WIPO

AP/CE/I/3 Add.
ORIGINAL: English/French/Spanish
DATE: July 15, 1997

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

COMMITTEE OF EXPERTS ON A PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES

Geneva, September 15, 16 and 19, 1997

INFORMATION RECEIVED FROM MEMBER STATES OF WIPO
AND FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

Addendum prepared by the International Bureau

I. INTRODUCTION

1. The present document is an addendum to document AP/CE/I/3 containing the memorandum of the International Bureau entitled "Information Received from the Member States of WIPO concerning Audiovisual Performances."

2. That document sums up, and, in its Annex, reproduces the full text of the information received from Member States of WIPO to a circular referred to in paragraphs 5(ii) and 6 of the document by the deadline–May 31, 1997–indicated in the circular.

3. The present document covers the information received after the above-mentioned deadline, but before June 30, 1997, from *Algeria, Argentina, Australia, Brazil, Colombia, Croatia, the Czech Republic, the Holy See, Hungary, Kazakstan, Slovenia, Spain, Sweden, Thailand, Zambia* and *the European Community and its Member States.* The information is summarized in the following paragraphs, whereas the full text (in the case of the response received from Australia–for the reasons referred to there–a detailed summary of, and extracts from, the text) of the information received is included in the Annex to this document.

II. GENERAL INFORMATION ON THE *DE FACTO* SITUATION

4. The responses received from *Algeria, Australia, Brazil, Croatia, the Czech Republic, the Holy See, Kazakstan, Slovenia, Thailand, Zambia* and *the European Community and its Member States* refer to the relevant norms in the existing national and regional legislation, respectively. That information is reproduced in the Annex, and is also reflected in document AP/CE/I/2 on "Existing National and Regional Legislation concerning Audiovisual Performances."

5. The response received from *Thailand* indicates that serious problems exist in the area of enforcement, *inter alia*, because performers are not aware of their rights and because of the lack of their bargaining strength *vis à vis* the producers and users of their performances.

6. The responses received form *Australia* and *the European Community and its Member States* also deal with arguments concerning the extension of the rights of performers to their audiovisual performances and the fixations of such performances and with the foreseeable effects of such an extension.

7. The response received from *Australia* includes extracts from two studies on the options for enhanced protection of the rights of performers and from an associated report on the foreseeable economic effects of such enhanced protection. The study and the report discuss both the arguments in favor and the arguments against an extended protection of performers as well as the micro-economic and macro-economic costs of such extension.

8. The response received from *the European Community and its Member States* indicates the reasons for which, in the view of the European Community and its Member States, differentiating protection according to the nature of performance does not appear to be justified, and refers to the position represented and the proposals submitted, in that respect, by the European Community and its Member States at the WIPO Diplomatic Conference on

Certain Copyright and Neighboring Rights Questions (Geneva, December 2 to 20, 1996). The response underlines that "the European Community and its Member States wish to reaffirm the utmost relevance of the protection of audiovisual performances in the future environment, and reiterate their attachment to a solution that should provide a high level of protection and allow the necessary flexibility to be acceptable to all countries, and, at the same time, avoid any unjustified differentiation on the basis of the nature of the performance."

9. The response received from *Spain* states that the position of that country is reflected in the response submitted by the European Community and its Member States.

III. CONTRACTUAL PRACTICES

10. According to item (ii) of the decisions quoted in paragraph 5 of document AP/CE/I/3, the information requested on the *de facto* situation was to cover particularly contractual practices. Eight of the 16 above-mentioned responses contain information on such practices.

11. The response received from *Algeria* states that, under the law of the country, the common provisions on contracts are applicable in the field of audiovisual fixations, that, in that field, performers are linked with producers either through employment contracts or through service contracts, and that, in all cases, producers have exclusive rights in respect of audiovisual performances.

12. The response received from *Argentina* indicates that actors are represented by the Argentine Association of Performers (*Asociación Argentina de Intérpretes)*. This representation extends particularly to the management of a right to remuneration for the theatrical performances of films through contracts concluded with the principal distributor chains of the country. The response also mentions that the Argentine Association of Actors (*Asociación Argentina de Actores*) and the Association of Argentine Broadcasters (*Asociación Teleradiodifusoras Argentinas*) have concluded a collective agreement which regulates contributions of actors to television programs and provides for a right to remuneration to them for any repetition and any simultaneous or differed retransmissions (by cable or satellite) of such programs.

