

# Approaching the contract

## Efforts in opening the AV heritage to online audiences

Authors: Gabriele Di Majo (RAI), Valentina Martone (RAI)

### HOW THE COVID 19 PANDEMIC CHANGED AV CONSUMPTION HABITS

Almost two years of pandemic have increased audiences' interest in non-linear offers due to the restrictions we all faced. Staying home led us to fully experience new ways of consuming audio-visual content on online platforms.

According to the data coming from our OTT platform, RaiPlay, during the 8 weeks of lockdown, time spent on the platform increased by 65% compared to the 8 previous weeks. Even in the 8 weeks after the lockdown, we saw a 12% increase in time spent on the platform, compared to the 8 weeks before the lockdown. (Figure 1)

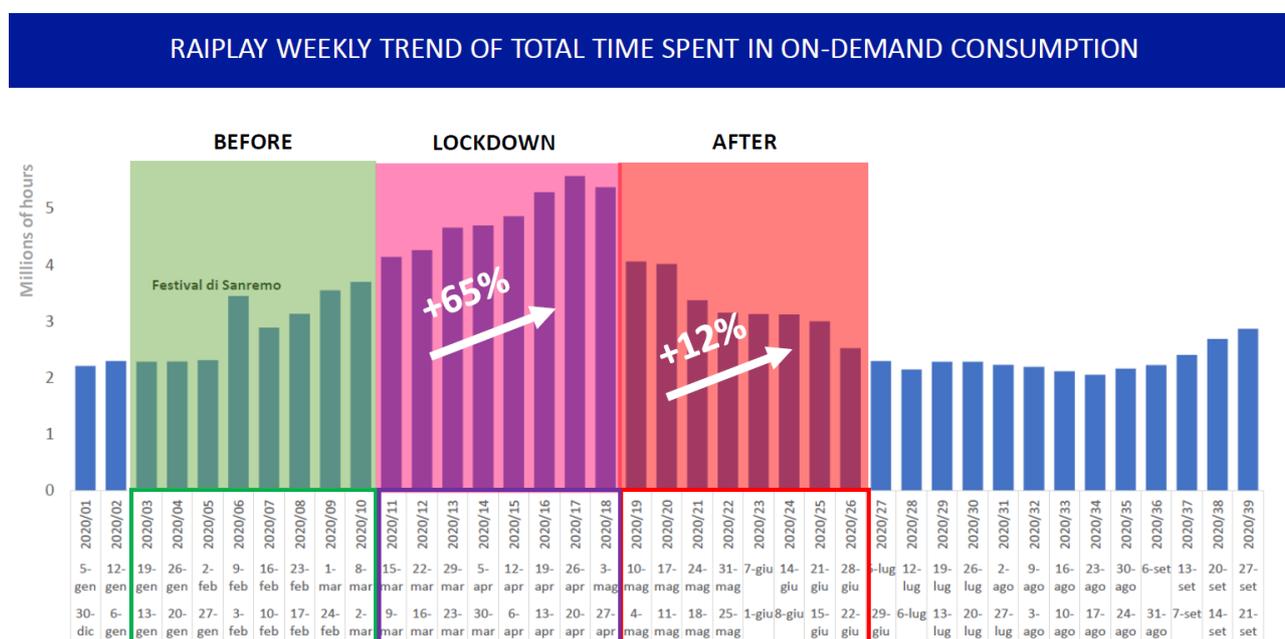


Figure 1

If we analyse a longer period of time, (Jan 2020 – August 2021) in the first 8 months of 2021 RaiPlay's on demand consumption recorded stronger performances compared to the

previous year: time spent is over 150 million hours, +32% compared to the same months of 2020. (Figure 2)

