VIDEO ART WORK AND THE AGREEMENT FOR ACQUIRING VIDEO ART WORKS

eenrich@copyrait.com
www.copyrait.com

Introduction

A “video art work” is normally included in a master device that is usually owned by the artist who created it and under the latter’s control and from which new devices or copies can be made or passwords are provided for access thereto by those who acquire it.
A video art work is intangible and its price in the art market can be very high. However, the purchaser of the body or device containing a copy thereof receives a mere object (for example a DVD or hard disc, or not even an object, but only a password to access the work hosted in the cloud) and such object *per se* has no great value. Therefore, mechanisms must be found to provide legal security for the purchaser so that the object received allows such person to enjoy the work and exercise the exploitation rights thereof in the manner required and so that the permanence sought in the work does not depend on the durability of the device that contains it.
The legal problems that arise from video art works due to their special features are explained in this report, their adaptation to the copyright regulations (focused on Spanish law) and the different clauses that should be included in an agreement are explained.

1. What is a video art work from a “legal” standpoint?

The Spanish Copyright Act (hereinafter referred to as the “LPI”, *Ley de Propiedad Intelectual*) defines works that can be protected by law as any original artistic creations expressed in any way, whether tangible or intangible, as and then it provides a list, as examples[1], among which obviously “video art

[1] **Article 10 Original Works and Titles**

1. The subject matter of copyright shall comprise any original literary, artistic or scientific productions expressed in any way, whether tangible or intangible, known at present or that may be invented in the future, including the following:

a) Books, pamphlets, printed matter, correspondence, writings, speeches and addresses, lectures, forensic reports, academic treatises and any other works of the same nature.

b) Musical compositions with or without lyrics.

c) Dramatic and dramatic-musical works, choreographies and miming entertainment and theatrical works in general terms.

d) Cinematographic works and any other audiovisual works.

e) Sculptures and works of painting, drawing, engraving and lithography, picture stories, cartoons or comics, including drafts or sketches thereof and other plastic works of art, whether applied or not.

f) Projects, maps, models and drawings of architectural and engineering works.

g) Illustrations, maps and designs relating to topography; geography and science in general terms.

h) Photographic works and works expressed by any process similar to photography.

i) Computer programs.

works" are not included. This does not mean they are not protected by Law, but it is difficult to fit them within other categories of "similar" works, such as those mentioned in point d) (cinematographic works and any other audiovisual works).

Therefore, in order to determine the effects or legal regulations for video art works, we must find the principles and articles in the LPI that could be applicable to them and rule out those that cannot be applied by analogy (or those regulating certain works that have similar features to those of video art works).

1.1. A video art work fits in with the definition of "audiovisual work" in the LPI, but its regulation raises serious practical problems.

Although a video art work fits within the description of an "audiovisual work", (Article 86 of the LPI, "*creations expressed through a series of associated images, with or without sound, that are essentially intended to be shown by means of projection devices or any other means of communication of the images and the sound to the public, regardless of the kind of physical devices containing such works*"); in my opinion, the regulation of an audiovisual work in the LPI is aimed at traditional cinematographic works: various authors (scriptwriters, directors, composers, with unwaivable and non-transferable rights related to the exploitation of the work handled by performing rights organisations, PROs), the charachterization as a work in collaboration, the existence of an assignee who is presumed to hold all the rights (the audiovisual producer, also holding the exploitation rights for *audiovisual recordings,* according to Article 120 *et seq.* of the LPI), all of this designed for a business model (mainly cinematographic exhibition in cinemas and on television). All these features, the parties involved and the business model referred to in the LPI were originally designed having cinematographic works in mind, but video art works and its market are very different from the film industry and market. Therefore, the application of the legal regulations governing audiovisual works to video art works would be somewhat contrived.

If we could say that a video art work is not an audiovisual work (in the legal sense that these terms have in the LPI) then Articles 90.2 and 90.3, which determine the rights for authors of audiovisual works to receive a percentage of the proceeds from the admission tickets, when the work is projected in a public place, would not be applicable [2]. This right is unwaivable and non-transferable

[2] **90.2.** Where the authors referred to in the previous paragraph have signed audiovisual recording contracts with a producer for the production thereof, it shall be presumed that, unless otherwise agreed in the agreement, subject to the unwaivable right to fair remuneration referred to in the following paragraph, that they have assigned their rental right.

The author who has assigned or transferred his/her right to rental in relation to a phonogram or the original or a copy of an audiovisual recording to a producer of phonograms or audiovisual recordings shall preserve the unwaivable right to receive fair remuneration for the rental thereof. Such remuneration shall be payable by those who carry out the rental operations for phonograms or audiovisual recordings to the public in their positions as successors in title of the holders of the relevant right to authorise such rental and shall be valid as of 1 January 1997.

