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## EMPLOYING THE PERFORMING ARTIST IN FRANCE

*Tony A. Kenneybrew, J.D., Ph.D.*<sup>†</sup>

### I. INTRODUCTION

In the United States and most European countries, the summer months are synonymous with festivals of all types: music, dance, theater, circus, etc. It seems very obvious that these festivals would not be able to “go on” without the needed participation of the performing artists and technicians. Some of these dancers, singers, actors, clowns, jugglers, acrobats, and contortionists may be working for free, while others may be receiving payment for their performance. In France, due to the French employment laws and the longstanding French democratic principal of freedom from enslavement, most of the performing artists and technicians are paid.

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The French Constitution<sup>1</sup> gives numerous rights to every employee in France, including the right to go on strike.<sup>2</sup> When workers in France feel as though their legal status and statutory benefits are being threatened by an employer, a combination of employers, or by the National government, they do not hesitate to exercise their constitutional right to go on strike. Even future workers who are not yet are part of the work force go on strike to protect their status, as was the case recently (March 2006) in France when the high school and college students went on strike (and joined by the workers) protesting against the *Contrat Premier Embauche* law or C.P.E (First Employment Contract).<sup>3</sup> This is also true of

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1. The current Constitution of France was adopted on October 4, 1958. It is typically referred to as the Constitution of the Fifth Republic. France has had 15 fundamental laws. *La Constitution*, Legifrance, available at <http://www.legifrance.gouv.fr/html/constitution/constitution.htm> (last visited Apr. 1, 2006).

2. The French Constitution of October 27, 1946, pmbll., line 7 ("*La Constitution – Preamble de la Constitution de 1946*") available at <http://www.legifrance.gouv.fr/html/constitution/const02.htm> (last visited Apr. 1, 2006) (The current Constitution of France of October 4, 1958 recognizes the preamble of the French Fourth Republic's Constitution of October 27, 1946, which recognizes the right to go on strike. "Le droit de grève s'exerce dans le cadre des lois qui le réglementent." Additionally, it is interesting to point out that while the United States was being torn apart by Civil War, the French enacted an imperial law on May 11, 1864, making striking legal if it was non-violent.)

3. The students, joined by the workers, objected to the new job contracts law for under 26 year olds which allowed a two year probation period (instead of the usual 3 months) and dismissal without justification. Lasting for several weeks, the student protests culminated in violence in Paris and other French cities. Several universities were occupied by the students as especially the Sorbonne University in Paris (reminiscent of the 1968 student riots). "Cars were burned and shops smashed today in the center of Paris as vandals erupted from the ranks of student demonstrators trying to force the government of Prime Minister Dominique de Villepin to withdraw a new youth employment law." Katrin Bennhold and Craig S. Smith, *Labor Law Protests in Paris Erupt in Violence*, The New York Times, March 24, 2006. On March 28 2006, "As many as 2.7 million demonstrators marched through the streets of French cities Tuesday in one of the country's largest protests in decades, as striking workers shut down the Eiffel Tower and the Paris Opera and disrupted train, bus and airline service nationwide in opposition to a new youth labor law." Molly Moore, *Huge Protest Puts France to the Test*, Washington Post Foreign Service, March 29, 2006; Page A13. "The massive show of strength created new fissures in President Jacques Chirac's government, which early this month triggered the crisis by passing the measure to waive some of France's strict job protections and give employers new freedom to dismiss people under age 26," Molly Moore. "The French government contends that the country's elaborate social safety net, including strict job protections, is too expensive and is holding the country back in global competition," Molly Moore. The French Prime Minister Dominique de Villepin eventually gave in to the student and work unions' demands for complete withdrawal of Section 8 of the new employment law. See

entertainment artists, even if the consequence means blocking several or all of the festivals and shows in France. In fact, this was the case when the French performing artists and technicians went on strike in 2003.<sup>4</sup> They were “worried about changes to a unique French [employment] system that protects them with an unemployment plan covering their downtime between projects.”<sup>5</sup> During that strike, many of the famous French festivals, like the internationally famous *Festival d’Avignon*, were shut down or cancelled.<sup>6</sup> The curtains stayed down, and the show did not go on. Like the student and worker protests in March 2006, the cancellation of all of the festivals in France that hot summer of 2003 made international headlines.<sup>7</sup>

Many Americans tend to think that the French are always on strike.<sup>8</sup> So far, in the United States, it is uncommon for entertainment artists to go on strike nationally and march through the streets of the nation’s capital

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law: *LOI n° 2006-396 du 31 mars 2006 pour l’égalité des chances*, Journal Officiel, n° 79, April 2, 2006, page 4950.

4. Angela Doland, *French Performers Go On Strike*, Associated Press, Paris, July 2, 2003, available at <http://www.cbsnews.com/stories/2003/07/02/entertainment/main561473.shtml>.

5. *Unionising Workshop: Intermittents du spectacle 2003*, available at <http://flaxmanlodge.omweb.org/modules/news/article.php?storyid=66> (last visited Apr. 1, 2006); *French Artists at the Barricades*, Community Arts Network: API News, July 2003, available at <http://www.communityarts.net/apinews/archive/apinews48.php> (last visited Apr. 1, 2006). French singers, dancers, actors, choreographers, technicians, circus performers — all sorts of people with seasonal employment in the arts — have united in protest, says Elaine Sciolino in the *N.Y. Times* (7/1/03). The object of their wrath is a deal signed recently by three unions with the French employers’ association that would reduce unemployment benefits to eight months from 12 months a year for workers who do not have full-time work. The agreement also requires workers in the arts to work 507 hours in 10 months rather than over the course of a year before they are eligible for the benefits. The strike has disrupted or caused the cancellation of several major arts festivals throughout France, most of which employ freelance entertainment artists.

6. Alan Riding, *Strikes Shut Down French Festivals*, *N.Y. TIMES*, July 11, 2003, at E1 (Late Edition - East Coast).

7. See Alan Riding, *Strikes Shut Down French Festivals*, *N.Y. TIMES*, July 11, 2003, at E4; Jon Henley, *Walkout Brings Avignon Festival To a Halt*, *THE GUARDIAN*, July 9, 2003, <http://arts.guardian.co.uk/news/story/0,11711,994520,00.htm>; Paul Ben-Itzak, *Artists’ Union Forces Cancellation of Montpellier, Marseille Festivals; Aix & Avignon Threatened*, *The Dance Insider*, July 1, 2003, [http://www.danceinsider.com/f2003/f0701\\_3.html](http://www.danceinsider.com/f2003/f0701_3.html) (last visited Mar. 24, 2006).

8. In an address to the CSIS, the French Trade Minister responded to this statement: “The French are always on strike? In fact, the labor climate in the private sector is better than is often asserted: according to the OECD, the number of days of strikes per 1,000 employees is 25% lower than in the United States.” Christine LAGARDE (French Trade Minister), *France: a paradise for foreign investors?*, Embassy of France in the United States, April 7, 2006. [http://www.ambafrance-us.org/news/statmnts/2006/lagarde\\_CSIS040706.asp](http://www.ambafrance-us.org/news/statmnts/2006/lagarde_CSIS040706.asp)

with banners and slogans, blocking traffic, chanting, shouting, and demanding specific rights, while seriously disrupting and prohibiting summer festivals. Why not imagine dancers, singers, actors, clowns, and acrobats marching on the green grass of the Capitol Building in Washington D.C.? Why not imagine them demanding more rights, or the protection thereof, under the eyes of the bronze Statue of Freedom,<sup>9</sup> or even marching down Pennsylvania Avenue to the White House under the worried eyes of the U.S. Secret Service. Maybe this is unimaginable due to the fundamental differences between the United States and France when it comes to employment philosophy, principals, and laws (to name a few). For instance, in 1981, the late U.S. Republican President Ronald Reagan fired more than 11,000 air traffic controllers who dared to stage a strike.<sup>10</sup> Prior to that incident, the late U.S. Democratic President John F. Kennedy made this famous remark: “[A]sk not what your country can do for you: Ask what you can do for your country.”<sup>11</sup>

How is it that the French entertainment artists and technicians were bold enough to march through the streets of Paris, from the *Champs Elysées* through the *Boulevard Haussman*, to the *Place de la République*, for something other than a parade? Was there a certain revolutionary fever, or revolutionary nostalgia in the air?<sup>12</sup> Why is it that they were not fired or replaced by other artists so that the show would “go on,” instead of losing millions of euros already invested in the promotion of the French festivals? Why is there such a strong national solidarity among the French entertainment artists and technicians? What is it about their status that would make them even want to protect it?

