

**SONG, PERFORMANCE AND AUTHORSHIP:
THE CASE OF FLAMENCO IN SPAIN**

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Abstract. This article aims to explain the dilemma between the importance of performer contributions to the song and the legal treatment that they receive in the market. It applies to the case of flamenco in Spain. We have designed a methodology based on three approaches: interviews with experts, in order to clarify the creation process of the flamenco song; a study of Comparative Law to determine the legal status of the performer; and finally, surveys to measure the valuation of the contributions from the performer to the song. The conclusions show that the contributions of the performer are essential to the flamenco song as it represents its creative labour; however it is not protected by copyright.

Keywords: song, performer, copyright, cultural valuation, flamenco

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1. Introduction

Copyright regulations do not consider a performer's contributions to the song as creative labour. This is based on the idea that the song is finished when the author signs it, and its externalisation carried out by the performer is less valuable, or deserves less protection. Or from another point of view, it seems that the labour of performers is a routine labour, which is uncreative, and therefore least considered in the context of the legal protection involving copyright. This article exemplifies this situation with the case of flamenco song in Spain.

Flamenco¹ is a traditional popular music genre with its own characteristics such as aesthetics, performance, and socio-cultural significance, amongst others. However, one of the most relevant features of flamenco is its consideration as an *arte vivo* due to its oral tradition. For this reason, the performer is not a mere

¹ Flamenco was accepted in the Representative List of the Intangible Cultural Heritage of Humanity in 2010.

reproducer of the work and its creative contributions to the flamenco song are fundamental.

The research develops a methodology based on three approaches to demonstrate the gap between the legal protection and the importance of the performer for the flamenco song. First, by means of interviews with experts, it lays out the creation process of the flamenco song where its externalisation, carried out by the performer, is one of the key stages. Secondly, it studies intellectual property regulations from different countries to learn the necessary requirements for the recognition of creative contributions by copyright. Finally, through surveys applied to different market agents of flamenco, it determines the cultural valuation of the performer's contributions to the song.

The conclusion shows that the contributions of the performer are essential to the flamenco song and it represents a creative labour. Therefore, copyright creates a gap in which special features of traditional popular songs, such as flamenco characterised by its orality and consequently its performers, are not considered.

2. Song, performance and authorship

This article conceives the song as the sum of creative inputs from the different agents that are involved in its creation, resulting in a collaborative work. However, this concept does not originate from international copyright legal frameworks which grant less protection to the performer's creative contributions.

Thus, the methodological proposal starts by describing the creative process of the flamenco song, as well as the various agents that intervene in it. This description process is carried out through interviewing renowned Spanish music industry experts². The experts concur that the song's creation process starts when the author resorts to a pre-existing creative source known as cultural heritage. That creative source derives in musical forms known as *palo*³ in flamenco.

In this stage, the author selects the *palo* for the development of the future song with its own rhythmic and harmonic characteristics. The author would then add personal elements such as melodies and lyrics, producing a musical composition. Current copyright legal frameworks would consider the song concluded at this point, overlooking what we consider would be the last stage: the externalisation.

² Fifteen interviews were carried out by experts that include performers, authors and managers of cultural spaces, among others. The selection criterion was their relevance in the world of Spanish music, specifically in flamenco (e.g. artists who have obtained renowned national and international awards, agents who manage important festivals and cultural spaces like *la Bienal de Flamenco Flamenco de Sevilla*). The list of the distinctive characteristics of each interviewed expert is presented in Appendix I, and Appendix II presents the questions put to the experts.

³ The *palo* is each of the traditional varieties of the flamenco cante such as the *siguiriyá*, *soleá*, *bulerías* or *fandango*, amongst others. These varieties are distinguished by having a specific metric, called *compás* and a delimited harmony for the accompaniment (Manuel 2010).

During the externalisation the performer completes the creation process of the song. In it, the composition's features combine with the performer's elements such as talent, spontaneity and own concept of cultural heritage, derived components that enable the recreation of what the author sets. The song is not completed until it is externalised; until then the song reaches most of the audience who gives it an appreciation (Bourdieu 1984). The purpose of the song is to be performed, therefore this stage cannot be overlooked.