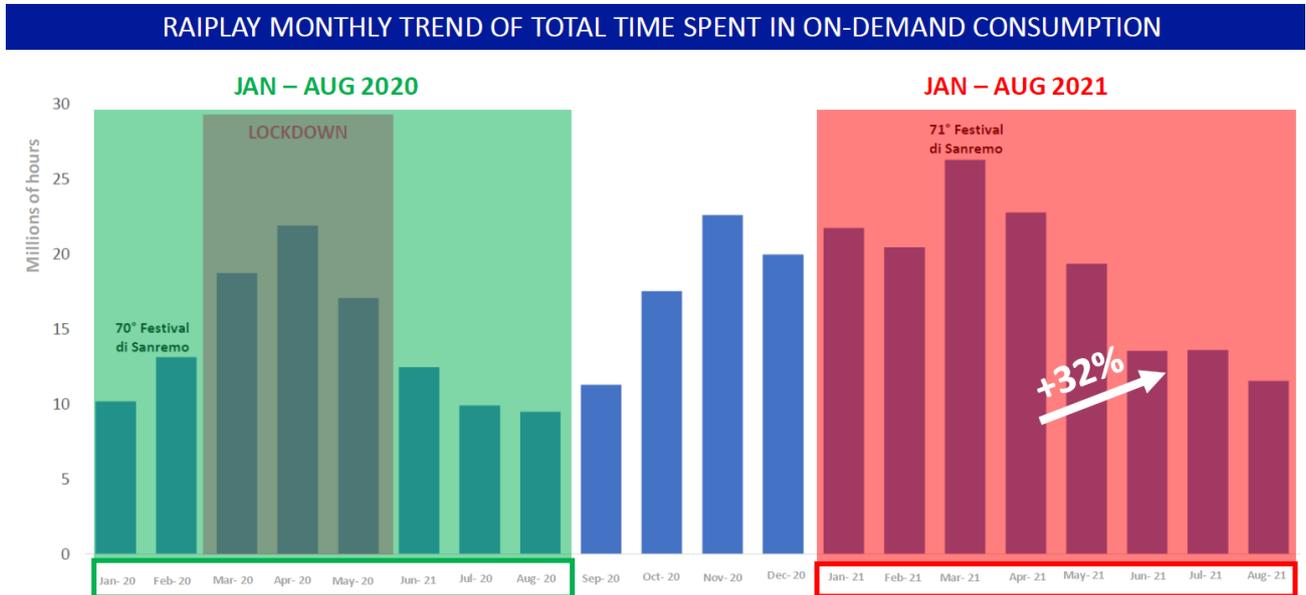


Figure 2

During the first lockdown growth is more evident for archival products, those unrelated to TV channel programming, for which there was a 109% increase in time spent. (Figure 3)