13. The response received from *Colombia* outlines the result of a survey among producers and performers of television programs and states that, in general, producers favor general service contracts providing for the payment of a certain amount for the actual performance and a separate remuneration for the transfer of economic rights for the future.

14. The response received from *Croatia* refers to the fact that, under the Copyright Law of the country, there is no presumption of transfer of rights of performers, but that the form of contractual transfer has been adopted. The response also states that performers, in respect of their audiovisual performances, may exercise their rights directly or through an authorized agent, for example, a collective management organization. The Croatian Performers' Rights Collecting Society functions as such an organization.

15. The response received from the *Czech Republic* indicates that contractual practices differ depending on whether the films in which the audiovisual performances are included were produced before or after 1991. Before 1991, there was a State monopoly in the field of film production, and the studios, in general, obtained performers rights on the basis of employment contracts. Those rights had been transferred to a State fund before privatization of the studios, and that State Fund reached a financial settlement with rights management organizations, which acted, *inter alia*, on behalf of performers. Since 1991, the contractual practice has not been standardized. Producers try to conclude contracts without due respect to the rights provided to performers under the Copyright Act. There is a collective management organization in the country–INTERGRAM–which, in addition to the rights of performers, also deals with the rights of producers of sound and audiovisual recordings.

16. The response received form *Hungary* presents the main features of the contractual practices in respect of cinematographic films, on the one hand, and films made for television, on the other. In the case of cinematographic films, standard contracts provide for the exhaustion of rights of performers–with the exception of a right to remuneration for "home taping"–with the first fixation of the performance, while, in the case of television films, under standard contracts, a right to equitable remuneration for any subsequent use of an audiovisual performance also survives first fixation. That right is exercised through collective management.

17. The response from *Slovenia* states that contractual practices are in harmony with the relevant provisions of the Copyright and Related Rights Act, under which there is a rebuttable presumption of transfer of the rights of performers by concluding a contract for film production. However, in respect of the rights transferred by the operation of the presumption, audiovisual performers retain an unwaivable right to demand equitable remuneration from their producers.

18. The response received from *Sweden* includes the information obtained from the Swedish Union of Theatrical Employees. The Union states that the contractual practices were developing, until 1995, to the satisfaction of performers based on extended collective management and on contracts concluded in the framework of collective bargaining between employers and employees and their organizations. The situation changed in 1995 with the introduction of a presumption of transfer of rights to film producers. This change, which "performer organizations strongly disapproves," has led to tension between the bargaining parties.

IV. STATISTICS

19. In harmony with the relevant part of item (ii) of the decisions quoted in paragraph 5 of document AP/CE/I/3, information was requested also on statistics concerning audiovisual fixations. Four of the 16 responses mentioned in paragraph 3, above, contain some statistical data on various aspects of audiovisual performances, audiovisual performers and their rights.

20. The response received from *Australia* indicates the gross sums collected by collective management organizations (in 1993) as well as the number of “artists and related workers” and their estimated average income (in 1991).

21. The response received from *Croatia* mentions how many individual contracts the Croatian Radio and Television (HRT) concluded with performers in 1996.

22. The response received from *Hungary* contains statistics on the number of Hungarian performers receiving remuneration for home taping on videotapes and for simultaneous and unaltered retransmission of broadcast programs in each year from 1992 to 1996 and on the number of Hungarian performers receiving remuneration for repeated broadcasts in each year from 1990 to 1995.

23. The response received from *Sweden* indicates the annual amounts of the remuneration distributed to performers for audiovisual performances in respect of reproduction and distribution, recording and broadcasting and cable retransmission (the relevant year or period when the amounts indicated were distributed is not identified).

[Annex follows]

ANNEX

RESPONSES RECEIVED FROM MEMBER STATES OF WIPO
AND FROM THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

(see paragraph 3 of the document)

ALGERIA

The legal protection of performers has just been written into the new legislation on copyright and neighboring rights (Ordinance No. 97-10 of March 6, 1997, on the Rights of Authors and Neighboring Rights).

Performers qualify for the protection regime introduced by the legislation regardless of the form of expression of their performance (audiovisual or phonographic fixation).

However, it should be pointed out that the legal protection introduced for the benefit of the owners of neighboring rights will not be effective until January 1, 1998, which is the date of entry into force of the provisions of the above-mentioned Ordinance No. 97-10 that relate to authors' rights and neighboring rights.