In addition to laying out the creation process, the interviewers identified the components of the flamenco song. On the one side, there is harmony, rhythm, music and lyrics, which would be traditional structural elements (Rosón 2010), and on the other side the added talent of the performer (Heredia-Carroza et al. 2017). According to the experts, talent, which we consider the fifth structural element of flamenco, materialises through distinctive elements, improvisation, technique, its ability to produce emotion and generate reflection in spectators, and the ability to feel and make others feel flamenco.

Figure 1 illustrates the need for the elements from the cultural heritage, the author and the performer, to come about in the creation process of the flamenco song. It also shows the intellectual property protection that each receives: public

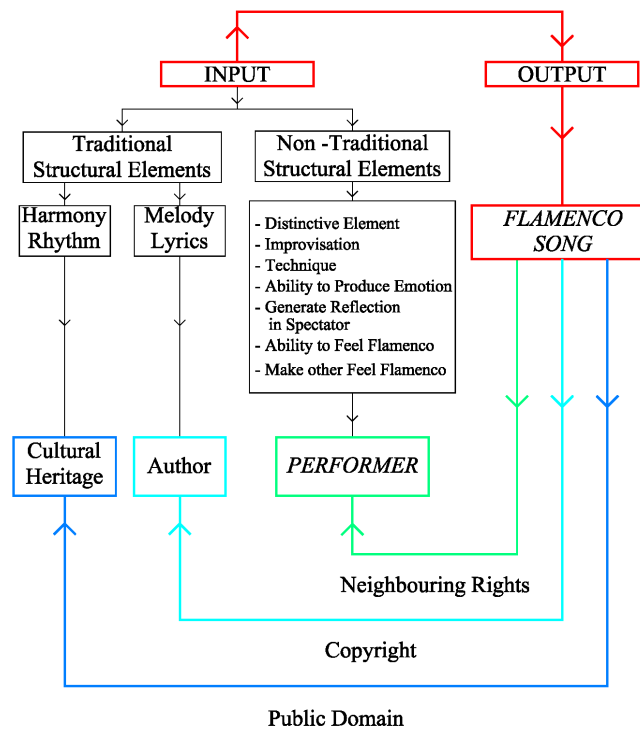


Figure 1. Intellectual Property Protection for the elements of flamenco song.

domain⁴ for cultural heritage, copyright for the author and neighbouring rights for the performer (Heredia-Carroza *et al.* Forthcoming-A).

Through a study of comparative law, the next section explains the differences between copyright and neighbouring rights and its effects on the performers.

3. Comparative law analysis

3.1. Differences in the legal treatment of the author and the performer

The study of the gap between the protection of the performer's contributions and the value it represents for the flamenco song requires identifying the differences between the legal treatment of copyright and neighbouring rights (WIPO 2011).

Copyright focuses on the patrimonial rights of distribution, public communication and transformation and the moral rights of paternity, integrity, legal disclosure, modification, removal from the market due to a change in intellectual or moral convictions, as well as access to the one remaining original copy.

Neighbouring rights do not include the patrimonial right of transformation, or the moral rights of legal disclosure, modification, removal from the market due to a change in intellectual or moral convictions, and access to the one remaining original copy.

The differences between copyright and neighbouring rights have negative effects on the performers. For example, performers do not have transformation rights of the composition and they also have to abide by its integrity right. The performer must then remain faithful to what the author set for the composition. However, in music characterised by orality, recreation, and spontaneity like flamenco, this legal treatment has a derogatory meaning (Heredia-Carroza *et al.* Forthcoming-B).

Another example, related to the performer not holding the rights for removal from the market happens when the song is used against their moral or intellectual convictions. The author may request the removal from the market but the performer who is the face of that song and who might face repercussions cannot make that same request.

Still one of the most controversial differences is the time span of patrimonial rights. The rights for authors last all their lives and seventy years after their death or declaration of death. However, a performer's rights last only seventy years from the performance or from the legal disclosure of the recording (Directive 2011/77/EU). This substantial time difference means that the author and its future generations will be lawfully protected by copyright and receive royalties from the compositions, yet the performer's future generations or themselves, will not, although as stated earlier, and in line with the legal criteria of joint works, the song is not completed until it is externalised.

