster consists of broadcasting a signal transmitting a radio or television program (program composed of musical and literary works for a radio broadcast, audiovisual works for a television broadcast).

Although the creation, performance, recording and broadcasting of works mean the same thing everywhere on the technical level, this is not true for the way they are defined on the legal level.

According to the French legal tradition of "authors' rights", only "creative works" are considered as "works" which may be protected under this system of "authors' rights". The services performed by performing artists and actors, producers or broadcasters are not considered to be works falling within this category protected by authors' rights and are protected via rights "related" to authors' rights, known also as "neighbouring" rights.

According to the Anglo-American system of "copyright", the principle of "related or neighbouring rights" does not exist and the definition of a "work" is extended to cover
certain performances (broadcasts are considered "works"), whereas other services performed (given by performing artists and producers) are protected via "rights in performances".

Throughout this publication, the term "work(s)" shall refer exclusively to "creative works" as understood according to French legal tradition, whereas the term "performance(s)" shall refer to other "ventures" protected outside of the creative work itself. For the sake of clarity, the term "related rights" used in the TRIPS Agreement has been preferred over the concepts of "neighbouring rights" or "rights in performances (of a work)", in order to refer to these rights involved in services performed regardless of the legal system applicable. The term "copyright" shall be used to designate the legal protection of works in the Anglo-American conception as well as in the French conception.

**What is a copyright work?**

As seen above, services performed may be something quite easy to define, but on the other hand, it is very difficult to define a “copyright work” which means a work in which copyright subsists.

It should be noted immediately that copyright does not protect only works of art, but "literary and artistic" works, known as "creative works".

This means that copyright protects not only artwork, but other creative works including scientific papers (but not a scientific invention which is protected via patent law) and speeches, pleadings in court, etc.

Therefore, a work need not necessarily have artistic value to be protected under laws on copyright.

**Why is it important to know whether you are dealing with a work which is protected?**

Copyright laws grant authors (and the author's assigns or beneficiaries) a monopoly over the exploitation of their works. The agreement of the author is thus required before a third party uses a protected work in any way (for example, if the work is reproduced in a
photograph or a film). If such agreement is not obtained, this third party would be guilty of infringement of copyright which is punishable by law.

On the other hand, works which are not protectable and works which are not longer protected (due to expiration of the term of protection) may generally be used freely by third parties when they are freely accessible.

Example: the façade of a building is a copyright work if it is original. Therefore, no reproduction of the façade may be made without the agreement of the author or the author's assign, unless an exception has been provided for by law. However, if the façade of a building is not original (and is thus not protected) or if the authors' rights have lapsed, anyone can make a reproduction of the façade without the author's agreement being required.

How can you know whether you are dealing with a protected work or not?

The main difficulty in identifying a "work" on the legal level resides in the fact that there is no definition of what is a copyright work.

Although no law has ever defined a creative work, certain laws have given lists, such as the Berne Convention does under Article 2. These laws provide that protection is granted to literary, musical, fine art, cinematographic, photographic works, etc., but without specifying what a "literary work", "musical work" or "cinematographic work" really is.

In the majority of cases, the fact a definition is lacking does not pose a problem. Any "object" qualified as a creative work by an author will have that quality as long as someone else hasn't challenged it. Usually such a challenge would be implicit - due to a third party's unauthorized use of an object which the author believes is a copyright work and that this third party believes otherwise (or more often, the third party does not even bother to ask the question).

Example: a photographer takes some photos at a former psychiatric hospital. One of the photos shows the door of the toilets to the former dormitory for alcoholic patients above which is written in gilded letters the word "Heaven". The photo, which was part of a triptych, had been reproduced in a book and the original had been exhibited and sold by an art gallery.

The author of the inscription (the word "Heaven") felt that this use infringed his rights as an author to his work and he took action against the photographer, the
book publisher and the gallery for unlawful use of his artistic work. The Defendants, on their side, believed that the word "Heaven" inscribed above an old door did not constitute a "work of art".

In a Decision rendered 28 June 2006, the Court of Appeal of Paris, together with the Court of Cassation, found in favour of the author of the inscription on the grounds that "the work in dispute does not consist in a simple reproduction of the word "Heaven", but that the placement of this word in gilded letters with a patina effect and in a particular type of letters on an old door with a lock in the shape of a cross, fit into a decrepit wall with peels of paint was a combination that implied aesthetic choices expressing the personality of the author."

With this example in mind, it is necessary to complete the explanations given above. Even if the question of whether an "object" is a "creative work" may seem to be only an abstract question except if a dispute arises, it is generally useful to ask this question outside of any dispute in order to avoid potential conflict.

For example, a filmmaker or photographer should ask themselves whether or not an object they plan to reproduce (the façade of a building, for example) is protected and whether authorization from the right holders to the work is necessary.

How can you find an answer to this question?

You have to do the same thing a judge dealing with such a case would do, in order to determine whether an object in dispute is a copyright work.

But how would a judge go about this if no laws give an actual definition of what a "work" truly is?

Without a legal definition of a copyright work, jurisprudence (i.e., case law precedents decided by judges over the years) has upheld two conditions which a work must meet in order to be protected under copyright laws.

- the first condition is that the work must exist in a form that is perceptible: the idea which forms the basis of a novel or a script is not protectable until the author has allowed it to take shape in a form which is perceptible for third parties.
- the second condition is that the work must be original.

A number of countries have integrated this condition that a work must be original into their legislation, without defining what this criteria means.

Case law precedents often refer to the idea of a "reflection of the author's personality" or a "personal touch". In this case, a work would be considered a copyright work when it reflects the author's personality, which is what certain judges have described as the result of a creative effort, or as something that stood out from the commonplace surrounding us.

It can be seen from the above that determining whether a work is original and whether it can be protected or not, is essentially a subjective question and depends on the perception of the person called on to decide.

As demonstrated by the example of the word "Heaven" painted above the door related earlier, the concept of a work does not necessarily always take the form of a written text, a music score, a painting or a roll of film. The following examples may also benefit from protection under copyright laws due to their originality:

- a wine list;
- the title of a consumer guide;
- an painting exhibition (it is the selection of the paintings and the way they are exhibited which is protected, even if all of the works are part of the public domain);
- the lighting of a public monument which is itself not protected by copyright (which means that photographers are free to take pictures of or film the monument during the daytime, but not at night when it is lit up).

What can be done faced with the uncertainties of this type of situation?

In a large number of cases, there is no question about it : a screenplay based on a book that was published, background music from an album recorded, a film of a ballet performance – if the authors are alive (or if they are dead, but their rights have not lapsed) – are almost always protected works. It will thus be necessary to obtain the required licenses or authorisations from the authors, not to mention from the performers and the producers when applicable.
In case of doubt, there are several things you can do:

– see if there is a name on the "object" that might be protected. A name stamped on a work usually means that a person is claiming they have the capacity of author. In such a case, it is likely that the artist will consider this "object" as a copyright work and, in this case, the author or his right holders should be contacted;

– verify whether the duration of protection covering a protected work is still running (see concept 1.4. Term of protection);

– contact national collecting societies to find out whether the "object" is listed among the works they manage the rights for;

– apply for authorisation from a Copyright Tribunal in countries where such institution exists and where it is in a position to issue such authorisation.

Finally, the concept that the protection of a work is contingent upon it being "original" may be understood in two different ways. First - according to the meaning explained above, a work is original when it reflects the author’s personality or personal touch, meaning that it is the result of a creative effort. However, a work may not be original because it looks too much like an already existing work, even if it is still the result of a creative effort.

In this case, there are two possible situations:

- either the pre-existing work which resembles the new work is protected by laws on copyright and the new work is likely to constitute an infringement of the rights of the author of the pre-existing work who could claim damages on account of such infringement;

- or the pre-existing work is no longer protected by copyright (because the duration of protection has lapsed). In this case, no infringement of the rights of the author of the pre-existing work have occurred, but the author of the new work cannot claim a monopoly over the exploitation of the new work. In concrete terms, the author may exploit the work and collect income from it, but cannot prevent third parties from also inspiring themselves from the same original source.
Determining whether a work is original because it reflects the author's personality, just like assessing the similarities between two different works, is something very subjective.

A very interesting example of this can be seen in the case pitting the heirs of Margaret Mitchell, author of "Gone with the wind" against Régine Desforges, author of "La Bicyclette Bleue". The fact that decisions were successively handed down by the French Courts, including the Tribunal de Grande Instance de Paris, the Cour d'Appel de Paris, the Cour de Cassation and finally, the Cour d'Appel de Versailles (once the decision of the Paris Court of appeal was annulled by the French Supreme Court) clearly show how difficult an exercise this is.

The Tribunal de Grande Instance of Paris, which initially heard the case, ruled that infringement of authors' rights had occurred based on similarities existing between the two works.

The Court of Appeal of Paris subsequently ruled that the overall design, spirit and style of the two works, together with the way the plot unfolded, were fundamentally different and decided that infringement - even partial infringement - of Margaret Mitchell's book had not occurred.

The French Supreme Court annulled this decision on the grounds that the Court of Appeal "had failed, just as the judges in the first instance, to search for whether the way the scenes and the dialogues were composed and expressed in 'Gone with the wind' and 'La Bicyclette bleue', which described and employed comparable relations between the characters involved, included similarities to such an extent that in the second book, certain episodes appear to constitute a re-enactment or an adaptation of those contained in the first book for which the second could be considered a revival."

The Supreme Court then referred the case back to the Court of Appeals of Versailles, which performed a very thorough investigation and ruled that no infringement had occurred based on an in-depth comparison of the two works and in particular, the following considerations:

...“Whereas the characters in 'La bicyclette bleue', the relationships they have among them and the scenes and the dialogues corresponding to their relationships, as summed up by the Court, consequently derive their interest, as stated by the appellants, only through the positions they take in connection with the events they are experiencing and which constitute the wording of the novel; whereas the report of these events, via a historical epic, set during the first part of World War II and the impact the war had on the life,
behaviour and mentality of the French, admittedly give the characters presented an original status and role in a comparable way to those of ‘Gone with the wind’, made up of specific connotations and related to the events they live through and which they echo, project and experience; whereas the result of a subsequent analysis of the characters shows that it cannot be claimed they were inspired by those of ‘Gone with the wind’, which is shaped by the context imposed on the characters of this novel by society in the deep South and by the challenges and values at stake during the American Civil War; whereas in addition, the whole story in the novel by Régine Deforges is a cross between covert and overt sensuality, whereas Margaret Mitchell's novel is characterised on this level by the reserve and roughness proper to her situation at that time and at that place; whereas, as a result of these facts, a moral and philosophical symbolism admittedly dominated in both novels through the idea that what drives humankind unbridled, sexually or otherwise, has a dialectical relation with the events and disasters that transcend them, but which is especially characterised in 'La bicyclette bleue' by the author's preference to destabilise and be adventurous and in 'Gone with the wind' by a more backward-looking nostalgia; whereas this characterises the specific features of Léa Delmas, François Tavernier, Laurent d'Argilat, Camille d'Argilat, who play the supporting roles in 'La bicyclette bleue', due to the situations they experience and the scenes that bring them together, compared to the corresponding characters in 'Gone with the wind' and to their relations to the events and scenes;

Whereas under these conditions, it is not possible to find that the scenes and dialogues or even the situations or episodes accused in 'La bicyclette bleue' are copies or adaptations causing an infringement, since due to their composition and the way they are expressed, as part and parcel of an original work of fiction, they do not present the similarities required to constitute infringement with those of 'Gone with the wind'."

Practical application: what should you do if you plan to refer to a pre-existing work?

Just like in the case of 'La Bicyclette Bleue' referred to above, a certain number of works of all types of artistic genres have referred to past works for a variety of reasons. The reference to a pre-existing work may be for the purpose of paying tribute to an author, a work or a genre, making a parody or a caricature, it may occur through reminiscence (this is a term used in the field of music to designate the presence of pre-existing works in a new work that the composer is unaware of having integrated) or in other cases, may simply constitute copyright infringement.

Therefore, when you plan to refer to a pre-existing work in order to pay tribute to it or to make a parody of it, there is a risk that doing so may be considered infringement of another author's rights. In this case, there isn't a single specialist in the field of copyright law who could predict whether this
is or is not the case as it is not the law which sets down these boundaries. In the event of a dispute, it will be up to the judge to assess the aspects of similarity between two works in order to determine whether one constitutes unlawful use of the other.

As seen above, the analysis involved is subjective. There is no real interest in referring to case law precedents because in principle, you will never encounter two identical cases. In addition, when the same case is progressively heard by courts of different levels of jurisdiction in the same country, this regularly leads to contradictory decisions.

As it is impossible for lawyers to guarantee any safeguard on the legal level in this area, it appears that the following method should be used: when you plan to make a clearly identifiable reference to a pre-existing work protected by copyright in a new work, the best guarantee would be to request authorization from the right holders to the work you are drawing your inspiration from. As the author’s copyright is an exclusive right, this authorization may come at a price. Consideration may be negotiated. If authorization is refused, and you decide nevertheless to continue with your plans, then the risk of legal proceedings must be taken into account, along with an always unpredictable result.

Caution must also be taken with sequences that may be considered as "obviously parodical". In addition to the fact that all countries do not provide for an exception in their legislation when it comes to parody, what looks "obvious" to one person may not necessarily be so obvious to another and the assessment of the court may be considerably different from that of an author.

Prior rights

Raising the issue of whether a work is truly original if it has too many similarities to an existing work also brings to mind the question of who has prior rights in a work. In case of a dispute between right holders to two similar works, the first point that needs to be settled is the date on which each of these works was created.
The easiest way to establish the date a work was created consists in filing a copy with a national or foreign collecting society the author is a member of. Another method in certain countries is to register a copy of the work with the records administration of the Ministry of Finance. This type of registration usually provides proof of the exact date the document was registered.

It is not necessary to wait until the work is completely finished to file or register a copy. The author of a script, for example, can take advantage to protect his script throughout the period he is still working on it by registering a treatment of a few pages giving the main items involved in the future work. This will also make it safer to pass the project around to interested parties.

1.2 THE RIGHT HOLDERS IN CINEMATOGRAPHIC AND AUDIOVISUAL WORKS

Throughout the lifetime of a film, many people can end up holding rights (see Part II on contracts and the transfer of rights).

This section covers the original right holders in cinematographic and audiovisual works.

The original right holders generally include:

- the authors of the film
- the performing artists and actors
- the film producers.

It should be recalled that the type of rights these different categories of right holders may benefit from will vary depending on the legal system. In systems inspired by the French model, the authors of the film hold the "authors' rights" and performing artists and actors hold what are known as "related" or "neighbouring" rights. In Anglo-Saxon style systems which do not know related rights, these rights are qualified as "authors' rights" or "artists' rights" or "producers' rights", etc.
1.2.1 AUTHORS OF A FILM OR AN AUDIOVISUAL WORK

The concept of an "author" is a legal notion. Just like the law, this concept will continuously evolve over time. Thus, depending on the place and the time period, the same people will not always be recognised as having the capacity of author of a film.

The issue of attributing the capacity of author to a work posed little problem up until the end of the 19th Century. At the time, it was logical to decide that the author of a written work or a music score was the person who wrote it and that the author of a painting or a sculpture was the artist who had made it.

With the birth of cinema in France in 1895, this question started to get much more complicated. Based on the fact that in the 19th Century, photographers were generally considered to be technicians and not authors, literary authors and playwrights of the time opposed the recognition of filmmakers, considering that they too were nothing more than technicians. In the beginning of the 20th Century in France, the author of a film was considered to be the author of the script, which was subsequently adapted to the screen by the film director who was in charge of a technical job.