Consequently, the regime applicable at present to performers, among other things in the field of audiovisual performances, is determined by ordinary contract law.

Official statistics are not available on contractual practices, but we are able to state in general terms that, in the field of audiovisual performances, the performers are tied to the producers by employment or service contracts.

Regardless of the nature of the relations with producers, the latter are the exclusive holders of the rights in the audiovisual performances of performers.

ARGENTINA

In institutional terms, it is the Argentine Performers' Association that represents actors, as they form part of the Association and have been included in its representative mandate since 1957.

In legal terms it has been acknowledged that these performers are covered by Article 56 of Law 11.723 on Copyright, and that consequently they have the same rights as the performers of music, namely the right to share in a royalty or fee similar to that accruing to musicians, and are consequently entitled to equitable remuneration for every time that their likeness is projected.

Contractually, on the strength of the above precedent, agreements have been signed with the main chains of distributors in the country, under which performing actors are paid a royalty or fee for every national film that is shown in cinemas.

There has moreover been a collective work agreement (No. 322/75) since 1975; it was signed by the Argentine Association of Actors and the Association of Argentine Radio and Television Broadcasters, and it regulates the involvement of actors in television work. It also provides for the payment of remuneration for every repeat and for simultaneous or deferred transmissions by other media (cable, satellite).

AUSTRALIA

1. Information concerning the protection of performers in Australia in the field of audiovisual performances is provided at Annexure A. This information is extracted from a study of the options for enhanced protection of the intellectual property rights of performers in Australia undertaken by Mr. Brad Sherman and Mr. Lionel Bently and an associated report on the possible economic effects of enhanced performers' rights by the Bureau of Transport and Communications Economics. These studies were commissioned by the Australian Government in 1995. The full texts of the reports are available at the website of the Department of Communications and the Arts (http://dca.gov.au/publicat.html). Both reports are generally relevant to the question at issue although dealing more broadly with the question of enhanced performers' rights. This site also contains a number of other reports that may be of interest to the International Bureau. [...]

Australia reserves its position in relation to both of these items. Please note that the annexures are provided purely for information purposes.

[The above text is the relevant part of the response received from Australia. The extracts from the studies annexed to the response are voluminous. Therefore, the International Bureau and the Information and Security Law Division of the Attorney-General's Department of Australia, which sent the response, have agreed that, in the present document, only a summary of the studies is presented and those parts of the studies are quoted which seem to be the most essential ones. The full text of the studies, in the original, English, version, is available at request.]

2. [The study of Mr. Brad Sherman (Law Department, Griffith University, Nathan, Brisbane) and Mr. Lionel Bently (Faculty of Law, Kings College, London) is entitled "Performers' Rights: Options for Reform." In the first chapter of the study, under the title "Background," the development of the Australian legislation concerning the rights of performers is described. This is followed by the second chapter entitled "Views on extended performers' rights." The third and last chapter included in the extracts deals with "Specific Issues" and contains the following sub-chapters: Control; Micro-economic costs; Macro-economic costs; Industrial awards; Performer qua employer; Featured/non-featured performers; Rights to be granted; Collective administration; Audio versus audiovisual; Miscellaneous. In the following, the second chapter and five subchapters of the third chapter are reproduced.]

Views on extended performers' rights

Those in favour of extended performers rights included the Musicians Union, the Media Entertainment Arts Alliance, the Queensland Philharmonic Orchestra, the ACTU, and the Australian Copyright Council. Without exception, all the performers that we communicated with were in favour of extended performers rights. [...]

The Australian Record Industry Association (ARIA) reported that the Record Industry "welcomes and endorses the Government's objective of ensuring performers are adequately and appropriately rewarded for their creative effort while maintaining a positive environment for the maintenance of industry." ARIA stressed the fact that these two outcomes are inextricably inter-related. ARIA pointed out that while they were in support of performers' rights they did not support the Union's proposed model.

The Australian Film Finance Corporation (FFC) said that "it was not opposed to the creation of a new performers' copyright which is analogous to the rights of composers and record producers over sound recordings."

[...] While reiterating its views as outlined in the MIAC Report (that is, support for performers rights subject to a number of reservations), the ABC said it has "become increasingly concerned about the likely economic impact if performers are granted improved rights in the nature of a copyright." The EIEA did not take a "position either in favour of , or against such rights. Until more is known about the type of rights and possible options for introduction, we reserve our position." In a similar way, the AANA said that the impact "on advertisers will depend on the precise nature of the system."