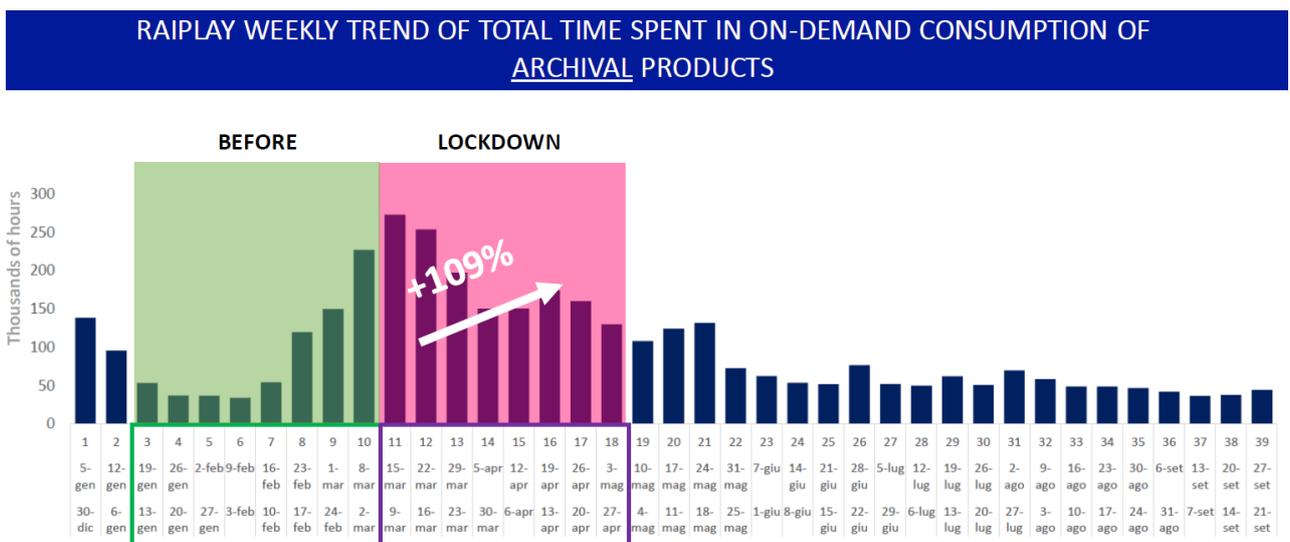


Figure 3

Considering a longer period (the first 8 months of 2021), RaiPlay experienced a decrease in On - demand consumption of archival products, -35% compared to the same months of 2020. Nevertheless, if we exclude the exceptional period of the lockdown and compare only January and February of both 2020 and 2021, we can see a 49% growth in Time spent on the platform. (Figure 4)

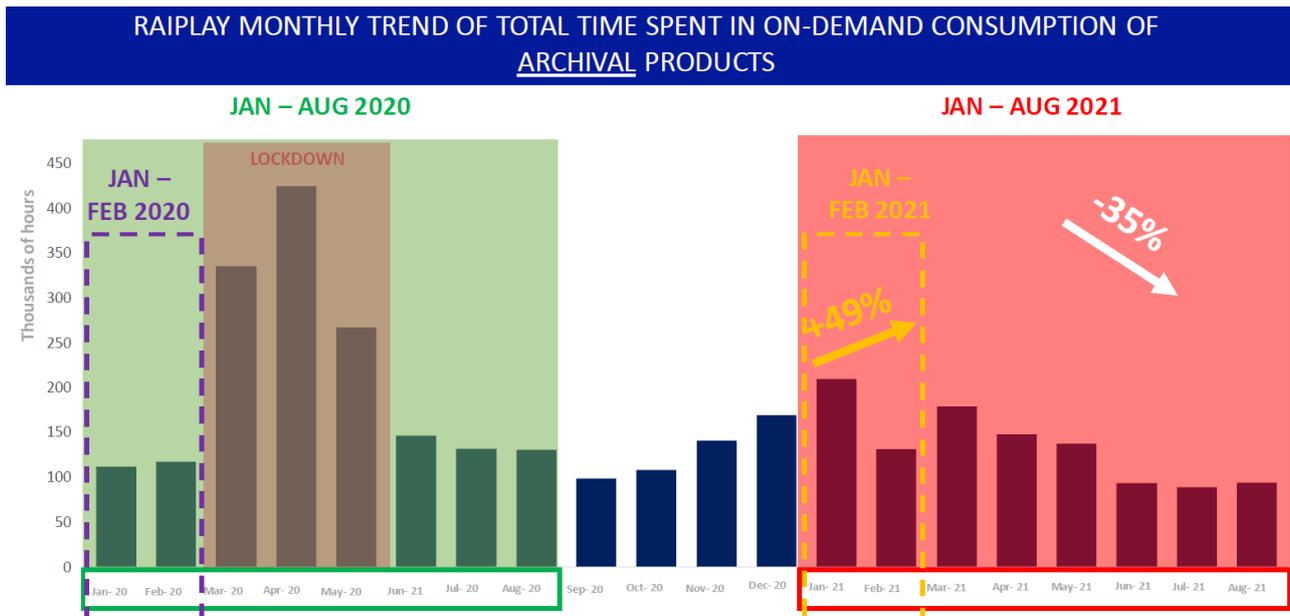


Figure 4

In this context of changed audience habits, we can say that archives have been a significant source of AV content for online consumption, both free and fee based.

### HOW THE PANDEMIC BOOSTED THE USE OF ARCHIVES

Moving from the user's point of view to that of content producers, we can see other effects of the pandemic on AV archives.