Over time, film directors - just like photographers - have asserted themselves as authors in their own right, which has naturally had an influence on the status of a cinematographic work itself. Films were initially considered to be literary works adapted to the screen and over the course of the 20th Century, came to be considered as (audio)visual works based on a written script. This of course had an impact on the respective rights of the stakeholders involved.

On the international level, even if all countries' legislations consider the author of a work to be the person who created that work, there may be differences depending on whether the law limits the capacity of the author to the "intellectual creation" of the work or extends this capacity to cover the "economic creation" of the work.

There are currently four different legislative approaches to the concept of who should be considered to be the author of a cinematographic or audiovisual work:

- certain countries' legislations grant the capacity of author to all people who make a significant creative contribution to the making of a film;

- certain countries' legislations lay down an exhaustive list of those persons considered to have the capacity of author of a film or an audiovisual work;
- certain countries' legislations combine the principle of contributing to the intellectual creation of the work and a list of those persons presumed to have the capacity of author of the work;

- finally, other countries' legislations reject the criteria having to do with the actual intellectual creation of the work and prefer to refer to "economic creation" and grant the capacity of author to the producer of the film. Although this is the case for British law (which has inspired a number of other countries' legislations), when transposing various EU Directives on authors' rights and related rights in 1996 the United Kingdom extended the capacity of author of the work to cover the main director of the film as well (who now shares this capacity with the producer). Nevertheless, those film directors who are bound by contract to the producer through an employment agreement do not benefit from this capacity, as these rights remain originally vested in the producer unless provided otherwise by contract.

As can be seen from the above, the capacity of author of a cinematographic or audiovisual work varies depending on the country. This is why it is important to refer to national legislation in order to determine who those persons are who benefit from this capacity in each country.

If there are no specific legal provisions pertaining to cinematographic or audiovisual works in the legislation of a given country, legal provisions governing joint or collaborative works, i.e., works created together by several authors, for which the individual contribution of each is identifiable, should be referred to.

1.2.2 OTHER RIGHT HOLDERS

Alongside those persons who benefit from the capacity of authors of the film, there are right holders who are not authors, but who benefit from similar rights as those of the authors for the performances they give.
1.2.2.1 Performing artists

Actors who perform in a film do not have the capacity of authors. However, they benefit from rights which are similar to those of the authors for their performances (see concept "2. Rights in works and performances"). As a result, these rights must be transferred to the producer in order for the exploitation of the film to be valid lawfully.

1.2.2.2 Producers of films or audiovisual works

A producer is generally defined as the person who took the initiative and the responsibility to make an audiovisual recording.

In addition to the rights transferred to the producer by the authors of the film and the performers or actors, the producer also holds, in those countries recognising the existence of related rights, his own right for his contribution as the producer. In countries of Anglo-Saxon legal tradition, where the producer is already considered to be the author of the film, the producer's rights fall under the category of authors' rights.

1.3 BENEFICIARIES OF PROTECTION (INTERNATIONAL PROTECTION)

The exploitation of a film is international by nature. With the development of co-production agreements, the same is more and more true for the creation and production of a film as well.

International protection of cinematographic and audiovisual works relies on each State granting foreign right holders the same protection it grants to its own nationals.

This issue is settled by way of international agreements:

For authors' rights:

The Berne Convention for the protection of literary and artistic works (Articles 3 - 6). Pursuant to this Convention, all authors who are nationals of one of the countries of the Berne Union (i.e., a Contracting State of the Berne Convention) are protected in all of the other countries of the Union where they are treated the same way as national authors.
For performers' rights:

The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Article 2). Just as with the Berne Convention, the Rome Convention provides that foreigners should be equated with nationals.

For authors' rights and the rights of performers:

The Agreement on Trade-Related aspects of Intellectual Property Rights (TRIPS) (Articles 3-5). This Agreement provides for the principle of equal treatment of foreigners and nationals, as well as for the principle of "Most-Favoured-Nation Treatment" (according to which any advantages granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members), reserve made for advantages granted in accordance with the provisions of the Berne Convention or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country.

1.4 TERM OF PROTECTION

1.4.1. TERM OF PROTECTION OF COPYRIGHT

According to Article 7 of the Berne Convention, the Countries of the Union must protect cinematographic and audiovisual works for a period of at least 50 years. This period begins running as of the death of the author (but in actual fact, it will be the death of the last surviving co-author since a film is almost always a collaborative work). However, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made lawfully available to the public, or, failing such an event within fifty years from the making of such a work.

The duration of protection of a cinematographic or audiovisual work may thus vary depending on the country. This may have major consequences, as the law of the country where protection is being sought will always apply. This means that a work may still be protected in the country of origin, but not in other countries. The opposite (a work that is no longer protected in its country of origin, but is still protected in other countries) would require however that special legal provisions apply in the country granting a longer duration of protection than the country of origin, since according to the principle established by the
Berne Convention, the duration of protection in a foreign country should not exceed the duration of protection in the country of origin.

In States which have adopted the principles of the European Directive on the harmonization of terms of protection of copyright and related rights (Directive 93/98/EEC), the term of protection lasts 70 years and starts running as of the first day of January after the death of the last of the following persons to survive: the principal director, the author of the screenplay, the author of the dialogue and the composer of music specifically created for use in the cinematographic or audiovisual work.

Therefore, in each specific case, it is important to refer to the legislation of each country to determine whether or not a cinematographic or audiovisual work benefits from protection under copyright law.

Once the term of protection has expired, the work is considered to have "fallen into the public domain". This means that the former monopoly over exploitation of the work no longer exists and that anyone who can access the work lawfully may use and exploit it.

This principle applies to all works and therefore works that can be used to make a film as well, such as a literary work used to write a screenplay, the music used in a film, etc.

Attention should be paid to one problem that may arise, however. The fact that the term of protection has expired for a work does not necessarily mean that the work you are familiar with today is part of the public domain. Indeed, an old music score produced by a composer who is long dead may have already been adapted by another composer who is still living and whose rights have not yet lapsed. Although the original work may be in the public domain, the adaptation may be protected and could only be used with the agreement of the composer who performed this adaptation. This is the case for one of the most famous pieces of Baroque music, the Adagio by Albinoni, which is often performed not in its original version, but in an adapted version made in the first half of the 20th century.

Although this issue mainly concerns music, it may also apply to the field of theatrical works (a play from historical times may have been adapted or the translation may still be protected) and in the field of translation of literary works.

Therefore, it is always important to check when you are dealing with what you think is a work in the public domain, whether the version you are using is really the original version in the public domain and not an adaptation that is still protected.
1.4.2 TERM OF PROTECTION OF RIGHTS IN PERFORMANCES

The term of protection of rights held by performers and producers is generally shorter than the term of protection granted to authors. It should be noted that any State is free to grant a term of protection which is longer than that provided for under International agreements, which certain States have done by aligning in certain cases the term of protection of related rights with that of authors' rights.

Pursuant to the TRIPS Agreement, the term of the protection available to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place.

Although in most countries the term of protection of rights held by performers and producers is shorter than the term of protection granted to authors (often only 50 years), the starting date to calculate the term of protection is not, as it is for authors, the death of the author or the death of the last surviving co-author, but the date the fixation was made, the work was published or the public performance took place.

2. RIGHTS IN WORKS AND PERFORMANCES

2.1. OVERVIEW

In general, the law grants authors and performers both "economic" rights and "moral" rights. In most cases, producers only benefit from economic rights.

Economic rights are rights which give their holder a monopoly over the exploitation of a work or over the services they have performed.

Moral rights are essentially the privilege of authors who are the only ones to benefit from a full moral right in their work. Moral rights give certain prerogatives related to the fact that the work is considered to be the product of the author’s personality. Moral rights are thus personal and inalienable, contrary to economic rights.
Performers are usually the only holders of related rights to benefit from moral rights.

Although economic rights which reflect the technical conditions used to exploit a work, together with performances given, are treated fairly similarly on the international level, the same is not true for moral rights, the scope and breadth of which vary considerably depending on the country.

Between France - which created moral rights in the 19th century through case law precedents and which strongly upholds them today - and the United States, where they do not even exist, moral rights have been applied very differently depending on the country.

### 2.2. ECONOMIC RIGHTS

Economic rights were originally based on two fundamental prerogatives of the author: the right to authorise the **performance** of his work and the right to authorise its **reproduction**.

These rights, which originated in France at the end of the 18th century, were relatively easy to implement before the development of technology made it possible to reproduce the performance of a work.

Back then, a public showing or "performance" consisted in the public performance of a play, a recitation, a concert, etc. Reproduction was limited to printed publications or manual copies.

Everything changed however with the development of photography, the birth of cinematography and the invention of the phonogram and radio broadcasting.

The various methods used to exploit creative works were exploding and at the same time, the geographic scope of distribution of works was developing considerably.

A similar revolution took place at the end of the 20th century with the development of digital recordings, the expansion of information technology and the development of high-speed communications networks.
In between, it became possible to transmit sound and images via cable and satellite broadcasting.

As a result of this, the number of ways laws on copyright reserve control to the author over his work have multiplied, giving rise to a multiplication of the rights authors are recognized to benefit from by law.

The two basic rights authors were acknowledged to have at the end of the 18th century (reproduction and public performance) still exist today, but they are now only the basic foundation on which an entire, complex system has been built.

The public performance right, more often referred to as the "right to communicate to the public", currently includes the following rights:

- the right to perform the work in a place accessible to the public. This right covers live performances, as well as the communication to the public of a work which was pre-recorded (disk, film, etc.);

- television and radio broadcasting rights:
  - the right to authorise terrestrial broadcasts
  - the right to authorise satellite broadcasts
  - the right to authorise cable retransmission;

- the right to communicate a work broadcast via radio or television in a public place (a radio or television which is audible and/or visible in a place accessible to the public);

- the right to make available, i.e., the right to make the work accessible to the public on line (internet).

In addition to the above, authors of graphic and fine arts also benefit from the right to "exhibit" or display their works.

The right to reproduce a work, which consists in the right to manufacture or authorise the manufacture of copies (books, disks, DVDs, etc.) also includes:
- translation right: translating or having the work translated into another language;

- adaptation right: the right to adapt the work into a different genre;

- distribution right: the right the author benefits from to control the distribution of copies of his work (via sale, rental, lending). In certain countries, this right is exhausted at the time of sale or any other lawful transfer of ownership of a copy. This means that the author can no longer prevent the buyer of a copy of his work from reselling it, giving it away or destroying it. However, the fact that distribution rights are exhausted does not usually impact the prerogatives the author has to rent or lend his work. The author retains the right to control exploitation of copies of his work by way of rental or lending, i.e., he retains the right to authorise or prohibit these forms of exploitation (although certain exceptions for public lending exist in certain countries).

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2.3. MORAL RIGHTS

Although economic rights of authors were already enshrined in French law by the end of the 18th century, moral rights were slowly created by "judge-made" law via case law precedents. Throughout the entire 19th century in France, the various courts developed a theory of moral rights, recognising a new breed of rights vested in authors based on the fact that creative works are a product of an author's own personality.

These rights, which were subsequently also written into law, have the specific feature of being inalienable. In France, these rights are also perpetual. In most other countries, moral rights benefit from the same term of protection as economic rights.

Moral rights of the author include:

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2.3.1. AUTHORSHIP RIGHT

Having an authorship right, known as a "paternity" right in French, gives an author the right to be recognised in this capacity. This means the author has the right to have his name printed on copies of his work or on the contrary, to refuse that his name be mentioned or require that a pseudonym or "pen name" be used.
Authorship rights also allow authors to oppose a third party's name from being placed on their work.

2.3.2. DISCLOSURE RIGHT

Having a disclosure right gives the author the privilege of deciding exactly when his work is finished and may be disclosed to the public for the very first time.

Although no one can force an author to disclose a work he believes is unfinished, exercising this right does not protect the author from being sentenced by a court to pay damages if he does not comply with a contractual time limit to deliver a work when invoking this right.

2.3.3. THE RIGHT TO REPENT OR WITHDRAW A WORK

The right to "repent" gives the author the right to change his work. The right to withdraw a work gives the author the right to withdraw the work from circulation. This right is mainly used in the publishing field when an author may regret what he wrote at a certain time in his life. Although few countries' legislations expressly rule out the application of the right to repent or withdraw a work in the cinematographic and audiovisual field, exercising this right in this field is not very realistic, as the author will be under the obligation to compensate the holder of exploitation rights in the work for the related prejudice suffered.

2.3.4. RIGHT TO THE RESPECT OF THE INTEGRITY OF AN AUTHOR'S WORK

This right, which allows authors to oppose that their works be changed without their agreement, is the moral right which gives rise to the greatest number of disputes.
Many infringements of this right to the respect of the integrity of cinematographic works are committed when they are exploited on television. Films may be interrupted for commercial breaks, certain sequences may be cut, framing or editing may be modified, logos or other messages may be superimposed on images, black and white films may be colorized, films may be time compressed, end credits may be deleted or accelerated with sound cuts and other images on the screen at the same time, etc.

Infringements of these types are treated very differently depending on the country.

Even if in France and in other countries which have adopted similar legislation, it is prohibited to make any changes to a work without the author's agreement, this is not true elsewhere.

According to Article 6bis of the Berne Convention, authors have the right to oppose modifications of their work which they feel will damage their honour or their reputation. A large number of countries have integrated this provision directly into their own legislation and authors are thus only allowed to prohibit changes which indeed would be damaging to their honour or reputation. In the event of a dispute, it is therefore up to the judge to determine whether this or that change made to the work does constitute such damage and only then will such changes be punishable.

This type of system runs contrary to the interests of authors whose rights are restricted simply out of habit. The experience Italy has had in this area is quite enlightening. Italy was the first country in continental Europe to end the State monopoly over public television and open up to private television stations at the end of the 1970's. Soon, films were being interrupted for commercial breaks and certain authors voiced their opposition to this practice. When the issue was brought to court, certain judges found in favour of the authors back in the beginning of the 1980's on the grounds that the audience could not appreciate the real value of the film and that this situation was damaging to the reputation of the films' authors. However, judges changed their minds very quickly, asserting that audiences had gotten used to commercial breaks and were aware that the film they were watching on television with commercial breaks was not the original work. Under these circumstances, the reputation of the authors remained intact.

Considering that a film is going to be exploited on the international level and that the law applicable to any extra-contractual dispute is the law of the country where protection has been applied for, it is advisable when entering into any contract between the author and the producer, to include the required provisions in the contract relating to the right to the respect of the integrity of the author's work so that exploitation is not impeded in certain countries. Thus, even if in the author's and producer's countries of origin the legal system applicable to integrity is the Berne Convention (which only prohibits changes which will damage the honour or reputation of the author), it is appropriate to provide by contract for all of the changes that may be made to the work (commercial breaks, etc.) and to obtain authorisation from the author in order to make such changes. This will avoid the risk of having a problem exploiting the film in
certain countries where strong protection of moral rights is granted and where a broadcaster may fear that the author's moral rights may prevent exploitation if the author has not explicitly authorised commercial breaks.

It should be stressed that when an author authorises changes to his work on a contractual basis which otherwise would constitute an infringement of his moral rights, this does not mean that the author has transferred or waived his moral right. By giving this authorisation, the author is in fact only exercising that right.

Finally, performers also enjoy certain prerogatives stemming from moral rights, including mainly authorship rights (which allow them to require that they be credited for their performance) and the right to the respect of the integrity of their performances (which allows them to oppose any changes or misrepresentation of their performance).

