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MAIN FEATURES OF THE INTERNATIONAL PROTECTION OF AUDIOVISUAL WORKS AND PERFORMANCES

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I. INTRODUCTION

1. This background paper has been prepared for the first of my two presentations to be made at the sub-regional seminar. First, it describes the specific international norms on the international protection of audiovisual works; second, it outlines the current situation regarding the international protection of audiovisual performances; and, third, it refers to the general means to fight audiovisual piracy and to the specific measures needed against "camcoding" piracy. Another background paper has been prepared for my second presentation on the topic of "Prospects for Improving the Protection of Performers at International Level."

II. SPECIFIC INTERNATIONAL NORMS ON THE PROTECTION OF AUDIOVISUAL WORKS

A. Introductory remarks

2. Under the Berne Convention, the TRIPS Agreement and the WIPO Copyright Treaty (WCT), in general, the same provisions apply to audiovisual works (or as the Berne Convention refers to them: "cinematographic works to which are assimilated works expressed by a process analogous to cinematography") as to any other category of literary and artistic works. However, it is exactly this category of works in respect of which there are the greatest number of special provisions in these international treaties. Where these special provisions differ from the general norms, they apply in accordance with the principle of *lex specialis derogat legi generali*.

3. In the following paragraph, those special provisions are listed and commented in the order in which they appear in the above-mentioned treaties.

B. Berne Convention

4. Eligibility for protection. Article 3 of the Convention contains the general rules on the eligibility for protection: works of authors who are nationals of, or who have their habitual residence in, one of countries of the Union, and works first published in such a country, or simultaneously in such a country and a country outside the Union.

5. Article 4(a) of the Convention provides for a subsidiary criterion for eligibility of audiovisual ("cinematographic"[1]) works; namely in respect of those the maker of which has his headquarters or habitual residence in one of the countries of the Union.

[1] Hereinafter the adjectives "audiovisual" and "cinematographic" are used as synonyms in accordance with the clarification of Article 2(1) of the Berne Convention that works expressed by a process analogous to cinematography are assimilated to cinematography. The adjective "cinematographic" is used in those cases where the texts of the relevant international norms are quoted on the understanding that, on the basis of the said clarification, it means any kinds of audiovisual works.

6. Term of protection. Under Articles 7(1) and 7*bis*, the general rule concerning the term of protection is the life of the author and 50 years, and, in the case of works of joint authorship – a category into which audiovisual works usually fit in – the life of the last surviving joint author and 50 years after his death.

7. Article 7(2), however, provides for an alternative term that countries may apply instead of the term determined in the general rules. It reads as follows:

> "However, in the case of cinematographic works, the countries of the Union may provide that the term of protection shall expire fifty years after the work has been made available to the public with the consent of the author, or, failing such an event within fifty years from the making of such a work, fifty years after the making."

8. The alternative term of protection provided for in this paragraph follows the 50 year minimum, but it is not to be calculated on a *post mortem auctoris* basis, but rather from the time of the "making available to the public" of the work, or, in the absence of such "making available," from the time the making of the work. (This usually results in a term shorter than the one provided for under Article 7*bis*). It is to be noted that the concept of "making available to the public" is broader than the concept of "publication" as defined in Article 3(3) of the Convention. In addition to making available a work to the public through distribution of copies (which takes place in the case of "publication"), it also extends to such acts as public performance, broadcasting and communication to the public by wire; that is, to "making available" works without reproduction and distribution of copies. Also, it equally covers interactive making available of works as provided for in Article 8 of the WCT.

9. Making available a cinematographic work to the public is only applicable as a starting point for the alternative term of protection under Article 7(2) if it takes place "with the consent of the author." Here – as also in the majority of other provisions of the Convention (to which, of course, the provisions on moral rights does not belong – the reference to the author is be understood as meaning the owner of copyright in general, as discussed in the commentary to Article 2(6), above. It is particularly important to note this in respect of a provision on cinematographic works in the case of which the Convention – under its Article 14*bis*(2)(a) – leaves to national legislation of the country where protection is claimed to decide who is to be recognized as the original owner of copyright (implying the possibility of granting original ownership to the makers – producers – of such works).

10. It had also been recognized by the advocates of the civil law system that, in view of the sometimes very great number of creative contributors to a cinematographic work, the calculation of the *pma* term is extremely difficult. Thus, the provision of paragraph (2) may also offer a simpler solution to them. However, they do not necessarily make use of this possibility for solving the problem of the sometimes great number of joint authors of cinematographic works; they simply reduce the scope of those joint authors who may be taken into account in the calculation of the term of protection.

11. Limitations of the right of broadcasting. Article 11*bis*(2) of the Convention provides as follows:

> "It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the paragraph 1 [*inter alia*, the right of broadcasting] may be exercised, but these conditions shall apply only in the countries

where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."

12. "Conditions" of exercising the exclusive right of broadcasting, in general, mean compulsory licenses or mandatory (obligatory) collective management. At the 1967 Stockholm diplomatic conference the idea emerged that the application of Article 11*bis*(2) should be excluded in the case of broadcasting of cinematographic works, but finally the conference did not adopt such a provision.

13. However, audiovisual works usually require a lot of creative and financial investment which may only be recouped if the owners of rights are able to decide when, where and under what conditions they authorize the use of their works (through subsequent "distribution windows"). Therefore, the application of compulsory licenses or the prescription of mandatory collective management would be in conflict with the normal exploitation of such works and thus with the basic objective of the Convention reflected in its preamble: "to protect, in as effective… a manner as possible, the rights of authors in their literary and artistic works."