This essay is an analysis of the employment of performing artists in France, and it attempts to answer the above questions. In doing so, it also aims to answer the following question: what should non-French employers,

9. See generally *The Statue of Freedom*, The Architect of the Capitol, <http://www.aoc.gov/cc/art/freedom.cfm> (last visited Mar. 20, 2006) (“The bronze Statute of Freedom by Thomas Crawford is the crowning feature of the dome of the United States Capitol. The statute is a classical female figure of Freedom wearing flowing draperies.”).

10. See Statement and a Question-and-Answer Session With Reporters on the Air Traffic Controllers Strike, PUB. PAPERS 687 (Aug. 3, 1981); see also 15 U.S. Dep’t of Transp. Ann. Rep. 21-22 (1981) (The air traffic controllers were civil servants).

11. John F. Kennedy, President of the U.S., Inaugural Address (Jan. 20, 1961), in S. Doc. No. 87-9 (1961).

12. See generally Bureau of European and Eurasian Affairs, *Background Note: France*, U.S. Department of State, <http://www.state.gov/r/pa/ei/bgn/3842.htm> (last visited Mar. 27, 2006) (France has several different forms of government since the Revolution of 1789, including several Republics, and two Empires, today France is currently in its 5th Republic).

who are contemplating hiring performing artists in France, know before they venture into the realm of French employment law and litigation?

In order to analyze the employment of performing artists in France, it is important to define the term “performing artist” and the other pertinent terminologies used. In this essay, the words “entertainment artist” are used for the French word “*artiste du spectacle*,” “performing artist” for the French word “*artiste-interprète*,” and the word “extra” for the French word “*artiste de complément*.” These three French terms are not used interchangeably, and each of them has its own meaning in French dictionaries. However, the definitions that we will be using for all three of these terms will be those in accordance with the definitions given in, or deduced from the French laws. For example, in this essay, the word “entertainment artist” is the translation of the general French term “*artiste du spectacle*” as found in the French laws. However, the French laws do not define what an entertainment artist is, but instead it gives a non-exhaustive list of entertainment professions and categories. From this list one can deduce who entertainment artists are. For example, formally trained opera, choir and classical singers (*l’artiste lyrique*), actors, dancers, show entertainers (*l’artiste de variétés*), musicians, popular and folk singers (*le chansonnier*), orchestra conductors, orchestra arrangers (*l’arrangeur-orchestrateur*), film directors, and extras (*l’artiste de complément*).<sup>13</sup> Indeed, these are some of the very entertainment artists that one would have seen in the 2003 France festivals. It will later be demonstrated through examining French laws that a “performing artist” is an entertainment artist, and is clearly not an “extra.” Determining whether or not an entertainment artist is a performing artist or an extra is an important element in entertainment employment litigation.

Before analyzing these French laws with respect to the performing artist, it is important to underline that France is a civil law country. This does not mean that the only judicial remedy available in France is damages, nor does it mean there are no criminal remedies. Being a civil law country generally means that the only laws in France are the enacted laws. The enacted laws are principally coded;<sup>14</sup> therefore, unlike the

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13. See C. TRAV. L762-1 (Fr.) (In French, “Sont considérés comme artistes du spectacle, notamment l’artiste lyrique, l’artiste dramatique, l’artiste chorégraphique, l’artiste de variétés, le musicien, le chansonnier, l’artiste de complément, le chef d’orchestre, l’arrangeur-orchestrateur et, pour l’exécution matérielle de sa conception artistique, le metteur en scène.”)

14. It is a myth that in civil law countries that all the laws are coded. Laws in France are not automatically codified. For example, the French intellectual property code was created in 1993. Prior to that, there were several enacted laws that were cited by their dates of

common law system (like that in the United States), French court decisions are not precedent *stricto sensu*.<sup>15</sup> Though case law assumes a less important role in a civil law nation, judicial interpretation of the Code is still a necessary component in the administration of justice. This legal doctrine is often referred to as a *jurisprudence constante*.<sup>16</sup> A future employer of performing artists in France should also know that except for paying the lawyers' fees of the losing party (the French rule<sup>17</sup>), there are no equity remedies, and that ignorance of the law is not a valid defense in France.<sup>18</sup> For these reasons, this essay will principally be analyzing the enacted laws.<sup>19</sup>

The analysis of the employment of performing artists in France will be done in two parts. First, the essay will analyze the nature of the different laws in France governing the employment of the performing artist. In doing so, it will statutorily define the word "performing artist" and explore the scope of one's rights, most notably through an analysis of the pertinent provisions of the French labor laws, and the French Intellectual Property laws. In the second part of this essay, it will analyze the implementation of these different laws that govern the employment of performing artists, and the different remedies available.

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enactment. See CHRISTIAN DADOMO & SUSAN FARRAN, *THE FRENCH LEGAL SYSTEM* 25 (1993).

15. Although judges are not bound by other higher court decisions, as in the case with common law countries, it is important to emphasize that French judges often evaluate the holdings of higher courts for guidance. Particularly helpful are the decisions from the highest Supreme Courts in France: the *Cour de Cassation* and the *Conseil d'Etat*. See ANDREW WEST ET AL., *THE FRENCH LEGAL SYSTEM: AN INTRODUCTION* 57 (1993).

16. In France, the concept of *jurisprudence constante* of the *Cour de Cassation* (for civil and penal cases) or the *Conseil d'État* (for administrative cases) is, in practice, the equivalent to case law. *Jurisprudence constante* is of considerable import in certain domains such as labor law or administrative law. In particular, the *Conseil d'État* and the Constitutional Council have distinguished fundamental principles that statutes and regulations must follow, even when those principles were not explicitly written in statutes. See generally B. DICKSON, *INTRODUCTION TO FRENCH LAW* 11 (1994).

17. *Nouveau Code de procédure civile*. Article 700.(Fr).

18. The French very commonly use the sayings: *nul n'est censé ignorer la loi*. The jurists very often have recours to the Latin maxims *Nemo censetur legem ignorare* and *Dura lex sed lex* (*la loi est dure mais c'est la loi*). Our translation: "No one is deemed to be ignorant of the law" and "the law is strict but that's the law" respectively.

19. The French codes may also contain decrees or "décrets," "règlements," and "circulaires." To distinguish the different laws, the "legislations" from the "décrets" and the "règlements." The codes put the capitol letter "L" before the article for the legislation, a capital "D" before the article for the decrees and a capital "R" before the "règlements."

## II. NATURE OF THE DIFFERENT LAWS IN FRANCE GOVERNING EMPLOYMENT FOR THE PERFORMING ARTIST

The provisions of the enacted laws concerning employment in France are governed by national labor laws, or the French Labor Code (*Code du Travail*). This national employment code has specific provisions with respect to the “entertainment artist,” which also includes the performing artist (this will be demonstrated later). When looking for the definition of the term “performing artist” (*artiste-interprète*), the labor code, as mentioned earlier, was insufficient because it only provided a list of entertainment professions that also included extras.

However, there are specific provisions establishing distinct differences between the various entertainment artists that are hidden in the provisions of the French intellectual property laws (or the French *Code de la Propriété Intellectuelle*). The French intellectual property laws are not employment laws; however, they recognize rights of the performing artists with respect to their remuneration. Also, there are general personal provisions in the French Civil Code (*Code Civil*) that the performing artist may be able to invoke for monetary damages when one’s performance was recorded or filmed, and exploited without the performer’s authorization. This means that the future employer of performing artists in France, or anyone wanting to hire the services of an independent performing artist, must consider the provisions of three different French codes: the French Labor Code, the French Intellectual Property Code, and the French Civil Code.

