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The definition of the *phonogram* in the WPPT

1. International instruments dealing with performers' intellectual property rights grant to them, to some extent, satisfactory elements of protection in a significant number of countries. 76 countries are currently a party to the Rome Convention (1961) and 42 to the WPPT (1996).
2. Adopted in 1996, the WPPT aims to update and improve the protection brought by the Rome Convention (from which, according to article 1 of the WPPT, it shall not derogate), taking into account the evolution of the Internet-related technologies.
3. It protects the rights of performers whose performances are fixed under the form of phonograms as well as those of producers of phonograms, and grant to them an appropriate and efficient protection when their works are exploited over the Internet.
4. **The main improvements for performers brought about by the Treaty are:**
 - The moral right, which confirms at international level that performers' rights belong, like authors' rights, to the family of human rights, and tend to protect the creative activity of the artists;
 - The right of distribution (of copies) of phonograms, which is necessary to fight against traditional piracy, including the case of CDs imported after they have been illegally manufactured in countries where it was not legally possible to oppose;
 - The right of (interactive)making available of phonograms, which deals with such uses on the Internet by which a phonogram is accessible to members of the public individually, from a place and at a time chosen by them;
 - The right to equitable remuneration for broadcasting and communication to the public of "phonograms published for commercial purpose". It should be noted that this concept is very broad as it includes any sound recordings made available to the public on the Internet.
5. It is also significant that the simulcasting of radio and television broadcasts is protected by the right to equitable and single remuneration, as such use is considered a non-interactive act of communication to the public.
6. **Protection relates to the content of what is fixed on a "phonogram"**, i.e. the content of any interpretation whose original fixation is exclusively aural. Unfortunately, the WPPT doesn't protect audiovisual fixations of audiovisual performances. Performers are thus still waiting for an efficient protection as regards their fixed audiovisual performances.
7. As regards the protection brought to performers by the WPPT, I wish to address the very interesting question of the definition of the phonogram as provided by the treaty. This is an essential point, because some divergences still subsist and the substance of the treaty itself depends on it. Such divergences are regrettable, for it seems absolutely essential that lawyers everywhere in the world are able to use a simple and non-ambiguous definition.

8. According to the established definition provided by article 3 b) of the Rome Convention from which the WPPT must not derogate (see Article 1.1. of the WPPT), 'phonogram' means "any exclusively aural fixation of sounds of a performance or of other sounds".

9. A question of major importance is increasingly arising, which can be expressed as follows: do the Rome Convention, the WPPT and related national laws protect performances fixed in a phonogram when that phonogram is exploited together with images, following its incorporation (i.e. its reproduction) in an audiovisual product?

10. This issue will be increasingly controversial during the next decades, and obviously, music performers and their organisations will be active in order to achieve the protection of music performances fixed in phonograms, whether they are exploited together with images or not.

11. To our knowledge, there are pending court cases about this issue in at least three countries, and we do think that there will be others in a near future. The High Court of Australia already took a decision, in 1998, which confirms that the broadcasting of commercial phonograms incorporated in television broadcasts is subject to the right of remuneration provided for to the performers and the producers of such phonograms.

12. A regrettable strategy has been developed on this issue, at international, regional and national level, which tries to impose a specific interpretation of the definition of 'phonogram' provided for in the WPPT. According to this interpretation, the statutory protection of a fixed audio performance (*phonogram*) is "suspended" as soon as such a fixed performance is exploited together with images. We believe this to be a misinterpretation of both the Rome Convention and the WPPT and we give below our reasons for this view.

13. According to Article 3 b) of the Rome Convention, *phonogram* means "any exclusively aural fixation of sounds of a performance or of other sounds". There is no doubt that this definition refers to the material results of the act of exclusively aural fixation of an unfixated performance. What is protected through this notion of 'phonogram' is the content of the fixation (i.e. the performance, which from the moment of the fixation continues to exist in the resulting phonogram) and obviously not the medium or the carrier into which the original embodiment has taken place.

14. It follows from the previous paragraphs that the act of *audiovisual fixation* (which has not yet been defined in any international instrument) can only consist of the **simultaneous** fixation of both the sounds and images of a performance. If the phrase 'audiovisual fixation' is used to denote the material result of such an act, it follows that it must still refer only to the two simultaneously combined elements of the performance.

15. It equally follows that any further use of such a fixed performance will involve the use of an already protected phonogram, even if it has been subsequently associated with images for example as the sound part of a music video or film. Both of these cases will involve the reproduction of the phonogram.