2.4. EXCEPTIONS TO RIGHTS HELD BY AUTHORS AND HOLDERS OF RELATED RIGHTS

National laws on copyright generally provide for a certain number of exceptions to this monopoly authors and performers hold over exploitation of their works and performances. This means that there are cases when protected works and/or performances may be used without it being necessary to ask for the agreement of the right holders.

There is one widely-made mistake in this area which it is important not to commit. The existence of a legal exception to the exclusive rights held by the author and the holders of related rights does not have the effect of vesting the user with any rights. This is a frequent error committed in connection with the exception of private copying. In many instances, attempts have been made to redefine this exception as an actual "right to private copying".

The private copying exception only means that users who lawfully access a work (for example, via a television broadcast) do not have to ask permission from the right holders when it is technically possible to make a copy of the work and a copy is made exclusively for private use. Therefore, if it is not technically possible to make a copy (for example, because the work is protected by an anti-copy device), this exception will not apply.

It should therefore be kept in mind that an exception to the authors' rights does not have the ensuing effect of vesting the persons who benefit from this exception with any rights themselves.
It is also useful to note that according to the Berne Convention, exceptions provided for under national legislation must meet a three-fold condition (also known as the "three-step test"):

- they must apply to certain special cases;
- they must not conflict with normal exploitation of the work;
- they must not unreasonably prejudice the legitimate interests of the author.

The number and extent of exceptions to economic rights of authors and holders of related rights varies from one country to another. Although the Berne Convention and the Rome Convention only provide for a few exceptions (Articles 10 and 10bis of the Berne Convention; Article 15 of the Rome Convention), a general framework for all of the exceptions likely to apply in Europe was established in the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (Directive 2001/29/EC of the European Parliament and the Council dated 22 May 2001).

The existence of exceptions to the monopoly over exploitation held by the author and the holders of related rights does not mean that the use of the work or the performance without the authorisation of the right holders is necessarily free of charge. In certain countries, the exclusive rights, for certain forms of exploitation, are replaced by a right to compensation (such as for example with private copying, public lending, etc.). This means that the right holder cannot oppose the use of his work or performance by a third party, but that this third party must pay consideration for the authorisation granted to him by law.

Therefore, exceptions to the rights of authors and holders of related rights do not mean their works or performances may be used free of charge.

The main exceptions involved in the cinematographic and audiovisual industry are the following:

**Works located in a public place**

The issue of protected works which are located in a public place (façades of buildings, graphic or fine art work, etc.) is of particular interest to filmmakers. Shooting in the city streets often involves the reproduction of works protected by laws on copyright.
The legislation of a number of countries has thus provided for an exception to the author's exclusive rights when his works are located in a public place, on the condition that his works are not the main object being reproduced.

Thus, establishing or travelling shots which show the façades of buildings protected by copyright does not require authorisation from the holders of rights in decorative façades. On the other hand, if the camera lingers on a specific piece of artwork which is protected, this exception will generally not apply and the authorisation of the right holders will be necessary.

**Quotation**

The principle of fair use of a quotation from a work is often wrongly interpreted in the audiovisual and multimedia field. Indeed, certain persons reproduce excerpts of works supposedly on this basis when in fact they do not hold the rights to do so. It should be kept in mind that the exception of quotation is subject to strict rules and that in the event of failure to comply with these rules, a fake quotation may be redefined by a court as a real infringement.

A quotation usually consists in reproducing an excerpt of a text belonging to a third party, but quotations may also be used under this policy of fair use in the field of music, images, etc.

In the literary and scientific fields, quotations are authorised without the agreement of the author of the text reproduced under the following conditions:

- the quotation must be drawn from a work which was published lawfully;
- the quotation must be made for the purpose of criticism, controversy, review, teaching or in scientific publications;
- the quotation must be made in accordance with honest commercial practices and to the extent justified by the purpose sought without infringing the rights of the author;
- the quotation must mention the source and the name of the author.
In addition to these conditions, it must be obvious to the public that the quotation is truly a quotation, i.e., that it belongs to a third party and not to the author using it.

Although these first two conditions provided for by law (lawful publication of the work quoted and the fact that the author's purpose must be critical, controversial, etc.) are easy enough to verify objectively, the definition of "honest commercial practices", "extent" and "without infringing the rights of the author" are criteria that will more likely be assessed on a subjective basis.

Aside the fact that a quotation cannot be substituted for the consultation of the original work, in the event of a conflict as to whether the legal conditions are complied with, the quotation is generally assessed in light of the length of the work quoted, as well as the length of the work using the quotation.

**Private copying**

Certain countries authorise the private copying of cinematographic and audiovisual works.

The copy may be only temporary (for the purpose of screening it later) or permanent. In the case of a permanent copy, certain countries have set up a royalty system for private copying, via a levy charged on the price paid for recording media and/or recording equipment. These levies are designed to compensate the loss of earnings of right holders.

Generally, a specialised collecting society will need to be established to collect these levies and redistribute the royalties to other collecting societies representing the interests of the various categories of right holders.

The main feature of a private copying is that it is indeed "private", i.e., it must not be used outside of private circles (for example, the family circle). Such copies must therefore not be sold, rented, exchanged or lent.

Finally, it should also be stressed that a private copying is only lawful if it was made from a copy made available lawfully to the copier in the first place. Thus, it is lawful in countries that authorise private copying to copy a film broadcast on television. On the other hand, it is
unlawful to copy a work made available via Internet without the authorisation of the right holders, for example via peer-to-peer networks.

**Education**

The Berne Convention, together with the legislation of many countries, provides for exceptions to the exclusive rights of the authors and holders of related rights in the field of education.

Works may thus be used for educational purposes as an illustration for teaching under the following conditions:

- they may only be used to the extent justified by the purpose sought;

- their use must be compatible with fair practice.
II. TRANSMISSION OF AUTHORS' RIGHTS AND RELATED RIGHTS
Transmission of the right to exploit a work

Cinematographic and audiovisual works are artistic creations which necessitate the implementation of industrial resources to exist and be exploited.

Although the French conception places emphasis on the work’s artistic dimension whereas the Anglo-Saxon tradition emphasizes the economic dimension, both systems are confronted with the issue of how to transmit the rights of authors and performing artists in connection with the creation and exploitation of works.

Authors, performers, producers, distributors and broadcasters of a work are usually different persons. Each economic player must have the required authorizations to be a stakeholder in the production and exploitation chain of a work which begins with the author as far as a creative contribution is concerned and with the performing artists as far as their performances are concerned.

NB: the system described here is the so-called "independent" production system as opposed to the American majors which are distribution companies directly exploiting their films worldwide and which are not the model analyzed in this Guide.

Authors and actors playing a part in a work must first authorize the producer to make and exploit the film. The producer will then authorize distributors and broadcasters to exploit the film, often by calling on sales agents.

As the present text has been translated from the French and to clarify the terminology used here, it should be noted that the French concept of “producteur” actually corresponds to the Anglo-American concept of a "production company", whereas the Anglo-American concept of a "producer" (who is usually an employee of the production company just like the authors of the film) corresponds to the French concept of a “producteur délégué”. The word “producer” as used in this Guide refers to the production company which is usually a legal entity.

Different forms of transmission of rights
Authorizations given by authors and actors for the producer to make and exploit the film, and authorizations to exploit given thereafter to third parties by the producer, are made by way of assignment of rights or licenses.

**When rights are assigned**, the ownership of those rights is transferred to the assignee who becomes the owner of the right that was previously held by the assignor.

A license is an authorization to exploit given by the right holder.

A license to exploit is usually granted:
- for a specific territory (a country or a group of countries),
- for a specific duration (e.g., 7 to 10 years for licenses granted to distributors)
- for certain specific forms of exploitation (the producer does not necessarily sell all exploitation rights for a given territory to a single person).

A license may be entered into either on an exclusive or a non-exclusive basis. When an exclusive license is granted, the beneficiary is the sole holder of the rights licensed for a given territory, a given period and one or more given forms of exploitation. This is the case, for instance, for companies distributing films in theaters. A distributor will be solely entitled to distribute the film in the country stipulated in the agreement throughout the time period determined in the agreement. This exclusive right finds its justification in the substantial expenses required for the distribution (printing copies) and advertising of the film.

In the case of a non-exclusive license, several persons may be authorized to exploit the same rights on the same territory and for the same time period. For instance, licenses granted by distributors to motion picture exhibitors are non-exclusive.

There may be several different types of non-exclusive license holders: certain theaters may be entitled to a "first run release" and are thus in a position to exhibit the film before other theaters (thereby reducing the costs of copies). In many countries, this form of exploitation has been replaced by a strategy aimed at recovering the cost of the film as quickly as possible (meaning that more copies must be made simultaneously).

Exclusive licenses may be granted one after the other: on a market where television plays a very important role in funding motion picture production, it is common to find in a given country that a first run (e.g., for one year) is granted to a pay-television channel, and a second run (e.g., for three years) is granted to a free-to-air television channel upon expiry of
the first run, followed by a third run (at a much more affordable cost) for yet another free-to-air television channel.

**Practical Application**

In practice, film authors and film actors assign their rights to the producer.

Once vested with the rights previously owned by the authors and actors, the producer usually goes on to grant licenses to exploit that are limited in time and space.

For instance, a film producer may license a French distributor to exploit one of its films in France for a ten-year period and at the same time license an Italian distributor to exploit the same film in Italy for seven years.

The producer may decide to grant to the national distributor of its choice a license for all or only certain forms of exploitation. For example, the producer may grant a license for theatrical distribution to a distributor, grant television broadcasting rights to a broadcaster with which it deals directly, and grant DVD distribution rights to yet another distributor.

Considering the risks linked to the exploitation of a cinematographic work, it is easier to find a distributor in a foreign country when that distributor has a license covering all forms of exploitation of the work. Should the distributor be unable to secure payback for costs incurred to promote the film via theatrical release, these losses may be offset by proceeds made from selling the film to a television channel.

The producer may grant licenses once the film is completed or even before its completion (in practice, during the film project development phase), so that future proceeds from these licenses may be used to finance the production of the film. This is referred to as pre-sales of rights (to distributors or television channels whose commitments make it possible for the producer to solicit bank financing).

**Procedure of transmission of rights**
In countries of French legal tradition, the initial transmission of rights between the author and the producer is done by way of agreement, which takes effect as the expression of the parties' intentions.

In the Anglo-Saxon tradition, if an author is employed under contract, authors' rights are originally vested in the production company employing that author. Works created under this system are known as "works made for hire".

In some countries, the transmission of authors' rights is governed by legal assignment, which means that the rights are transferred to the producer by operation of law.

Subsequent transfers of rights (by the producer to right holders who may use the work) are still carried out in all three systems through sales agreements or licenses granted by contract.

As opposed to the "works made for hire" system in which the rights in works are originally vested in the production company, contractual systems apply the principle of a restrictive interpretation of sales and licensing of rights, meaning that any right that has not been expressly conveyed to another party by the author remains vested in the author. Understandably, sales and licensing agreements must be drawn up with the utmost care so as to avoid any restrictions on exploitation caused by the failure to obtain certain rights.

However, it should be noted that countries with legislation providing for a contractual system often encompass a presumption of assignment of rights, the scope of which varies depending on the legislation (cf. this concept under: 1.3.3. Presumption of assignment of rights).

1. PRINCIPLES APPLICABLE TO ALL CINEMATOGRAPHIC AND AUDIOVISUAL CONTRACTS

The following information is valid for all sales, transfers or licensing of cinematographic or audiovisuals works.
1.1. THE "CONTRACT" PRINCIPLE

A contract is a meeting of minds for the purpose of creating obligations.

Not every meeting of minds or common intention can form a contract. For instance, if two persons were to set a date to go see a film, there is a meeting of minds but no contract is formed since going to the film does not constitute an “obligation” for the parties. Should either party fail to show up, the other party is not entitled to any compensation.

This is not the case with a contract, i.e. when the parties have accepted mutual obligations. For example, in a sale, the seller has an obligation to deliver the item sold and the buyer is under an obligation to pay the price. Should either party fail to fulfill its obligation, such party may be ordered by a court to perform and/or to compensate the other party.

It should be noted that breach of contract is not sanctioned in the same way in all countries. "Moral damages" may lead to hefty compensation in some countries, whereas only token compensation is offered in other countries. The remedy for material damages will only bear on the damage actually sustained and proven in some countries, whereas the remedy in other countries may include punitive damages or payment of the profit that the injured party could have expected if the contract had not been breached.

These factors must be taken into consideration in any international business relations.

1.2. THE "OBJECT" OF THE CONTRACT

The object or subject-matter of the Agreement, i.e. the content of the parties’ obligations, will be examined in detail in Section 2.

A general remark is nevertheless called for here: the rights sold or licensed – whether by the author to the producer, by the producer to a distributor, by a distributor to a broadcaster, etc. – must necessarily be the rights owned by the seller or licensor.

This remark may seem so obvious that it appears trivial. Notwithstanding, it seems useful to recall this fundamental principle, enshrined in Roman law for over two thousand years, since it is currently being challenged as a result of Internet file sharing (peer-to-peer networks).
Many Internet users place on line and share works without holding any rights to exploit these works.

The action of placing works on line illegally may be viewed as just another form of copyright infringement and the person responsible could be likened to the copyright infringer producing pirated DVD’s in his basement. There is, however, a big difference de facto but not de jure between these two individuals. The second individual is committing a crime knowingly and prefers to hide it, whereas the first individual loudly proclaims his right to do so. The global debate pitting the advocates of copyright protection against the advocates of a “free culture” and "sharing" will of course raise questions in the mind of the layman who does not have specialized knowledge of the law. This is not the appropriate forum to examine this issue in more detail, but it is important to call the reader’s attention to the fact that the principle whereby "no one can transfer more rights to another than he or she has“ is a fundamental principle not only in the legal system but also in civilization as it is conceived today. Indeed, this principle may be seen as one of the branches of an alternative, with the other branch being the appropriation of property by the use of force.

Advocating the right to share works protected by copyright, without the authorization of the right holder, is also in violation of several provisions laid down in the Universal Declaration of Human Rights:

– Article 27 (2): "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author;"

– Article 29 (2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society;"

– Article 30: "Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein."
1.3. CONTRACT FORMATION

1.3.1. PRINCIPLES

With the exception of contracts for which legal formalities are required by law, contracts are formed by a meeting of minds between parties with a common intention, and thus by mutual consent.

However, it should always be kept in mind that you must systematically be in a position to prove the content of your contract in the event of a dispute, regardless of the circumstances in which the contract was formed. Hence, it is generally preferable to draw up a contract in writing.

In the cinematographic and audiovisual sector, where contracts are often numerous and complex, a written document is indispensable. This document is indispensable as regards the relations between the signatories so that they can ascertain the exact content of their agreement throughout their entire relationship – which may be long-lasting; it is also indispensable as regards the relationship that third parties may entertain with the work, and this is sometimes an issue long after the signatories have ceased to exist.

Two examples:

– Obtaining public aid.

In countries offering public support for the film industry, a certain number of contracts – especially contracts bearing on the acquisition of authors’ rights by the producer – must be filed along with the application for public aid.

NB: experience has shown that it is not rare for the parties who are negotiating a contract to try to save time by filing an incomplete or draft version of the contract so as to speed up the process of obtaining public aid. The common intention of the parties is then usually to supplement or alter the contract at a later stage. However, the parties may later fail to do so and, in the event of a dispute, they end up with an incomplete contract that does not reflect their actual intentions.
It is therefore recommended that a contract not be signed if the parties consider that it does not fully and accurately reflect their agreement. In cases where it is absolutely indispensable to sign an incomplete agreement, arrangements must be made regarding how the contract will be finalized (e.g., by calling on a third-party expert).