### A. French Labor Code (*Code du Travail*) and the Performer

The performing artist is an entertainment artist. The French Labor Code provides both general employment provisions and provisions pertaining specifically and exclusively to the entertainment artist. It may seem logical to begin this demonstration with an analysis of the general laws before the specific laws; however, due to the particularly specific nature of the entertainment artist, and the determinant-factor character of the specific laws triggering the application of the general laws, it is appropriate to analyze the specific provisions beforehand. After the analysis of the specific laws, this essay will analyze the general laws.

#### 1. Specific Employment Laws Pertaining to Performer

The specific provisions of the French Labor laws pertaining to the entertainment artist, which includes performing artists, address the definition and legal status of an entertainment artist, and the different social protections granted to certain entertainment artists.



*a. Definition and Statutory Status*

The French word “*artiste du spectacle*” (entertainment artist) statutorily means both a “performing artist” and an “extra” according to the provisions of article L762-1 of the French Labor Code.<sup>20</sup> It is very interesting that the French Labor Code includes the term “extras” in its definition of an entertainment artist. One can argue whether or not an “extra” is an artist.

*i. Definition of entertainment artist*

Article L762-1 of the French Labor Code defines what an entertainment artist is; it includes both the performing artist and the extra. However, it makes no distinction between a performing artist and an extra. The Intellectual Property Code, as noted earlier, makes that distinction. Article L762-1 of the French Labor Code defines performing artists as entertainment artists who are formally trained in opera, choir, classical singers (*l'artiste lyrique*), actors, dancers, entertainers (*l'artiste de variétés*), musicians, popular and folk singers (*le chansonnier*), orchestra conductors, orchestra arrangers (*l'arrangeur-orchestrateur*), film directors and extras (*l'artiste de complément*).<sup>21</sup> Indeed, these are some of the very entertainment artists that one would have seen in festivals in France in 2003.

This list is obviously not a complete list (performing artists, such as jugglers, clowns, and pantomimes are conspicuously absent). However, in application with the Intellectual Property Code provisions (that will be analyzed later), judges do not limit entertainment artists to this list. Therefore, the list is not exhaustive.

With respect to extras, the law is very clear. The law specifically mentions “extras” (*l'artiste de complément*<sup>22</sup>). Recognizing there are many other types of extras, the law makes no attempt to make a list. This clearly shows the intent of the French legislators was to include extras in the legal definition of entertainment artists. Being recognized as an entertainment artist is an important step toward being recognized as a salaried worker.

20. C. TRAV. art. L762-1 (Fr.).

21. In French, “Sont considérés comme artistes du spectacle, notamment l'artiste lyrique, l'artiste dramatique, l'artiste chorégraphique, l'artiste de variétés, le musicien, le chansonnier, l'acteur de complément, le chef d'orchestre, l'arrangeur orchestrateur et, pour l'exécution matérielle de sa conception artistique, le metteur en scène.” C. TRAV. art. L762-1 (Fr.).

22. C. TRAV. art. L762-1 (Fr.).

ii. Salaried Worker

French law provides that in order to be able to benefit from the provisions of the Labor Code, one must be a salaried worker and not an independent worker. For many years in France before 1973, it was not clearly defined whether or not an entertainment artist (either a performing artist or an extra) was an independent worker or a salaried worker. This lacunary provision was to the great advantage of the performing artists' companies, the theaters, the producers, and the production agencies of the entertainment artist. They could hire the entertainment artists and extras as independent workers. It is well known that performing artists and extras do not have bargaining power, and the "starving" and inexperienced entertainment artists at times had no other choice but to accept the position as an independent worker. In this fashion, the organizations were not considered as employers, and as a consequence they would not have to pay social charges or employment benefits and the artists had neither unemployment insurance nor health benefits.<sup>23</sup>

In 1973, the French legislator implicitly recognized that if an employer could avoid paying more for the employee, he would do so without hesitation.<sup>24</sup> It also recognized the absence of bargaining power on the part of the entertainment artists. Moreover, in 1973, the French parliament enacted a law that recognized that all entertainment artists are presumed to be salaried workers. This was done to protect the entertainment artists from wide spread abuse.<sup>25</sup> Article L762-1 of the French Labor Code unequivocally states that there is a presumption that an entertainment artist is a salaried worker.<sup>26</sup> The law specifically provides that the entertainment artist is presumed to be a salaried worker; if there is a contract and he/she were performing for money for a person or an organization as long as the entertainment artist is not a formally registered

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23. In France the employer has the burden of filing, declaring, paying each month employer charges to an organization called URSSAF (*Union pour le Recouvrement des cotisations de Sécurité Sociale et d'Allocations Familiales*). This is French quasi-state body which is responsible for collecting the multiple employee and employer contributions for health cover, unemployment insurance, retirement and pension plan, etc. The burden falls upon the employer to declare and remit the relevant sums each month to the URSSAF. Employers often argue that these fees are too heavy and that they should be abolished. See generally CHRISTOPHER JOSEPH MESNOOH, *LAW AND BUSINESS IN FRANCE: A GUIDE TO FRENCH COMMERCIAL AND CORPORATE LAW* (1994).

24. *Loi n° 73-4 du 2 janvier 1973 Journal Officiel du 3 janvier 1973* (Fr.).

25. *Loi n° 73-4 du 2 janvier 1973 Journal Officiel du 3 janvier 1973* (Fr.). C. TRAV. art. L762-1 (Fr.).

26. C. TRAV. art. L762-1 (Fr.).

independent work and performing as such.<sup>27</sup> Employers can no longer easily cheat and have the entertainment artist sign a contract as an independent worker if the entertainment artist is not registered as an independent worker. This is because being registered as an independent worker is the *sine qua non* condition to be an independent worker (who pays his or her own employment charges and health benefits). The law also says that this presumption subsists no matter how or how much the entertainment artist is paid, and no matter what status was agreed upon in the contract (salaried worker or independent worker). This is a public policy law.

This recognition of the legitimacy of entertainment artists, and the granting to them an employee social status, were indeed pleasant victories for the entertainment artists in France. This French social notion that all entertainment artists are presumed to be salaried workers is still unique in Europe. This means that both the performing artist and the extra are salaried workers, unless they are registered as independent workers. This public policy is one of the cultural exceptions that France boasts. This law does not mean that all employers will comply. As we will see later, many employers have found ways to circumvent the law.

#### *b. Statutory Protections*

Some performers (as well as technician) in France that are salaried workers can enjoy a special, statutory, quasi-unemployment welfare status that is unique in Europe called "show intermittent status," or "*le statut d'intermittent du spectacle*." The workers benefiting from such legal status are called "show intermitents" or "*intermittents du spectacle*." All French entertainment artists may also benefit directly or indirectly from certain unions.

##### *i. Welfare Status for the Performer: Intermittent du Spectacle*

The French legislators recognize that all of the entertainment artists need to rehearse, and that the majority of them are not paid during rehearsals. Not all of the entertainment artists have permanent salaries, like the dancers working for the Paris Opéra Ballet. They also recognize that the majority of the entertainment artists do not work regularly, and are deprived of work. As a solution, articles L351-1<sup>28</sup> to L351-2-1 of the

27. C. TRAV. art. L762-1 (Fr.)

28. "En complément des mesures tendant à faciliter leur reclassement ou leur conversion, les travailleurs involontairement privés d'emploi, aptes au travail et recherchant un emploi, ont droit à un revenu de remplacement dans les conditions fixées au présent chapitre." C. TRAV. art. L351-1 (Fr.).