90.3. In any event, regardless of the provisions included in the agreement, when the audiovisual work is shown in public places with payment of an admission charge, the authors referred to in paragraph 1 of this article shall be entitled to

and is exercised by the authors through the PROs. Therefore, every time an audiovisual work is shown in public (in cinemas, on television, on planes, in a museum) the PROs that the author belongs to (in Spain, normally the Spanish General Authors and Publishers Association ("SGAE"), which includes scriptwriters, directors and composers), collects and pays the author's remuneration rights for public performance. Not categorising video art works as audiovisual works would mean that this public performance right would not be applicable, although this does not imply that such association cannot charge for communicating the music video art works may contain. Neither would it prevent the VEGAP, the collecting society for visual art created by artists (which also includes video artists) from being entitled to authorize, in the name of the artists, the public performance of video art works.

However there is no legal protection or case law that categorically states that a video art work is not an audiovisual work, according to the LPI[3], and therefore if video art works are shown to the public in any events, there could be a conflict between the two collecting societies: on the one hand, the SGAE, which would want to charge the relevant amounts payable to the authors, according to Articles 90.2 and 90.3 LPI, and, on the other hand, the VEGAP, because video artists are considered "visual artists" and, as such, they could be members of the VEGAP and the latter could charge public performance rights.

1.2. <u>It is not an "original visual work of art" in the legal sense of the terms.</u>

The only difference between video art works (in general terms, apart from "installations") and other categories of visual arts, lies in the fact that they are not included or jointly embodied in an object (canvas, bronze, watercolour on paper etc.), or shown in it, but they are contained in a device, along with some technical elements and equipment, needed to be able to view it. It is intangible, but this does not mean ephemera, because its creator and its purchaser want to be able to view it with no time limit.

---

receive a percentage of the proceeds from such public exhibition from those who show the work in public. The organisers may deduct the amounts payable as remuneration from the amounts that must be paid to the assignors of the audiovisual work.

Those who run public cinemas or projection premises shall regularly pay the amounts received from such remuneration to the authors. For such purpose, the government may adopt the appropriate supervisory measures by means of regulations.

[3] **It is difficult to avoid application of the rule in Article 86: Definition:**

1. <u>The provisions contained under this Title shall be applicable to cinematographic and other audiovisual works</u>, deeming this to mean creations expressed through a series of associated images, with or without incorporated sound, that are essentially intended to be shown by means of projection equipment or any other means of communication of the images and of the sound to the public, regardless of the kind of physical devices in which such works are included.

2. All the works defined in this article shall hereinafter be referred to as audiovisual works.

This leads to certain consequences regarding the right to exhibition or public performance due to the provisions in Article 50.2 LPI not being applicable.[4] In other words, when one acquires a "visual art work", the acquisition of the object (for example, a sculpture) implicitly includes the right to exhibit the work. However, if we say that video art works cannot be categorised as "visual art works", this would imply that the acquisition of the device that contains the work does not allow its purchaser to "exhibit it to the public", but the express authorisation would be required from the author to acquire this exploitation right. This is why it is important to write and sign an agreement in which, in addition to acquiring the device containing the video art work, the rights of exhibition and others are also acquired.

1.3. It is a "*sui generis*" work among the works protected by the LPI and this allows the parties in an agreement to adapt its regulation.

A video art work is viewed, it is accessed, every time it is "shown to the public"[5] regardless of the medium through which such exhibition takes place, whether by projection on a screen or wall, viewed on a screen or by any other means.

I am inclined to argue that a video art work does not have a specific regulation in the LPI (therefore the specific rules governing audiovisual works or "original visual art works" should not be applicable to it. However, due to the fact that it is, however, a protectable work, (an original creation expressed by means of any medium or device), its copyrights and the assignment thereof are governed by the general principles of the LPI. This lack of specific regulation makes it

---

[4] Article 56 of the LPI**.** *Assignment of rights to the owners of certain physical devices*

1. The acquirer of the ownership of the device in which the work has been included, only by virtue thereof, shall not be granted any exploitation right for such work.

2. However, the owner of the original of a plastic work of art or a photographic work shall be entitled to display the work in public, even if it has not been disclosed, unless the author has expressly excluded such right in the procedure to dispose of such original. In any event, the author may oppose such right being exercised by applying for, if need be, the interim injunctions referred to in this law, when the work is exhibited in such a manner that harms the author's good name or professional reputation.

[5] Article 20 of the LPI: Communication to the public shall be construed as any act whereby a group of persons is allowed access to the work without prior distribution of a copy to each person.

Communication shall not be deemed public when taking place in a strictly domestic environment that is not an integral part of, or connected to, a dissemination network of any kind.