The Confederation of Australian Subscription Television (CAST) said that while they did not oppose the concept of Performers' Rights *per se*, they wished to record a number of concerns with the planned extension.

[...] It was clear from the responses we received that a number of interested parties were very much against extended performers' rights. For example, the Advertising Federation of Australia (AFA) said that the extension of performers rights was of considerable concern. More specifically they argued that there "should be no legislative recognition of any copyright in any performance by a performer to the extent that the performance is for payment in the production of an advertisement."

The Australian Children's Television Foundation (ACTF) said that it "strongly objects to the introduction of any form of additional performers' rights." The Federation of Australian Radio Broadcasters (FARB) said that they had consistently been opposed to the extension of rights to performers. They also said the they believed the issue should be approached with considerable caution.

The Federation of Commercial Television Stations (FACTS) stated that its views of performers' rights were similar to the view expressed in the FARB submission to the MIAC Report. More specifically FACTS said that it was "unable to provide [us] with views until it received at least some indication of the possible models being considered by the IDC. Without this indication, FACTS believed that it would be counter productive (if not impossible), to

attempt to canvass the impact on the commercial television industry of the multitude of ways in which improved performers' rights could be introduced.

[...] It became apparent from the responses we received that in many cases, there was a widespread misunderstanding not only of performers' rights protection but also of copyright and intellectual property more generally. If a practicable, workable scheme is to be developed, consideration could be given to furthering the education of creators, producers and users as to the nature of performers rights protection. This might be achieved as an element of an ongoing consultation process.

[...] Many respondents (particularly those opposed to performers' rights) focused on the question of *whether* performers' rights should be introduced rather than on the *form* that such a scheme should take. As the terms of reference for the Report require us to focus on the nature of a performers' rights scheme, we have only addressed these normative issues in passing. In any case, the arguments raised against extended performers rights did not differ much from those as set out in the MIAC Report. [...]

Micro-economic costs

There was concern from a number of organisations that the introduction of extended performers' rights would lead to increased costs. In particular, it was suggested:

(i) Extended performers' rights would lead to increased bureaucratic costs (ABC).

(ii) Legal costs were seen to be "a significant and new cost in the extension of any rights, as any contracts containing rights will have to be subject to extensive review by a lawyer to ensure the certainty of chain of title" (SPAA).

(iii) The AFA argued that performers' rights would create financial uncertainty for advertisers and would reduce their flexibility to adapt advertising schedules to economic and business conditions. More specifically they said that the extension of performers' rights will significantly increase the cost and complexity of making advertisements and will deter investment in this important sector of the Australian content industry (AFA).

(iv) The AANA argued that advertisers need a degree of certainty regarding the cost of advertising as these costs will influence the relative weight given to advertising as part of the marketing mix. In addition "extension of performers' right will reduce this certainty and increase production costs."

(v) CAST said that they were concerned at "any unreasonable level of financial burden which might flow to its members from a system of greater rights payments for performers." In particular, they said "the current sum of rights payments should not increase but should be distributed differently to include payments to performers." CAST also stressed that the subscription television industry is a new and still financially fragile industry.

It should be noted that the Australian Film Finance Corporation said in relation to remunerative rights that assuming the rate of remuneration was ultimately governed by the

Copyright Tribunal in line with similar statutory licenses, they did not anticipate that the effect upon the recoupment would be substantial. [...]

Macro-economic costs

There was widespread concern about the likely macro-economic impact of improved performers rights. Indeed the Screen Producers Association of Australia said that the "economic impact was SPAA's main concern in regard to performers' rights."

Many of those who objected to the extension of performers' rights called for a detailed study of the economic implications of the proposals. While these issues will be considered by the Bureau of Transport and Communication Economics (BTCE), it may be helpful if some of the main concerns were outlined here. These included:

(i) the impact of extended performers rights on Australia's balance of trade (ABC);

(ii) the impact on the competitiveness of Australian produced products in overseas markets resulting from the introduction of improved performers' rights (ABC);

(iii) the impact of the scheme from the point of view of the producer/production company (SPAA).

(iv) Extension of performers rights would necessarily lead to an increase in costs which would be handed on to the public in the form of price increases for cinema tickets, CDs etc.