⁴ Public domain refers to the intellectual heritage that is free from all exclusivity in its access and use.

The following study of comparative law displays the requirements that distinct copyright legal frameworks foist on agents for lawful protection.

3.2. Requirements for the protection by copyright: a comparative law analysis

The most recurring criteria amongst intellectual property regulations are: personal mark⁵, distinguishable variation⁶, global protection of the song⁷, *Gestaltungshöhe*⁸ (creative depth), novelty⁹, as well as artistic, cultural, spiritual and technical criteria¹⁰ (Heredia-Carroza et al. 2017).

When examining flamenco song, experts agree that the performers fulfil these criteria when they externalise the song and perform in front of audience as they stamp their personal mark. This also happens within various music genres as each interpreter has its own sound, attire, image, technique and all of these reflect on their performance. Also, when the performer recreates the composition of the author giving place to a version of it; that is distinguishable variation, novelty and technical criteria. This becomes evident when a same song is performed by two different *cantaores* in flamenco.

Furthermore, the song is a relation of creative inputs from author and performer that cannot be separated. There is no song without performance, just as much there is no performance without the musical composition by the author. That is what global protection refers to and is precisely the approach of this paper.

The creative depth, artistic, cultural and spiritual criteria, relies on the professional and personal background of each performer and their capability of transmitting them to the audience. Empirical studies by Heredia-Carroza (Forthcoming) prove how mostly the elements related to feelings, account for the value of the song.

The fact that experts consider that the performer fulfils the criteria in intellectual property regulations leads to a discussion of why does copyright distinguish two different levels of legal protection for author and performer? Is

⁵ French Cour de Cassation in its 1st July 1970 sentence points out that criteria should be protected by copyright, regardless of the novelty of the contributions made to the song.

⁶ Legal criterion held by the courts from United States of America, namely when the contributions to the song are an appreciable variation and not merely trivial and therefore enhance the pre-existing song.

⁷ This criterion is taken into account by Anglo-Saxon systems, such as British, Australian or New Zealand's. The different contributions such as lyrics, melody, amongst others, can be protected like autonomous works. But also, the whole work is protected in the broad sense (González 2001).

⁸ The German *Persönliche Geistige Schöpfungen* contains the most demanding standard of originality within Europe. It requires a minimum level of new labour in the song, which can be determined in different ways, depending on the establishment in question and the degree of creative freedom that the author has (de Román 2003).

⁹ The most important criteria for European Union directives concerning intellectual property, therefore not much attention is paid to the author's personality which is present in the song.

¹⁰ Supported by the Lithuanian Constitution of 1992 and the regulations of Serbia, Venezuela or the Republic of the Congo (Geiger 2017).

performance routine labour? And can the performer be considered as a mere reproducer of the musical composition by the author?

The *Texto Refundido de la Ley de Propiedad Intelectual*¹¹ from Spain (TRLPI), further than considering the flamenco songs as joint works, offers another possible solution to the discussion based on the provisions in article 132: alternately, the regulations of copyright should be applied to the ones covered by neighbouring rights. However, this is a way to standardise the legal treatment without changing the status of any of the agents in the creation process of the song.

In spite of the importance of its content, after analysing the existing jurisprudence on article 132, it has never been reinforced to expand the rights of performers. Hence the difficulty of weighting the value of the performer's contributions based on the above mentioned criteria from an empirical approach. That is why in the next section we measure the value of the elements in the flamenco song, as well as the role of cultural heritage and the contributions from the authors and performers towards it; reasoning the applicability of copyright regulation for the performer.

4. A song's perceived cultural value

As mentioned by Hutter and Frey (2010: 205) cultural value is not hidden, it is expressed through 'audience applause, expert reviews, prizes, or length of text and footage dedicated in print and broadcast media'. For which reason in order to measure the value of cultural heritage for the flamenco song 696 surveys were undertaken by consumers (586), critics (fifty-one) and cultural managers (fifty-nine), these last two are grouped as experts.