- 1) REUSE OF ARCHIVAL MATERIAL IN NEW PRODUCTIONS. For media companies, the difficulty in traveling and filming outside promoted the reuse of archival material in new productions, among which some are born as non-linear products. An example is Rai docu-series “Ossi di seppia”, available on RaiPlay, which is a story in 26 episodes designed to retrace important events in recent Italian history. Another interesting example is “SanPa - Sins of the Savior”, a perfect

example of a Netflix production massively exploiting RAI's archive to tell the story of a famous rehab community in Italy during the 1980s.

- 2) **USE OF THE ARCHIVE IN LINEAR TV SCHEDULES.** In response to the difficulties of filling up linear schedules, new and creative solutions were elaborated. A very interesting case of archival usage is "Domenica con..." a new form of program schedule for RAI's history channel, Rai Storia, that started at the beginning of the pandemic and covered up to 15 hours in one day. Every Sunday a different cultural or entertainment personality, such as Roberto Bolle, Nicola Piovani or Pupi Avati, becomes the "director for a day" of the channel, choosing and introducing contents from Rai's archive.

## **HOW THE PANDEMIC REINFORCED THE SOCIAL ROLE OF THE ARCHIVES**

It is important to highlight how the pandemic has reinforced the social role of our archive.

A lot has been done for Education during and after the closing of schools, offering tools for students, teachers or enthusiasts. Rai and the Ministry of Education launched a new educational initiative called "La scuola non si ferma". Part of this initiative are new educational tv programmes that use great quantity of archival materials, such as "La banda dei fuori classe". In the same period, Rai released a new section called "Learning" on the OTT platform, with educational content targeted both to students and the general public.

Moreover, accomplishing its own cultural role in the country, RAI made an exceptional effort to bring cultural events directly into people's houses. When theatres and venues closed due to the lockdown, RAI Play hosted and live streamed shows from the most famous Italian theatres such as Teatro La Scala in Milan or Teatro dell'Opera in Rome. During the same period, Rai published several theatrical shows and operas from Rai's archive on RaiPlay.

Another example of innovative use of archival material for cultural purposes is Rai Teche virtual tour "Sulle tracce del crimine" (Hot on the Heels of Crime). In October 2020, RAI Teche set up the physical exhibition in Museo Di Roma in Trastevere. Repeated closures due to pandemic lockdowns prompted the creation of a virtual tour. Visitors can now navigate in virtual rooms experiencing an immersive tour through different multimedia

content, more than 200 photographs and 80 tv shows, retracing the history of crime fiction and shows produced by RAI from 1954 until today.

## **THE INVOLVEMENT OF THE RAI RIGHTS ARCHIVE DURING THE PANDEMIC**

Initiatives like these show how, now more than ever, Rai's archive is asked to provide content for a great variety of purposes, both for internal use and to sell to third parties.

Rights Archive department is the Rai department in charge of right clearance. We are a team of 22 people and from March 2020 we have been mostly working from home. Since the beginning of the pandemic, we have witnessed a considerable increase in requests for online exploitations (especially VOD), which forced us to a new reflection on the interpretation of old contracts, signed when this kind of technology did not exist.

But before considering our approach to the older contracts, let us focus on how the definition of VOD has mutated in Rai's contracts during the years.

## **VOD DEFINITIONS IN RAI**

The earliest occurrences of the wording Video On Demand in Rai contracts date from 1998, especially in licensing contracts with major US or UK counterparts. Early Vod, sometimes associated with generic Internet rights, were included in contracts not as granted rights, but as elements which needed further negotiation with the counterpart to be acquired. In one of these contracts VOD is defined like this:

*"VOD": the end user pays a separate fee solely for the privilege of viewing a single exhibition of an individual Programme at a time chosen by the user."*

In 2005 with our internal official Glossary of Rights the wording VOD obtains a more detailed definition:

***Paid** exploitation of a program made available electronically and via streaming on individual request at any time, on any platform and with any modality / access terminal, as a result of the choice made by the user within an offer of programs. The user can choose to freeze the image, to go back or forward. (Our translation)*

We notice at that time the term VOD referred only to a paying service.