(v) The AANA said that the outcome of the proposed system will be increased business costs. In particular they suggested that it would lead to direct costs as a result of the payment of residuals to performers every time an advertisement is broadcast and from the fact that broadcasters will transfer their additional production and administrative costs to advertisers in the form of increased media rates. Additional costs would also be incurred through administration of the payment/authorization system (such as tracing individuals to obtain authorization for subsequent or additional uses).

(vi) It was pointed out to us that Australia was a net-copyright importer.[1] ABC Radio, for example, has a slender majority of overseas performances in terms of music on its networks and so thus the majority of license fees collected would be in respect of overseas performers. [...]

[1] Given that copyright arises on the creation of a work and not as a result of registration, it is difficult to know exactly what is meant by the expression "net-copyright importer." We were given no economic studies to back up such claims.

Rights to be granted

(i) We received very little detailed comments as to the nature of the rights to be granted to performers. In general, however, there was agreement by those who favoured extended performers' rights that the existing rights should not only continue, but that they should be applied to all relevant formats. In addition there was agreement that the right should be extended to include:

- causing a recorded performance to be heard and/or seen in public;
- broadcasting a recorded performance;
- transmitting a recorded performance to subscribers to a diffusion service;
- renting a sound recording of a recorded performance;
- educational copying of radio and television broadcasts; and
- private copying

(Responses by ACC, MEAA, MU, FFC, ACTU.)

The FFC added the rider that they were not "opposed to the grant of... a rental right if analogous rental rights are also granted over films and sound recordings."

ARIA also agreed with the introduction of a rental right. However they said that a rental right should apply to film for producers first and then to performers.

(ii) There was general agreement amongst those in favour of extended performers' rights that such rights should be inalienable rights to the income generated under the statutory license. There was also agreement that the rights subject to statutory licence would be assignable only to the authorized collecting society (ACC response). In contrast, ARIA said that "radical, repugnant and totally uncommercial concepts of unwaivability must be totally rejected." [...]

Audio versus audiovisual

Somewhat surprisingly, we received few arguments to the effect that performances in the audiovisual industry should be treated differently from those in the audio sector. We did, however, receive a number of arguments against the drawing of such distinctions. For example, ARIA said that the "rights must apply to audio *and* audiovisual subject matters." Performers were also emphatic that no distinction should be drawn between the rights. [...]

Miscellaneous

[...] It was suggested to us by a number of respondents that in relation to collective works such as film there was no basis on which to differentiate the contribution made by performers from other contributors. For example, it was said that "the process of producing a film or television series is collaborative and involves the input of many different creative contributors (including the producer, writer, director, composer, editor, cinematographer, etc.) in addition to performers. To accord special rights to performers could lead to a misconception that performers' contributions is more valuable than the contribution of other production personnel."

3. [The report prepared by the Bureau of Transport and Communications Economics (BTCE) is entitled "Economic Effects of Extended Performers' Rights." The extracts from the report include the following titles: "Summary and conclusions; Economic effects of the existing copyright system for artists; Award conditions and the IRC response; Economic analysis of market for performers in audiovisual fixations." In the following, certain essential parts of the extracts are reproduced:]

Summary and conclusions

The BTCE study deals with the economic effects of extending rights to performers; it is not concerned with the issue of whether an extension of rights is justified. The study relates, in the main, to a model of equitable remuneration rights, which are not assignable, and which operate on a reciprocal basis with other countries.

The economic effects relate to possible changes in income distribution as between performers, producers, users of productions, consumers, advertisers, government, and overseas residents; and to potential changes in the employment of Australian performers if and when the cost of using their fixations rises. The economic effects include also a range of administration costs, and any national welfare loss from net remittances overseas.

It has not been possible to present any conclusive results from the analysis. Many factual details are not known, and the behavioural responses of the parties involved cannot be predicted. The analysis describes the interactions which are likely to occur in inter-related markets as a result of performers' rights, and indicates the direction of effects and the expected outcome under various assumptions.

Different assumptions would lead to different outcomes. There are several factors which would be particularly important in influencing the economic outcome, and which remain uncertain at this stage. [...]

The first is the definition of "performer." The key occupations likely to be affected by a performers' rights regime would be actors, instrumentalists, and singers and dancers. Newsreaders, journalists, sports commentators and sportsmen are excluded under the present definition in the Copyright Act. Eligibility for rights could be further restricted to feature artists, or to creative performers, excluding those called "ancillary performers' in the French legislation. While "extras" are not likely to be classed as performers, the status of orchestral players, chorus members, session musicians, and performers with minor parts could be in doubt.