– Checking the validity of sales, transfers and licensing of rights

Authors’ rights "automatically" protect a work in the sense that no formalities are required (as opposed to trademark law which calls for registration). This simplicity leads to difficulties, however, in proving ownership of rights: since no formality is required, there is no other proof of the sale, transfer or licensing of a right aside from the contract signed to this effect itself.

As a result, in the event of any dispute, the successive contracts (attesting the chain of title) will be the only evidence that a work is lawfully exploited.

An attempt was made to remedy this problem with the establishment of an International Register of Audiovisual Works. This Register was set up by Treaty in 1989 but it has not brought the benefits that were expected.

Certain countries have also established a public register of cinematographic and audiovisual works. Although these registers are useful sources of information, as a general rule, they do not contain all contracts pertaining to a cinematographic or audiovisual work since registration is not a prerequisite for protection.

Numerous problems may therefore arise when attempting to identify right holders, especially for older works if, for example, certain production companies have been declared bankrupt or were liquidated, or if right holders have passed away and their heirs are unknown, etc. This is why many works are currently not exploited in countries that are devoid of a Copyright Tribunal that may grant authorizations to persons who can provide evidence they have carried out all reasonable measures to search for the copyright holders without success.

Moreover, it is not rare for a legitimate right holder in a work that is several years old to discover that the work is being unlawfully exploited by third parties. In such cases, when the chain of title is explored, it can usually be seen that the chain was broken at some point.
A single disruption in the chain of title (a party transfers more rights than it has acquired in violation of the principle whereby “no one can transfer more right to another than he or she has”) suffices for the entire chain of subsequent rights to be invalidated without all the parties concerned being necessarily in bad faith.

Whenever rights are sold, transferred or licensed, it is therefore indispensable to ascertain that the seller or licensor is indeed the holder of all rights it intends to convey. In actual fact, it is not always possible – and it is usually impossible in most cases – for a distributor who wants to purchase DVD rights to distribute a film in a given territory which was produced 10 or 20 years earlier, to be presented with all the contracts involved in the chain of title. It is therefore a question of the trust the distributor has in the reputation of the company which is a party to the agreement, and which already proceeded likewise with the previous right holder, etc.

Nevertheless, once a problem arises (unauthorized exploitation of a film in DVD format, for example, constituting an act of infringement which will necessarily give rise to remedies under civil law even if the person guilty of copyright infringement is unaware of the fact), an entire series of court cases may be filed. The legitimate right holder will summon the DVD distributor to court, who in turn will hold liable the company that sold it the rights; this company will do the same with the alleged right holder that sold it the rights, and so and so forth, until the point is reached where the chain of title is broken.

Although this type of procedure usually leads to the sentencing of the company – if it still exists – which was the link in the chain responsible for the unlawful exploitation (company which probably acted recklessly or was careless when it acquired the rights), it nevertheless entails a considerable waste of time and money for all companies concerned. It is therefore of the utmost importance to draw up all agreements to sell, transfer and/or license rights in writing and to demand that the party transferring the rights produce a copy of the documents establishing that it is the legitimate holder of each right acquired.

### 1.3.2. HOW TO SIGN A CONTRACT WITHOUT BEING BOUND

The fact that a contract irrevocably binds the parties once they have signed it should force them to commit themselves only if they have full knowledge of the facts and make them only take on obligations if they are sure they will be able to fulfill those obligations. In real life, however, abiding strictly by this principle is hardly compatible with the realities of business in general and with film production in particular.
Let us imagine two cases:

– First example: in order to set up a major international project, it would be extremely useful to know in advance whether an English distributor is prepared to distribute the film in England. Say an English distributor has indeed read the script and expressed interest. This distributor would even be ready to undertake to distribute the film in England, provided that an English actor of international renown obtains a leading role. At this stage, however, the producer is not yet sure that it will be possible to give a leading role to an English actor.

– Second example: a producer has just read a book and would like to adapt it to the screen but realizes that a considerable budget will be needed to produce the film. The producer is not sure he can raise the funds required, but knows that someone else may purchase the screen adaptation rights if he waits too long.

These are two situations where the problem of the chicken and the egg crops up. Where do you begin? If agreed in writing too early, the deal could turn out to be detrimental to the English distributor who would be under an obligation to distribute the film in Great Britain even if a leading role is not given to an English actor in the end. The producer would also find himself in a delicate situation after acquiring, at a high price, screen adaptation rights for a novel that he may be unable to produce as a film.

Two legal techniques may be applied in such instances: the signature of a conditional agreement would solve the problem in the first example, and the signature of an option agreement would be the solution in the second example.

1.3.2.1. SIGNING A CONDITIONAL AGREEMENT

A condition may be either a condition precedent or a condition subsequent.

Entering into an agreement subject to a condition precedent means that the enforceability of obligations created under the agreement is contingent upon a future uncertain event whose occurrence is beyond the control of the person undertaking that commitment.

Thus, our English distributor may sign a contract whereby he undertakes to distribute the film in England (and incidentally to pay a minimum guarantee), on the condition precedent
that a leading role is given to an English actor of international renown. Given the existence of this condition, the distributor will be obligated to distribute the film only if an English actor of international renown obtains a leading role. Otherwise, even if the contract has been signed, it would remain inoperative and the distributor would not be obligated to distribute the film or to pay the minimum guarantee.

There is a second type of condition known as a condition subsequent which does not suspend the enforceability of obligations but retroactively renders the contract null and void if the contingency occurs.

For example: an actress contractually accepts a role in a film to be shot six months later, subject to the condition subsequent that she is recruited at an audition to be held one month after the contract is signed for a show to be staged in a foreign country for one year. If the actress is selected at the audition and is therefore unable to appear in the film, the contract signed with the producer retroactively becomes null and void. If the actress is not selected, the contract remains valid and she must fulfill her obligation since the contingency that would have invalidated the contract did not occur.

A condition is therefore an extremely valuable instrument in order to obtain a remedy-free release from an agreement when parties are uncertain about their ability to perform at the time of signature. It is important to remember that the fulfillment of a condition can never be contingent solely upon the will of the person who is bound conditionally. In the two examples above, the English distributor’s commitment depended on the film producer’s decision and the decision to recruit the actress or not was up to the casting director.

### 1.3.2.2. THE OPTION AGREEMENT

The dilemma for a producer wishing to acquire screen adaptation rights in a novel, without knowing whether or not he will be able to finance the film production, can be solved thanks to an option agreement.

Entering into an option agreement allows you to acquire the right to sign a future contract on pre-determined terms and conditions. For a producer interested in screen adaptation rights in a novel, this means not buying the rights, but “buying the right to buy the rights”.

An option differs from a condition in that it is subject to the sole will of the person benefitting from the option.
Should a producer wish to purchase screen adaptation rights in a novel, the publisher (who will usually have obtained screen adaptation rights from the author) will grant the producer, for consideration in most cases, a six-month or a one-year option to acquire the rights in the novel at a set price.

By signing the option agreement, the publisher is no longer entitled to sell the rights to anyone else during the lifetime of the option. During this period, the producer merely has to inform the publisher that he intends to take up the option for the contract transferring the rights to automatically become final and effective.

It is immediately clear that all parties have everything to gain from seeing to it that the option agreement is as comprehensive as possible. It is generally recommended that the final contract to transfer the rights actually be negotiated and drawn up, and simply contain a clause transforming it into an option agreement.

The upside to such an option agreement is that there is nothing more to negotiate should the producer exercise the option. The downside is that, given its precision and its development, such an option agreement is more expensive than a less developed contract entailing the need to negotiate certain points when the option is exercised.

At the close of the option period, the contract automatically expires and the publisher is free to sell the rights to anyone if the producer has not exercised the option.

### 1.3.3. PRESUMPTION OF ASSIGNMENT OF RIGHTS

In certain countries of Anglo-Saxon tradition, rights are originally vested in the production company, whereas other countries use a system of legal assignment.

In countries that do not apply these systems, the need for greater legal security has led a certain number of them to institute a "presumption of assignment" by law, according to which authors and performing artists involved in the creation of an audiovisual work and who are under contract with the producer are assumed to have transferred their exclusive rights to exploit the work to the producer, unless proof is given to the contrary.
The scope of this presumption may vary from one country to another and will therefore not necessarily apply everywhere to the same persons and will not have the same magnitude in all countries.

In the pages above, we have examined why it is indispensable to have written contracts in the cinematographic and audiovisual industry. The presumption rule therefore does not apply to authors whose rights have been sold or licensed in a detailed manner in the contract signed between authors and producers. Nevertheless, a clause of this type may be useful for certain staff members who could obtain recognition of their status as "authors" given their contribution, but whose contract does not stipulate the specific transfer of certain rights: this could apply, for example, to the person who designed the film sets or the costume designer.

Lastly, it should be noted that for countries that have not introduced a presumption of assignment of rights into their legislation and that do not use the system of legal assignment or the "works made for hire" system, the Bern Convention lays down under Article 14 bis [2] a presumption of "legitimation" which is not a presumption of assignment of rights, but a presumption that the authors who have brought contributions to the making of a cinematographic work, within the framework of a contract between them and the producers, are assumed, unless otherwise specified, to have commissioned the producer to exploit the said cinematographic work.

1.4. REVENUE COLLECTION AND RIGHTS MANAGEMENT

The management and sharing of the revenue or "receipts" of a film are complex matters in view of the great variety of sources of revenue and the number of persons between whom revenue is to be shared.

In general, a film will be exploited as follows:

– Theatrical exhibition

– On line exhibition (video on demand)

– Television exhibition
  - pay-per-view television
  - pay television
  - free-to-air television
- satellite transmission
- cable retransmission
- Media sales (DVD)
- Media rental
- Public lending
- Private copying

All these various forms of exploitation may take place in a large number of countries where the film will generally be distributed by a local distributor.

Most of these forms of exploitation will be managed individually, based on the contractual relations between the parties.

For example: for a theatrical exhibition, each exhibitor pays the rental fee agreed upon to the film distributor; the distributor directly remunerates the producer who commissioned him to distribute the film, whereas the producer will directly remunerate, based on the contracts signed between the parties concerned, the authors and actors whose remuneration is linked to the film’s proceeds.

Nevertheless, in certain cases, individual management is not feasible and a collective management system must be set up.

What is collective management?

Collective management started with technological developments at the beginning of the 20th century.

Before that period, a work could only be exploited by a public performance at a given location or reproduced by hand or else by printing. It was therefore quite simple to identify the user or publisher of a work, and just as easy to call on the right holders to acquire the required authorizations.
With the invention of the phonogram and radio broadcasting, individual management became impossible in many cases. For example, the holder of rights in a musical work could no longer exercise control over the use of a phonogram and radio broadcasting to air his/her work around the world. Conversely, it was impossible for a radio broadcaster to request the required authorizations from each right holder in order to broadcast all the works contained in the station’s daily programming.

This situation led to the birth of collecting societies, set up initially in the musical sector by composers and music publishers so as to enable efficient management of works around the world. These right holders established organizations entrusted with the task of managing their works, by granting licenses to all potential users. Such organizations were founded in most countries and have signed reciprocal contracts amongst themselves, most of which enable licensing of nearly the entire repertoire of music from around the world. Radio stations and television channels wishing to broadcast musical works then sign a collective agreement with these organizations, enabling them to use this repertoire without requesting authorization from each right holder, against payment of a lump sum amount. The collective management organizations or "collecting societies" then apportion the amounts thus collected amongst all right holders.

The collective management system spread from the music industry to other areas, including the film and audiovisual sector.

The forms of exploitation covered by collective management, due to the fact that individual management is not feasible, are as follows:

- private copying: in certain countries, remuneration for private copying is collected in the form of a royalty levied on recording media and devices enabling the recording of works. This royalty is usually collected by a specialized management organization which redistributes the amount collected to other management organizations which in turn distribute these amounts to their members;

- public lending: usually the same procedure as for private copying;
cable retransmission: this means the simultaneous, unaltered and unabridged retransmission of television channels’ programs that are relayed by cable to neighboring countries. The price paid by television channels to acquire broadcasting rights only covers their national territory. As a result, if their program is relayed to other territories via cable, a fee is collected from users in these territories and the amount is then redistributed by collecting societies to all right holders.

These three areas share one point in common: individual management (i.e. based on individual contractual authorizations) is impracticable due to the number of right holders and operators concerned.

In addition to areas where rights and revenues may only be managed collectively, there are certain forms of exploitation where rights management may be either individual or collective, at the discretion of the right holders. This is the case in certain countries where authors may grant television broadcasting or videographic distribution rights to a collecting society. In such cases, this situation must be taken into consideration when drawing up contracts for the transfer of rights between authors and producers. Indeed, the collective management of these rights would replace individual management and this then implies that the author is not remunerated by the producer for those forms of exploitation handled by a collecting society.

Lastly, it is to be noted that film score composer’s rights are almost always managed collectively. This practice is based on a longstanding tradition dating back to the days of silent movies, when a pianist would play an accompaniment for the film and collecting societies would then collect all royalties due from the film theater for the use of their musical repertoire.

1.5. CHOOSING THE APPLICABLE LAW

The contractual relation between the parties must be governed by a single body of legislation. The parties may choose this law – and they are advised to do so – whenever they have the choice.

The question does not arise in cases where both parties are from the same country and are signing an agreement in that country, since their national law will automatically apply. On the other hand, the law applicable to the agreement must be determined once there is any element of foreign origin, and this is often the case in the cinematographic and audiovisual industry.
For example: if a producer based in country A calls on a distributor in country B to distribute its film, would the laws of country A or country B apply?

In cases where the parties have not chosen the applicable law, it will usually be up to the courts called on to hear a dispute to determine the applicable law by applying the rules of private international law. Until the dispute is settled, there is therefore an element of uncertainty regarding the legal provisions that will be applied and which may vary from one country to another.

Choosing the law which will govern an agreement presents the advantage of offering security to the parties who, from the very outset, know which law will govern their contractual relations. This law will usually, but not necessarily, be the national law of one of the two parties to the agreement. It is to be noted – and this is one of the difficulties in choosing the applicable law – that each party will tend to seek to impose its own national law. Even if the strongest party often wins, this point may be negotiated.

It is important to know that if the parties opt for a law other than the national law of the actual court which subsequently rules on a dispute, the parties must prove the content of that law.

However, in most cases, the clause pertaining to the applicable law also stipulates which courts have jurisdiction and ensures that both coincide. For example, the parties will choose the courts having jurisdiction in country A, which will apply the laws of country A.

1.6. TREATMENT OF DISPUTES ARISING DURING THE PERFORMANCE OF THE AGREEMENT

It is easier to provide for what should be done if something goes wrong when everything is going fine. The signature of an agreement in the cinematographic and audiovisual field is often the start of an exciting adventure for the parties concerned. This enthusiasm can lead some to forget that tensions or conflicting interests may develop throughout this joint project.

The quality of an agreement largely depends on the measures taken by the parties to fulfill their obligations, the grounds for termination of the agreement and the treatment of disputes.
The occurrence of a dispute during the performance of an agreement is not a problematic matter in itself. What may be problematic for the parties is the fact that they did not plan on how to handle this dispute. Indeed, once a dispute arises, it often becomes more difficult to negotiate a solution, with each party tending to blame the other party.

Hence, it is recommended that all contracts should provide for:

– The means whereby a party must inform the other party that it considers that such other party is not fulfilling its obligations. As a general rule, such situations give rise to formal notice addressed to the defaulting party and calling on this party to fulfill its obligations in accordance with the provisions stipulated in the agreement. The terms and conditions of this formal notice must be specified and a deadline must be set for the defaulting party to fulfill its obligations.