14. In accordance with this, national laws, in general, do not apply compulsory licenses and do not prescribe mandatory collective management in respect of broadcasting of audiovisual works. Even the application of extended collective management system[2] is not appropriate in such a case. For example, paragraph (2) of Article 3 of the 93/83/EEC Satellite and Cable Directive allows the application of extended collective management in case of simultaneous satellite transmission of a terrestrial broadcast, but paragraph (3) of the same article excludes the applicability of such a system in respect of audiovisual works.

15. Rights in audiovisual works. Article 14*bis*(1) of the Convention provides as follows:

"Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article."

16. The "rights referred to in the preceding Article" mans the rights mentioned in Article 14(1):

"Authors of literary or artistic works shall have the exclusive right of authorizing:

(i) the cinematographic adaptation and reproduction of these works, and the distribution of the works thus adapted or reproduced;

(ii) the public performance and communication to the public by wire of the works thus adapted or reproduced."

[2] In case of extended collective management, the law extends the validity of licenses granted by a collective management organization on behalf of its members also to the rights of non-members in the same category. There are two indispensable conditions of such systems: first, sufficiently broad original repertoire, and, second, the possibility of those owners of rights who do not want to be covered to leave ("opt out" from) the system.

17. Article 14(1) provides for three kinds of rights to authors of pre-existing literary and artistic works in respect of the incorporation of their works into a cinematographic work. First, a right which is clearly recognized in the Convention for all categories of works, and, therefore, in this respect what is involved is just a confirmation of those rights in this context resulting in a redundancy (this is the case in respect of the rights of reproduction and adaptation). Second, rights which are granted elsewhere in the Convention only for certain specific categories of works, and, therefore, in order to recognize the also for cinematographic works, a separate provision was necessary (this is the case in respect of the rights of public performance and communication to the public by cable). Third, the right of distribution in respect of which more detailed comments are needed.

18. As regards the right of distribution mentioned in paragraph (1)(i) of Article 14, the meaning of "distribution" should first be clarified. In this respect, there is a significant difference between the English and French texts of the Convention. In the English version, the word "distribution," while, in the French text, the expression "*mise en circulation*" is used. The English word "distribution" can be interpreted in two ways: either to mean the first distribution only, or to mean all subsequent acts of distribution. The expression "*mise en circulation*" (putting into circulation), however, seems to indicate that only the first distribution is meant. And, taking into account Article 37(1)(c) of the Convention ("in case of differences of opinion on the interpretation of the various texts, the French text shall prevail"), the meaning of the French text is decisive. This seems to mean that the minimum requirement is to provide for a right of distribution exhausted with the first act of distribution (putting into circulation) of the copies concerned. (The provision does not offer any guidance whether the exhaustion is supposed to have national or international effect).

19. The provision in Article 14(1)(i) on the right of distribution has a specific relevance from the viewpoint of whether or not a right of distribution – at least a right of first distribution in the sense of "*mise en circulation*" – exists under the Berne Convention. The question may also be put in this way: is this provision also redundant (as is the one on the right of reproduction) or does it mean a new element with a right of (first) distribution only existing in the case of cinematographic adaptations (and, on the basis of the reference to Article 14(1) in Article 14*bis*(1), cinematographic works themselves)?

20. There are sufficient reasons to believe that the provision on the right of distribution in item (i) of paragraph (1) is as much redundant as the provisions on the right of adaptation and the right of reproduction in the same item, and that a right of (first) distribution does exist under the Convention as an inseparable corollary of the right of reproduction.[3]

21. Ownership and transfer of copyright in audiovisual works. These issues are regulated in Article 14*bis*(2) and (3) of the Convention:

> "(2)(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

[3] For the reasons of this, see Mihály Ficsor: "Guide to the Copyright and Related Rights Treaties Administered by WIPO," WIPO publication No. 891 (E), paras. BC-14.12 to BC-14.18.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work.

(c) The question whether or not the form of the undertaking referred to above should, for the application of the preceding subparagraph (b), be in a written agreement or a written act of the same effect shall be a matter for the legislation of the country where the maker of the cinematographic work has his headquarters or habitual residence. However, it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking shall be in a written agreement or a written act of the same effect. The countries whose legislation so provides shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.

(d) By "contrary or special stipulation" is meant any restrictive condition which is relevant to the aforesaid undertaking.

"(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union."

22. In contrast with all the other preceding provisions of the Convention, which consistently use the term "author" to indicate who is the original owner of rights, the second sentence of paragraph (1) of this Article uses the term "owner of copyright" for the first time. It is already an indication of what follows then in paragraphs (2) and (3).

23. At the 1967 Stockholm revision conference, an attempt was made to solve a complex problem which had created quite a lot of trouble in the international markets of cinematographic works. That problem was that different national systems existed in respect of the questions of original ownership and transfer of rights in such works, such as (i) the system of "film copyright," where the producer (the "maker") of a film was recognized as the original owner of copyright; (ii) the "legal transfer," where the rights became also owned by the producers, but on the basis of a more complicated legal structure (where, in principle, the rights were vested in human creators, but they were regarded, under the law, as immediately assigned to the producer); and (iii) the "presumption of transfer" system where the human creators were also the original owners of rights, with a presumption, however, that when they contributed to a cinematographic production, they transferred their rights to the producer (such a presumption, however, may also be rebutted).