2. The following, in particular, shall be deemed acts of public communication:

b) The public projection or exhibition of cinematographic and other audiovisual works.

h) Public exhibition of works of art or the copies thereof.

i) Making works available to the public, through wire or wireless procedures, so that any person may access such works from the place and at the time such person chooses.

very important to have an agreement in which the parties (the artist and the purchaser) must determine the terms and conditions that they wish to govern their relationship and the ownership and exploitation of the work.

A video art work, due to the mere fact that it is created and expressed, with no need for any formality whatsoever, is granted the benefits of the protection of the LPI when the criteria for creativity and originality have been met, in other words, when it has been created by the intellectual efforts of its author or authors.

Since the author, as the one responsible for the creation, is the "owner", there is nothing to prevent it from being legally categorised as a "*sui generis*" or tailor-made work (and not as a visual or audiovisual work as defined by the LPI) and from structuring the rights held and contractually assigning them to a third party that wishes to benefit from them.

The purchaser of a video art work needs to be sure that the price paid for it will allow it to be exhibited, without needing to pay any additional amounts to any PRO, and that it will be able to do verything needed in each specific case (making back-up copies, technological migration, distribution, etc.).

All this can be determined in an agreement, the structure of which is explained in the second part of this report.

2. Who is the author of a video art work, according to the Spanish Copyright Act?

Spanish law specifies that the author is the natural person who created the work (even though the rights can be assigned to a legal person)[6].

The fact that other authors take part in creating a video art work (as in the case of an audiovisual work, for example, a composer, scriptwriter) can make it a work in collaboration. This question must be defined by the author with the people who have made a creative contribution to his/her video art work. Among these, the different shares in the ownership and rights for their contributions should be determined. In "cinematographic audiovisual works" there is usually a producer involved that integrates the work[7] and this is the one that coordinates all the authors (the director, scriptwriter and composer); but in the case of video

[6] In the US copyright system, unlike the Spanish one, we find that, by applying the term of "*work made for hire"* that allows a third party other than the creator to directly obtain the copyrights, such third party can be categorised as the author of the work. This could result in serious consequences to the original ownership of video art works of US origin.

[7] **Article 120 Definitions**

1. "Audiovisual recordings" mean fixations of a scene or sequence of images, with or without sound, whether or not they imply creations that can be described as audiovisual works, according to the meaning in Article 86 of this law.

2. "Producer of an audiovisual recording" means the natural or legal person that takes the initiative and undertakes the responsibility for such audiovisual recording.

art works, the video artist is often the same person who performs all these roles (author and producer) and it will be him/her who determines the percentages of collaboration in the case other creators are involved.

The author using pre-existing works belonging to third parties that have not taken part or collaborated in creating the video art work (for example, including pictures from other pre-existing works or music) does not make the authors of such works the authors of the video art work, however the authorisation is indeed required from the rightholder of these works.

3. Which rights does the author hold?

3.1. The author of a protectable work, according to the Spanish LPI, holds the following rights, *inter alia:*

a) Moral rights: The right to disclosure, the right of paternity and integrity of the work (Article 14 of the LPI). These are rights that cannot be waived or transferred. Therefore, the rules for transferring ownership of other assets cannot be strictly applied to a video art work. The purchaser of a work protected by copyright can never be the "full owner" thereof, (even though such person can become the full owner of the device that contains it) because the author will always retain certain rights on the work.

b) Exploitation rights: The author is entitled to authorise the reproduction (fix the work in copies), distribution (make these copies of the work available to the public by sale, rental or on loan), public communication or performance (allow a number of persons access to the work without having previously distributed copies, for example, public exhibition of works of art, broadcasting the work on television or projecting the video art work in a museum), make the work available to the public (a number of persons being able to access the work at any time and in any place, in other words, on the Internet) and its transformation.

The holder of the copyrights may assign part or all of the exploitation rights he/she holds providing the different levels of protection are agreed and combining: at the first level are the exploitation modes mentioned, at another level there is the time (term) and territorial scope. The holder may assign part or all of these rights at different levels to a third party: in this respect, for example, in the case of a televised cinematographic work, the right to broadcast the work in France can be assigned to a French TV channel for one year and, at the same time, the same right can be assigned to a Spanish channel for the same term but for Spanish territory; or the right may be granted to a museum to show the work to the public by means of an exhibition therein and the right to reproduction and distribution of copies in DVD may be assigned to a third party.

The assignment of *inter vivos* rights always takes place by means of an agreement.

3.2. Acquisition of rights for pre-existing works and image rights

The use of any pre-existing work in a video art work requires prior assignment of the reproduction and transformation rights by its author or holder, unless the pre-existing works used are already in the public domain: a script, music, pictures from other audiovisual works, etc.; similarly, if the image of a person is shown (the face, physical representation, name, voice, biographic data, etc.), such person's consent is required. At the time the video art work is transferred to a third party, the author must guarantee all the required consents have been obtained from the persons who could have a relation with any content included in the video art work.