For example: a registered letter will be sent to the defaulting party with formal notice to fulfill its obligations within fifteen days.

– The consequences linked to failure to respond by the party receiving formal notice: The parties often consider that the continuous failure to fulfill an obligation after formal notice has been served constitutes a breach of contract.

Nevertheless, it is important to note that, should the party considered to be in default raise an objection, the courts shall determine whether or not the accusation actually constitutes a case of non-performance and is therefore sufficient ground for a breach of contract.

In practice, this situation leads to the following problems:

- If a party terminates an agreement based on the fact that it considers it is entitled to do so, that party runs the risk that a court called on by the other party may rule that the accusation does not constitute a case of non-performance of the agreement and may therefore charge the party who considered itself in its right with wrongful breach of contract. This party may then be sentenced to compensate the other party;

- In order to avoid this risk, the party which considers itself in its right must, before terminating contractual relations, call on the courts to note that the other party is responsible for the wrongful breach of contract. This is usually a lengthy procedure, especially since the party which considers itself entitled to terminate the agreement will often not have the time to wait for the outcome of the proceedings without jeopardizing the project from an economic standpoint.
The drawbacks outlined above may be mitigated by stipulating:

- acts which the parties consider to constitute cases of non-performance of the agreement and thus forming sufficient grounds for termination on account of the defaulting party. By stipulating in the agreement that an act or an omission will result in termination of the agreement, the parties leave no room for the court to exercise its discretionary authority. The court’s role is then limited to verifying whether or not the act or omission brought forward as grounds for termination actually occurred.

For example: a contract stipulates that late payment occurring more than one month after the time limit specified by the parties constitutes default justifying the termination of the agreement on account of the party which paid late. In such an instance, the court’s role if petitioned by the defaulting party shall be limited to verifying that the time limit was actually exceeded.

In this case, the party which considers itself in its right may run less of a risk in terminating the contractual relations if it considers this to be in the interests of the project, since it is then only a matter of verifying an actual fact and not a matter of determining whether an act constituted default justifying termination of an agreement.

Although court proceedings in contractual matters present the advantage of leading to a solution that is binding upon the parties, they also present major disadvantages:

- court proceedings are lengthy: in most countries, the length of proceedings is incompatible with the economic requirements of the film and audiovisual industry;

- court proceedings are usually costly;

- very few judges have a thorough knowledge of the film industry and the audiovisual sector and certain court decisions may sometimes be surprising.

Parties may decide to choose directly by way of contract one of the following methods of alternative dispute resolution:

– Arbitration:
Arbitration consists in calling on "private judges" known as arbitrators who are selected by the parties.

Arbitration offers two main advantages compared to court proceedings:
- faster resolution: the case is handled swiftly, and as a general rule, no appeal may be filed;
- arbitrators are chosen for their expertise in the film and audiovisual sector.

The main drawback with arbitration is that it is usually more costly than court proceedings since the parties must pay the arbitrators in addition to the attorneys.

– Conciliation:

The parties who have inserted a conciliation clause in their contract refer issues to a person chosen by joint agreement who will seek to reconcile the parties and to reach an amicable settlement.

A good conciliator must be an expert in the film and audiovisual sector so as to objectively and independently inform each party of the risks incurred in the event of court or arbitration proceedings. If the conciliator is properly chosen, his/her authority will allow the parties to view the dispute under a different light and to reconsider their points of view, which are not always as obvious as they may think.

Conciliation has the advantage of being fast and inexpensive.

Conciliation may be combined with other types of recourse. Preliminary conciliation may be provided for before court or arbitration proceedings are instituted.

Conciliation nevertheless presents two weaknesses:
- conciliation has no legal effects – and is therefore a waste of time and money – if either party fails to put in an appearance;
- the agreement reached after conciliation is usually not enforceable (unless the parties render it enforceable, for instance by having the agreement registered by a court or laid down in a notarized deed).

- Mediation:

The role of a mediator is to allow the parties to find the solution to their dispute by themselves. In countries where mediation has been incorporated into procedural rules, the recording of the parties’ agreement by the mediator is enforceable just like a court decision or arbitral award.

Like conciliation, mediation has the advantage of being fast and inexpensive. As is the case for conciliation, the personality and qualities of the mediator will be decisive.

2.1. THE PRELIMINARY RECITALS

The preliminary recitals are there to define the agreement. This is where the project and the parties’ roles are described.

The preliminary recitals may be drafted as follows:

The producer intends to produce a fiction feature film lasting approximately XXXXX minutes, in color, provisionally entitled (working title of the film)

To this end, the producer:

(option 1: the scriptwriter has already written a first version of the script)

has reached an agreement with the author in order to acquire, under the terms and conditions stipulated in this agreement, rights concerning
(option 1.1. this is an original work)

the original script/the dialogues written by the author under the working title (working title of the script), which the producer represents and warrants it has read and is familiar with;

(option 1.2. this is an adaptation)

the screen adaptation of a literary work entitled (title of the work), published by (identity of the publisher), the screen adaptation rights of which are held by (identity of the holder) / are in the public domain.

The work was written by the author alone / in collaboration with (identity of the co-author(s))

(option 2: the initiative was taken by the producer and no script exists as yet)

instructs the author to write alone / in collaboration with (identity of any co-author), based on the synopsis/specifications appended to this Agreement

option 2.1.

an original script

option 2.2

a screen adaptation of the work entitled (title of the work to be adapted)
This article will define the nature and scope of the transfer of rights, specifying:

- the duration of the transfer/license:

  NB: legal language can be pleonastic. The objective is to ensure legal certainty and, as a result, most contracts state the duration of the transfer and the exclusive nature of the transfer even when dealing with an outright sale that entails the transfer of title. This is because, in the past, in various countries the duration rights were transferred to producers by authors (via exclusive licenses in fact) was limited in time.

  In most contracts today, the lifetime of the transfer corresponds to the duration of protection under copyright laws. It still may happen in some cases that the duration of the transfer is limited in time (e.g., 20 years after signature of the agreement). Although this type of clause was understandable in the days when film theaters were the only way to exploit a film in business terms, and when renegotiation was judged necessary after a certain period since the producer had already recovered its investment theoretically, these clauses are now more of a handicap due to the uncertainties they entail for long-term exploitation of a film. In addition to difficulties with exploiting a film for which rights are about to expire, there is also the difficulty of locating the right holders for negotiation purposes once the authors have passed away.

- Territorial scope of the transfer/license:

  Since films are intended to be exhibited in as many countries as possible, the territorial scope of a transfer or license usually covers all countries. Many contracts, drawing inspiration from the U.S. example and anticipating on technological developments, currently extend the scope of an assignment to encompass “the entire universe”.

  This clause may be drafted as follows:

  **Article 1:**
In its capacity as the sole holder of all rights in the script/the adaptation, the author hereby transfers to the producer, which accepts, on an exclusive basis and throughout the entire world, and for the duration they are protected by copyright, all rights defined in Article 2, under the terms and conditions stipulated in Article 3.

Variant:

In its capacity as the sole holder of all rights in the script/the adaptation, the author hereby transfers to the producer, which accepts, all rights defined in Article 2 under the terms and conditions stipulated in Article 3;

Duration of the transfer/license:

Territorial scope of the transfer/license:

The forms of exploitation authorized also need to be defined. As the provisions regarding the rights transferred and the terms and conditions of payment for the transfer are often quite detailed, they are covered by specific clauses.

2.3. RIGHTS TRANSFERRED OR LICENSED

This article is of vital importance. If incomplete or drafted imprecisely, film exploitation may be hampered due to a disruption in the chain of title (since the producer cannot transfer property that it does not own).

In drafting this article, it should be kept in mind that a film is not a one-off economic venture, but that it can give also rise to other ventures in the future. As a result, the contract should not be limited to the various forms of exploitation specific to the film to be made, but should also take into consideration the future economic ventures the film may generate.

For example, a film may lead to a remake (this can often be the case if the film was a big hit), but films may also be followed by a "sequel", "prequel" or "spin off" (this last form being
more commonplace for television), and can result in considerable merchandising (figurines of heroes in the film, toys, clothing, etc.).

These forms of exploitation can only occur with the authorization of the film producer (or another party the producer transferred his rights to), whereas the producer can grant this authorization only if he has acquired the corresponding rights from the original right holders.

It should be recalled that provisions laid down in great detail (which may sometimes appear superfluous since, according to the principles currently in force, it would be "normal" for the contract to be construed as necessarily entailing the rights in question) offer the significant advantage, in the film and audiovisual sector, of reassuring all third parties who will be acquiring, at a very high price in some cases, exploitation rights in the film and who are not familiar with the principles in question (e.g., because of a different legal system), or quite simply in order to avoid taking any risk.

For example: a television broadcaster would give preference to a film for which the producer has obtained the authors’ authorization to interrupt the television broadcast with commercial breaks, rather than a film for which the producer holds no such authorization but claims that applicable laws merely punish alterations of the work that are "damaging to the author’s honor or reputation" and that established case law precedents have not considered commercials on television to constitute any such damage.

When drafting such a clause, you should also recall that:

- the translation of a work is based on a right to reproduce the work, which is the author’s exclusive right; authorization must therefore be given for translations;

- authorizing the reproduction of the work in the form of animated images does not imply authorization to make publicity stills (still pictures usually taken by a photographer attending rehearsals or film shoots). These pictures therefore require authorization;

- all acts which may constitute an infringement of the author’s moral rights (which are non-transferable) must be authorized by the author in all countries where moral rights apply and where an author is not allowed to waive such rights according to the law;

- in countries where certain forms of exploitation of works – other than the forms of exploitation that are mandatorily collectively managed – are also managed by collecting societies, the contract must stipulate that:
- the author shall provide the producer with the list of countries where the author’s collecting society will be managing its rights;

- it is incumbent upon the producer to remind broadcasters that the price of the license granted does not include compensation for authors whose rights are managed by a collecting society;

- authorization to reproduce and exploit the work does not necessarily entail authorization to exploit excerpts from the work; this authorization must therefore be granted separately. The same applies, for example, to multimedia works or film trailers in film theaters, VOD, television, etc.

- the right to make the film does not imply the right to make an adaptation of the film or to publish a literary work based on a summary of the film. A literary adaptation is part of "tie-in" or "ancillary" exploitation rights whereas, setting aside this type of exploitation, provisions should be made for the producer to reproduce stories taken from the work designed for the purpose of advertising or promoting the work;

- the film may be presented at festivals or competitions and provisions must therefore be made concerning the allocation of any awards obtained by the film.

The model clause presented below takes into account these various features for the transfer of rights in an original script in light of the different available forms of exploitation.

**Article 2:**

*The rights under this agreement are all rights necessary for the making of a cinematographic, television, audiovisual or multimedia work, irrespective of its designation, format and duration, based on the script the rights of which are the subject of this agreement, as well as the rights necessary for exploiting the completed work in all countries for all methods of exploitation and on all media, together with all ancillary rights.*

*In particular, these rights include:*
1) the right to translate or order the translation of the script and to produce the work in the English original language or in any other language;

2) the right to directly or indirectly record, using any technical process, on all media, in all formats, using any frame ratio, images in black and white or in color, in two or three dimensions, the original soundtracks and dubbing, the film’s titles or subtitles, as well as still photographs depicting scenes from the film;

3) the right to directly or indirectly make, in any quantity chosen by the producer or its assigns, all original versions, duplicates or copies on all media, particularly on film, magnetic media, digital media, etc., in all formats and via any process using the aforementioned recordings;

4) the right to directly or indirectly circulate these original versions, duplicates or copies for the cinematographic or audiovisual exploitation of the work, for online exploitation as well as for any secondary exploitation;

5) the right to directly or indirectly exhibit the work in public in the original, dubbed or subtitled version, in any commercial or non-commercial film theater either for a fee or free of charge;

6) the right to exploit the work in the original, dubbed or subtitled version, on any media intended for sale or rental to the public for private use;
7) the right to directly or indirectly exhibit the work via television broadcasting free of charge or for a fee, in the original, dubbed or subtitled version, via any process inherent to this method of exploitation (terrestrial television, distribution via cable, satellite, interactive television, pay-per-view, etc.) intended for all types of receivers, whether fixed or mobile, along with the adjustments which are indispensable for this exploitation depending on the exploitation practices and techniques applicable in each country for which rights are transferred (interruption for broadcasting commercial sequences, channel logo inlay, etc.), with the producer solely having a duty to remind television broadcasters, with whom it will be dealing in those countries – a list of which will be supplied by the author and appended to this agreement – where copyright is managed by a collecting society, that the fulfillment of obligations with regards to the producer does not relieve television broadcasters of the obligations that they have or will be contracting with the collecting societies of which the author is a member;

8) the right to authorize the reproduction and exhibition of excerpts from the work in the original, dubbed or subtitled version, as well as the duplication of all sound and dialogue contained in the work in view of exploitation by all audiovisual processes;

9) the right to include the work or excerpts from the work as chosen by the producer in the original, dubbed or subtitled version, in any multimedia work, irrespective of media, form, designation and intended use;

10) the right to make the work or excerpts from the work available online, in the original, dubbed or subtitled version, and to include the work or excerpts from the work, in the original, dubbed or subtitled version, in all databases accessible to the public via all means of communication;

11) the right to directly or indirectly reproduce, in all languages, stories from the work, whether or not illustrated, provided that these stories do not exceed 8,000 words and are directly intended for advertising and promoting the work. For the purposes of such publicity or promotion, these texts may be published in reviews, newspapers, and magazines, but may not be published in book form;

12) the right to exhibit the work in public in the original version, dubbed or subtitled, at all festivals, competitions, retrospectives, etc., it being understood that the author shall retain all amounts, objects or any other mark of honorary distinction related to his personal involvement in the film and that may be awarded to the author. Money collected for the entire work shall be shared, with 50 percent for the producer and 50 percent for all the authors of the film;
13) the right of remake, i.e. the right to make and to exploit a work subsequent to the work under this agreement and reusing the same themes, situation, characters, dialogs, staging, etc.;

13b) solely for documentary films:

The right to adapt the work or the subject of the work to make a new work of fiction, irrespective of format, duration, language, media, or intended use, as well as the right to exploit this new work in accordance with the terms and conditions set forth in this article.

14) the right of "sequel" or "prequel", i.e. the right to make and exploit a work subsequent to the work under this agreement, based on the same themes, situation, characters, dialogs, staging, and presenting new situations that may be prior to or the sequel to the work based on the script which is the subject of this agreement;

15) the right of spin-off, i.e. the right to adapt one or more elements in the work (characters, situations, etc.) in view of their exploitation in one or more cinematographic, television, audiovisual or multimedia works subsequent to the work covered by this agreement, in adventures that are different from those narrated in the script which is the subject of this agreement;

16) the right to use all elements in the work (story, characters, dialogs, soundtrack, music, clothing, etc.) in view of any commercial or industrial exploitation, in any form whatsoever (publication in the form of books, records, reviews, in the press), in all languages and in any form whatsoever; production of objects, toys, advertisements, imagery, all forms of video games as well as merchandising tie-ins related thereto, etc.);

As the ultimate beneficiary of these rights, the producer is entitled to use the aforementioned rights in any manner it sees fit, by entering into any agreements that are useful for the exploitation of the work, without prejudice to the rights guaranteed to the author under this agreement.
2.4. COMPENSATION

Compensation is the consideration for the transfer of the rights set forth in the preceding article. This is often the lengthiest article to negotiate.

Various issues must be treated:

2.4.1. FORM OF COMPENSATION

Compensation may be fixed or percentage based, or may be a combination of both.