24. Point (a) of paragraph (2) leaves to the country where protection is claimed the option to determine who is the original owner of copyright in a cinematographic work. The countries of the Berne Union are free to choose any of the above-mentioned systems, and basically they may choose to grant original ownership to authors as human creators, to producers or both to

authors and to producers[4]. Although this solution had been adopted on the assumption that it corresponded to the principle of national treatment, it did not seem ideal, even at the time of the adoption of this provision, since it resulted in a situation that there were different original owners of rights in the same works in different countries (something that led to problems from the viewpoint of the predictability of the system, and raised serious questions concerning legal certainty and the credibility of contractual arrangements). Under the present conditions created by economic globalization and the spectacular development of the global information infrastructure, these problems have been further accentuated.

25. In view of these difficulties, it is believed by some experts and interested circles that it would be better to leave the determination of original ownership (as well as the regulation of transferability) of rights to the country which is the most closely related to the creation and production of the cinematographic work, and where, thus, all the basic contractual arrangements are made, arrangements which later serve as a basis for, in general, a very long and complex chain of subsequent contracts. This kind of solution, of course, might only relate to the answer to the question of "who" leaving the answers to such questions as "what," "with what exceptions and limitations," "under what conditions," "how long," etc., to the law of the country where protection is claimed, and to the application of the principle of national treatment. So far, however, at the international level, these are only *de lege ferenda* ideas.

26. Point (b) of paragraph (2) is to be applied in those countries where authors as human creators are the original owners of rights in cinematographic works. It does not apply in countries where producers ("makers") are the original owners of rights (on the basis of the "film copyright" system or a "legal transfer;" it does not apply, since in those countries, no similar measures are needed to guarantee reasonable conditions for the exercise of rights; the rights are, "by definition," in the hands of producers, as original owners).

27. The system provided for in this provision is called "presumption of legitimation" in a neutral manner, rather than "presumption of transfer," since it only concentrates on the desired end-result – namely that the contributors mentioned may not "in the absence of any contrary or special stipulation," object to the acts listed in the provision. Although a rebuttable presumption seems to be quite a logical solution, other means of implementing this norm are also possible, such as specific contractual schemes.

28. The presumption is applicable as soon as the contributors mentioned in the provision bring contributions to the cinematographic work. It is to be noted, however, that this presumption does not apply with respect to certain basic contributors covered by paragraph (3).

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[4] A specific system was introduced in the 92/100/EEC Rental, Lending and Related Rights Directive (in its 2006 amended and codified version, its number has become 2006/115/EC. The Directive provides for the rights of "producers of the first fixation of a film" and it mentions these rights among related rights. There are similar provisions on the rights of the "producers of first fixations of films" also in the 2001/29/EC Information Society Directive. It is to be noted, however, that, where a film qualifies as cinematographic work (the expression "cinematographic work" also meaning any other audiovisual work), its first fixation is nothing else but the cinematographic work itself. Since, under Article 2 of the Directive, the individual creators of a cinematographic work are recognized as original owners of rights in such a work, this means that, under the *acqui communautaire*, both authors and producers are original owners of rights in cinematographic works.

29. The provisions of points (c) and (b) of paragraph (2) are sufficiently clear and self-explanatory. They do not require specific comments.

30. Paragraph (3) exempts countries of the Union from the obligation of applying the "presumption of legitimation" system in respect of the basic contributors to cinematographic works mentioned in it: authors of scenarios, dialogues and musical works crated for the making of the cinematographic work, as well as, with the proviso included in it, the principle director (the latter, in fact, is regarded, in general, as the most decisive creator of such a work). The application of presumption is still possible but not obligatory.

C. TRIPS Agreement

31. Compliance with the substantive provisions of the Berne Convention. Article 9(1) of the Agreement provides that Members of the World Trade Organization (WTO) must comply with Article 1 to 21 and the Appendix of the Berne Convention except for the provisions on moral rights. Thus, in general, these provisions of the Convention apply under the Agreement also for audiovisual works. However, the Agreement also contains certain further special provisions in respect of audiovisual works.

32. Right of rental. Article 11 of the Agreement provides as follows:

> "In respect of at least computer programs and *cinematographic works* [emphasis added], a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title."

33. Term of protection. Article 12 of the Agreement provides as follows:

> "Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making."

34. It is, *inter alia*, the term of protection of cinematographic works where the calculation on a basis other than the life of a natural person (an author) is possible under Article 7(2) of the Berne Convention (which, by virtue of Article 9(1) of the TRIPS Agreement ia also applicable under the TRIPS Agreement. However, as discussed above, the concept of "publication" is narrower than the concept of "making available."

35. It follows from this that, in certain cases, the minimum term of protection is longer under the TRIPS Agreement than under the Berne Convention; namely, in cases where the first lawful making available of a cinematographic work to the public is not through publication but in another form (such as public performance). In such a case, the 50-year term of protection starts under the Berne Convention but does not start yet under the TRIPS Agreement; under the latter, it only starts with the eventual authorized publication of the

work, and, thus, ends later. In other – although less typical – cases, the minimum term of protection is longer under the Berne Convention than under the TRIPS Agreement; namely, when no authorized publication takes place within 50 years from the end of the calendar year of the making of a cinematographic work, but the work is made available to the public, with the consent of the author, within that period in another form (such as public performance). In such a case, the 50-year term of protection expires under the TRIPS Agreement when 50 years from the making of the work have elapsed, while under the Berne Convention it expires much later (up to 50 years minus one day) as the time elapsed from the making of the work until its making available to the public, with the consent of the author, in a form different from publication.