3.3. The author's and performers' rights for the video art work

The definition of who is the author or authors of a video art work depends on the law under which such work was created. In the Spanish copyright system, the creator of the work is its author, a natural person. Under US law, the work may be commissioned and the copyrights directly assigned to the person who commissioned it[8].

Similarly, the rights of the performing artists-actors must be considered, in case they perform a role according to a previous script. These must have authorised the author of the video art work to fix their performance and reproduce the recordings.

4. What rights does the purchaser hold? The difference between the rights for the device and the rights for the work

Copyrights shall be independent, compatible and may be combined with the ownership rights pertaining to the physical object that contained the intellectual creation (Article 3 of the LPI).

The essential aspect of copyright is the difference between the work and the device, which provides a value to the intangible and intellectual part of the work, the creative part. Article 56 of the LPI differentiates between the rights held by the owner of the device and the copyrights on the work:

"1. The acquirer of the ownership of the device in which the work has been included, only by virtue thereof, shall not be granted any exploitation right for such work.

2. However, the owner of the original of a visual work of art or a photographic work shall be entitled to display the work in public, even if it has not been

[8] According to section 101 of the US Copyright Act a *"work made for hire"* is 1) a work prepared by an employee within the scope of his/her employment; or

2) A work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."

disclosed, unless the author has expressly excluded such right in the procedure to dispose of such original ..."

The owner may exercise his/her property right on the device containing the original of a visual art work, he/she may donate, transfer or assign it on loan to third parties and the purchaser or borrower may be granted the same rights as the owner or lender holds: the exhibition to the public of such work. The principles stipulated in the LPI must be observed for the assignment, depending on whether the assignment is exclusive or not[9].

However, strictly speaking, we cannot consider that a video art work is a "visual art work" (in the terms of the LPI). This is the basic point to understand that whoever purchases a video art work, by the simple fact of acquiring it, will not obtain more rights than those granted thereto due to owning the device, the same for example as those that could be obtained by a purchaser of a CD or DVD in any shop: to benefit from the work contained therein for the person's private use. (If we agree that a video art work is not the "original of a visual art work"). The owner of the device containing a video art work would not even hold the right to public exhibition. The person would hence neither hold the right to

---

9 **Article 48 Assignment of Exclusive Rights**

The assignment of exclusive rights shall be granted with an express statement of that nature and shall grant the assignee, within its assigned scope, the right to exploit the work to the exclusion of any other person, including the assignor himself and, unless otherwise agreed, the right to grant non-exclusive licences to third parties. It shall also confer the right, which shall be independent from that of the assigning rightholder, to file legal actions for infringements that affect the rights that have been assigned thereto.

The assignment shall place the assignee under the obligation to make all the arrangements necessary for the exploitation granted to be effective, according to the kind of work and the practices prevailing in the professional, industrial or commercial field concerned.

Article 49. Assignment of the Assignee's Exclusive Rights

The assignee holding exclusive rights may transfer such exclusive rights to any other person with the express consent of the assignor.

In the absence of such consent, the assignees shall be held jointly and severally liable by the first assignor for the obligations undertaken by virtue of the assignment.

No consent shall be necessary when the assignment occurs as a result of the dissolution or a change of ownership of a corporate assignee.

Article 50. Non-Exclusive Assignment

1. The non-exclusive assignee shall be entitled to make use of the work according to the terms of the assignment and at the same time as both the other assignees and the assignor him/herself. His/her rights shall be non-transferable except in the cases referred to in paragraph three of the previous article.

2. Non-exclusive licences granted by management associations for the use of works from their repertoires shall in all cases be non-transferable.

reproduce the work by making copies in printed catalogues, video catalogues (CD, DVD), include it on a website or to create and exploit merchandising products. If the purchaser of a video art work wishes to obtain any of these rights, such person must formalize an agreement with the author or authors (or the copyright holder) so that they assign the rights the purchaser needs to acquire for his/her use of the work.

5. What do we mean when say we want to "acquire a video art work"?

Regardless of being considered that it is not an "original visual art work" (in the sense these terms have in the LPI), a video art work has a special feature: it is not materialised as any object whatsoever. It is not like a sculpture, in which the work (as a legal-intellectual concept) is embodied in the device in which it is materialised. When acquiring a dematerialised, intangible video art work, the author, owner of all the rights, provides the purchaser with a physical object through which the work can be accessed, the device (DVD, hard disc, etc.) that contains it. Sometimes a device is not even provided, for example, when the work is hosted on a server, in the cloud, etc.