Copyright created during the course of employment currently rests with the employer rather than with the employee. Unions and the Copyright Council are concerned that performers' rights should apply to performers whether or not they are employees. Otherwise, performers on permanent employment contracts with orchestras, operas, ballet or theatre companies, and possibly session musicians, might be excluded from owning rights. A possible option would involve rights for employees in relation to uses of fixations other than those related to the purpose of the business in which the performer is employed.

It is therefore uncertain how many artists will be classed as performers eligible for rights, and how many performers would fall into the category of employees, or alternatively, performers whose fixations are commissioned. The classification will have an important influence on returns to performers and costs to producers and users of fixations.

The second factor relates to the nature of the rights awarded. Different assumptions about the nature of rights would lead to different economic outcomes. A possible legislative model would create equitable remuneration rights which might or might not be assignable. An equitable remuneration right, as opposed to an ownership right would relieve some anxieties among producers about exposure to litigation risk, and the cost of indemnifying overseas purchasers against such risk.

A further factor, and issue for the legislation, is whether the right to remuneration would be exercisable only against the producer or against broadcasters, distributors and exhibitors in Australia and overseas. The choice would influence administrative costs, and possibly the incidence of cost increases.

The levels of remuneration for performers' rights will be determined by negotiation between the parties or through adjudication by the Copyright Tribunal. At this stage we can only speculate about the levels of payment. Similarly, the details of remuneration payments will determine the extent to which users are able to reduce their commitments by using relatively more overseas or other non-rights bearing programmes.

Employer bodies have foreshadowed returning to the Industrial Relations Commission (IRC) to renegotiate industrial awards in the light of remuneration under performers' rights. Again, we can only speculate about the response of the IRC.

Administration costs of performers' remuneration may be greater if the unions proceed to establish new collection societies rather than exploit economies of scope from use of established societies.

Remuneration to performers could be restricted to those in countries offering reciprocal rights and adhering to the Treaty of Rome. However if the United States successfully exerted diplomatic leverage, or changed its present policy and offered reciprocity, there could be a substantial negative impact on Australia's overseas royalty flows.

Allocative and distributional outcome

Income distribution

Performers are likely to achieve some gain at the expense of other groups (producers, users of fixations, consumers, advertisers), particularly from public performance and broadcast use. How much they will gain depends on the importance of performers' costs in total production costs, and the ability of users, such as radio broadcasters and television networks, to absorb costs or pass them on. Also, if some performers become redundant as a result of their higher costs, the ability of other performers to sustain increased incomes will depend on the strength of competitive pressures in the labour market. In the long-run, gains to performers may be small.

It appears that the main category of performers likely to gain would be those paid according to awards which do not include remuneration for repeat or residual use, for example, casual and session musicians. Session musicians, however, may be classed as employees with rights limited to uses other than those which relate to the purposes of the business in which the performer was employed. Where gains accrue to a new class of performers, such as session musicians, they may be at the expense of other performers already receiving remuneration, for example, recording artists.

Performers may also gain from the removal of uncertainty about remuneration for future uses of fixations. An equitable remuneration right should secure returns from future use of fixations (including potential use in multi-media, on-line or broadband applications) which could otherwise be eroded by transfer of copyright in the fixation to a third party, or which are not currently provided for, and which would require renegotiation of contracts in the event of copyright owners finding additional uses for fixations unknown at the time the original contracts were negotiated.

Remuneration of performers on independent contracts outside awards

The contracts negotiated individually by leading actors, recording artists and soloists are likely to take full account of expected sales of fixations, rebroadcasts and overseas exploitation. These performers are usually advised by professional agents and their contracts will reflect the supply and demand for their individual talents. It seems immaterial whether their contracts specify residuals and royalties for subsequent uses of the fixation, or alternatively sell out the rights to future remuneration to the producer for a single upfront payment.

The introduction of a new right to remuneration should not change the real contract price (combining both upfront fees and the present value of residuals) since it will shift neither supply nor demand for the talent in question. Of course, agents will try to exact leverage from the new legislation, but well-advised producers should not succumb to such attempts. The final result may not be very different where users are initially responsible for increased rights payments, as users will place pressure on producers to bear some of the cost imposed.