36. This means that a Member of WTO which is also party to the Berne Convention (and/or to the WCT) may only make its legislation fully compatible with both the TRIPS Agreement, on the one hand, and the Berne Convention and the WCT, on the other hand, if it provides that, in the case of a cinematographic work, (i) the term of protection is 50 (or more, as determined in national law) years from the end of the calendar year of the first authorized publication of the work; (ii) failing such publication within 50 years from the end of the calendar year of the making of the work, the term of protection is 50 years from the end of the calendar year of any other first making available to the public of the work with the consent of the author; and (iii) failing both an authorized publication and any other making available to the public with the consent of the author within 50 years from the making of the work, the term of protection is 50 years from the end of the calendar year of making.

37. Extension of the "three-step test" to all economic rights. Under the Berne Convention, the three-step test only applies in respect of exceptions to and limitations of the right of reproduction. Article 13 of the Agreement extends the application of the test to all economic rights; thus, also to the right of broadcasting. As discussed above, the application of compulsory licenses or the prescription of mandatory collective management in respect of broadcasting by the application of Article 11*bis*(2) of the Berne Convention would result in a conflict with the normal exploitation of copyright in audiovisual works. Under the Convention, as also discussed above, the need for the non-application of such limitations in respect audiovisual works may only be justified by the objective of the Convention reflected in its preamble, in the case of the TRIPS Agreement, this is based on Article 13, since the second condition of the test is that an exception or limitation must not conflict with a normal exploitation of the work.

D. WIPO Copyright Treaty (WCT)

38. Compliance with the substantive provisions of the Berne Convention. Article 1(4) of the WCT provides that the Contracting Parties must comply with Article 1 to 21 and the Appendix of the Berne Convention. The difference in contrast with the similar provision in Article 9(1) of the Berne Convention is that in this case, also the provisions on moral rights are covered. Thus, in general, these provisions of the Convention apply under the WCT also for audiovisual works. However, the Agreement also contains certain further special provisions in respect of audiovisual works; some of them similar to those in the TRIPA Agreement.

39. Extension of the "three-step test" to all economic rights. Article 10 of the WCT also extends the application of the three-step test to all economic rights similarly to Article 13 of the TRIPS Agreement. Thus, what is discussed above regarding the non-application of Article 11*bis*(2) in the case of cinematographic works also applies in this respect.

40. It is to be noted that the 1996 Diplomatic Conference also adopted an agreed statement concerning Article 10(2) of the WCT which reads as follows: "It is understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." It is submitted that this does not contradict what is stated in the preceding paragraph in view of the arguments discussed in paragraphs 13 and 14, above.

41. Extended coverage of Article 14*bis*(2)(b) of the Berne Convention as applied in the context of the WCT. As mentioned above, Articles 1 to 21 of the Berne Convention are also applicable under the WCT; thus, also Article 14*bis*(2)((b) of the Convention which, as quoted above, reads as follows:

> "However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or *any other communication to the public*, or to the subtitling or dubbing of texts, of the work." (Emphasis added.)

42. By virtue of Article 8 of the WCT, the coverage of this provision has been extended under the Treaty. This is so since Article 8 reads as follows:

> "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them."

43. Since under Article 8, the concept of communication to the public also extends to the right of interactive making available to the public, in the context of the WCT, the expression "other communication to the public" receives a broader coverage too extending to this "sub-right" of the right of communication to the public.

III. THE ISSUE OF INTERNATIONAL PROTECTION OF AUDIOVISUAL PERFORMES

A. Introductory remarks

44. There is good reason for which the title above only refers to the *issue* of international protection of audiovisual works rather than just to international protection of such performances. The protection of such performers rather only exist in respect of live performances, in respect of their audiovisual fixations, practically no international obligations exist. This is reviewed in the following paragraphs as regards the Rome Convention, the TRIPS Agreement and the WIPO Performances and Phonograms Treaty (WPPT).

B. Rome Convention

45. Definition of "performers." Article 3(a) of the 1961 International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) defines the term "performers" in a way that it also covers "audiovisual performers: "'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic work." It is to be noted that this definition does not cover the performers of expressions of folklore.

46. Article 7 of the Convention also provides for the rights of performers:

> "1. The protection provided for performers by this Convention shall include the possibility of preventing:
>
> (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
>
> (b) the fixation, without their consent, of their unfixed performance;
>
> (c) the reproduction, without their consent, of a fixation of their performance:
>
> (i) if the original fixation itself was made without their consent;
> (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
> (iii) if the original fixation was made in accordance with the provisions of Article 15 *[on exceptions]*, and the reproduction is made for purposes different from those referred to in those provisions [comment added].
>
> "2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organizations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organizations."

47. The introductory sentence of paragraph 1 of Article 7 uses the expression that the protection provided by this Convention for the performer "shall include the possibility of preventing" the acts listed in the paragraph if they would be done without his consent. The report of the 1961 Rome Diplomatic Conference states that "this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of criminal statutes."[5]

48. Although the legislation of the United Kingdom has changed in the meantime, and it has granted performers assignable "property rights" or "rights to remuneration" in respect of certain acts concerning fixed performances, it continues only granting un-assignable "non-property rights" in respect of those "bootlegging" acts which are mentioned in Article 7.1(a) and (b) of the Rome Convention. The infringement of such a right is only actionable as a breach of statutory law, and criminal sanctions may be applied in case of certain commercial acts. A performer has such non-property rights in respect of the fixation of a live performance, its broadcasting live or its inclusion in a cable program, and the making of a fixation of a live performance from a broadcast or cable program in which it has been included.[6]

49. The report of the Rome Diplomatic Conference, nevertheless reflects the agreement that the acts enumerated in paragraph 1 do require consent by the performer, and stresses that, therefore, the application of a compulsory license system would be incompatible with the Convention (since, under such a system, a performer could not prevent, but would have to tolerate, the acts in question).[7]

50. Term of protection. Article 14 provides for the term of protection of the rights of performers in this way:

"The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

(a) the fixation was made for phonograms and for performances incorporated therein;
(b) the performance took place for performances not incorporated in phonograms..."