For this purpose, apart from the acquisition of an object (the device), which is governed by the regulations in the Spanish Civil Code referring to the purchase of goods, the purchaser of a video art work, if he/she wants to do something else with it, apart from enjoying the work for his/her private use, he/she must acquire certain rights exclusively held by the author. This will be the object or contents of the video art acquisition agreement.

Strictly speaking, from the point of view of copyright law, under the copyright systems, we cannot consider the works are "acquired" because the author of a work never actually "transfers" it, since there are certain copyrights for the work that cannot be transferred or waived (in particular the moral rights). Therefore, when acquiring a video art work, the purchaser will be granted certain rights for the work that the author can assign, the exploitation rights.

The conclusion is that the purchaser of a video art work must acquire the exploitation rights needed in order to perform his/her activity (or strictly speaking, the authorisation or licence must be obtained from the owner to exercise them); in other words, as an example, if a museum wants to permanently project the work in a room, reproduce any fragment or fix a photo in a catalogue or allow partial viewing on its website, such museum must be granted a licence to reproduce, communicate and make the work available to the public and to transform it in order to fragment it in a video or photo. In the case of acquisition by an individual, even though at the time the video art work is acquired there is no intention of exercising these rights, it must not be ruled out that one day he/she could sell, donate or transfer *mortis causa* the work to a third party that does indeed need to exercise such rights. Therefore, although a licence is not needed for additional rights (for example public exhibition) when acquiring video art for private use, as the private purchaser of the device containing the video art work is only entitled to view it for his/her private use, it is also advisable to acquire certain exploitation rights to anticipate any possible acts of exploitation that could be required in the future.

For such purpose, the video art work acquisition agreement is of a complex nature, *sui generis*, requiring the inclusion of various elements that have a specific regulation in different laws:

- acquisition of certain elements to enable access to the work: equipment, installation, technology and the device or container of the work (the regulation of the purchase in the Spanish Civil Code, Spanish Commercial Code);
- rendering services by the author: installation, updates, assisting in migration to new devices depending on technological progress, etc. (regulation of service agreements in the Spanish Civil Code);
- obligations required by the purchaser from the author so that the latter performs or refrains from performing certain actions (for example, not to "create" works that are identical to the work or not to produce new copies of the same work when a limited series is involved (regulation of obligations in the Spanish Civil Code);
- licence for exploitation rights: reproduction, public communication, etc. (regulated by the Copyright Act);

From this explanation we can conclude that an agreement is important. It cannot be presumed that one acquires all that is required when purchasing a video art work and documenting it simply by obtaining the device and paying the price, sometimes not even with a simple invoice. The legal certainty of a purchaser that wishes to obtain the rights required to perform its business, as a museum or gallery or simply as a collector, would only be sufficiently covered by means of an agreement in which all the required elements are listed, and "a standard agreement" that "covers everything" cannot be used because every work, every author and every project of the acquirer will have its own features and special needs.

However, I will explain some general parameters in the second part of this document in order to understand the basic contractual contents that, in order to simplify this, we will call a "video art work acquisition agreement", and that will probably be repeated in many agreements of this kind. I will list and mention, in the form of a checklist, the main points that must be taken into account when drawing up a video art work acquisition agreement. All this is included in Spanish law, even though it could also be valid in other copyright systems (mainly European Continental and Latin American systems). On the other hand, not everything explained in this document may be valid according to the Anglo-Saxon common law copyright systems (USA, Canada, UK, Australia, etc.)[10].

II. THE COMMON STRUCTURE AND CLAUSES IN VIDEO ART WORK ACQUISITION AGREEMENTS

1. Parties in the agreement

[10] This study is not intended to be used as general legal advice to acquire video art works nor to replace the advice of a lawyer, to be consulted in each specific case.

1.1. Primary acquisition: Agreement entered into by the original author of the work with a purchaser

As the author has by law the full domain over the work and the right to authorise its exploitation, all agreements must include the author as its origin, the first link in the chain of rights and title; the author is the first one who authorises and assigns certain rights on the video art work, under the terms and conditions he/she consideres suitable, to a purchaser or assignee. Due to the fact that the purchaser might not be an "end-user" but one day may wish to assign the acquired work and rights to a third party, in the original acquisition it must be considered that not only the rights immediately needed must be acquired (for example, a gallery owner needs to exhibit the work in his/her gallery or a collector simply wants to enjoy it for his/her private use) but also those eventually required by a third party to whom the first purchaser may transfer the work and the relevant rights in the future. I therefore do not differentiate whether the purchaser is a gallery owner, a museum or a collector, as the purchaser should always try to acquire most of the rights that could be reasonably needed by any third party to whom the work and certain exploitation rights may be transferred in the future.