French Labor Code allow labor employee unions, and employer unions to get together to create protocols concerning the payment of unemployment benefits to workers who are deprived of work. This protocol must receive the approval (*agrément*) of the French Labor Ministry.<sup>29</sup> In 1936, the labor employee unions and employer unions of the cinema industry got together and created an unemployment indemnification regime entitled, “*Régime Salarié Intermittent à Employeurs Multiples pour les Techniciens et Cadres du Cinema.*”<sup>30</sup> In 1969, the performing artists were added to the protocol<sup>31</sup> to help those artists that are deprived of work. The result was that the performing artists, such as the extras and the technicians, can have a permanent status of being un-employed as long as they are not registered as an independent worker. The latest protocol is entitled “*Protocole d’Accord Relatif à l’Application du Régime d’Assurance Chômage aux Professionnels Intermittents du Cinéma, de l’Audiovisuel, de la Diffusion et du Spectacle.*”<sup>32</sup> It was signed June 26, 2003, then modified November 13, 2003, and approved by ministerial decree on December 12, 2003<sup>33</sup> following the strikes of the entertainment artists in 2003. The Entertainment intermittents, or “*Intermittents du spectacle,*” is a “social welfare” form of un-employment status for entertainment artists, both performing artists and extras, and the technicians that do not work every

29. C. TRAV. arts. L352-1 & L352-2-1 (Fr.).

30. Alain Rabot, *Histoire de l’Intermittence dans le Spectacle*, La Fédération des Artes de la Rue,

<http://www.lefourneau.com/lafederation/intermittents-03/histoire.htm> (last visited Mar. 26, 2006).

31. *Id.*

32. See generally Law. No. 289 of December 12, 2003, Journal Officiel de la République Française [J.O.][Official Gazette of France], December 14, 2003, p. 21313;

„Under this regulation, cultural workers in between two productions with no income were paid from the unemployment fund – under the condition (which was already difficult for many to fulfill) that they could prove 507 hours of working time for a total of twelve months. This resulted in a twelve-month claim to unemployment benefits. However, since businesses and three unions signed the ‘Protocol Unedic’ on a new regulation of unemployment insurance last summer, the regulation above is no longer valid since the beginning of this year. Now the same number of working hours has to be proven in eleven months, and then unemployment benefits can only be claimed for eight months. This means that 35% of those who could previously claim benefits are no longer entitled to them.“

*Spectacle Inside the State and Out. Social Rights and the Appropriation of Public Spaces: The Battles of the French Intermittents*, available at [http://www.republicart.net/disc/precariat/intermittents01\\_en.htm](http://www.republicart.net/disc/precariat/intermittents01_en.htm) (last visited Mar. 26, 2006).

33. Law. No. 289 of December 12, 2003, Journal Officiel de la République Française [J.O.][Official Gazette of France], December 14, 2003, p. 21313.

day. In order for the French arts to continue in France, and in part as a response to an increasing American cultural invasion of France, there was a need to create un-employment benefits for the entertainment artist in France. As an entertainment intermittent, the artist receives monthly employment benefits (after a certain period) when he or she is not working. They can even go on paid vacation and get home loans. The employers contribute to the payment of these monthly benefits. The artists are paid what is called a "cachet" for his or her performance. This paradigm is unique to the rest of Europe. In fact, this regime is often referred to as the "cultural exception" (*exception culturelle*) of France, and it is often threatened.

However, one must keep in mind that not all performing artists are intermittents. This intermittent status is not automatic, there are conditions, like being unemployed and registered at the unemployment offices (*Agence Nationale Pour l'Emploi* (A.N.P.E.) and *Association pour l'Emploi Dans l'Industrie et le Commerce* (A.S.S.E.D.I.C.), and requirements, such as having a written contract of a determinate duration (CDD) and working a certain number of hours throughout the year (507 hours<sup>34</sup>) as a performing artist (not as a group). It also does not apply to entertainment artists with regular permanent jobs, like permanent performing artists in theaters, shows (such as dancers at the *Moulin Rouge*, the *Lido*, the *Folie Bergers*), or the civil servant performing artists (such as the civil servant dancers for the *Paris Opera Ballet*), civil servant singers for the *Paris Opéra*, and the civil servant musicians on the *Paris Symphony Orchestra*, or from any other French city. The threat of losing this unique status was what provoked the entertainment artist and technician strikes in France in 2003. For many, losing the status of intermittent would translate into losing general benefits from the employment code and especially not receiving unemployment benefits when not working.

## 2. General Employment Laws Applied to the Performing Artist

Because there is a presumption that all entertainment artists, including performing artists, are salaried workers, there are general provisions of the Labor Code that the employer must obey, or it will face severe sanctions. For example, the work must be legal and there must be a written contract.

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34. Circulaire ASSEDEC n° 04-25 du 30 décembre 2004. (p. 22,24,25)  
<http://www.intermittents-unedic.com/pdf/ci0425a.pdf>

*a. Legal Issues*

As in most other countries, workers, including performing artists, in France must have legal status. They are French citizen or immigrants with work permits.

i. Legal Employment

Being legally employed in France does not only require working while having a proper work permit, but it also requires fulfilling certain employer obligations set out in the provisions of French Labor code. For example, receiving a pay slip in France is a right.<sup>35</sup> The French Labor Code provides that all workers, including performing artists, must receive a pay slip at the time of payment.<sup>36</sup> The pay slips are proof that the employees are enrolled in Social Security, the national socialized medical insurance program. The pay slips also provide proof that every hour worked has been declared and compensated, and that the employer is paying, and has paid all the employer charges that must be declared to the French Labor Ministry.

ii. Illegal Employment

French law doesn't use the expression "illegal worker," as used in the United States, but instead uses the phrases "illegal employment," or "dissimulated employment."<sup>37</sup> Performing illegal employment in France is a criminal offense for the employer,<sup>38</sup> but not for the worker, who is considered the victim. Illegal work in France involves not only hiring a worker who lacks a work permit, but also not fulfilling the French Labor Code employer obligations mentioned above.

"Dissimulated employment" may also be a "concealed" or "disguised" employment relationship. Some examples of doing illegal work are: an employer paying a worker in cash without giving the worker a pay slip; an employer giving a portion of a worker's pay in cash, without indicating this cash amount on the pay slip, and not declaring this cash amount to the Labor Minister; an employer not giving a pay slip to a worker, even though the payment was by check; or the employer hiring a foreigner who lacks a work permit.

Under French law, the worker is the victim and is never pursued criminally, because the worker is considered deprived of the benefits that are provided in the provisions of the Labor Code. The burden of proof is

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35. C. TRAV. art. L143-3 (Fr.).

36. C. TRAV. art. L143-3 (Fr.).

37. C. TRAV. art. L324-9 (Fr.).

38. C. TRAV. art. L362-3 (Fr.).

on the employer to prove that he made all the necessary social declarations and obeyed the Labor Code procedures when hiring an employee. France has work inspectors that can conduct surprise inspections at any time, and they can search and seize without a warrant. This is most often done after receiving a tip. There is no notion of probable cause, as in the United States, before a search warrant is issued.

### iii. Labor Unions

As we saw earlier, the right to go on strike is deeply imbedded in the French Constitution of 1958 as “a fundamental right of our time.”<sup>39</sup> Unless the entertainment artists are civil servants, the striking employees do not even have to file prior notice of strike.<sup>40</sup> The French Labor Code also allows the entertainment artists, both performing artists and extras, to benefit directly and indirectly from the assistance of French labor unions (*syndicates*). The French labor unions, and Performing Artists’ unions, successfully participate in minimum wage, benefits, and the Union contract with the employers (the Conventions Collectives). Where the written contract may be silent, the union agreement fills in the gap if the courts have not done so. Regarding minimum wages, the performing artist does not have to be a member of a particular union to benefit from the provisions in the protocols signed between the unions and the employers of a specific industry. The late U.S. President Ronald Reagan’s firing of more than 11,000 striking air traffic controllers in 1981,<sup>41</sup> would have been completely illegal under French law.<sup>42</sup>

### b. *Types of Employment Contracts*

All salaried workers, including performing artists, have some sort of employment contract, either written or oral. Sometimes it can be to the advantage of the worker not to have a written contract. In French employment law there are two mains types of employment contracts:

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39. See *supra* notes 1-2 and accompanying text.