51. Point (a) certainly does not apply to performances incorporated in audiovisual fixations, since it only applicable to performances incorporated in phonograms (exclusively aural fixations), and point (b) does not apply either to audiovisual performances where they have been incorporated in an audiovisual fixation with their consent since, by virtue of Article 19, no rights granted by the Convention applies to them from that moment. Therefore, the term

[5] Records of the 1961 Rome diplomatic conference, p 43.
[6] Copyright, Designs and Patents Act 1988, section 182.
[7] Records of the 1961 Rome conference, p. 43.

of protection provided in point (b) is only relevant and applicable for audiovisual performances if they have been incorporated in an audiovisual fixation without their consent (on the understanding that, in respect of unfixed (live) performances, no term of protection is meaningful since, if they are not fixed they cannot be used later than during the performance itself).

52. Exceptions. Article 15 provides exceptions to the rights provided for in the Convention:

> "1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:
>
> (a) private use;
> (b) use of short excerpts in connexion with the reporting of current events;
> (c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;
> (d) use solely for the purposes of teaching or scientific research.
>
> "2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention."

53. Article 19: taking back what has been given. The provisions of Article 7 on the rights of performers do not differentiate between the various categories of performers and, thus, they also cover "audiovisual performers." However, Article 19 provides as follows:

> "Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application."

54. This provision was adopted on the basis of a proposal of the United States (which, however, has never acceded to the Convention). As soon as a performer has consented to the incorporation of his performance in an audiovisual fixation, Article 7 of the Convention, providing for the possibility of performers to prevent certain acts, is not applicable any more. Such possibility only applies to "audiovisual performances" if the audiovisual fixations are made without their consent ("bootlegging").

55. This means that "audiovisual performers" who have consented to the inclusion of their performances in audiovisual works, irrespective of the provisions of Article 7.1(iii), do not enjoy a right of reproduction of such fixations of their performances. In such a case, they do not enjoy, of course, any rights of broadcasting and other communication to the public either for the very reason that Article 7 does not provide for such rights in respect of any fixed performances no matter how they are fixed; only Article 12 does, but it only covers fixations in phonograms published for commercial purposes (subject to the possibility of reservations under Article 16).

56. It was made clear during the debate at the Diplomatic Conference that Article 19 has no effect upon performers' freedom of contract in connection with the making of visual and audiovisual fixations, nor does it affect their right to benefit by national treatment, even in connection with such fixations.[8]

C. TRIPS Agreement

57. Coverage concerning the rights of performers; rights in live performances. The first sentence of Article 14(1) of the TRIPS Agreement reads as follows: "In respect of a fixation of their performances on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation."

58. As far as the fixation of performances is concerned, the coverage of this provision is narrower than the coverage of the relevant provisions (Article 7.1(b)) of the Rome Convention, since this provision only covers fixation of a live performance on a phonogram, while, under Article 7.1(b) of the Rome Convention, the protection provided for performers extends to the possibility of preventing fixation on any medium. (The TRIPS Agreement does not contain any definition of "phonogram" but it includes, by reference, several provisions of the Rome Convention in which the term "phonogram" is used; the absence of any separate definition seems to indicate that the definition contained in Article 3(b) of the Rome Convention is applicable, according to which "'phonogram' means any exclusively aural fixation of sounds of a performance or of other sounds" (emphasis added)). This means an even weaker protection of audiovisual performers under the TRIPS Agreement than under the Rome Convention. While the Rome Convention guarantees such performers at least the possibility of preventing an unauthorized audiovisual fixation, and they only lose their rights – in particular, the right of reproduction – by virtue of Article 19 when they authorize such fixation, the TRIPS Agreement does not offer them even the possibility of preventing audiovisual fixations.

59. Rights in live performances. The second sentence of paragraph 1 of Article 14 of the TRIPS Agreement provides as follows: "Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance."

60. As quoted above, under Article 7.1(a) of the Rome Convention, performers have the possibility of preventing the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation. A "broadcast performance" may still be a live performance (unless, in parallel with the broadcasting, a fixation is made); therefore, the coverage of Article 7.1(a) of the Convention might seem to be narrower than the above-quoted provision of the TRIPS Agreement (which uses the expression "live performance" without any limitation).

61. This is not the case, however, for the following reasons: The TRIPS Agreement does not contain any definition of "broadcasting," and/or "rebroadcasting" but it includes, by

[8] *Ibid*, p 53.

reference, certain provisions of the Rome Convention in which those terms are used. The absence of separate definitions seems to indicate that the definitions contained in Article 3(f) and (g) of the Rome Convention prevail, according to which "'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds," and "'rebroadcasting' means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization." The above-quoted provision of the TRIPS Agreement only covers broadcasting and does not cover rebroadcasting; consequently, its effect is the same as that of Article 7.1(a) of the Rome Convention. In this respect, Article 7.2(1) of the Rome Convention should also be taken into account, according to which "[i]f broadcasting was consented to by the performers, it shall be a matter for domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes." This provision seems to be covered by the first sentence of paragraph 6 of Article 14 of the TRIPS Agreement (see below) under which "[a]ny Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention." Thus, rebroadcasting of live performances is a matter for national legislation under both the Rome Convention and the TRIPS Agreement.

