

## Chapter 18

# The Audiovisual Works as Digital Library Content: Storage and Exploitation

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### ABSTRACT

*The digital reproduction and transmission of audiovisual works seems to be the next stage of dissemination and commercial exploitation of protected works, following musical works. Additionally, the latest major novelty of the information society is the creation of digital libraries, for profit or not, at national and international level. The inclusion of audiovisual works in digital libraries and their resulting exploitation raise a number of legal issues. This chapter aims to review the economic rights involved in the process of digital exploitation as well as the delimitation of the safeguarding of the moral rights, which the libraries are bound to observe. Such review examines both continental and common law jurisdictions. It does not, however, address issues related to the off-line exploitation of audiovisual works or their further use by the user of the digital library services.*

### 1. INTRODUCTION

The need of safeguarding the legitimate exploitation of audiovisual works through the Internet is now more pressing than ever. On the one hand, the show industry is already using digital technology for the creation of audiovisual works and intends to be increasingly, but safely, active on the Internet. On the other hand, the number of users who seek or exchange audiovisual files through

the Internet is growing exponentially. For that reason, a number of initiatives have been taken on a private or state level with the aim of establishing digital libraries with databases containing digitized or digital audiovisual works available to the public, either with or without remuneration. The requirements for the operation of such libraries raise a number of issues from the viewpoint of intellectual property law.

First of all, the very notion of audiovisual works has been significantly expanded, following technological developments. Moreover, the

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content and scope of the economic rights which the authors or their assignees will have to transfer to the digital libraries must be examined in detail, taking into account the different legal protection systems in place in continental and in common law jurisdictions. Finally, it is imperative to address the issues raised by the exploitation of audiovisual works through the Internet in connection with the safeguard of the moral rights of the author and performing artists. This discussion is often overlooked, as usually the emphasis is placed on economic rights. Nevertheless, in practice the consent of the authors and performers or their assignees for the reproduction and dissemination of their work or performance through the Internet depends to a large degree on the safeguard of the overall terms of its exploitation, especially on the observance of the right of integrity.

## **2. DEFINITION OF AUDIOVISUAL WORKS**

The concept of audiovisual works was formulated in consecutive stages, largely thanks to legal doctrine and jurisprudence. In contrast, most legislative texts only provide either concise definitions or an enumeration of some of the elements defining audiovisual works.

### **2.1. The Influence of New Technologies**

The gradual formulation of the concept of audiovisual works is related to the circumstances of their appearance and their direct dependence on the technological progress of the times.<sup>1</sup> The first attempt at forming the concept was the result of the development of the motion picture industry, which for a long time would remain the only source of audiovisual works. Therefore, an audiovisual work was initially identified with a motion picture, which in turn stemmed from the art of photography.

The first international texts did not include a conceptual description of the terms “cinematographic work” or “audiovisual work”. The term “cinematographic work” was first used at the Berlin Conference (1908) during the revision of the Berne Convention, which aimed to extend protection mainly over motion picture adaptations. The text of the 1886 (1979) Berne Convention, as currently in force, includes motion picture works in the protected categories of original works (Art. 14 bis) without providing a full definition of the term.<sup>2</sup> Nonetheless, the indicative enumeration in Article 2 (1) reflects a wide concept of the term. From this point of view as worthy of protection are deemed not only cinematographic works but also “works expressed by a process analogous to cinematography”.<sup>3</sup> In a similar vein, Article 19 of the 1961 Rome Convention includes a reference to “films”.<sup>4</sup>

Regarding the first national legal acts on the protection of intellectual works, they usually refer to cinematographic works as protected creations, without further definition of the term. In France, the 1957 law on intellectual property simply lists cinematographic works among the other categories of protected works.<sup>5</sup> The 1965 German law on intellectual property directly links cinematographic works with photography.<sup>6</sup> The 1985 Portuguese law extends its protection to cinematographic works provided they display originality.<sup>7</sup> Similarly, a simple reference to cinematographic works is the approach of the Swiss<sup>8</sup>, the Norwegian<sup>9</sup> and the Swedish<sup>10</sup> legislation.

On the contrary, US legislation replaces from the very beginning the term “cinematographic work” with the wider notion of “audiovisual work”, according to which “audiovisual works are works that consist of a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, or electronic equipment, together with accompanying sounds, if any, regardless of the nature of the material objects, such as films or tapes, in which the works are embodied”.<sup>11</sup>

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