16. A number of key points have to be considered in connection with this act of reproduction.

- a) In both the Rome Convention and the WPPT the only criterion for defining a 'phonogram' is the original process of fixation (i.e. the initial act of recording a performance).
- b) There is no provision in either of these instruments for subsequently changing the definition of the 'phonogram' or for suspending the definition when certain uses are made of the phonogram.
- c) The definition is not confined to 'commercial sound recordings', which represent only one of the many possible material results of the act of fixation.
- d) As stated above, a 'phonogram' is defined solely by the process of creation and not by any use to which it may subsequently be put. This is clear from the text of both instruments but, to avoid any doubt, the Diplomatic Conference of the PPT adopted An Agreed Statement related to Article 2(b) stating that 'it is understood that the definition of phonogram provided in article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work'. It should be noted that the Statement refers to the incorporation of the rights and is concerned to avoid any incorrect 'suggestions' that might be implied from the text of the Article.

17. Despite these clear textual facts some commentators have advanced an argument that, due to the article 2 (b) of the WPPT, the “nature” of the phonogram is “suspended during its incorporation”. The protection of the WPPT would, in this opinion, be excluded “where the soundtrack appears together with, or is otherwise connected to, the image track”. In this opinion, “only the ‘form’ of being incorporated or not during the exploitation is relevant.”

18. We strongly reject such argumentation, which goes beyond the content of the WPPT and is not practicable, for the following reasons:

- a) From the moment a performance is fixed, it is protected by the WPPT as a phonogram for any subsequent use. Any further incorporation of this fixed performance into an audiovisual product would then be an act of reproduction of this **already protected** phonogram.
- b) The idea of a suspension of the nature of the phonogram is pure invention. There is no trace of such a legal principle in the records of the WIPO Diplomatic Conference of 1996. By the way, due to a lack of time, there was no debate at all during this Diplomatic Conference about the wording of the definition of phonogram. It would have been possible to get such rule of suspension in the WPPT through a specific provision similar to the formula included in article 19 of the Rome Convention concerning the right of reproduction. Such a rule might have said, for instance, that as soon the incorporation of a phonogram into an audiovisual work or product is authorised, such or such right provided for by the WPPT to performers and producers “cease to be applicable”. But obviously, there is no such provision in the WPPT.
- c) The consideration from which, “*only the ‘form’ of being incorporated or not during the exploitation is relevant*” is clearly not practicable, especially in the digital environment. Any digital medium, including a CD, can incorporate images together with sounds. These can be moving or still images, especially in the framework of Internet uses. Moreover, such principle would facilitate abuses where users would systematically exploit phonograms together with images in order to escape the protection provided by the WPPT; the making of such “audiovisual works” being done, for instance, in a foreign country where the right of reproduction is not exercised by performers.

19. A very simple example would be the one of discotheques with a screen displaying images somewhere in the room, in order to escape the payment of the equitable remuneration provided by the Rome Convention and the WPPT. Similar practices could happen on the Internet, where technologies of digital transmission afford an easy making available of images, to the detriment of both the performers and the producers of phonograms; especially whether the uploading is done from a country where the legislation does not protect neighbouring rights, or from a country where such rights are not exercised in practice.

20. We add a final argument: Article 1. (1) of the WPPT says: “*Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the ‘Rome Convention’).*”

21. If the meaning of article 2 (b) of the WPPT were in reality that the incorporation of a phonogram into an audiovisual “work” could result in the suspension of the protection of the audio performances fixed in a phonogram, such rule would conflict with the definition of ‘phonogram’ provided for in the Rome Convention.

22. It would for instance result in the exclusion of the right to remuneration provided by article 12 of the Rome Convention where a commercial phonogram is broadcast or communicated to the public together with images, or it would result in the exclusion of the right of reproduction provided by article 7 of the Rome Convention in case of the reproduction an audiovisual product, which incorporated a phonogram illicitly.

23. As a whole, this question also shows how problematic the discrimination that WPPT creates between aural fixations and audiovisual fixations is. Taking into account the fact that performers are not protected at international level as regards their audiovisual fixations (except by the Rome Convention as regards the reproduction of unauthorised audiovisual fixations), this discrimination encourages the employers of artists, as well as the users of audiovisual fixations, to perpetuate the present situation.

24. Moreover, this discrimination might lead to real inconsistencies. For instance, an actor who authorises the audiovisual fixation of his performance actually has no right at international level, but the actor who authorises the fixation of his voice only is protected by the WPPT, including the case when the phonogram where his voice is fixed is reproduced within an audiovisual product, either as voice-off or for dubbing.

25. We contend that the above analysis of the Rome and WPPT Conventions is legally sound and would strongly oppose any suggestion that new attempts should be made to remove performers protection from audiovisual uses of phonograms. This would imply a revision of the WPPT in order to reduce its legal scope, which would be extraordinary to say the least, and, most importantly, an important majority of WIPO Member States have clearly expressed the wish that artists be better protected, especially in the new digital context, and in a consistent and non-discriminatory way.

26. The signatory organisations thus solemnly reiterate their claim for the convening, as soon as possible, of a WIPO Diplomatic Conference, with a view to adopting an international instrument relating to the protection of performers in their audiovisual fixations.

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