40. C. TRAV. art. L 521-3 (Fr.).

41. See generally David Kiley, *Fired Air-Traffic Controller Still Feels the Sting Decades Later*, Jun. 6, 2004, [http://www.usatoday.com/news/washington/2004-06-10-taylor-vignette\\_x.htm](http://www.usatoday.com/news/washington/2004-06-10-taylor-vignette_x.htm) (providing background information of President Reagan’s actions).

42. See C. TRAV. arts. L 521-1 & L 122-3 (Fr.). “La grève ne rompt pas le contrat de travail, sauf faute lourde imputable au salarié. Son exercice ne saurait donner lieu de la part de l’employeur à des mesures discriminatoires en matière de rémunérations et d’avantages sociaux. Tout licenciement prononcé en violation du premier alinéa du présent article est nul de plein droit.” C. TRAV. art. L 521-1 (Fr.).

permanent work contracts,<sup>43</sup> and contracts of a determinate duration (commonly known as “performance contracts” in the United States).<sup>44</sup>

i. Permanent Contract

A permanent work contract, or *contrat de travail à durée indéterminée* (commonly known in France as a C.D.I.), is an agreement that does not specify a termination date.<sup>45</sup> In theory, it is a contract for life. Certain strict conditions must be met in order to be able to terminate a permanent contract. The public policy rule in France is that every worker has a permanent contract unless otherwise specified. According to the Labor Code, if a worker does not have a written contract, he automatically has a work contract for the rest of his life. This is one of the reasons why, at times, not having a contract is beneficial. Problems with this system occur when an employer has friends or family who are only volunteering, because this could trigger articles of the Labor Code.

This system of permanent contracts can be very costly to an employer when there is a termination of the contract imputed to the employer. Even a performing artist without a written contract is considered to have a permanent contract. It is rare to see a performing artist with a permanent work contract. Conversely, most civil servant performing artists do have permanent contracts. The vast majority or other entertainment artists have contracts of a determinate duration.

ii. Contract of a Determinate Duration

A performance contract, or *contrat de travail à durée déterminée* (commonly known in France as a C.D.D.), is an agreement that clearly specifies a termination date<sup>46</sup>. It is important to understand that having a contract of a determinate duration is the exception in French Labor law. France does not want employees living precariously from one contract of a determinate duration to another. France also does not want an employer to offer a job with a contract of a determinate duration when the job consists of the main activity of the employer. Because it is the exception, there are very strict rules to follow in order to maintain a contract of a determinate duration. French employment law requires that certain elements be clearly mentioned in the contract. For example, the reason why the employer is seeking to employ for a specific duration, the name of the work field as it is listed in the Labor Code that permits an employer to

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43. C. TRAV. art. L121-1 (Fr.).

44. C. TRAV. art. L122-1 (Fr.).

45. C. TRAV. art. L121-1 (Fr.).

46. C. TRAV. art. L122-1 (Fr.).



establish a contract of a determinate duration, and the date the job (work contract) starts and terminates. If these obligations are not followed, if they are illusory, or breached, the contract automatically becomes a permanent contract.

There are also certain obligations that must be performed, or the employer risks the contract automatically becoming a permanent contract. For example, a contract of a determinate duration must be in writing<sup>47</sup>, it must be given to the employee within 3 days from the start of the job, the employee cannot work past the termination date specified in the contract, it must not be for work that is the permanent activity of the employer<sup>48</sup>, it must be on the list of activities that are mentioned in the Labor Code<sup>49</sup>, and it must not be to replace striking workers<sup>50</sup> (nonexhaustive). Performing Artists are listed in the Labor Code as an activity for which an employer can seek a contract of a determinate duration.

### *B. French Intellectual Property Code (Code de la propriété intellectuelle) and the Performing Artist*

Under what circumstances is the entertainment artist a performing artist, and when is he or she not? Thinking sequentially, the future employer in France must first determine if its employee is a performing artist. The statutory definition of a performing artist is not found in the provisions of the French Labor Code, nor the French Civil Code, but is found in the French Intellectual Property Code. The French Intellectual Property Code has provisions pertaining specifically to the performing artist and the extra, in its section entitled *Neighboring Right to the Authors' Rights*.<sup>51</sup> Article L212-1 of the French Intellectual Property Code defines a "performing artist." The pertinent portion reads as follows: "[s]ave for ancillary performers, considered such by professional practice, performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts."<sup>52</sup>

In virtue of this article, there are clearly two conditions that must be met to qualify as a performing artist: (1) the employee must be performing,

47. C. TRAV. art. L122-3-1 (Fr.).

48. C. TRAV. art. L122-1 (Fr.).

49. C. TRAV. art. L122-1-1 (Fr.).

50. C. TRAV. art. L122-3 (Fr.).

51. Authors' rights are often regrettably translated into copyright. The philosophy and spirit of the French author's right is not like the Copyright Act of 1976. See 17 U.S.C. § 101 et seq. French law protecting authors is more human and more focused on the author, whereas the American Copyright Act does not mention the author, only the copyright holder. The author is eclipsed by the right to make copies.

52. CODE DE LA PROPRIETE INTELLECTUELLE, art. L212-1 (Fr.).

and (2) must be performing a literary or artistic work. Absent one of these conditions, the employee is not a performing artist. The law does not specify if the work must be copyrighted, or in public domain (for example, the copyrighted late 20th century ballet "*Le Sacré de Printemps*" created by Maurice Béjart,<sup>53</sup> or the 17th century public domain play "*Le Bourgeois Gentilhomme*" written by Molière<sup>54</sup>). By clearly specifying a literary work of art, the legislator arguably excludes performing industrial work or a trademark. The entertainment artist performing a trademark (a brand name) would arguably not be a performing artist. The article of the French Intellectual Property Code is also unclear as to whether an entertainment artist who does not meet the conditions of a performing artist is an extra. This can only be inferred. If an employee entertainment artist is not a performing artist, by default the employee is an extra. However, the word "extra" is not defined by the law.

Only the performing artist benefits from the specific provisions of the French Intellectual Property Code. In fact, the French Intellectual Property Code recognizes the rights of the performing artist, while he or she is working, and after the work (his or her artistic performance) has been performed, sold, recorded, reproduced, and commercially exploited. The "extra" does not benefit from these rights. Because the remuneration and quasi employment provisions of the French Intellectual Property Code only apply to performing artists, it is very important to distinguish between the statutory status of a "performing artist" and that of an "extra" when determining which status applies to the entertainment artist to be hired. This essay will first analyze the rights that exist while the work is being performed, and then the rights retained after the work has been performed.

### 1. Rights While Work Is Being Performed

During the time of employment, the performing artist benefits from several provisions of the French Intellectual Property Code. For example, the performing artist must have a written contract.<sup>55</sup> However, not having a written employment contract in France can be used in favor of the worker, no matter what the profession may be. The public communication

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53. Maurice Bejart born in Marseille 1926. French choreographer of the Ballet du XXe Siecle. His best known works include "Le Sacred u Printemps/the Rite of Spring" (1959), "L'Oiseau de Feu/the Firebird" (1970) and "Bolero" (1981).

54. The pseudonym for the 17th century French actor and writer of comedies Jean-Baptiste Poquelin (1622-1673). Molière is considered one of the greatest writers of French comedy. His best-known works include "L'école des Femmes" (1622), "*Tartuffe*" (1664), "*Le Misanthrope*"(1666), and "*Le Bourgeois Gentilhomme*" (1670).

55. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-3 (Fr.).

of the performance, reproduction, and the transfer of the performing artist's economic rights must be in writing. Article L212-3 provides that "[t]he performer's written authorization shall be required for fixation of his performance, its reproduction and communication to the public as also for any separate use of the sounds or images of his performance where both the sounds and images have been fixed."<sup>56</sup> This means that if the performance is being broadcast on live radio, television, or internet, the employer cannot disseminate and broadcast the performance without written authorization from the performing artist.

The performing artist can also benefit from entertainment artists' labor union collective bargaining agreements (*conventions collectives*), such as labor union contracts and labor union minimum wages. These collective bargaining agreements also specify that the performing artist must be paid the trade union minimum wages of a performing artist and the compensation cannot be the same as the salary of the extras. However, unlike the in the United States, the performing artist does not have to belong to an artist labor union (like the Actors' Guild) in order to be employed.