It is rare for authors' rights to be sold outright to a producer for a flat-rate fee. On the other hand, the producer will go on to grant the right to exploit the film for a flat-rate fee in a certain number of instances, such as for television exploitation or for exploitation via any type of media in a remote country where verifications are difficult or impossible to carry out.

Contracts transferring rights in a script usually include fixed remuneration and percentage-based remuneration linked to the film's proceeds.

The fixed portion of compensation will usually consist in a "minimum guarantee". This is an amount compensating the author irrespective of the film's proceeds, but which is usually deducted from the revenue generated. As a result, after having paid the fixed portion, the producer will not remunerate the author on a percentage basis until he has recovered the minimum guarantee already paid to the author from the share of proceeds inuring to the author. The expression “minimum guarantee” means that the amount paid to the author cannot be recovered by the producer if the film’s proceeds are insufficient for the percentage-based share of remuneration due to the author to be equal to the amount already paid.

Percentage-based share of remuneration: this consists in a percentage of the proceeds collected by the producer (see below: “Basis of calculation”). This percentage may vary depending on a number of criteria, such as the author’s renown, the forms of exploitation concerned or the film’s box office performance. Thus, different percentages may be provided for depending on pre-determined levels of proceeds generated.
2.4.2. BASIS OF CALCULATION

For each form of exploitation, the producer receives only a fraction of proceeds generated from the exploitation of the film. Thus, for theatrical distribution, the exhibitor will pay to the distributor the film rental price from which the distributor will retain its costs and its fee before passing on the remaining balance to the producer. Percentage-based remuneration is then paid out of the amount collected by the producer.

It is within this framework that the question of the producer’s expenses comes up (the amount paid by the distributor constitutes gross receipts from which the producer will deduct its expenses to arrive at the net proceeds known as the “producer’s share of net receipts”).

The amount of net receipts will obviously depend on the extent of expenses that may be deducted. As a result, when negotiating an agreement, it is extremely important to define the "net receipts" used as the basis for calculating the rate of percentage-based remuneration. All agreements that stipulate a percentage-based remuneration scheme usually state in the appendix the definition of “net receipts”, bearing in mind that this definition may vary considerably from one agreement to another.

This link gives access to a definition of net receipts suggested by the SACD, the French collecting society for cinema and audiovisual authors.

It should be noted that the legislation of certain countries may impose a basis of calculation on the parties. This is the case of France, for example, where the law requires that authors must receive compensation based on a percentage of the price paid by the public for those forms of exploitation where the price is paid in consideration of a "specific, individual communication of the work".

2.4.3. MINIMUM GUARANTEE AMOUNT

The minimum guarantee may be offered as an advance payment (recoverable from percentage-based receipts) or not. It is important to determine:

- the amount of the minimum guarantee;
- the terms of payment of the minimum guarantee (in general, there are different stages linked to script development, from signature of the agreement up to the producer’s acceptance of the completed version of the script);

- what will become of amounts already paid if the producer were to reject the work submitted by the author;

- what will become of compensation should the producer call on a co-author or have the script rewritten.

It must be recalled at this stage that the compensation due to authors and holders of related rights for the simultaneous retransmission via cable, private copying, or public lending must be collected by a collecting society.

Below is an example of a scriptwriter compensation clause, with several variants:

**Article 3:**

By way of consideration for the transfer of the rights listed in Article 2, the producer shall pay to the author, for each method of exploitation defined below, a percentage of the producer’s share of net receipts collected by the producer, in keeping with the definition of producer’s share of net proceeds as defined in the appendix.

1) For all forms of theatrical exhibition, whether commercial or non-commercial, this percentage is set at XXXX%;

This percentage will be increased to XXXX% after writing off the total cost of the film, i.e. after the producer recovers the total amount spent for making the film as per the producer’s share of net proceeds.

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%
2) Regarding all forms of television exploitation for which rights inuring to the author are not collected by a collecting society, this percentage shall be set at

- % for the following countries:
- % for the following countries:
- % for the following countries:

These percentages shall be increased to XXXX% after writing off the total cost of the film;

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%

3) Regarding the exploitation of the work on media intended for sale or rental to the public for private use, such as the media defined in Article 2.6, this percentage shall be set at

- % for proceeds from rental;
- % for proceeds from sales;

These percentages shall be increased to XXXX% after writing off the total cost of the film;

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%

4) Concerning the exploitation of the work on line, this percentage shall be set at XXXX%.

This percentage shall be increased to XXXX% after writing off the total cost of the film;

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%
5) Concerning the exploitation of the work or of excerpts from the work in a multimedia work, this percentage shall be set at XXXX%.

This percentage shall be increased to XXXX% after writing off the total cost of the film;

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%.

6) Concerning all forms of exploitation of ancillary rights, this percentage shall be set at XXXX%.

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%.

7) In the event of a remake, this percentage shall be set at XXXX%.

Should the producer assign the rights stipulated in this paragraph, this percentage shall be set at XXXX%.

8) In the event of a sequel, prequel or spin-off, this percentage shall be set at XXXX%.

Should the producer assign all or part of the rights stipulated in this paragraph, this percentage shall be set at XXXX%.

Advance payment to be deducted

The producer shall pay to the author a total of XXXX as an advance payment to be deducted from the compensation defined in this Article, on the condition that the schedule set out below is fully complied with. This amount, which constitutes an advance, shall be recovered in full by the producer from amounts inuring to the author by virtue of the foregoing provisions prior to any new payment. This set-off will continue until full recovery of the advance payment on all exploitation proceeds.
The advance payment shall be disbursed as follows, it being understood that payment “upon delivery” means within “15 days of delivery”:

- (amount) upon signature of this agreement;
- (amount) upon delivery of the synopsis by or before (date) subject to written acceptance of the synopsis by the producer;
- (amount) upon delivery of the treatment by or before (date) subject to written acceptance of the treatment by the producer;
- (amount) upon delivery of the first version of the script by or before the (date) subject to written acceptance of this version by the producer;
- (amount) upon written acceptance, by the producer, of the completed version of the script to be delivered by or before (date).

The compensation defined above includes the cost of rewriting and the cost of any proofreading. After the producer accepts the completed version of the script, any co-scriptwriter or third party chosen by the producer to rewrite the script shall be remunerated by the producer, whether such person works on his own or in collaboration with the author. Under no circumstances may the author’s compensation be reduced in the event of rewriting by a third party.

Rejection of the script

Should the producer reject the work carried out by the author at any stage whatsoever during the period of script development, the producer may terminate this agreement without any indemnity being due in the event that – within a time period equivalent to one-half of the time elapsed between the delivery of the rejected work and the completion of the preceding phase, with this time period beginning on the day after the producer informs the author of its rejection – the author fails to deliver to the producer a new version of his work in keeping with the producer’s request.

First variant:
In this event, the author shall retain the amounts previously paid by the producer and shall recover all of his rights in his work. No compensation shall be due for the work rejected. However, should the work carried out by the author pursuant to this Agreement be subsequently used as part of a production, the author shall refund the producer for amounts paid pursuant to this Agreement. These amounts shall be reimbursed at the nominal amount (or, alternatively: these amounts shall be readjusted by applying the consumer price index; or, alternatively: these amounts shall be increased by a XXXX% annual interest). The author shall not be obligated to refund the producer until he has received payment within the framework of the new production. Notwithstanding, payment shall be made in all cases by or before the first day of principal photography for the new production.

Second variant:

In this event, the producer may choose between (i) either not paying the author the amount pertaining to the work rejected, with the author nevertheless retaining the amounts previously paid for works accepted and recovering the full extent of his rights in his work, or (ii) have the work continued by a third party, starting from the last accepted piece of work produced by the author, with the author’s share of receipts then being recalculated to take into account the third party’s participation in the continuation of the scriptwriting.

Failing an agreement between the parties, assisted by their counsels if necessary, the sharing of rights between the co-authors shall be decided by an arbitrator chosen by the parties or by an arbitral panel composed of one member appointed by each party if the parties fail to agree on appointing a single arbitrator.

Third variant:

In this event, the producer may have the work continued by a third party, starting from the last accepted piece of work carried out by the author, with the author’s share in receipts then being recalculated to take into account the third party’s participation in the continuation of the scriptwriting.

Failing an agreement between the parties, assisted by their counsels if necessary, the sharing of rights between the co-authors shall be decided by an arbitrator chosen by the parties or by an arbitral panel composed of one member appointed by each party should the parties fail to agree on appointing a single arbitrator.
The author may nevertheless object to the continuation of the project by the producer and recover all of his rights in his work by informing the producer of his decision by registered letter within fifteen days after the producer has notified its decision to continue with project development after termination of this Agreement, provided that the author refunds the producer for those amounts already paid by the producer pursuant to this Agreement. Payment shall be made within XXX weeks after the author notifies the producer of his decision to recover his rights. The author’s recovery of his rights is conditional on full payment.

Terminology

In this article, whenever we refer to the “completed version” of the script and acceptance by the producer of the completed version of the script, this only concerns the project development phase. This expression must therefore be understood as a sufficiently completed version for it to be shown to any investors or co-producers, but without this being the version intended for shooting that is known as the final version. The author knows that it is customary for co-producers, investors, distributors or the producer himself to request changes during subsequent project development, and the producer may ask the author or a third party to make changes when rewriting the script.

Project abandonment

The benefit of the advance payment to be deducted shall be fully vested in the author pro rata to the amounts actually paid or still due depending on the performance and acceptance of the services stipulated in the above schedule if, for any reason whatsoever, the script is not used by the producer or if the film is not completed.

Collective management

No compensation shall be due to the author by the producer for the forms of exploitation for which compensation is collected by the collecting societies of which the author is a member.

Compensation inuring to the author for simultaneous retransmission via cable, for private copying and public lending shall be collected and paid to the author exclusively by the collecting society of which the author is a member.
2.5. REWRITING THE SCRIPT

The practice of script rewriting by a third party is commonplace in Anglo-Saxon countries where the author’s moral right does not exist or is under-protected.

In countries where the author’s moral right is protected, script rewriting calls for the author’s approval of changes made to his work by a third party.

This clause is not always necessary. It should nevertheless be borne in mind that it will be very difficult to set up a co-production of international scope with Anglo-American partners if the contract signed with the author of the script does not include a script rewriting clause. Such a clause is usually very difficult to negotiate with authors accustomed to strong protection of their moral right and negotiations often end with the words “take it or leave it”.

Aside from cases where the producer considers that the script or a part of the script must be rewritten by a third party, there may be instances where creative contributors are unable to complete their artistic contribution or, more rarely, refuse to complete it.

Provisions must be made so that, in such instances, the producer may have the task completed by a third party.

Example of an appropriate clause:

*The author hereby undertakes, but without the producer being under an obligation to call on that author, to lend assistance in rewriting the script, on his own or in collaboration with third parties chosen by the producer or by a co-producer.*

*The author nevertheless expressly authorizes the producer to have the script rewritten by a third party, without any participation by the author.*

*Should the author be unable to complete the script or refuse to complete such, the author shall not be entitled to object to the continuation by a third party of the work he has already performed if the producer sees fit and at the producer’s request.*
Notwithstanding, the producer shall be under no obligation to keep the author’s incomplete work.

Variant for the first two paragraphs (for countries with strong protection of authors’ moral rights) – case of a co-production with Anglo-American partners:

The author is aware that the script is not the final work that will be communicated to the public but that the script will be used as a basis to make the film. The author is aware of the fact that the film will be produced originally in the English language, within the framework of a co-production with Anglo-American partners. The author is also aware of the fact that transposing the plot into a different linguistic and cultural environments implies not only translating the script and adapting it to the new environment but also, where appropriate, calls for changes that co-producers, financial partners, distributors or the producer himself may request, and that the producer may have changes made or ask the author to make changes when the script is rewritten.

The author hereby undertakes, but without the producer being under an obligation to call on the author, to lend assistance in rewriting the script, under terms and conditions to be subsequently defined, on his own or in collaboration with third parties chosen by the producer or by a co-producer and the producer. The author expressly authorizes the producer to have the script rewritten by a third party, it being understood that the producer shall ensure that the meaning of the script is not distorted.

2.6. DEADLINE FOR PRODUCING THE FILM

One of the obligations of the producer who benefits from all of these rights is to produce the film. This is a complex operation and it can take several years between the signature of the first agreements and the film’s release.

In agreements on the transfer or assignment of rights, it is therefore important to specify the deadline for the film to be produced. Failing this, rights could be frozen for a very long period. It is to be noted that this clause does not usually prevent the producer from going on to assign its own rights to another producer (who will be bound by the same deadline obligation) if this is not forbidden in the agreement.
Experience has shown that some authors occasionally tend to forget the contracts they have signed and that were not acted upon. In some cases, an author who guarantees in all good faith that he is the sole holder of rights in a script, may have forgotten that he already signed an agreement with another producer simply because the agreement did not lead to the film being produced.

It is extremely important, both for the author transferring his rights and the producer benefiting from these rights, to clarify this matter and to make sure that no prior transfer or assignment has taken place. Authors sometimes have a tendency to consider that any previous agreements are "null and void" since the agreement never took effect. If neither the agreement, nor applicable laws specify a deadline for starting production, or if the deadline stipulated in the agreement or by law has not elapsed, the previous right holder may suddenly appear during the project development phase (e.g., after information has been communicated about the project in connection with a presentation to obtain public aid) so as to obtain payment for the rights of which it is still the legal holder.

Where appropriate, it should also be verified that this deadline was not suspended due to a "force majeur" event.

Example of an appropriate clause:

In the event that, within five years of the delivery to the producer of the completed version of the script as accepted by the producer, the producer has not started up film production, this agreement shall automatically be null and void and the author shall recover clear and free title to all of his rights, with the benefit of the amounts already paid to him remaining vested in him.

Failing express acceptance of the completed version of the script by the producer, the five-year deadline specified above shall begin one month after the author has sent a registered letter, return receipt requested calling upon the producer to accept the completed version of the script or to give its comments on the script, if no reply to this letter has been received.

The deadline specified in the above paragraphs shall be suspended in the event of a force majeur event and throughout the duration of such force majeur event, without prejudice to the producer’s potential decision to terminate the Agreement.
Variant 1:

*In this event, the benefit of the amounts paid or due to the author, as defined in Article 3 applying to cases where the producer would not be continuing with the project, shall remain vested in the author.*

Variant 2:

*In this event, the producer shall have the same possibility of choosing as that defined in Article 3 applicable to cases of termination of the Agreement on account of the producer’s failure to accept the author’s work.*

2.7. FINANCIAL REPORTING

All parties with an interest in revenue generated by the film are entitled to receive financial reporting. Hence, they must be regularly informed concerning the film’s box office and other financial performance, and the amounts due to them must be computed and paid out within the time limit agreed upon. This right also means that beneficiaries may call for an audit of the operating accounts relevant to the film.

It is to be noted in this connection that separate accounting must be kept for each film or audiovisual work in exploitation.

Example of an appropriate clause:

*The producer shall keep the author informed of the exploitation of the work.*

*The operating accounts shall be closed on the 31st of December each year. The statements shall be sent to the author within two months after the closing, along with the amounts inuring to the author. These amounts shall be transferred to the author’s account No. XXXX at (name of bank).*

*The producer shall keep production and exploitation accounting in its ledgers which the author or his representative shall be entitled to consult during working hours on business days, with eight days’ prior notice.*
2.8. CREDIT TITLES

All creative contributors, as well as actors taking part in the film are entitled to see their name appear in the credits. Font size and the order in which the names are featured sometimes give rise to intense negotiations.