62. From the viewpoint of the rights of audiovisual performers, there is an important difference between the first and the second sentences of Article 14.1 of the TRIPS Agreement. While the possibility of preventing unauthorized fixations of live performances only extends to fixations on phonograms, the possibility of preventing unauthorized broadcasting or other communication to the public of such performances does extend to any live performances.

63. Term of protection. Under Article 14.5 of the Agreement, the basis of the calculation of the term of protection is the same as under the Rome Convention with the difference that the minimum term is 50 years rather than 20. However, since it is only in the case of broadcasting and communication to the public of live performances that the Agreement applies to any kind of performances, the term of protection is irrelevant.

64. Exceptions. As regards exceptions, Article 14.6 prescribes the *mutatis application* of the provisions of the Rome Convention.

D. WIPO Performances and Phonograms Treaty (WPPT)

65. Definition of "performers." Article 2(a) of the WPPT defines "performers" as follows: "'performers' are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."

66. As it can be seen, the definition has been extended to performers of expressions of folklore. By this, an old and unjustified restriction of the concept of "performers" and "performances" is eliminated at the international level. The extension of the definition – by offering an indirect means of intellectual property protection – may also contribute to the protection of the legitimate interests of those communities which have created and maintain the folklore expressions concerned.

67. Coverage concerning the rights of performers; rights in live performances. The provisions of the Treaty on the rights of performers form four categories: (i) Article 5 on moral rights which are only applicable to live aural performances or performances fixed in phonograms; (ii) Article 6 on economic rights in unfixed (live) performances; (iii) Articles 7 to 10 on exclusive rights (reproduction, distribution, rental, (interactive) making available to the public in respect of performances fixed in phonograms; and (iv) Article 15 on the right to a single remuneration (along with producers of phonograms) for broadcasting and communication to the public of phonograms published for commercial purposes.

68. In the case of the first, third and fourth categories of rights, it is clear that they do not apply to "audiovisual performers." It is only the second category of rights – economic rights in unfixed performances – that seems to require specific comments.

69. Article 6 reads as follows:

> "Performers shall enjoy the exclusive right of authorizing, as regards their performances:
>
> (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
>
> (ii) the fixation of their unfixed performances."

70. The acts covered in this article are practically the same as those mentioned in Article 7.1(a) and (b) of the Rome Convention, although the language of the latter is more complex. The only possible substantive difference may exist if, in the case of Article 6(ii) of the WPPT, from the two possible interpretations of the word "fixation" discussed below, the restrictive one is accepted – to only mean embodiment of sounds – since, in Article 7.1(b) of the Rome Convention, the word "fixation" is used without any limitation, also extending to audiovisual fixation.

71. However, the legal nature of the rights differs. By virtue of Article 7.1(a) and (b) of the Rome Convention, "the protection provided for performers" only must "include the possibility of preventing," while Article 6 of the WPPT provides for a genuine exclusive right of authorization in respect of these acts.

72. The expression "the fixation of… unfixed performances" used in Article 6(ii) of the WPPT is not interpreted in a uniform way. The question is whether the right to authorize the fixation of unfixed performances under Article 6(ii) extends to all fixations or only to fixations on phonograms. The text of the provision, when read alone, may suggest that any kinds of fixations are covered. If, however, the definition of "fixation" under Article 2(c) is taken into account, it appears that a narrower interpretation is justified. According to the said definition, "fixation" only means " the embodiment of sounds, or the representation thereof from which they can be perceived, reproduced or communicated through a device" (emphasis added). On the basis of this definition, Article 6(ii) only extends to fixation on phonograms.[9]

[9] This interpretation was presented, for example, by the International Bureau of WIPO in document WIPO/CR/SYM/GUZ/01/3/a, pp 18-19, para 91.

73. Nevertheless, this interpretation does not seem to be generally accepted. For example, the report of the first session of the WIPO Committee of Experts on a Protocol Concerning Audiovisual Performances, held in September 1997, reflects a differing position of the delegation of Japan in the following way: "Referring to Article 6 of the WPPT, the Delegation took the view that it might be considered that the right of performers to authorize the fixation of their unfixed performances included audiovisual performances, since it had been agreed at the Diplomatic Conference to remove the word 'musical' in the expression 'musical performances' contained in the draft Article, in order to include audiovisual performances in the scope of protection concerning unfixed performances."[10]

74. However, the reason for which the adjective "musical" was removed requires an interpretation in itself. There is nothing in the records of the Diplomatic Conference to indicate the reason for the removal of this adjective which was already in brackets in the "partly consolidated" text of the draft WPPT.[11] The minutes of Main Committee I reflect the removal of this adjective in the following way:

> "863. Mr. SILVA SOARES (Brazil) asked whether a decision was to be taken on the word "musical" which was in brackets.
>
> "864. The CHAIRMAN invited the Delegation of the United States of America to take the floor on that matter.
>
> "865. Mr. KUSHAN (United States of America) explained that his Delegation had, as the only Delegation, placed a reservation on the deletion of the word "musical," contained in brackets in Articles 9 and 11. His Delegation was now in a position to withdraw that reservation so that the word "musical" had to be deleted.
>
> "866. The CHAIRMAN thanked the Delegation of the United States of America for that clarification and for the withdrawal of its reservation. Consequently, the word "musical," so far in brackets, had to be deleted from Articles 9 and 11."[12]

75. Two comments should be added to this. First, in the given stage of the debate, Articles 9 and 11 were discussed – that was the reason for which the statement of the U.S. delegate only referred to those Articles – but the withdrawal of the U.S. reservation, in fact, related to all Articles where the adjective "musical" still appeared in square brackets. Second, it seems that the reason for the withdrawal of the "reservation" was not what the delegation of Japan referred to in the above-quoted statement but rather an argument presented and discussed during the informal consultations; namely that, with the adjective "musical," the coverage of the WPPT would have been narrower than that of the TRIPS Agreement which, in its Article 14.1, extends to the fixation of performances on phonograms in general (since performances – recitations – of literary works, such as poems, are also recorded on phonograms).