Initially some uncertainty will be introduced, because both parties will be unsure about the valuations the market will ultimately place on the new rights. The preexisting system will be disturbed, and until the new regime becomes familiar and the Copyright Tribunal brings down precedent-creating adjudications, either the performer or the producer could make a windfall loss or gain by striking an inappropriate contract price.

However, sound recording artists may gain more from broadcast and public performance use of their works than from sales of recordings as a result of equitable remuneration rights, and similarly, actors, etc., start to gain where users pay via collecting societies for rights to use fixations.

Remuneration of performers on award rates

Industrial awards for some classes of performers include explicit provision for residuals for re-use of fixations. Others do not and remunerate the performer with a sessional fee only (see Appendix I).

In the former case, it is not clear whether the Copyright Tribunal would reach a similar view about equitable levels of remuneration to that previously established before the IRC. Whatever the outcome, it seems plausible that employers could in due course succeed in removing equivalent provisions for compensation from the relevant industrial award. Will the proposed legislation enable the parties and the two tribunals to resolve any problems of overlap or under-provision quickly, or even in advance? If it does, it seems unlikely that significant shifts in the overall remuneration of these performers or in the costs of productions will emerge.

Where the award does not provide residuals in respect of re-use of a fixation, the outcome is more uncertain. Employers could logically argue in the IRC that the "present discounted value" of expected future remuneration under performers' rights should be deducted from session fees n the existing awards. However, experience of both adjudications on rates by the Copyright Tribunal and of typical payment flows over a number of years would be needed before anyone could compute such present discounted values.

In the short run the performers under the second type of award might achieve financial gains, while producers would incur increased costs. This could lead to reduced demand for performers, and the performers in questions may already be in over-supply. If the forces of supply and demand in the labour market are not resisted by the IRC, real levels of remuneration would tend to fall back towards the pre-existing levels, after a possibly prolonged transition.

Allocative effects

An attempt to exploit performers' remuneration rights will initially result in increased costs for producers or users of fixations. Cost increases will accrue in broadcast and public performance use irrespective of the type of performer involved. The preceding discussion, however, suggests that cost increases facing producers may be mainly confined to those classes of performers who are paid at award rates and whose awards do not presently incorporate explicit and "equitable" residual payments for re-use of fixations.

To the extent that users and producers are able to absorb additional costs, or pass them on to advertisers, government or consumers, the improved bargaining power of performers might succeed in maintaining higher performer incomes.

If it is not possible to absorb or pass on the cost increase, adjustments by consumers, users and producers to higher prices will tend to reduce the demand for fixations involving Australian performers. They will substitute at the margin away from the affected products, to the extent possible given the basis for remuneration payments to performers. The scope for absorbing or passing on costs is probably limited in radio broadcasting and production of audio and audiovisual products, though there may be scope in commercial television.

Substitution possibilities are limited by the specific nature of consumer demand for some products and, in the case of Australian television, by the content rules supported by the Broadcasting Services Act. Most television broadcasters currently exceed Australian content requirements in both (first-time) drama and commercials; they therefore have some scope for substitution before coming up against regulatory constraints. At the margin it may be possible to shift the program mix to some extent towards imported programs, repeats, game shows, etc. They could also lower quality levels in first-time Australian drama, and commercials, and in particular reduce purchases of productions which intensively utilised performers whose costs had been increased. Again this would depend on the way remuneration payments are designed.

There are two possible outcomes if demand for performers decreases as a result of the above responses. Pressure in the labour market from the unemployed will tend to lower the level of remuneration initially sought; or employed performers gain at the expense of performers whose services are no longer required.

In the first case, in the long-run, there would probably be little change in performers' incomes. In the second, where the labour market for performers is not sufficiently competitive, incomes in total may or may not be increased, and there will be fewer performances.

In the interim in either case there could be significant disruption, depending on the strength of performers' claim, and significant costs could be incurred in negotiating settlements and adjusting to a new regime.

It is possible that performers will not therefore seek to exploit their rights, or will curtail their demands, exploiting their rights mainly to claim against a third party when a party to an initial contract defaults, and to secure returns which may become available in future new uses of performances, when the initial contract for the fixation cannot be renewed or renegotiated.