Example of an appropriate clause:

In any communication or advertisement related to the film and launched by the producer, as well as in the film’s credit titles, the author’s name shall appear as follows: (examples: “Script: X. Y.”; or “written by X. Y.”)

The font size used for the full name of the author, and co-authors if applicable, shall be XXXX% of the biggest font size used, with the exception of those used for the film title and the actors.

In the credit titles, these references shall be on a separate and fixed title board if this process is used.

However, the author expressly authorizes the producer to carry out any special advertising using only the film’s title or the name of the film stars and the name of the director and/or taken from a publicity slogan or from a catchline where names cannot be listed.

2.9. REPRESENTATIONS AND WARRANTIES

In any agreement conveying rights to another party, the transferor of those rights is called on to grant the beneficiary of those rights several warranties, such as a guarantee that the work is an original work, that rights in the creative works being transferred are duly held, that there is nothing in the work for which the beneficiary could be held liable (e.g., invasion of a third party’s private life), that there are no disputes pertaining to ownership of the rights, that no external factors may hinder the fulfillment of the agreement, etc.

This clause is not there merely for style. In the event of a dispute, the party who transferred the rights and gave its warranty to the beneficiary may be required to compensate the beneficiary if that party sustains damages on account of an event covered under the warranty.
Example of an appropriate clause:

The author hereby represents and warrants that it will guarantee and hold harmless the producer against any disturbances, claims or evictions whatsoever; the author also guarantees the peaceful and exclusive enjoyment of the rights granted.

In particular, the author represents and warrants to the producer that:

a. the author is the sole author and the sole holder of rights in the work covered under this Agreement; with the exception of those rights related to retransmission via cable, private copying and public lending referred to in Article 3, the author has not assigned the management of any other rights held by him to any party whatsoever;

b. the author has not carried out and shall not carry out, throughout the entire duration of this Agreement, any action likely to infringe the rights granted to the producer in any manner whatsoever;

c. the author is not bound by any commitment that might prevent the performance of this Agreement;

d. the work covered under this Agreement contains nothing that might infringe upon any third party’s right of title;

e. there is nothing in the script that might constitute invasion of the private life of third parties, libel or slander, or any other criminal offence;

f. the work covered under this Agreement is not disputed in any manner whatsoever, whether any such dispute has been brought before the courts or not;

g. the author has full capacity and authority to enter into and to sign this Agreement;
h. the work covered under this Agreement has never been exploited, in any manner whatsoever, and no exploitation rights in this work have been granted to third parties.

2.10. PENALTY FOR NON-PERFORMANCE OF THE AGREEMENT

This provision stipulates those events the parties consider serious enough for the agreement to be terminated. It specifies requirements for giving formal notice to the other party (this is always necessary), as well as the penalties in the event of failure by either party to perform its obligations.

It should be noted that provisions concerning penalties may vary depending on the stage you are at in film production. As a general rule, film production comprises the four stages below:

- development: this stage begins on the day the producer starts to work on the project and ends when the film enters into the pre-production stage. This is the preparation period that will enable the film to be made. The main phases consist in: the search for funding, acquisition of rights, scriptwriting, signature of agreements with the director and the actors, search for sales agents / distributors, possible signature of co-production agreements, etc.;

- pre-production: this stage usually lasts eight to twelve weeks and is used to prepare shooting;

- production stricto sensu: this involves the shooting of the film which for an "average" production generally lasts five to eight weeks;

- post-production: this stage includes editing, recording music tracks, editing the music, special effects, etc. The length of this period varies depending on the time spent on these various activities.

As can immediately be seen, if a party fails to fulfill its obligations, the impact of such non-fulfillment as well as the impact of the penalty can vary significantly depending on the production stage when this occurs.

Thus, it may be logical that during the film development phase – when only a few third parties are involved – if the producer fails to respect its obligations to the author, this may result in the producer losing the rights granted by the author. However, such a penalty is
inconceivable once the film is in the production phase *stricto sensu* (shooting) or later on during the exploitation phase, considering the resounding impact it would have for the film and for all parties concerned.

Just like all the other contractual provisions, penalties for non-performance must be based on an equilibrium taking into account not only the personal interests of the parties concerned, but also all of the other inter-related interests that were mobilized to enable the film to be produced. In this type of situation, the emphasis must therefore be placed on financial penalties.

Example of an appropriate clause:

*Should either party to the Agreement fail to fulfill the obligations laid down in the following Articles (nos. of relevant Articles), the Agreement may be terminated due to the fault of that party who shall incur liability for such termination, without prejudice to all damages that may be claimed by the other party if the defaulting party fails to remedy the situation within (number of) days after receiving notice to perform its obligations via registered letter, return receipt requested.*

*In the event such non-performance consists in the producer’s failing to pay any of the amounts due to the author by virtue of this Agreement, the Agreement may be terminated and shall incur the producer’s exclusive liability, under the terms and conditions set forth in paragraph 1 of this Article; where necessary, the author is authorized to cease his collaboration as prescribed in this Agreement, with the benefit of all amounts paid being vested in the author and amounts outstanding for any work actually carried out by the author and accepted by the producer shall immediately become due and payable.*

*The penalties defined above shall apply only during the film development stage. Under no circumstances may such penalties apply after the development phase. Thus, after completion of the development phase, the author agrees not to request the rescission or termination of this Agreement, with any damages sustained by the author due to any instance of non-fulfillment of obligations by the producer being offset by the payment of interest on any overdue payments outstanding, accruing at the rate of XXX% per year. Similarly, the author shall refrain from any seizure of the film or from taking any action intended to prevent or to make the production or the exploitation of the film more difficult, under penalty of indemnifying the producer for any damages and any loss of film proceeds.*
2.11. APPLICABLE LAW AND DISPUTE SETTLEMENT METHODS

This clause stipulates the law governing the agreement and how disputes will be settled.

Example:

This agreement is governed by the laws of (country). In the event of any dispute, the courts of (city) shall have sole jurisdiction.

Variant in arbitration:

This agreement is governed by the laws of (country). In the event of any dispute, and failing an amicable agreement within XXXX days as of the date either party notified the other party concerning the dispute, such dispute will be settled by way of arbitration. The arbitrators shall be competent to rule both on the merits of the case and on interim measures. Should the parties fail to agree on the appointment of a sole arbitrator jointly chosen by them, they shall each appoint an arbitrator and the two arbitrators thus appointed shall appoint a third arbitrator who will preside over the arbitration panel.

Should the parties fail to appoint the arbitrators within XXX days, the arbitrator shall be appointed by (for example: the presiding judge of the commercial court of (city), ruling in summary proceedings at the petition of whichever party takes this initiative). In the event of the refusal, resignation, impediment or death of the arbitrator, the parties shall appoint another arbitrator within XXX days after ascertaining this incapacity or deficiency. In the event that such appointment is not made within this time limit, the presiding judge of the commercial court of (city) shall appoint an arbitrator.

If no conciliation is reached, the arbitrator shall hand down his award within XXXX months after his acceptance.

In the arbitration proceedings, the parties and the arbitrator are not bound by the time limits and forms applicable to court procedures.

The arbitration award shall be in writing and shall state grounds for the award. The award shall be drawn up in the required form so that it may be enforceable abroad.
The arbitration award shall be final and its execution shall be binding upon the parties. The award shall be immediately enforceable, notwithstanding appeal.

The party which due to its failure to execute the arbitration award, forces the other party to file a petition for court-ordered enforcement of the award, shall bear all costs of the enforcement proceedings.

The fact that arbitration proceedings are initiated does not suspend or modify, in any manner whatsoever, the parties’ obligations under this Agreement, as long as the arbitration award has not been rendered.

Challenging this arbitration clause does not suspend arbitration proceedings.

2.12. THE OPTION CLAUSE

If the producer does not want to be firmly committed, but would merely like to take out an option on a script, the agreement may be transformed into an option agreement by adding the following provision at the beginning:

The author hereby grants to the producer, who accepts, an exclusive and irrevocable option bearing on the acquisition of the rights defined herein in the script provisionally entitled (working title of the script).

This exclusive option is granted for a lump-sum amount of (amount) with one half being payable upon signature of this Agreement with the other half being payable three months later.

The option shall be effective for (number) months following the signature of this Agreement.

The option shall be exercised by registered letter, return receipt requested sent to the author’s address appearing in this Agreement or to any other address notified to the producer in writing by registered letter, return receipt requested.

In the event the option is exercised, the relations between the parties shall be governed by the following provisions:
The above is followed by the full text of the agreement which will become final once the option is exercised without any need to renegotiate.

3. PROVISIONS SPECIFIC TO CINEMATOGRAPHIC AND AUDIOVISUAL CONTRACTS

In order to make a film (which constitutes a reproduction of the author’s work and of the actors’ performance) and then to exploit the film (by communication to the public or by reproduction), the producer must enter into agreements to acquire the necessary rights from the author(s) of the film and from the actors. These contracts will also be indispensable in order to set up financing arrangements for the film. Hence, contracts are of the utmost importance in carrying out the project.

This section shall review, based on an example – the contract binding the producer to the scriptwriter –, the main contractual clauses pertaining to the production and exploitation of a cinematographic or audiovisual work.

NB: the following clauses cover the most important aspects regarding the content of such an agreement. These provisions should be seen as basic content, which may be altered and which already constitute a choice among others. They may therefore serve as a guideline for drawing up contracts, but are not standard clauses to be reproduced in all cases. In some instances, they may be used as presented in these pages, whereas in other instances, they must be altered, supplemented or adapted. Lastly, certain clauses presented here may not be consistent with legislation in certain countries. It is therefore recommended that you call on a specialized legal expert to draw up any contract.
III. COOPERATION BETWEEN PRODUCERS
INTRODUCTION

More and more often these days, films and audiovisual works are being produced by several producers within the framework of what is called a "co-production". When these producers come from different countries, we talk about an international co-production.

ADVANTAGES OF CO-PRODUCTIONS

Producing a film via a co-production offers two main advantages:

1. The first advantage lies in the possibility of pooling financing from several producers and in the case of an international co-production, from several different countries. This makes it easier to cover the cost of the film.

2. The second advantage lies - for the case of international co-productions - in easier access to the markets of the various co-producers of the film. When the film was produced within the framework of a co-operation agreement, i.e., a Treaty between States (which may be bilateral when it is signed by two States or multilateral when it is an international instrument such as the European Convention on Cinematographic Co-production), it benefits from having the nationality of each country that is co-producing it and from the skills the various co-producers have to offer. This generally means that through the effects of these Treaties, the culture of these different countries will be reflected in the film and it will thus be easier to find market outlets for it in the country of each co-producer.
1. WHAT IS A CO-PRODUCTION?

All agreements related to the production of a film by several people are not necessarily co-production agreements.

First of all, co-production agreements need to be distinguished from "co-financing" agreements. A film may be co-financed by investors without this automatically making them co-producers themselves.

Co-production agreements are also different from contracts covering "presales" of rights through which distributors or broadcasters contribute to the financing of a film by buying the exploitation rights to the film in advance. This makes it possible for the producer to discount these future payments with a bank and to invest the related amount to finance the cost of the film.

However, it is true that in certain cases, in addition to engaging in presales, television channels may also enter into co-production agreements. In this case, the channels act in a two-fold capacity to help cover the cost to produce the film.

Contracts related to co-financing and presales are different from co-production agreements because the investors, distributors, television channels, etc. do not become co-owners of the film.

Investors in films acquire the right to receipts from the film, meaning that they will have the right to receive a portion of the receipts generated through exploitation of the film. Distributors and television channels, on their side, have the right to exploit the film (for distributors, in theaters or in DVD format and for the television channels, on their stations, for example).

On the other hand, the main purpose of a co-production agreement is to create ownership rights to the film which will become vested in each co-producer. So what makes a co-production agreement
different from the other types of agreements mentioned above is the intention of the various co-producers to jointly become co-owners of the film.

The definition of joint property

Joint property is property owned by several persons which cannot be divided. This situation occurs, for example, in an apartment building. Each apartment is the private property of a person, but the common areas (entrance hallway, stairs, elevators, roof) are the joint property of all of the apartment owners. Indeed, it would be impossible to allow each owner to privately own a part of the entrance way of a building.

This same situation occurs when a film is produced by several producers. The finished film cannot be divided up among them and they therefore own it together, with each one of them having a percentage of ownership which is usually equal to the value of their contribution. For example, a co-producer who brings in 40% of the budget of a film, a second co-producer 35% and a third 25% will all three be the joint owners of the film, on the basis of 40% for the first co-producer, 35% for the second and 25% for the third.

Before getting to this point, they will have gone down a long road together that can present a certain number of obstacles along the way. To make it down that road successfully all the way to the end, the quality of the preparation stage is decisive. This is dealt with through the co-production agreement.
2. THE CO-PRODUCTION AGREEMENT

2.1. OVERVIEW

When preparing a co-production agreement, it is important to provide for the development of the project and the production of the project strictly speaking (the actual shooting of the film) separately. Thus, the first part of the agreement is devoted to the development phase and the second part to the production phase.

In the first part of the agreement between the parties, questions related to ownership of rights, choices to be made regarding the outline of the script, the language, the running time of the film, the timeframe allowed for scriptwriting, etc. will be settled, along with the final budget and the financing plan, the search for financing and allocation of such financing among the co-producers when applicable, and how the work will be divided up between the co-producers during the development phase. The extremely important issue of potential termination of the agreement during the development phase must not be omitted and must be covered in the agreement with a precise definition of all of the conditions under which the agreement may be terminated and what the consequences of such termination will be on the rights and obligations of the parties.

The second part of the co-production agreement will describe the role of each co-producer in connection with production strictly speaking. This covers control over the production, the liability of co-producers for budget overruns, how overhead expenses will be shared, the production schedule, the credits, the ownership and control of rights in the film, the provisions applicable to exploitation of the film, how the receipts will be shared, etc.
A few key aspects

Co-production agreements are highly complex and the stakes involved for companies that sign them are important. Each agreement is different and must be adapted to the situation of the parties signing the contract. This is why it is advisable to call on a specialized lawyer both during negotiations and prior to the signature of the final agreement.

Experience has shown that the co-production agreements circulating on the market (a certain number of which are simply the result of cut and paste techniques) fall into two categories - those that could be called "optimistic" and those that could be called "realistic".

"Optimistic" agreements reflect the philosophy that "everything's alright, nothing bad can happen" and "realistic" agreements take into account the fact that difficulties and disagreements may arise which can potentially worsen into legal disputes which in certain cases can have serious consequences for the companies involved.

The purpose of a co-production agreement is not only to define and complete a project together and share the resulting profits. One of the main questions that a co-production agreement needs to answer – just like any contract – is "what are we going to do if...?".

A certain number of problems can be anticipated on. You can tell a good contract from a bad contract because based on the concrete case to which it applies, it takes into account the main difficulties that may arise and shows the care the parties have taken to decide in advance what they will do if any of these difficulties occur. Naturally, it is easier to reach an understanding about the way a disagreement will be handled before it occurs when the relations between the parties are peaceful, compared to dealing with it directly at the time the disagreement occurs.

Some key aspects involved in the co-production agreement need to be taken into consideration for this purpose.
2.2. CREATING JOINT PROPERTY

Contrary to the example of the apartment building given above, once the film is finished there will no longer be any privately owned areas (the apartments)! However, before the film is finished, there is such a thing as privately-owned property, i.e., property owned by each co-producer which they will be contributing to the co-production. This is the case, for example, of rights held by one of the co-producers in a novel that is going to be adapted to the screen, for rights held by one or several producers in the script, for contracts with directors assigning their rights, etc.