1.2. Secondary acquisition: An agreement entered into between third parties, without the author taking part

Here I refer to an agreement in which someone who has originally acquired the work from the author (for example a gallery or a collector) transfers the video art work and the rights acquired from the author to a third party (for example, a museum or another collector). This would only be possible if the original agreement had included the possibility to assign the acquired rights to third parties. It must be borne in mind that exclusive and non-exclusive assignments granted to an assignee have very different effects for the purpose of further assignment to third parties[11]. The exclusive assignment of certain exploitation rights may only take place when a single work is involved and not various copies. However, if a work is edited in, for example, five copies, each of the acquirers thereof and the assignees of the rights may exercise them on a non-exclusive basis (for example to exhibit the work by projection), because there would be other four owners of the other four copies of the edition that could also exercise the same exploitation rights.

1.3 General issues related to the parties in the agreement

It is of particular importance to specify and verify the power of attorney held by the person signing the agreement (when such person is not the author) and to check that such person has been granted sufficient authority to undertake the commitments that are required by the purchaser in the name and on behalf of the author (for example when intermediaries or representatives are involved).

---

[11] See Article 48, 49 and 50 of the LPI in note 9

It is crucial that the person who signs the agreement guarantees that it is entitled to legitimately grant the rights that are being transferred (see point 7). For intangible works, the chain of rights (of the original author to the first purchaser and so on) must be well determined in all its links.

2. Previous documents

It is common practice in the art market that, during the negotiations between the parties (author and purchaser), before signing a proper agreement (in other words a sole document that contains the details of all the rights and obligations of the parties), they decide on the basic items to be included in their purchase agreement by holding negotiations, dealing with them by email or by signing a basic document (like a letter of intent or memorandum of understanding).

It should be borne in mind that an exchange of emails can be considered as a binding agreement and therefore the commitments accepted in such mails (e.g. the commitment to purchase the work at a certain price, the number of copies, terms of delivery, etc.) will be binding as though they had been drawn up in a formal written hard-copy agreement and duly signed by the parties[12].

One must also be careful with the documents that record intentions that are usually signed, for example at fairs. Here I am referring to the documents called for example deal memos, MOU (memorandum of understandings), letters of commitment, letters of intent, etc. These documents could have two very different consequences:

a) They could be mere proposals or drafts and not imply a binding commitment of any kind due to being subject to negotiations and subsequently signature of an agreement in which the final terms and conditions will be detailed; or
b) They could be binding, even if the details are left to be defined or precised in a subsequent agreement.

This potential ambiguity, depending on one text or another, means that such documents should be very prudently interpreted and one must be aware of the nature (mandatory or intentional) of the document signed and its effects and consequences in order to ensure such document has the effects actually intended by the party that signs them.

3. Object of the agreement

The object of a video art work acquisition agreement consists of the following:

a) To precisely define the video art work acquired, with the details, which are usually provided in an annex that is signed and attached to the agreement (see the following point);

[12] In Spain, Act 34 of 11 July 2002 on the information society and e-commerce services allows agreements to be entered into by email, in the same way as the Uniform Electronic Transactions Act in the USA.

b) To transfer the ownership of all the devices and physical elements that contain the video art work by the author to the purchaser; and to specify the exploitation rights that are granted ;
c) To detail the different obligations to perform or not to perform actions by the author or the services that the author must render to the purchaser; to specify how to use and exploit the video art work (assembly instructions, equipment, projection, updating, maintaining the installation, replacement, in the case of defects, etc.); and
d) To determine the price or consideration for transferring the device, the rights and services and the terms of payment for them.

4. Defining the video art work that is acquired by virtue of the agreement

The video art work, as the object of the acquisition agreement, must be defined in detail therein and/or in an annex. The following must be specified: its contents (title, topic, length), the authorship (author, the participation of third parties) and the technical features (device, format, length, language version, sub-titles etc.), instructions for installation, projection and storage; photograms of part of the work can be included.

Edition: The number of copies included in the edition of the same work and the number of the copy acquired must be specified.

5. Delivery and transfer of the device or access to the work

The video art work is usually contained in a device (hard disc, DVD, etc.) that must be delivered by the author or seller to the purchaser, guaranteeing that the specific copy is the one specified as the copy number “X” of the series or edition of the work. A “Certificate of authenticity and edition” issued and signed by the author may be included, but this cannot be deemed to replace the agreement.

Sometimes the video art work is not included in any device whatsoever, for example when it is hosted on a server or in the cloud and hence the “purchaser” is simply allowed access thereto without having a physical copy. In this case, the agreement must regulate the terms and conditions for access and include the relevant passwords; all this must be for an unlimited period of time (to make it equivalent to an ownership right for the work).

