

# Cinematographers'

## COPYRIGHT



*Carlos Rogel*  
Professor of Civil Law



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ASOCIACIÓN ESPAÑOLA DE AUTORES  
DE OBRAS FOTOGRÁFICAS  
CINEMATOGRÁFICAS

# CINEMATOGRAPHERS' COPYRIGHT

*Carlos Rogel Vide*  
Professor of Civil Law

Translation  
*Keelin Feeney*  
*Coro Hernando de Larramendi*



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*For Porfirio Enríquez,  
with pleasure and out of duty*



## I. GENERAL APPROACH

### 1. Cinema; Article 10.1.d) of the Intellectual Property Law and Article 86.1 of the same Law; author or authors. Essential Articles of the Intellectual Property Law relative to authors; Articles 5.1, 1 and 7.1

**Cinema**, etymologically, is to do with movement. In turn, cinematograph, cinematographic, are to do with movement that is recorded, written, captured in a container. Indeed, in Greek, *kinema* means “movement” and *grafo* “record”, “design”.

That in mind, cinematographic work is a work of the spirit contemplated as such in **Article 10.1.d) of the Intellectual Property Law** and not expressly defined in it. Nevertheless, considering the aforementioned Article 10, it is initially a work of the spirit because it is an original creation portrayed on a tangible support.

To be specific, it is a work constituted essentially by a succession of moving images. In this regard, at the same time, **Article 86.1 of the same Law** presents an Article called “concept”, which opens the Title relative to the “Cinematographic and Other Audiovisual Works”, works that it defines as follows:

“Creations expressed by means of a series of associated images, with or without incorpo-

rated sound, that are intended essentially to be shown by means of projection apparatus or any other means of communication to the public of the images and of the sound, regardless of the nature of the physical media in which the said works are embodied”.

As is logical and obligatory, the cinematographic work has to have an **author or authors** to attribute the existing copyrights to on the same, irrespective of the existence of other copyrights on the work in question that correspond to the artists –actors or performers–, to the audiovisual recordings producers and even the broadcasting entities with practically neighbouring rights –strong neighbouring rights, on occasions– to the rights of the authors.

In this regard and from now on, it is good to remember the literal reading of the **essential Articles of the Intellectual Property Law relative to authors**, Articles that are interrelated and which I purposely list in a different order to the one that is assigned by the Law.

**Article 5.1:** “The natural person who creates any literary, artistic or scientific work shall be considered the author thereof” (“that conceives and makes a scientific or literary work or creates and executes an artistic one”, said –in this regard and to be more precise– the Intellectual Property Regulation of 1880, still in force –although contemplated for the former Law of 1879– in which the current Intellectual

Property Law is not opposed and by expressed obligation of the Seventh Temporary Provision of the same).

**Article 1** –“Originating Fact”–: “The intellectual property in a literary, artistic or scientific work shall belong to the author (or the authors) thereof by virtue of the sole fact of its creation”.

*By virtue of the sole fact of its creation*, do not forget this. Also, remember the following: The creation and the corresponding authorship are a pre-juristic fact, a “prius” that Law must necessarily recognize, and the authority or legislator may not concede or otherwise authorships with discretion.

The time of peculiar privileges related to the works of the spirit is long gone and since the French Revolution, the consideration of copyright as the most sacred of properties is proximate. As a result, and as Ángel Carrasco<sup>1</sup> says, the definition of the concept of author contained in the aforementioned Article 5 of the Intellectual Property Law belongs to the type of definitions that cannot be completely arbitrary, when describing a fact whose reality comes from beyond the legislator.

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<sup>1</sup> Ángel CARRASCO, *Commentaries on the Intellectual Property Law* coordinated by Bercovitz, Madrid, Tecnos, 1st edition, page 102.



Therefore, any person that actively participates in the creation process of a work of the spirit has to be considered as its author, and there may be various participating parties, whether due to their own will –jointly written literary work, for example–, or whether it is due to the nature of the work when it is complex and it is necessary to reveal the contributions of different creators which happens with theatre work.

In the last case, we would be considering the so-called work of joint creation, defined in **Article 7.1** of the Intellectual Property Law as works “that is the unitary result of the collaboration of two or more authors”.

## **2. The Cinematographic work; Hollywood Oscars; cinematographic work: work with plurality of authors, work of joint creation and not collective**

**The cinematographic work** is clearly a work of joint creation as, due to its nature, it needs a series of diverse creative contributions. As expressed by expert Román Gubern<sup>2</sup>, “Narrative fiction cinema –which at first observation, is a moving image– is the result of an integration of

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<sup>2</sup> Román GUBERN, *General History of Cinema, Volumen XII*, Madrid, Editorial Cátedra (Academic Editorial), “Sign and image” Collection, 1995.

the iconic substance of photography, of the spectacular statute of the theatre, of the structure and narrative convictions of the novel and, once the sound dimension was mastered, of the acoustic expression of radiophonic drama”.

The different contributions mentioned, and others too, are taken into account by the cinematographic industry itself which signalized them, above the merely mechanical or professional, through a series of awards among which are worth noting the **Hollywood Oscars**<sup>3</sup> for their precedence and international fame.

The first *Oscars* were awarded in 1929 to films that had been released between 1 August 1927 and 1 August 1928. They were awarded for Best Film, Best Actress and Actors, Director, Scriptwriter, Title Writer –intertitles (or titles) for silent films, which explains the absence of awards for musicians–, Photography, Deco-

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<sup>3</sup> Juan Carlos Polo –*Los “Oscars” de Hollywood (The Hollywood “Oscars”)*; Publisher: Ediciones JC. Madrid, 1986; “Images” Collection, numbers 10 and 11– reminds us –page 7– that these awards were created by the *Academy of Motion Picture Arts and Sciences*, an Academy created on 4 May 1927 by a group of celebrities –Fairbanks, Pickford, Walsh, King, Thalberg, Meyer and others of the same calibre– to improve the artistic quality of cinema. The first awards were given in 1929 and only from 1931 were they called “Oscar” because, as the story goes, the face of the statuette given to the award-winners is similar to the uncle of the academy’s eventual executive director, Margaret Herrick, who exclaimed when she saw the similarity.

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