## 2. Rights after Work Has Been Performed

Unlike most employees, the benefits and rights recognized to the performing artist do not cease once the work has been performed. As mentioned above, article L212-3 of the French Intellectual Property Code specifies the entertainment artist's written authorization is required for fixation of his performance, its reproduction, and its communication to the public.<sup>57</sup> This also means that in French law, agreeing orally to, or allowing the film director to film/record the performance of the performing artist during the filming of a movie is not an automatic authorization from the performing artist, allowing it to be reproduced or communicated to the public. Nor is it a waiver of the right to have a written agreement.<sup>58</sup> After having performed the work, and if there was no written authorization, the performing artist still has rights to his or her recorded performance. The performing artist can either ask for damages, or for an injunction in order to cease or prevent the communication to the public of his recorded performance.

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56. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-3 (Fr.).

57. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-3 (Fr.).

58. It is important to underline that in French labor law, the rule is that the waiver of a right is never presumed (*la renunciation à un droit ne se présume pas*).

*a. Royalties*

After having performed, executed, or presented his/her interpretation, the performing artist may still receive remuneration. Article L212-3, paragraph 2 of the French Intellectual Property Code clearly provides that the performing artist, like authors, can receive remuneration or royalties for his interpretation after the work has been performed. Article L212-3, paragraph 2 of the French Intellectual Property Code provides that “[s]uch authorization and the remuneration resulting therefrom shall be governed by Articles L762-1 and L762-2 of the Labor Code, subject to Article L212-6 of this Code.”<sup>59</sup>

Article L762-1 of the French Labor Code provides that all contracts made with an entertainment artist for artistic production that are remunerated are considered to be an employment contract.<sup>60</sup> Indeed, article L762-2 of the French Labor Code clearly provides that the remuneration due to the performing artist as a result of the sale or the

59. CODE DE LA PROPRIÉTÉ INTELLECTUELLE art. L 212-3.

60. “Tout contrat par lequel une personne physique ou morale s’assure, moyennant rémunération, le concours d’un artiste du spectacle en vue de sa production, est présumé être un contrat de travail dès lors que cet artiste n’exerce pas l’activité, objet de ce contrat, dans des conditions impliquant son inscription au registre du commerce.

Cette présomption subsiste quels que soient le mode et le montant de la rémunération, ainsi que la qualification donnée au contrat par les parties. Elle n’est pas non plus détruite par la preuve que l’artiste conserve la liberté d’expression de son art, qu’il est propriétaire de tout ou partie du matériel utilisé ou qu’il emploie lui-même une ou plusieurs personnes pour le seconder, dès lors qu’il participe personnellement au spectacle.

Sont considérés comme artistes du spectacle, notamment l’artiste lyrique, l’artiste dramatique, l’artiste chorégraphique, l’artiste de variétés, le musicien, le chansonnier, l’artiste de complément, le chef d’orchestre, l’arrangeur-orchestrateur et, pour l’exécution matérielle de sa conception artistique, le metteur en scène.

Le contrat de travail doit être individuel. Toutefois, il peut être commun à plusieurs artistes lorsqu’il concerne des artistes se produisant dans un même numéro ou des musiciens appartenant au même orchestre.

Dans ce cas, le contrat doit faire mention nominale de tous les artistes engagés et comporter le montant du salaire attribué à chacun d’eux.

Ce contrat de travail peut n’être revêtu que de la signature d’un seul artiste, à condition que le signataire ait reçu mandat écrit de chacun des artistes figurant au contrat.

Conserve la qualité de salarié l’artiste contractant dans les conditions précitées.”  
C. TRAV. art. L762-1 (Fr.).

exploitation of the recording of his or her interpretation, execution or presentation by the employer, or any other user, is not considered as a salary if the presence of the entertainment artist is no longer needed to exploit said recordings. This means that when the performing artist's physical presence is not needed, he or she cannot claim employment rights.

However, this principle does not always stand true. It will later be demonstrated that despite the provisions of article L762-2 of the French Labor Code, the performing artist has employee rights, royalty rights, and moral rights after the work has been performed.<sup>61</sup> As previously shown, article L762-2 of the French Labor Code reminds the public that remuneration is not based on the salary received for work performance, but on the contrary; it is based on the sale or exploitation of reproductions of the performing artist's interpretation.

Article L212-3, paragraph 2 of the French Intellectual Property Code provides that the remuneration is "subject to Article L212-6 of this Code."<sup>62</sup> Article L212-6 provides that "Article L762-2 of the Labor Code shall only apply to that part of the remuneration paid in accordance with the contract that exceeds the bases laid down in the collective agreement or specific agreement."<sup>63</sup>

In the event that the performing artist's contract includes royalties, article L212-3 of the French Intellectual Property Code contradicts article L762-2 of the French Labor Code by stating that a percentage of the royalties is considered a salary. This means that even though the performing artist is no longer performing, a portion of the sales of the recordings is deemed equal to a salary, which results into payment toward the entertainment artist's retirement, health benefits, and employment benefits. Because these extra charges represent about 45% of the salary that the artist is to receive, any employer would prefer not to pay royalties, especially given the fact that the duration of these economic rights is 50 years.<sup>64</sup>

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61. "N'est pas considérée comme salaire la rémunération due à l'artiste à l'occasion de la vente ou de l'exploitation de l'enregistrement de son interprétation, exécution ou présentation par l'employeur ou tout autre utilisateur dès que la présence physique de l'artiste n'est plus requise pour exploiter ledit enregistrement et que cette rémunération n'est en rien fonction du salaire reçu pour la production de son interprétation, exécution ou présentation, mais au contraire fonction du produit de la vente ou de l'exploitation dudit enregistrement." C. TRAV. art. L762-2 (Fr.).

62. CODE DE LA PROPRIETE INTELLECTUELLE, L212-3 (Fr.).

63. CODE DE LA PROPRIETE INTELLECTUELLE, L212-6 (Fr.).

64. Art. L211-4 of the French CODE DE LA PROPRIÉTÉ INTELLECTUELLE provides that "[t]he term of the economic rights provided for in this Title shall be 50 years from January 1 of the calendar year following that of

The performing artist, as the holder, can relinquish the rights to royalties through a contract. However, if the performing artist has no bargaining power, these rights may not be properly negotiated, but automatically relinquished through boilerplate contracts.

*b. Personal Rights: Moral Rights and Privacy Rights*

Employers, especially foreign employers unfamiliar with the French law, should know that a performing artist in France is entitled to benefits from a limited form of personal rights with respect to their performance, even after the work has been performed and sold. The first type of personal rights is found in article L212-2 of the French Intellectual Property Code, which provides that [a performing artist] shall have the right to respect for his name, his capacity and his performance.<sup>65</sup> This means that the performing artist's name must appear in the credits, and that there is respect for the integrity of the performance. These statutory rights of attribution and integrity are called "moral rights."<sup>66</sup> By law they are attached to the person of the performing artist,<sup>67</sup> and are therefore considered personal rights.

Moral rights are recognized independently of the performing artist's economic rights and continue to remain with the performing artist even after the transfer of the pecuniary (economic) rights (e.g., sale of the performance). Even though moral rights are not pecuniary rights, the infringement of these rights can give rise to monetary (civil) reparation. Moral rights of the performing artists are inalienable rights, yet they may be transmitted to heirs in order to protect and continue the memory of the performing artist after his or her death.<sup>68</sup>

The second type of personal rights is found in article 9 of the French Civil Code. Under this article, everyone in France has the statutory right to be respected for his or her personal private life. Article 9 of the French Civil Code provides the following:

"Everyone has the right to respect for his private life. Without prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent

— the performance for performers;

— the first fixation of a sequence of sounds for phonogram producers, and of a sequence of images with or without sound for videogram producers;

— the first communication to the public of the programs referred to in Article L216-1 for audiovisual communication companies."

65. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-2 (Fr.).