On the website of *Flama. La guía del flamenco*¹², two different online surveys were uploaded, one targeting experts¹³ and the other, consumers¹⁴. The surveys were divided into four sections. In the first section, the experts were asked about their profile and the consumers about their consuming habits. Sections two to four were common for both experts and consumers. The second section contained questions related to the valuation of the flamenco song. The third examines cultural policy issues through four questions on public funding support for the

¹¹ Royal legislative decree 1/1996, dated 12th April, enacting the consolidated Text of the Intellectual Property Act, regularising, removing ambiguities and harmonising the legal provision in force on the subject.

¹² The magazine is a flamenco guide and the surveys which were available on the website from May to September 2017 was promoted also by the *Centro Andaluz de Documentación del Flamenco* and the website <www.promocionmusical.es>.

¹³ An expert is a person who through specialised training and accumulated experience (Holbrook 1999) whether by study or exercise of their profession has a high degree of artistic knowledge (Bourdieu 1984).

¹⁴ A consumer is a person guided by their preferences and willing to invest resources (time and money) in their participations of live shows and/or recording.

promotion of flamenco. The final section looks at socio-demographic aspects such as age and education level, among others.

The questions on section two, followed on a Likert scale from one to seven points, with an eighth ‘do not know, non-response’ option. The data was grouped into three levels: Low (from one to three), irrelevant (four) and high (from five to seven). In total, 586 consumers and 110 experts took the survey. Their observations created an *ad hoc* data base, with which empirical analyses on cultural value perception have been undertaken.

The first questions of section two were related to the perception of importance of cultural heritage, authors and performers. Fig. 2 highlights the importance of performers with a high valuation of 71.84 per cent from the consumers and 84.55 per cent from the experts, followed by cultural heritage and authors with a high valuation of 42.15 per cent from consumers and 30.91 per cent from the experts. Furthermore, when asked if they ‘consider the performer as an active participant of the flamenco song creation process’, 82 per cent of each group agreed.

The results reinforce the thesis that the purpose of the song is to be performed and that the externalising role of the performers is fundamental to the flamenco song.

Moreover, as the elements that come about in the creation process of the flamenco song were analysed, the results demonstrate that the contributions from the performers are highly evaluated by consumers and experts (Fig. 3). The distinctive elements of the performer outweigh the four traditional structural elements of the flamenco song. When analysing the elements related to feelings like: making others feel flamenco and the ability to produce emotions, which directly depend on the externalisation of the song, these have the highest valuation.

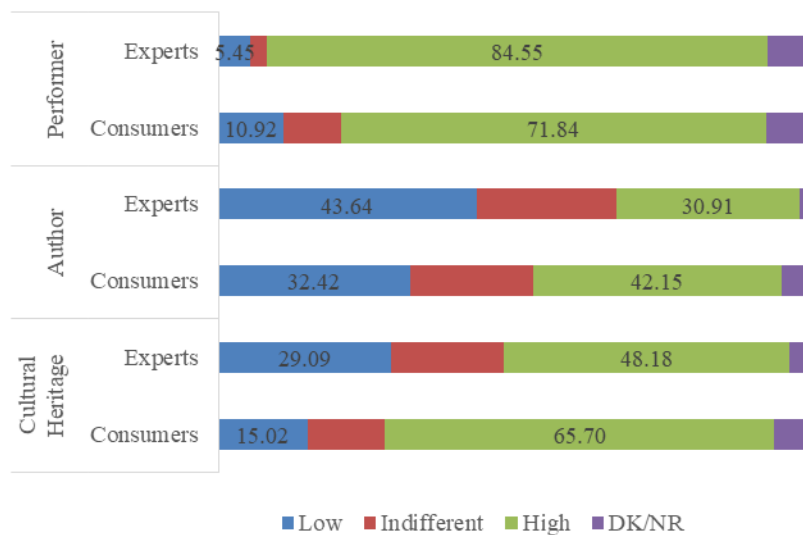


Figure 2. Cultural heritage, authors’ and performers’ importance valuation. The authors’ sources.



Figure 3. Valuation of the elements of the flamenco song. The authors' sources.

As stated before, different legal frameworks focus on copyright protecting the author. However these results lead to the discussion whether in case consumers and experts value the performer's contributions to the flamenco song so highly, should not copyright also protect the performer? And what would it take for it to be applicable? The proposal of this paper is to use joint works, supported by the concept of global protection of the song and other legal texts in Europe and North America. In Spain, the content of TRLPI's article 132 should be reinforced standardising the legal treatment without changing the status of any of the performer in the creation process of the song.