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[10] Document AP/CE/I/4, Annex II, p 3, para 5.
[11] In respect of Article 6, see Records of the 1996 Geneva conference, p 522.
[12] Records of the 1996 Geneva conference, p 762.

76. Another reason supporting an extensive interpretation of the coverage of Article 6(ii) is that, where it uses the word "fixation," it refers to an *act* – fixing an unfixed performance – while the word "fixation" in the definition included in Article 2(c) of the Treaty refers to the result of an act: an "embodiment" of sounds. Although this is truly a more weighty argument, it still seems that a narrower interpretation is justified. This is so, since, where in the same treaty, references to an act and to the result of the act – or, more generally, a verb form and a noun form so closely related to each other – are intended to be different, this obviously should be indicated somehow in the negotiating history of the treaty. In the case of the WPPT, there is no such indication.

77. Also the acceptance by all the delegations – although by some of them quite reluctantly – that, as soon as fixation is involved, audiovisual aspects are not covered by the Treaty, may be a weighty argument for a restrictive interpretation. Furthermore, the generally shared agreement that, in respect of those issues which were negotiated and settled in the TRIPS context, the two WIPO treaties should not extend the obligations under the TRIPS Agreement seems to confirm that the restrictive interpretation is more appropriate. It should, however, be stressed that this only relates to the minimum obligations under the Treaty (and the TRIPS Agreement), since it is obvious that protection against "bootlegging" is, at least, as necessary in the case of unauthorized audiovisual fixation of performances as in the case covered by Article 6(ii) (if the above-mentioned restrictive interpretation is taken as a basis).

78. Discussions at the 1996 diplomatic conference on the rights of audiovisual performers. The draft of WPPT, in fact, consisted of two alternative draft treaties: on the one hand, a treaty on the protection of the rights of performers in respect of their musical performances only – live or fixed on phonograms – and on the rights of producers of phonograms, and, on the other hand, a treaty on the protection of the rights of performers in respect of any performances – live or fixed in any medium – and on the rights of producers of phonograms. This was manifested in alternative provisions throughout the draft. The latter 'alternative treaty' with a broader coverage also contained a sub-alternative which consisted in the possibility of a reservation on the basis of which the audiovisual elements of performances could have been excluded from the scope of protection.

79. The coverage of the draft treaty was one of the most controversial issues at the Diplomatic Conference. This was so much obvious that the Chairman of Main Committee I suggested that the discussion about it should be postponed and that the above-mentioned alternatives should not be addressed yet. The intention was, to leave this issue, for the time being, to informal consultations and negotiations. It "surfaced" only once again at the level of formal discussions; it was only on Tuesday of the second week of the Conference that a debate took place about this in Main Committee I, which, however, did not produce a breakthrough; therefore, the issue of coverage was "transferred back" to informal consultations and negotiations.

80. Since the beginning of the preparatory work of the treaty, the most important difference of positions had been between the E.C. and its Member States and the U.S. This difference did not narrow at the Diplomatic Conference. In the debate in Main Committee I, the delegation of the E.C. stressed that there should be no "discrimination" among performances and that audiovisual performances should enjoy the same – high – level of protection as "aural

performances."[13] The E.C. position was supported by other European countries, the African Group, and the Group of Latin American and Caribbean countries. Japan reserved its position on this issue, and it seemed that China too since its delegation did not participate in this debate.

81. The U.S. delegation was in favor of maintaining the international *status quo* expressed in Article 19 of the Rome Convention and in Article 14.1 of the TRIPS Agreement. It opposed the extension of the coverage of the treaty to "audiovisual performers" pointing out the fundamental differences (also reflected in the specific status of "audiovisual authors" under Article 14*bis* of the Berne Convention) between the phonographic industry and the audiovisual industry due to which it did not deem it to be a discrimination to have two different regimes for the performers concerned. The U.S., however, made efforts to try to work out a compromise solution in this respect, as a result of which the level of international protection of performers could be raised, without the necessity of introducing fundamental changes in the well-functioning contractual system between the US film industry and the organization (guilds) representing actors.[14] The Group of Asian and Pacific Countries seemed to support the U.S. position, in particular India with its huge film industry that is also based on a contractual system.