In 2012, Rai published a new [Glossary of Rights](#) within the European Union financed project PrestoPRIME, proposing a shared terminology for the negotiation and management of rights. VOD Rights were defined as follows:

*The rights to make the audiovisual content available to the public **upon payment** of a per exhibition fee at the time chosen by the final viewer by means of Television and/or by means of any other electronic communications network on a streamed or downloaded basis. **Note: In almost all of negotiations the term VOD defines a right to provide an on-demand service for which an access fee is paid, a free of charge VOD is also possible but, in this case, a specific term has not been defined yet.***

This last sentence shows how the definition of VOD was in a transitory phase and free of charge services only began to be considered.

Only in 2015 does the full formalization of a free of charge VOD appear in RAI General Conditions of Contract: VOD is mentioned with all its Free of charge and Pay subcategories (Advertising VOD, Subscription VOD and Transactional VOD).

It is worth considering that 2015 was the year that Netflix was launched in Italy, thereby boosting the VOD market in our country and fostering the birth of other OTT platforms. In fact, our OTT service RaiPlay was launched the following year, in September 2016.

## **ONLINE EXPLOITATIONS IN CONTRACTS BEFORE 2012-2015**

In Rai's contracts, before 2012 and in some cases up until 2015, to designate free of charge online exploitations, it was used the concept of "online Multimedia rights".

In the Rai official Glossary of Rights of 2005 "online Multimedia rights" are defined as follows:

*data communication (images, texts, sounds, etc.) from a computer or other similar instrument (e.g. PDA, I-POD, console, mobile phone, etc.) connected via cable / fiber / twisted pair (modem, telephone, etc.), wireless or other online service to other computers or similar tools through a network, excluding the rights of online communication in videostreaming included in television rights.*

The word Multimedia appears in RAI contracts since the early 90's.

In a 1993 agreement with a conductor of the National Rai Orchestra we can read: *“Rai is entitled to [...] online (e.g. Internet) and offline (e.g. cd I, cd Rom) multimedia and interactive exploitation rights”*.

## **INTERPRETATION PROBLEMS FOR CONTRACTS SIGNED BEFORE THE 90'S**

Before the 90's, the language of contracts does not specifically address multimedia rights because the technology did not even exist. This entails problems in publishing online old works from our archive, even if they are in-house productions. Let us make an example.

A 1970's agreement between RAI and a music composer may grant broadcasting rights to use his or her music in a TV series. So today, who owns the right to publish his work online? We could say RAI owns it because the composer signed a contract which granted RAI all existing exploitations, on the other hand the composer could disagree saying he did not intend to transfer multimedia or VOD rights because such rights did not even exist when the contract was signed.

In such cases the ownership of some exploitation rights may be unclear.

According to Italian law, if a contract does not explicitly include a right and uses broad and generic formulas, the intentions of the parties and the purpose of the contract should be taken into consideration<sup>1</sup>. If it is not possible to reconstruct, a restrictive interpretation must necessarily be adopted in order to protect the intellectual property as much as possible, so that everything that is not expressly provided for is excluded from the transfer by the author<sup>2</sup>.

At the same time, from an archival valorisation perspective, an excessively rigid and literal interpretation should be avoided, since Rai would otherwise be prevented from using any

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<sup>1</sup> Italian Civil Code, Article 1362: “In interpreting the contract, it is necessary to investigate what was the common intention of the parties and not limit oneself to the literal sense of the words. To determine the common intention of the parties, it is necessary to evaluate their overall behaviour even after the conclusion of the contract.” (Our translation)

<sup>2</sup> Italian Civil Code, Article 1370: “The clauses inserted in the General Conditions of Contract or in forms prepared by one of the contracting parties are interpreted, when in doubt, in favor of the other.” (Our translation)

production created prior to the introduction of the Internet or the VOD technology. (Figure 5)