66. Note that extras are not granted moral rights.

67. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-2 (Fr.).

68. CODE DE LA PROPRIETE INTELLECTUELLE art. L212-2 (Fr.).

or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order.”<sup>69</sup>

Since the performing artist's performance is considered a part of their personality, the performing artist in France can also invoke article 9 of the French Civil Code to protect privacy rights with respect to image (including any other personal attributes, such as one's voice) in the interpretation. In situations where there is no written contract the use of a performing artist's image without written authorization constitutes an invasion of privacy, and thus a violation of article 9 of the French Civil Code.

### III. IMPLEMENTING THE DIFFERENT LAWS GOVERNING EMPLOYMENT FOR THE PERFORMING ARTIST

It is important to note that in trying to implement the different laws governing employment of a performing artist, France has two types of civil courts that deal with monetary reparations due to the performing artist. French Employment Tribunals (*Conseil de Prud'hommes*)<sup>70</sup> are specific courts in France that have exclusive jurisdiction with regard to the French Labor Code. If a performing artist in France believes that that his or her employment rights have been violated (was not paid, was not paid the minimum wages for a performing artist, was not declared as a performing artist, did not received a pay slip, was fired without a warning and without the employer respecting the procedure set fourth in the Labor Code, etc. . . list not exhaustive), the performing artist can file a claim before the French Employment Tribunals for reparation.

On the other hand, when dealing with intellectual property disputes, jurisdiction falls to the general civil courts, or the *Tribunal de Grande Instance*. If a performing artist in France believes that his or her intellectual property or personal rights have been violated (did not receive a written contract, his or her name did not appear in the credits, did not give permission to use his performance, etc. . . list not exhaustive), the performing artist can file a separate claim before the *Tribunal de Grande Instance* for reparation. However, if these intellectual property claims are

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69. C. CIV. art. 9 (Fr.).

70. The *Conseil de Prud'hommes* is from old French meaning Council of the Wise Men. It is important to note that this is not a jury trial but a trial before a panel of four judges. The four judges sitting on the *Conseil de Prud'hommes* are not professional judges, but members of the work force (two employees and two employers) who were elected. It is very often argued that the employees tend to judge in favor of the employees and the employers tend to judge in favor of the employer.

directly related to the employment claims, by applying the maxim “the accessory is attached to the principal,” the performing artist in France can bring up both employment law and intellectual property law issues together before the *Conseil de Prud’hommes*, provided there is no double jeopardy. In this case, where both labor and intellectual property law remedies are sought only before the *Conseil de Prud’hommes*, the principal claims would be those under provisions of the French Labor Code, and the accessory claims could be those based on violations of the French Intellectual Property Code or the French Civil Code.

It is also important to note that under certain circumstances, a performing artist in France may be able to seek more than civil monetary remedies. The French Labor Code provides for criminal sanctions when an employee is the victim of a criminal charge that is provided for in the Labor Code. Therefore, a performing artist, or labor law enforcement agents, may be able to press criminal charges.<sup>71</sup> As this paper is not an exhaustive analysis of the French Labor Code, it shall only analyze the most common disputes and remedies available to a performing artist before the French Employment Tribunal (the *Conseil de Prud’hommes*), and then those that would be within the competence of the *Tribunal de Grande Instance* and the Criminal Court (the *Tribunal Correctionnel*).

#### A. Remedies in Specific Employment Tribunal: *Le Conseil de Prud’homme*

As in any other employment dispute, the *Conseil de Prud’hommes* will reason sequentially when reviewing a case, and will first seek to determine whether or not there was a work contract formed between the performing artist and the alleged, or known employer. If there was the formation of a work contract, then the *Conseil de Prud’hommes* will determine whether the termination of the contract was legal (whether the procedures set fourth in the Labor Code for terminating a contract were respected). If the termination of the work contract was done illegally, it will then determine to which party to impute the termination.

#### 1. Determining the Existence of an Employment Contract

As was mentioned earlier, there is a legal presumption that all entertainment artists are salaried workers.<sup>72</sup> However, very often in France there is no written work contract with a performing artist. If there

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71. Unlike in the United States, the victim (employee) of a violation of the criminal provisions cannot sue in both criminal and civil courts. However, there is a possibility of beginning with a civil case then filing criminal charges before the civil case is over.

72. C. TRAV. art. L762-1 (Fr.).



is a written work contract, the employer explicitly declares the performing artist as an "extra" and not as a "performing artist" in order to avoid paying the minimum hourly wages, the employer social charges, and royalties. This is unacceptable. A performing artist who performed, or is performing, and did not or does not have a written work contract, who has a written work contract but was not or is not declared in the contract as a "performing artist" (*artiste-interprète*), or who has a written non-employment independent worker contract can file a claim before the *Conseil de Prud'hommes* within 5 years of the termination of contract (if terminated), to have his or her status converted into a salaried performing artist (called *requalification du contrat de travail*).

*a. Contract Not in a Written Form*

In determining the existence of an employment contract when there is no tangible written work contract, and a performing artist believes that his or her employment rights have been violated, the performing artist can file a claim before the *Conseil de Prud'hommes* seeking the court to recognize that work contract existed between the parties, and that his or her stature be converted into a salaried performing artist. To establish that there was an oral work contract in absence of a written contract, a performing artist must first prove that he or she was in a permanent subordinate position. The burden of proof is on the performing artist. The court will not look for consideration, or an equity remedy as in the United States, but will use the totality of the circumstances of the contractual relationship to determine whether or not the performing artist was in a permanent subordinate relationship. The French Labor Code does not define what a permanent subordinate relationship is. However, there are several decisions from lower French courts and the French Supreme Court (*Cour de Cassation*) that give examples of what constitutes a permanent subordinate relationship. By looking at the totality of the circumstances, some elements that the Court will consider are: orders taken, the place of work, the tools used, participation in meetings, the schedule, and discipline measures taken. If the court determines that the independent performing artist was in reality a salaried worker, the court will award the performing artist an indemnification of one month's pay.<sup>73</sup>

Once the performing artist manages to get over the hurdle of determining the existence of a work contract, it must be proven that he or she was working as a performing entertainment artist, and not as an extra. In the absence of a written contract, one of the common defenses of the employers is that the entertainment artist was an extra. This shifts the

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73. C. TRAV. art. L122-3-13 (Fr.).

burden of proof. Again, the burden of proof is on the performing artist. As we saw earlier, article L212-1 of the French Intellectual Property Code defines what a performing artist is; however, the code fails to define an extra.<sup>74</sup> It states that “performers shall be those persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works, variety, circus or puppet acts.”<sup>75</sup> The key terminology in the statute is performing a “literary or artistic work.” This excludes industrial works, like “trademarks.” Arguably, the entertainment artist shouting “McDonald’s” would not be a performing artist because “McDonald’s” is not a “literary or artistic work,” but a trademark. However, because extras can also sing, deliver, declaim, play in or otherwise perform literary or artistic works, this definition is not too helpful. The performing artist is obliged to turn toward court decisions for a definition of an “extra.” The performing artist will have the burden of proving that he or she is a performing artist by proving he or she is not an “extra.” Again, the court will examine the totality of the circumstances.

*b. Written Non-employment Independent Worker Contract*

Independent performing artists are independent workers who are registered with the Social Services, and pay their own employer charges and health benefits. However, if the independent performing artist who signed a non-employment contract is in reality working in a permanent subordinate position with the contractor, a claim can be filed before the *Conseil de Prud’hommes* (Court of Appeal) requesting that his or her independent worker status be converted into a salaried performing artist. This is the French public policy, and statutes clearly provide this possibility even if a contract was signed by the parties.<sup>76</sup> The French Supreme Court has constantly and abundantly ruled that the intent of the parties can not prevent a person from benefiting from the provisions of the Labor Code.<sup>77</sup> The fact that there is a signed contract with an independent worker does not mean that the relationship cannot be converted into an employer-employee relationship. To establish that there was a work contract, the performing artist must prove there was a permanent subordinate position. The burden of proof is on the registered independent performing artist.