5. Conclusions

The layout of the creation process for the flamenco song could be used as a model for others music genres which have taken alternatives to traditional authorship fixed by copyright; specifically, for traditional popular music, where the contributions of the performer are essential and authorship is most problematic. Indeed, the legal treatment issue pertains almost exclusively to the world of traditional popular music.

The layout enables a deeper knowledge of the flamenco's song structure and where its different elements originate from. The methodology based on three approaches: experts' interviews, a study of Comparative Law and surveys, prove

that copyright creates a gap between the legal protection and the importance of the performer for the song.

The article proposes the consideration of the performers as authors in collaboration of the songs where they participate with creative contributions, in line with the idea of joint works. For the specific case of Spain, the content of TRLPI's article 132 should be reinforced standardising the legal treatment without changing the status of the performer in the creation process of the song, based on the idea of global protection on the Anglo-Saxon copyright frameworks.

The proposal would allow the existence of songs with as many different performances. The creation process of given songs would have a common segment: the composition by the author, and a differentiated one: the externalisation carried out by the performers. With this proposal performers would benefit from the legal protection of copyright for the song on which they participate and the author would be protected in all the existing songs. This methodology could be replicated for the study of other musical genres.

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APPENDIX I

Panel of interviewed experts

PERFORMERS AND COMPOSERS	José Mercé	Award <i>Masters of Mediterranean Music of the Mediterranean Music Institute (MMI)</i> of Berkley College of Music. 2010 Medalla de Andalucía. One double platinum record, two platinum records, and two golden records
	Tomatito	2016 Gold Medal to Merit in Fine Arts. Winner of 6 Latin Grammy
	Marina Heredia	2016 Giralddillo for Cante. 2010 Best Cante Flanco CD Award by Crítica Nacional de Flamenco
	Paco Cepero	2003 Gold Medal to Merit in Fine Arts
	Rocío Márquez	2008 Winner of the Lámpara Minera and 2016 Giralddillo for Innovation
	Barullo	Winner of the 2016 Concurso Nacional de Córdoba dance category
POLITICIAN AND RESEARCHER	Juan Manuel Suárez Japón	1990-1994 Culture and Environment Counsellor of the Junta de Andalucía. Professor of Human Geography at the Universidad Pablo de Olavide
REPRESENTATIVES SGAE	Javier Losada Calvo	Vice-president of Pequeño Derecho of SGAE. 1999-2012 Member of the Administration Council of the AIE
	José Manuel Gamboa	Spanish journalist, writer, and musical producer specialized in flamenco. Currently, technical music analyst in the Flamenco specialty and member of the academic group of the Lecture of Flamencology at Jerez de la Frontera.
REPRESENTATIVES AIE	Álvaro Hernández-Pinzón	Director of Legal Consultancy and Collection Strategy
	Pedro Rivas Prieto	Attorney of AIE
CULTURAL MANAGERS	Cristóbal Ortega Martos	Artistic Director of la Bienal de flamenco de Sevilla (2014 and 2016)
	Isamay Benavente Ferrera	Artistic director of the Festival de Jerez de la Frontera
	Manuel Herrera Rodas	Artistic Director of the Jueves Flamencos organised by the Fundación Cajasol and member of the Advising Council of la Bienal flamenco de Sevilla. (1997-2006) Artistic Director of la Bienal de flamenco de Sevilla
CENTRO ANDALUZ DE DOCUMENTACIÓN DEL FLAMENCO	Ana María Tenorio Notario	Manager of the CADF Documentation Department

APPENDIX II

Questions asked to the personalities of flamenco interviewed

1. In your opinion, what are the main creative contributions to the flamenco musical work? Of the aforementioned contributions, what do the performers provide?
2. In your opinion, what elements reflect the originality/creativity of the performer's contribution to the flamenco musical work?
3. How can this contribution be measured?
4. Explain your methodology of work. Specifically: how do you participate in the artistic production process? Describe your performance.
5. What role does intuition and improvisation play in flamenco?