A key question when entering into a co-production agreement is when these privately owned pieces of property are going to become joint property. This is far from a theoretical question since legal disputes may arise during the production of the film regarding the issue of whether certain property is owned on a private or on a joint basis.

This type of a dispute usually arises when the film is not yet finished and one of the co-producers claims they are the joint owner of privately-owned property contributed by one of the other co-producers. This situation may lead to complex legal disputes that may be very difficult to settle.

It is possible to avoid this type of dispute by providing that each co-producer shall remain the sole owner of the privately-owned property it contributes up until the film is finished. It is at that time and that time only, once all of the co-producers have fully performed all of their obligations, that such privately-owned property becomes jointly owned by all of the co-producers.

For this purpose, a clause such as the following may be used:

*Throughout the time the film is being made and for the entire duration the exploitation rights of the authors have been acquired, each co-producer shall progressively gain ownership of the creative elements and the services performed after the signature of this*
Agreement, pro rata to each one's investment, i.e.,: co-producer 1 - ownership of % and co-producer 2 - ownership of %. 

The rights held by one of the co-producers at the time of signature of this Agreement or that will inure to such co-producer after the signature of this Agreement pursuant to an agreement entered into prior to the signature of this Agreement shall be divided up between the co-producers in the same way at the time the film is completely finished, i.e., when the first release print has been made.

The current version of the script written by (name of the author), entitled (title) dated (date) and containing (number) pages is the exclusive property of co-producer A. This version of the script and the adaptation rights in the script shall remain the exclusive property of this co-producer up until the time the film has been finished.

If rewriting work is financed by another co-producer, such rewriting work shall remain this co-producer's property up until the time the film has been finished.

It is hereby expressly agreed that aside the rights a co-producer may have acquired prior to the signature of this Agreement, each co-producer shall only become the owner of its share in the joint property of the rights in the film on the condition that co-producer has properly and fully performed its obligations.

A co-producer who does not perform its obligations and more particularly, who has not made the financial contributions it has promised within the time limits agreed upon shall in no event have the right to claim the capacity of co-producer of the film or any ownership rights inherent in this capacity. This co-producer shall benefit from a simple right to payment of a debt.
If for any reason whatsoever, the development or the production of the film do not continue, the provisions contained in Article(s) (no(s). of relevant Articles) applicable to termination of the agreement shall apply.

2.3. TERMINATION OF THE AGREEMENT DURING THE DEVELOPMENT PHASE

The clause governing the rights of the parties in the event the agreement is broken off during the development phase without one of them having defaulted is important. At this point, people may have very different opinions and it is essential to decide in advance how one of the co-producers can bow out of the production. For this purpose, an article defining the conditions under which termination will occur, as well as an article governing the rights of the parties in case of termination should be provided for.

Example of a clause relating to grounds for termination:

This Agreement may be terminated by either party during the development phase if any of the following events occurs:

– if, on the date of (date), one of the parties does not have available 100% of the financing of its share in the co-production, whether or not this is attributable to the default of such co-producer, it being understood that the failure to recognize the film by a national authority within the framework of a co-production agreement shall not be considered to constitute a case of default of the relevant producer if such producer has duly taken all of the measures required for such recognition;

– if no agreement is given within (number) weeks of the request made by one of the co-producers to the other regarding the main aspects related to the development or the production of the film (final budget, financing plan, schedules to this Agreement, etc.);
– if one of the parties is no longer interested in the project, as witnessed by repeated late
arrival or absence, repeated failure to participate in making important decisions or any other
form of disinterest that could delay the project;

– if the parties fail to agree on the final version of the script.

Example of a clause related to conditions of termination (the wording must be adapted or changed
depending on the case and the parties' choice):

1. If termination is attributable to one of the co-producers

1.1. who has not defaulted:

- the production shall be continued by the other co-producer if this co-producer is the
sole holder of the rights to the script or if these rights belong to the two co-producers,
it is the responsibility of the co-producer continuing the production to reimburse the
co-producer leaving the production for the costs it has incurred in connection with the
project, with the exception of overhead expenses.

- if the co-producer to whom the termination of this Agreement is attributable who
has not defaulted is the sole holder of the rights to the script, this co-producer shall
have a choice between:

- either transferring the rights and the project to the other co-producer in
consideration of reimbursement by the other co-producer of the costs the co-
producer leaving the production has incurred in connection with the project, with the exception of overhead expenses,

- or retaining the rights and the project in consideration of payment to the co-producer to whom termination is not attributable of an amount equal to twice the amount incurred by this co-producer in connection with the project, with the exception of overhead expenses,

If the co-producer to whom the termination of this Agreement is attributable who has not defaulted chooses to accept compensation by being reimbursed twice the amount incurred, the other co-producer shall have no right to force that co-producer to transfer the project. However, the co-producer to whom the termination is not attributable may require that compensation of twice the amount incurred be paid even if the other solution is proposed.

1.2. who has defaulted:

- the production shall be continued by the other co-producer if this co-producer is the sole holder of the rights to the script or if these rights belong to the two co-producers. The co-producer leaving the production who has defaulted shall bear the expense of all costs it has incurred in connection with the development of the project and shall compensate the other co-producer for any damages it has suffered due to the termination of the Agreement on account of its default. The price paid to acquire the rights to the script by the co-producer whose default has triggered the termination of the Agreement shall be reimbursed to this co-producer from the producer’s share of net receipts collected by the other co-producer after the film has been fully amortized for the portion not set off by damages that may be due to remedy the damage caused by its default.
- if the co-producer to whom the termination of this Agreement is attributable who has defaulted is the sole holder of the rights to the script, this co-producer shall have a choice between:

- either transferring the rights and the project to the other co-producer and bearing the costs it has incurred in connection with the project. In this case, the price paid to acquire the rights to the script by the co-producer whose default has triggered the termination of the Agreement shall be reimbursed to this co-producer from the producer's share of net receipts collected by the other co-producer after the film has been fully amortized.

- or retaining the rights and the project in consideration of payment to the co-producer to whom termination is not attributable of an amount equal to twice the amount incurred by this co-producer in connection with the project, with the exception of overhead expenses, plus full compensation for the damages suffered by the non-defaulting co-producer and the amount of (amount) as compensation for the loss of all possibility to collect a share in the profits generated through exploitation of the film.

If the co-producer to whom the termination of this Agreement is attributable who has defaulted chooses to pay compensation by reimbursing twice the amount incurred, the other co-producer shall have no right to force that co-producer to transfer the project. However, the co-producer to whom the termination is not attributable may require that compensation of twice the amount incurred be paid even if the other solution is proposed.

2. If termination is not attributable to one of the co-producers:

- the production shall be continued by the co-producer who is the sole holder of the rights to the script, it being that co-producer's responsibility to reimburse the co-producer leaving the
production for the costs it has incurred in connection with the project, with the exception of overhead expenses.

- if the rights to the script belong to the two co-producers, they shall negotiate an agreement.

2.4. FULFILLMENT OF THE OBLIGATION TO MAKE THE FINANCIAL CONTRIBUTIONS PROMISED

Setting up a financing plan for an international co-production is rarely simple. Sometimes, the financing a co-producer thought was secured ends up missing, as for example when a financier defaults. This type of situation is part of business life and a producer who suffers from this cannot be blamed unless that producer failed to inform its co-producer in time. Indeed, sometimes partners discover that a co-producer is not in a position to bring in the financing promised although the shooting of the film has already started, which is something that can jeopardize the film itself. When this happens, a conflict will usually arise between the co-producers when this could have been avoided by simply communicating information in time.

So as not to find yourself in this kind of situation, two clauses can be used - one related to establishing the presumption that the funds are available - and the other related to the obligation to inform.

Examples:

Establishing a presumption

By signing this Agreement, each co-producer hereby irrevocably agrees to contribute the amounts provided for herein. The agreement given by each co-producer to start shooting shall be considered irrebuttable assurance given to the other co-producer that on the date such agreement is given, that co-producer is in possession of all funding it has
committed itself to contributing or it has entered into valid contracts with partners whose solvency is secure and who have guaranteed that the schedule for the release of funds agreed to between the parties will be strictly complied with.

This type of clause, if it becomes necessary to implement it, will make it possible to prove that the co-producer who allowed the shooting of the film to start without informing the other co-producer that it did not have all of the financing promised available has committed a material breach justifying the termination of the agreement due to the fault of that co-producer who shall incur liability for such termination. The aim of this clause is not to punish, but to prevent and to avoid jeopardizing the production of the film.

Together with this clause, it is useful to add a provision providing for a general obligation to inform. In addition to being useful on the legal level, this also helps build more trust between the partners.

Obligation to inform

Each co-producer shall provide the other co-producer, in good faith, with all information related to the co-production covered under this Agreement.

More particularly, each co-producer agrees to inform the other co-producer within a maximum period of 24 hours of any difficulties of a financial nature that it may encounter in connection with the performance of this Agreement. For the purposes of executing this obligation, each co-producer shall immediately inform the other co-producer if any financier of the film withdraws financing or requests additional time to pay, regardless of the type and amount of that financier’s contribution.

The co-producer concerned by a financier who withdraws financing or who requests additional time to pay shall inform the other co-producer within the same time limit of the measures it intends to take in order to compensate for this withdrawal of financing
or request for additional time to pay and in order to scrupulously comply with its obligations applicable to financing the co-production. Aside the event of a duly proven case of force majeure, each co-producer shall be liable to the other in the event financial resources promised by a third party are not made available at the time previously agreed upon.

2.5. PRECAUTIONS REGARDING THE LEGAL QUALIFICATION OF THE AGREEMENT

As explained above, co-production agreements are designed for the purpose of creating joint property, i.e., a situation where several production companies jointly own a film or an audiovisual work.

Many co-production agreements contain a clause according to which the agreement states that it does not constitute a "company" between the co-producers. Indeed, doubts may arise in certain cases, which may be taken advantage of by the creditors of an insolvent co-producer, for example, in order to attempt to recover that co-producer's debts to them from the other co-producers. Although the legal qualification given to a contract by the parties is important (on the condition that it corresponds to the real content of their agreement, as otherwise it would be invalid), the way the agreement is performed is just as important.

Therefore, in order to avoid a co-production agreement from being redefined on the legal level as an instrument creating an actual company between co-producers, it is important when drafting and performing the agreement to avoid all clauses and all behavior that could be interpreted to mean that a company exists between the co-producers.

In the co-production agreement, this issue may be dealt with as follows:

Example of a clause related to the legal definition of the agreement
The parties agree to define this co-production agreement as an agreement to produce together, under the conditions set forth hereafter, the cinematographic or audiovisual work covered hereunder, by each contributing a substantial portion of the financing necessary for production and with the intention of becoming the co-owner thereof.

Each co-producer shall be acting exclusively in its own name and on its own behalf in relations with third parties. Each co-producer shall be solely liable towards third parties for commitments it has made. If one of the co-producers fails to comply with this provision, it shall be obligated to compensate the other co-producer for all damages it may suffer on this account.

2.6. TERMINATION CLAUSE

Termination of a contract on a unilateral basis due to the default of the other party often gives rise to legal disputes. This is why it is important to specify the conditions under which termination may occur and the situations justifying it.

The following example covers the various stages of production (and must thus be used in coordination with the clause applicable to termination during the development phase).

If, during the development phase of the project, which the parties hereby define as the period between the date of signature of this Agreement and the 15th day before the first day of principal photography (film shoot), one of the co-producers fails to fulfill its obligations for any reason whatsoever, the following shall occur: if the defaulting co-producer does not fully remedy the failure it is reproached with within a period of fifteen days following receipt of formal notice to do so via registered letter, return receipt requested, this Agreement shall automatically be terminated due to the fault of that co-producer who shall incur liability for such termination and the defaulting co-producer
shall lose its capacity of co-producer. The defaulting co-producer shall benefit from the right to claim reimbursement of the amounts it may have already invested in the form of a last-ranking debt against the producer’s net share of receipts. The co-producer who fails to fulfill its obligations may be substituted by a co-producer of the same nationality chosen by the other co-producer, without any of these measures prejudicing the potential right to damages.

In the event one of the co-producers defaults during the period running from the 15th day before the first day of principal photography to the date of completion of the film (first release print made), the time periods provided for above shall be reduced to 24 hours. Throughout the shooting of the film, considering shooting requirements and the extent of the damages an interruption, suspension or delay in shooting could cause, formal notice may be sent to the defaulting co-producer via any method on the condition that the time when such formal notice is served can be established.

If a force majeure event duly proven by the defaulting co-producer has prevented it from fulfilling its obligations, this co-producer shall not lose its capacity of co-producer. However, the other co-producer may, based simply on written notice of failure to fully or partially perform its obligations by the defaulting co-producer, substitute for the defaulting co-producer or take on a new co-producer to substitute for it. In this case, the share in the co-production of the co-producer that has failed to fulfill its obligations shall be reduced pro rata by the share of its obligations remaining unperformed which shall then increase the share of the co-producer substituting for it.

It is hereby expressly provided that failure to comply with the obligations set forth in Articles (nos. of relevant Articles) shall automatically cause the immediate termination of this Agreement due to the fault of the party failing to comply who shall incur liability for such termination, without prejudice to all damages that may be claimed.
The specific case of a refusal of a license for public exhibition from the authorities may be settled as follows, for example:

If one of the co-producers is refused a license for public exhibition from the authorities, the situation between the co-producers shall be dealt with as follows: the refusal of the license shall immediately cause the co-production agreement to be terminated and shall give rise to a right for the co-producer who did not obtain the license to claim reimbursement of all amounts invested in the film as a substitute for its right as co-producer. This debt shall be reimbursed by way of withholding 50% of the producer's share of net receipts generated by sales of the film worldwide with the exception of those territories reserved to the other co-producer, after any advances which may have been provided by the sales agent have been reimbursed. This debt shall be reimbursed using the very first receipts generated by the exploitation of the film which are collected by the other co-producer.

2.7. GOVERNING LAW AND SETTLEMENT OF DISPUTES

By definition, International co-production agreements involve at least two countries. However, only one country's law can govern the agreement. Therefore, it is up to the parties to decide on the national law that will govern their contractual relations. As each party generally has a preference for its own national law, it often ends up being the law of the co-producer who has the majority share that is chosen.

The parties also have the responsibility to decide how potential disputes that may arise between them will be settled. As regards this question, readers can refer to Point 2.11 under Part II.

There are two points worth mentioning here however:
– Considering the highly specialized nature of the field and the fact that very few judges are familiar
with co-productions (because the number of cases before the court is limited), it is almost always in
the parties' interest to remain involved in finding a solution to the dispute (and therefore not to let a
third party decide). This means that conciliation (and the qualities of the person chosen as a
conciliator) has an important role to play in this area.

The more the parties trust the conciliator, the more chances they have of settling their dispute via
conciliation. This is why it is useful to choose the person who will have this responsibility together. As
it is usually more difficult to agree on a conciliator once a dispute has arisen, the parties will increase
their chances of reaching a settlement via conciliation if they appoint a person by way of common
agreement directly in the co-production agreement.

– In the event of dispute, one of the parties may be tempted to block access to the film negative. It is
thus worthwhile to provide in the agreement that this is prohibited.

Example of such a clause:

Each co-producer hereby expressly agrees that in the event of a dispute or under any other circumstances, it will not take any measures whatsoever for the purpose or having the effect of blocking access to the film negative or preventing or making more difficult the printing of copies. Irrespective of the outcome of the legal dispute which may exist between the co-producers, the co-producer violating this obligation shall be liable for payment to the other co-producer of a lump-sum amount of (amount) per day it blocks access.