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74. INTELLECTUAL PROPERTY CODE, art. L212-1 (Fr.).

75. INTELLECTUAL PROPERTY CODE, art. L212-1 (Fr.).

76. C. TRAV. art. L122-3-13 (Fr.).

77. The assertion is based on the following quote from the French Supreme Court: “[l]a seule volonté des parties est impuissante à soustraire un salarié au statut social qui découle nécessairement des conditions d’accomplissement de son travail.” Cass. ass. plén., Mar. 1983, D. 1983, 381, concl. Cabannees; D. 1984, IR. 164, obs. Béraud *in* C. TRAV. art. L121-1 (67th ed. ditions Dalloz 2005).

The court will examine the totality of the circumstances to reach a decision.

If the court finds that the independent performing artist was in fact (de facto) a salaried worker, the court will award the performing artist an indemnification equivalent to one month's pay.<sup>78</sup> Very often, in an attempt to reduce the social charges, the reluctant employer counterclaims arguing that the independent worker was not a performing artist but an extra. In this case, the burden of proof is on the employer. However, one must keep in mind that having the status of a performing artist is not automatic. If the performing artist does not answer every single argument by the employer trying to prove he or she is an extra, the court may not recognize that the performing artist did not have the performing arts status.

## 2. In the Presence of a Written Employment Contract

If the performing artist has a written employment contract in hand, or if the court converted the performing artist's status into that of a salaried performing artist, he or she will enjoy all of the benefits in the provisions of the French Labor Code, without exception. In the case of a breach of an employment contract, the various remedies awarded are clearly laid out in the Labor Code, and depend on whether or not the breach of the work contact was done by the employer or the performing artist.

### *a. Breach of the Contract by the Employer*

#### *i. Employment Law Sanctions*

When the breach of the employment contract is imputed on the employer, the court can order the employer to pay several cumulative indemnities to the performing artists: one month's pay for not respecting the legal procedure concerning a minimum six month's pay for not inviting the artist to a review before being fired, one to three months for the period necessary for looking for a new job (*préavis*), 10% of the "préavis" for paid vacations, any back pay owed, 10% of the back pay for paid vacations, and the performing artist's lawyer fees. It is important to underline that in the event that the *Conseil de Prud'homme* has determined that there was illegal work, the employer will be ordered to pay a minimum of six months of pay.

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78. C. TRAV. art L122-3-13 (Fr.).

## ii. Personal Rights Laws Sanctions

When at least one of the performing artists' moral rights is infringed upon (they are not identified as entertainment artists in the work, or there are distortions, mutilations or other prejudicial modifications of their performance), the *Conseil de Prud'homme* can order the employer to pay damages to the performing artists for violation of their moral rights.<sup>79</sup> These damages are rewarded even if there is a written contract. In situations where there is no written contract and the performance is fixed in a tangible form of expression (e.g. record, DVD, film, video, photo, etc), the use of a performing artist's image without his written authorization constitutes an invasion of privacy. This would clearly be a violation of article 9 of the French Civil Code and "[w]ithout prejudice to compensation for injury suffered, the court may prescribe any measures, such as sequestration, seizure and others, appropriate to prevent or put an end to an invasion of personal privacy; in case of emergency those measures may be provided for by interim order."<sup>80</sup>

### *b. Breach of Contract by the Employee*

When the breach of the employment contract is imputed to the employee, the performing artist can be ordered to pay several cumulative indemnities to his or her employer: actual damages and lawyer fees. Also, if the employer recently paid for special training, he or she can ask the artist to reimburse the cost of the training. However, this is rarely the case, even if the employer asks for such sanctions.

## *B. Statute of Limitation and Remedies for the performing artists in General Tribunals*

### 1. Statutes of Limitation

Most of the claims against an employer are filed before the *Conseil de Prud'hommes*. There is a five year statute of limitations to file a claim before the *Conseil de Prud'hommes*.<sup>81</sup> This statute of limitations start to run from the date the pay was due, or from the date of the breach of the employment contract.<sup>82</sup> After the five years the performing artist, like any other employee in France, has waived the rights provided in the Labor

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79. CODE DE LA PROPRIETE INTELLECTUELLE, art. L 212-1 (Fr.)

80. C. CIV. art. 9 (Fr.).

81. C. TRAV. art. L143-14 (Fr.).

82. C. TRAV. art. L143-14 (Fr.).

Code. However, the performing artist can file his claim (criminal<sup>83</sup> or civil) against his employer separately before the general lower court, or the *Tribunal de Grande Instance* in the event of a violation of a right provided in the Intellectual Property Code or in the Civil Code.<sup>84</sup> This is especially true if the claim was never filed jointly before the *Conseil de Prud'hommes* as a part of the employment dispute (or accessory to the principal). The performing artist can even file his civil claim before the *Tribunal de Grande Instance* after five years of the termination of contract because the statute of limitations of the Labor Code is not the same as for the Intellectual Property Code or in the Civil Code.

It is important to understand that when there is a violation of rights that are provided in a code other than the Labor Code, the statute of limitations is not five years, but that which is provided for in the specific code. This means that the performing artist can still file a claim against the former employer after the five year labor Code statute of limitations has expired. If the performing artist decides to file criminal charges against his employer or former employer (i.e. for illegal work), the statute of limitations is three months.<sup>85</sup> This statute of limitations is three months for all regular crimes.

## 2. Remedies for the performing artists in General Tribunals

In France, there are two types of lower courts: civil and criminal.

### a. Civil Tribunals

Depending on the nature of the employer, the nature of the claim and the amount, there are three main civil courts that the employee can choose from: the *Tribunal de Grande Instance*, the *Tribunal d'Instance* for small claims, and the administrative court (*Tribunal Administratif*) when the employer is a public law entity, such as a city. The remedies offered in these courts are those found in the Intellectual Property Code, mostly damages.

### b. Criminal Court

The remedies offered in a claim before the Criminal Court (*Tribunal Correctionnel*) are those found in the Penal Code and the criminal

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83. The French Labor Code provides criminal sanctions for many illegal behaviors committed by employers. Illegal work is also a criminal offense committed by the employer. In such a case, the employee is considered the victim. C. TRAV. art. L362-3 (Fr.).

84. There are several types of lower courts in France and two types at the *Tribunal de Grande Instance* and the *Tribunal Correctionnel*.

85. C. PR. PEN. art. 8 (Fr.).

dispositions in the Labour Code and the provisions of the Penal Code (*Code Pénal*).

#### IV. CONCLUSION

Unlike in the United States, the performing artists in France benefit from many elaborate protective statutory provisions of the French civil law system: the French Labor Code, French Intellectual Property Code, and the French Civil Code. Their rights are both economic and moral in nature. However, some argue that these rights can be protected in Common law through tort law theories. Performing artists, as well as everyone else in France can even have their employment performance contract converted into a permanent contract when the employer does respect certain statutory obligations. Even those performing artists who do not have much work can eventually receive regular monthly unemployment compensation if they manage to acquire and maintain a certain number of performances in a year. Having such a protective system favoring workers that is also applied to artists, clearly explains why all of the performing artists would stage a strike and go as far as disrupting and canceling festivals, as in 2003. Critics believe that the system swings too far toward the workers and not enough toward the employers. Others may say this protective employment regime promotes the Arts and gives it a prominent place in society, while making it less a commodity. This all seems to be in accordance to 18th century French philosopher Jean-Jacques Rousseau's notion of Social Contract. Employers seeking to employ performing artists in France must understand that France is not an employment-at-will<sup>86</sup> country, that the performing artists in France are very well protected, and that the sanctions for violating the rights of the performing artists can be very severe. France makes exceptions when it comes to the genius of culture.

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86. "In the United States, employees without a written employment contract generally can be fired for good cause, bad cause, or no cause at all; judicial exceptions to the rule seek to prevent wrongful terminations." Charles J. Muhl, *The employment-at-will doctrine: three major exceptions*, Monthly Labor Review, January 2001 p. 3.

<http://www.bls.gov/opub/mlr/2001/01/art1full.pdf>