82. The U.S. delegation submitted a compromise proposal which was distributed on December 11; that is, on the day after the formal debate about this issue in Main Committee I. The delegation, however, presented the proposal orally during the said debate in Main Committee I. Since the written proposal was quite complex also containing cross-references to a number of draft provisions, it seems better to refer to it on the basis of the oral presentation as reflected in the Records of the Diplomatic Conference:

> "[The delegate pointed out that a] number of countries had pressed to expand the Treaty to cover performers of audiovisual works, rather than keeping the Treaty limited to sound recordings. He stressed that his country had consistently opposed extension of the Treaty in such a manner, and that it would continue to do so, unless serious problems that existed in making such extension were addressed. He saw two possibilities in that regard. Either the scope of the Treaty should be limited to exclude audiovisual performers, or an alternative approach should be developed that would permit the existing different systems to coexist.
>
> "… He said that his Delegation had developed a proposal that would accomplish that latter objective. The proposal had four interrelated and essential elements. First, the proposal would grant foreign performers statutory protection in the United States of America for their core economic rights. Those core economic rights were the rights of fixation, reproduction, distribution and making available to the public. The rights of modification and moral rights should be omitted. Second, each country should have flexibility under the Treaty as to how rights were to be implemented. With respect to its domestic performers, a country could implement the treaty obligations in a manner that would be consistent with its own existing system. He mentioned as an example that performers in the United States of America would realize their rights through the system of that country, which was based on collective bargaining agreements. Foreign performers, on the other hand, would receive specific statutory rights. The third

[13] *Ibid*, pp. 700-701.
[14] *Ibid*, pp. 699-700.

element of his Delegation's proposal was that the Treaty should contain provisions on transfer of rights. It should permit performers to freely transfer their economic rights. It would provide protection to performers beyond that provided by the Rome Convention, by allowing rights to continue to exist even after the performer consented to the fixation of his performance. Under the proposal, a presumption would apply that those rights were transferred to the producer once the performer agreed to participate in a film. The performer and producer would, however, be free to agree otherwise. The fourth element of the proposal would require each country to treat performers from other countries at least as well as it treated its own performers. The Delegate indicated that his country would accept material reciprocity with regard only to the broadcasting right.

"… He felt that that proposal offered a workable solution. If accepted as part of the Treaty, it would ensure meaningful protection for audiovisual performers around the world and would avoid extreme differences in the levels of protection from country to country. He emphasized that the proposal would also significantly increase the likelihood that the United States of America would be able to join the Treaty, and to extend benefits to both audio and audiovisual performers from foreign countries. He added that a failure to obtain such a compromise solution or an alternative that would simply allow the United States of America to take reservations on the question of protection for audiovisual performers could make it difficult, if not impossible, for the United States of America to accept and ratify the Treaty.

"… He said that his Delegation's willingness to put forward a proposal along those lines represented a major shift in the position of his country. He underscored that it was for the first time that the United States of America had been prepared to provide specific statutory rights to performers from other countries, and he strongly urged the Committee to give the proposal serious and favorable consideration."[15]

83. This seemed to be truly a major shift in the U.S. position and an important attempt to try and reach a compromise. The position of the E.C. delegation, however, was that the U.S. proposal had offered too little and too late, and it maintained its original position insisting that no distinction should be made between various performances, and the aural or audiovisual uses thereof, and that the United States should try to solve its problems through the possibility of reservations offered as one of the alternatives.[16]

84. On the basis of this reaction of the E.C. delegation, it was easy to foresee the final result: there was no chance to reach agreement on this issue. It would have been, of course, a major anachronism to conclude an agreement without such a country with a huge film industry, and the No ^{o} 1 exporter of audiovisual works all over the world. The coverage of the WPPT has been limited to "aural performances" and performances fixed in phonograms (this was slightly broader than the coverage of the corresponding alternative draft treaty which only extended to musical performances).

85. Nevertheless, the Diplomatic Conference adopted a resolution concerning audiovisual performances which read as follows:

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[15] *Ibid.*
[16] *Ibid*, p. 700.

"The Delegations participating in the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva,

"Noting that the development of technologies will allow for a rapid growth of audiovisual services and that this will increase the opportunities for performing artists to exploit their audiovisual performances that will be transmitted by these services;

"Recognizing the great importance of ensuring an adequate level of protection for these performances, in particular when they are exploited in the new digital environment, and that sound and audiovisual performances are increasingly related;

"Stressing the urgent need to agree on new norms for the adequate legal international protection of audiovisual performances;

"Regretting that, in spite of the efforts of most Delegations, the WIPO Performances and Phonograms Treaty does not cover the rights of performers in the audiovisual fixations of their performance;

"Call for the convocation of an extraordinary session of the competent WIPO Governing Bodies during the *first* quarter of 1997 to decide on the schedule of the preparatory work on a protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances, with a view to the adoption of such a protocol not later than in 1998."[17]

86. Considering the big gap between the positions of the E.C. and the U.S., the 1998 deadline seemed to be – and along with some subsequent deadlines, turned out to be – overly optimistic. The application of this resolution is discussed in my second background paper papered for this sub-regional conference.

IV. FIGHT AGAINST AUDIOVISUAL PIRACY

87. General means against piracy. It goes without saying that all the means prescribed by Part III of the TRIPS Agreement are to be applied also in the case of audiovisual piracy. In the digital, networked environment, the application and adequate protection of technological measures, as prescribed in Article 11 of the WCT and Article 18 of the WPPT, is also an indispensable guarantee against piracy of audiovisual works. Equally, as in respect of other categories of works and objects of related rights, it is also an important requirement to regulate the liability of service and access providers in a way that they are obligated to duly cooperate with rights owners in their fight against infringements. For this, *inter alia*, there is a need for a well-construed notice-and-take-down system.

[17] *Ibid*, p. 93.

88. However, there is a special aspect of audiovisual piracy which is very dangerous and requires tough measures; namely “camcoding piracy.” It means video-recording of newly released films during their theatrical presentation and then of uploading them on the Internet. By this, the chance for normal exploitation of films is seriously undermined or completely destroyed. In response to this, there is need for including in national legislation provisions: (i) to clarify that private-copying exceptions does not extend to such recording; (ii) to clearly prohibit such acts; and (iii) to prescribe criminal sanctions against those who perform such acts.

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