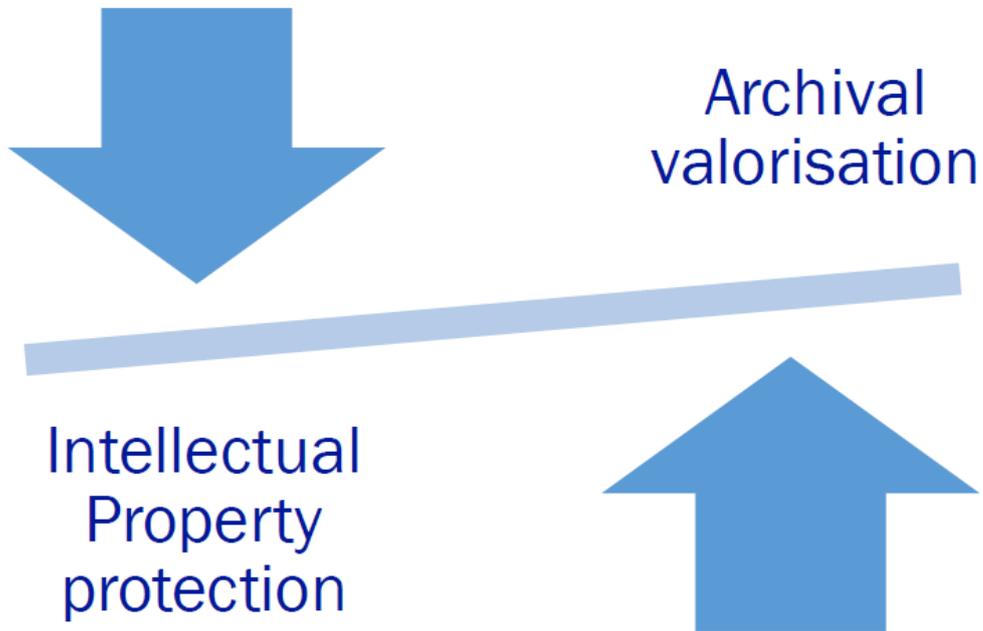


Figure 5

In order to take reasonable decisions, it is important to start from the contract text.

### **EXAMPLES OF CONTRACTS FROM THE 60's TO 80's**

Let us view some extracts from agreements between Rai and various artists (taken anonymously for privacy reasons) for the production of in-house shows from the 60's to the 80's.

1967 : The artist grants RAI *“free use for broadcasting purposes (radio, television, cable radio [filodiffusione]) in Italy and abroad”* (Figure 6)

OGGETTO - Presentazione artistica.

Alla  
RAI - RADIOTELEVISIONE ITALIANA  
DIREZIONE GENERALE  
Viale Mazzini  
ROMA



SIGNORA

MILANO  
via Cavour, 4

Ho ricevuto la vostra A/SCR/84 del Milano, 1/1/67  
col seguente tenore:

Si pregiano esprimere che la S.V. è da noi accolta in qualità di [redacted] per prendere parte alla realizzazione della PRODUZIONE TELEVISIVA di [redacted]

1) La prova, l'esecuzione e le relative registrazioni avranno luogo dal 2 al 5/1/67

2) Il contratto di lavoro di [redacted] di Milano via Cavour, 27, è in una località o città scelta da noi [redacted]

3) La S.V. si impegna a fornire tutto quanto necessario per le operazioni sopra descritte, in particolare: [redacted]

4) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

5) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

6) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

7) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

8) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

9) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

10) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

11) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

12) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

13) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

14) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

15) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

16) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

17) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

18) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

19) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

20) La S.V. si impegna a fornire tutto quanto necessario per la produzione suddetta, [redacted]

Figure 6

1973: "The agreed remuneration also includes the amount due for the total or partial free use, for broadcasting purposes (radio, television cable radio [filodiffusione]) in Italy and abroad of the production and recording by any means"

In RAI contracts, this same wording is used until the late 70's, when another contract template began to be applied.

1977: Your work can be *“freely used, in Italy and abroad, in every form and way, without limitations or constraints, for all purposes related to our business”* (generic formula)

1987: Rai can use your work *“in every form and way [...] in the context of commercial, publishing, audiovisual and recording activities”* (more specific formula)

## **ADDITIONAL CHECKS WITH COLLECTING SOCIETIES**

According to RAI, this type of wording, especially the one consenting only “broadcasting purposes”, does not allow an indisputable usage on online platforms. In such cases, RAI decided to carry out further verifications with collecting societies or directly with authors or artists. In RAI there is a specific department, the “Copyright” department (“Diritto d’autore”), which performs these additional checks.