6. Copies

The devices that currently contain video art works, in particular digital ones, are fragile in two ways: They can break, become impaired, illegible or obsolete, etc. They do not have the same solidity and durability as, for example, a bronze sculpture or an oil painting on canvas. The video art work is originally recorded in its production process as a master copy that the author controls and from which the copies for sale are issued. Apart from undertaking to comply with the edition limitation conditions (the number of copies) specified in the agreement, the author must allow the purchaser to make certain copies that do not “harm” the value of the work, in other words, those that do not diminish the unique

nature of the work or the limitation of the series nor harm the author's interests, by preventing the latter from receiving certain income from a potential sale. The author will not want the purchaser to be able to freely reproduce the work in order to avoid these damages. Therefore, the reproduction rights assigned must be very limited and specifically for the following: a back-up copy or a copy for lending, in the case of museums. It is true that digital devices can be easily copied but, due to the purchaser's responsibility for "its" work and the economic value derived from its "uniqueness", he/she should be aware of the danger of any uncontrolled circulation of copies.

7. Assignment of rights

It can be concluded from the explanation provided in the first part of this document that the essential element of the video art work purchase agreement is to detail with precision the acquisition of certain exploitation rights held by the author for the work and that can only be transferred *inter vivos* by means of an agreement.

The clauses detailing the rights to be assigned may be very diverse depending on how the purchaser intends to use the work[13].

The assignment of rights must include the time and territorial scope, because otherwise the provisions in the Spanish LPI protecting the author will be

[13] Examples of clauses detailing the uses of the work and assignment of copyrights:

"1. By virtue of this Agreement, the PURCHASER only adquiers the right to use the WORK, to carry out his/her own activities and may partially or fully communicate it to the public on the premises……. by its exhibición through projection using ……. including the website and accounts in the social networks controlled by the PURCHASER, and undertakes to project it strictly according to the instruccions provided in Annex 1.

The PURCHASER may use the still photos included in Annex 1 for each act of communication or dissemination in his/her activities, including making it available to the public on the Internet and in the social networks in the manner specified above.

The AUTHOR knows and accepts that the PURCHASER may sell the COPY of the WORK acquired by this agreement and assign the same rights obtained to any third party under the same terms and conditions granted hereby.

Any other use or explotation right, apart from those listed in this section, shall be reserved to the authord.

2. Assignment of explotation copyright:

In order for the PURCHASER to be able to achieve the uses described, the AUTOR assigns the PURCHASER the following explotation rights for the WORK:

a) The right to exhibition or public communication of the WORK, deeming this to mean the projection of the WORK in any activity so that the public can access it without altering or modifying the WORK;

b) The right to reproduce fragments or fix photos for promotional but not commercial purposes, i.e. exclusively to communicate the PURCHASER's own activity in agendas, newsletters, catalogues and on websites of the PURCHASER and social network profiles controlled by the PURCHASER.

c) The right to reproduce the WORK for the sole purpose of making ONE backup copy thereof but this may not be used for any purchase or transfer transaction whatsoever and must always remain in the custody of the PURCHASER or the subsequent owners of the COPY of the WORK.

If the PURCHASER wishes to use other exploitation rights for the WORK in any manner or under other terms and conditions to those specified in this agreement, it must obtain the relevant prior authorisation in writing from the AUTHOR.

The aforementioned exploitation acts shall always be carried out by specifying the name of the author and the title of the WORK in the usual way for video art works."

applicable, and, if there is no clause, the term for the assignment shall be five years and the territory shall be the one where the assignment took place[14]. Obviously, the purchaser will want to use the work for an unlimited term and will neither want the assigned rights to be limited to only one country.

8. Guarantees

Although the laws regulating the purchase determine certain general commitments of the seller, (for example guarantee of ownership an absence of hidden defects, that the work is free of liens and encumbrances), certain specific guarantees provided by the author for the ownership of the work, the copies and the legal standing thereof to sign the agreement should be included in the video art work acquisition agreement[15].
If such guarantees are not fulfilled or any of them are not true, this will enable the purchaser to claim compensation from the seller for the damages that are caused for such reason.

9. Rendering services and the author's commitments

The author must undertake the following commitments:

- Not to issue or publish more copies of the video art work than those specified in the agreement.
- Not to create new identical or substantially similar video art works to those that are acquired. This may be hard for an author to accept, but this commitment will prevent very similar copies being issued (for example with a different final editing cut of the same raw materials), which would harm the "unique nature" or scarcity of the work.
- To assist, and continue assisting for an indefinite period of time, in the access to the work when it is hosted on a server under the author's control.

[14] Article 41 of the LPI:

1. The exploitation rights for the work may be assigned by *inter vivos* transactions and such assignment of the right or rights shall be limited to the means of exploitation and for the time and territorial scope expressly specified.