If the author or the artist is not represented by any collecting society, permission must be asked directly to the rights’ owners, and, if a fee is requested, a direct negotiation must be carried out.

On the other hand, if the author/artist is represented by SIAE, the principal Italian collective society, but only a partial use of the work (less than 10 minutes) is needed, permission is not required because there is a preliminary agreement between RAI and SIAE.

Nevertheless, if a longer piece of footage must be used or if an entire old production must be uploaded on RaiPlay or sold to third platforms, RAI must get permission from SIAE or other collecting societies and then pay a license fee. After that, SIAE carries out the fee distribution among the authors according to autonomous criteria. (Figure 7)

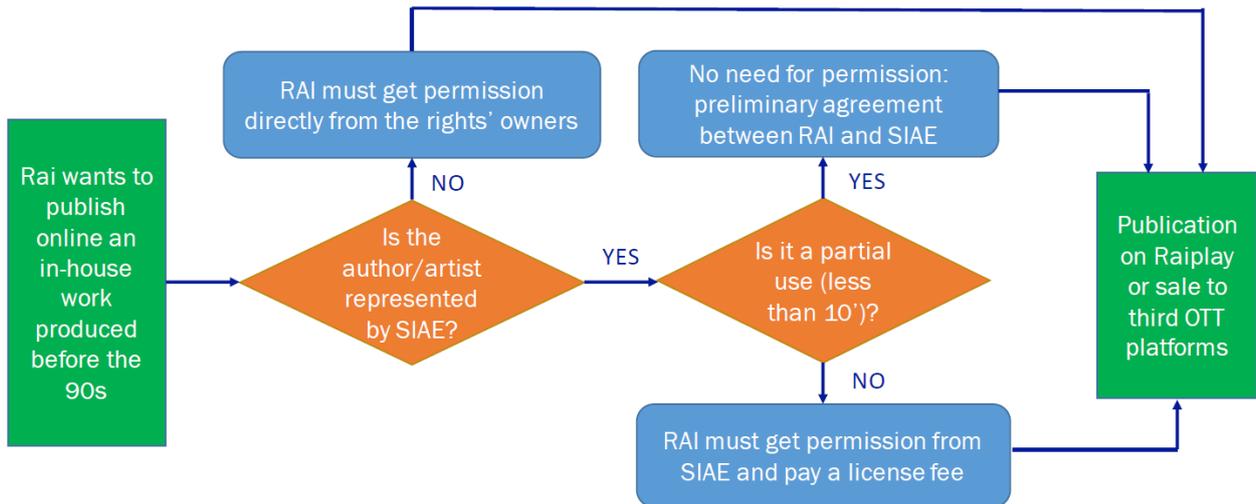


Figure 7

## CO-PRODUCTIONS, FILMING CONTRACTS AND LICENCE AGREEMENTS

Even in the case of co-productions made before the 90's, this type of checks with collecting societies must be carried out. This happens when RAI holds 100% of the existing rights in a specific territory. In the event that within the territory there is a division of the percentages of rights among the co-producers, it is mandatory to consult the other party, and if necessary, to sign a new agreement.

When we read an external filming contract (for example the filming of a theatrical performance or an event held at a private facility) or a license agreement signed prior to the 90's, we adhere strictly to the contract limiting the exploitation to the linear television only or signing a new agreement with the counterpart to acquire new exploitations rights.

## CONCLUSIONS

Having carried out the necessary checks at different levels (involving the Copyright department if necessary) some uncertainties may persist and some risks must be taken.

The ultimate goal of the rights clearance process is to open our archive to the public as much as possible. In an evolving media market, where online uses of archival materials moved from being optional to being necessary, it is important to take all needed steps to make older productions available for online publication and/or to ensure they can be re-used in new productions. Only in this way can Rai, as well as any other AV Archive,

maintain its social and cultural role, bringing our audio-visual memory to the new virtual world.