2. Failure to mention the time shall limit the assignment to five years and failure to mention the territorial scope shall limit such territory to the country where the assignment takes place. When the terms and conditions governing the exploitation of the work are not specifically mentioned in detail, the assignment shall be limited to such exploitation as can be necessarily deduced from the agreement and is essential to fulfil the purpose thereof.

[15] Example of the clause for the author's guarantees:
"The AUTHOR represents and guarantees the following:

(i) It is the original and only author of the WORK and is therefore the holder of the exploitation rights assigned hereby. The image rights have been acquired from the persons, if any, who could appear therein;
(ii) The WORK has been published in a limited series of X copies, among which is the COPY number, object of this agreement. The AUTHOR undertakes not to publish additional copies of the WORK or issue new editions of new works implying variations that are significantly similar to the WORK.
(iii) It is the legitimate owner of the COPY of the WORK, object of the transfer, and such copy is in perfect condition to be viewed and for public communication, and
(iv) It holds full legal standing to carry out the purchase and assignment of the rights, object of this Agreement."

- To assist in the so-called “technological migration”, in other words it must take all the actions that may be required to enable the purchaser to continue to use the work under the same conditions for an indefinite period of time and specifically to provide it with new devices resulting from any technological advance that makes the devices containing the work that was originally transferred obsolete[16].
- To “replace” the work for the purchaser when the latter is unable to use the device in case of force majeure, for example fire, flooding or destruction for any reason. In this case, the purchaser must not pay the price as though he/she were acquiring a new work but must only be charged the replacement costs (production of the new copy).

10. Assignment to third parties

A purchaser (for example, a gallery owner) usually will want to be allowed to transfer the work (or lend or donate it) and to assign the rights to a third party or at least (a private collector) and, even though this possibility is not immediate, such purchaser should not be prevented from doing so if such situation arises. Due to the fact of being the owner of the device containing the work, this ownership right grants its owner full domain thereof and it may sell, rent and donate it with no limitations. However, the exploitation copyrights are not an “object” and their transfer to third parties is not automatically acquired unless it is expressly stated in the agreement.

11. Applicable law to the agreement

Agreements imply a binding obligation because there is a law, under the protection of which they have been entered into that determines the conditions for drawing them up, signing them, their revocation, reasons for termination, etc. It has already been mentioned that the more detailed the agreement is, the less the applicable laws will have to be consulted and applied. The issues I have mentioned are already complicated and they would be even more so in the case of an international agreement, in other words those that have elements related to different jurisdictions (for example, a US author and a Spanish purchaser), in which the two different legal systems involved could be quite different.

In order to avoid ambiguities and legal insecurity, the parties in the agreement should choose the law they wish to govern it, which will normally be the one claimed by the strongest party in the relationship, providing it has some connection with the elements in the agreement. The law applicable to the agreement is independent from the law applicable to the work, its creation, its protection within the scope of copyrights and may or may not be the same.

[16] Example of a technological migration clause: “In the case that, for technological reasons, the device containing the WORK sold hereby could become obsolete or new devices or storage or access systems for the WORK are invented that imply a technological improvement and this technology is applied by the AUTHOR at such time, the AUTHOR undertakes to provide the PURCHASER or any third party that accredits to be the legitimate owner of the COPY at any time with a new COPY of the WORK in the aforementioned technologically updated device or access system, so that the PURCHASER or the subsequent owners of the COPY can use and enjoy it with guarantees for its durability.”

12. Competent jurisdiction or arbitration

In an agreement (in particular an international agreement) it is important to determine the jurisdiction or arbitral institution to which the parties will submit their disputes, if those appear. In order to avoid the long discussions arising due to each party wanting to be ruled by its own courts, a neutral and effective formula is advisable *a priori*: to submit to the jurisdiction of the courts of the domicile of the defendant. In this way, the enforcement of a potential judgement will be more effective and the proceedings will not have to be repeated in two different countries, one for the main dispute and the other (the defendant's country) for enforcement of the judgement.

A system can also be included for dispute settlement, prior to resorting to the jurisdictional channels, (for example a tiebreaker or mediation by a person or institution that is independent from the parties and is considered trustworthy for both of them). Disputes may also be submitted to arbitration, which could be of a general institutional kind (for example the Arbitration Court of Barcelona or the Chamber of Commerce in Madrid or even international arbitration courts) or specific arbitration for artworks.

Conclusion

Acquiring a video art work covered by the seller's good faith and with no further documentation other than, for example, an invoice and a certificate of authenticity could lead to a serious risk for the purchaser, who actually acquires nothing more than a device and absolutely no exploitation rights. In order to avoid this risk is adviseable to draw up and sign a formal agreement between the seller and purchaser regulating in detail what is of interest for the purchaser (the main party interested in this, since copyright laws protect the authors).