Summary

Creating a new property right does not create new value. The introduction of a new performers' right will tend to subdivide existing intellectual property in audio and audiovisual productions by explicitly re-allocating some parts of its value towards performers. Whether or not performers can retain over the long term any extra value conferred on them by such legislation depends on how the relevant labour market operates. Where the labour market is essentially unregulated (as it is for performers such as recording artists on individual contracts), it seems likely that price levels in performers' engagement contracts would adjust to compensate approximately for the value of the new right. Where the labour market is regulated (i.e., the performer receives award rates and conditions) then remuneration will not so readily or immediately adjust to compensate for the value to the performer of the new right. But over time pressures to adjust awards in a compensatory direction are likely to prevail. If they do not there is likely to be a reduction in employment of performers and a reduction in the output of Australian performances.

Perhaps the major benefit in the long-run will be the assurance of returns from subsidiary, including multi-media, use of performances, which may be in doubt where they rely on contracts with producers. The government has recognized the importance of generating content for use with emerging on-line, multi-media, and broadband interactive services, and

has concurrently recognized the need for adequate copyright protection to encourage Australians to take full advantage of the opportunities available (Creative Nation, October, 1994)

Economic effects of the existing copyright system for artists

The current system of rewarding creative artists such as writers and composers through copyright results in costs and benefits. The costs include the administration costs of the system, the compliance costs, and the national loss arising from positive net remittances overseas. The benefits are largely distributional, being the assumed equity benefits from rewarding artists. There may be improvements in economic efficiency from an increase in cultural output.

An indication of the resources involved in administering the system is not possible. It is possible to present those associated with administration of collecting societies, but many royalty payments are paid directly to copyright owners. Resources used in running the collecting societies appear to be only a small part of total administration and compliance costs.

It is also difficult to know the numbers of artists receiving copyright payments which might then be compared with the potential number of performers who might be involved in a system of performers' rights. Members of collecting societies are a poor indication; and the number of artists would not reflect the number receiving copyright payments, given the life of the copyright. [...] Guldberg (1994) puts the number of creative artists at around 57,000, or around 30,000 excluding designers, illustrators and journalists. This compares with estimates quoted in Price Waterhouse (1993, 1994) of 26,000 musicians and singers, and in Throsby (1994) of 17,000 practicing professional artists.

Table 1.1 Gross sums collected by collecting societies: 1993

	Total collected $ m.	Total dist'd to members *per cent*	Number of members [a]	Net direct overseas remittances $ m.	Administrative expenditure	Administrative expenditure as % income
AMCOS	12.5	81	189	-1.7	1.9	14.8
APRA	47.4	88	14,435	-7.5	5.0	10.5
AVCS	4.5	80	33	-0.1[b]	0.7	16.0
CAL	9.0	75	17,810[c]	-0.6	2.2	24.8
PPCA	2.2	47	28	Nil	1.2	53.0
TOTAL	75.5	83.7 ($63.2m.)	32,495	-9.9	11.0	14.6

a Membership does not reflect individual performers. One member may include large groups of performers
b Average for three years to 1993
c 1994 value
Source: Simpson (1995, p147-48)

Table 1.2 Details of creative artists

Artists with copyright	
Total royalties to creative artists	na (Approximate estimate between $100m. and $200m.)
Numbers of artists and related workers in copyright categories	57,380* (1991)
Estimated average income of artists and related workers	$26,930 (1991)
Copyright as percent of estimated incomes	9% total; 30% writers; 12% composers
Total net overseas remittances of copyright royalties in music and film/TV	$438m (1993-94)
Performers: 1992-93	
Estimated numbers of performers (practising professionals)	17,000
Average income of performers: all income : arts income	23,945 17,300

na not available
* Includes 28,000 designers, illustrators and journalists

Source Throsby (1994); Guldberg (1994)

Award conditions and the IRC response

The economic impact of performers' rights will depend crucially on whether the current conditions in awards, which in many cases provide remuneration for performers in the nature of royalties, will be changed in response to rights to remuneration based on performers' rights legislation. Awards could change such that new income streams are offset, and new, individually negotiated, contracts may also change to take account of these additional income streams. Award payments for residuals could be axed, and basic rates could change over time. [...] It has even been suggested (FACTS, pers. comm. October, 1995) that the IRC might refuse to handle cases where a significant amount of negotiation on remuneration is conducted in another forum.

Employers argue that "double dipping" would not be condoned, and that any increase in payments to performers will result in an immediate resort to the IRC to have relevant awards suspended and/or renegotiated. If successful, the result would ultimately be little change, if any, in the flow of payments to those performers covered by these awards. As indicated above, however, such renegotiation could take a long time, and there could be severe problems in the interim period stemming from doubts about the commitments of employers.

The major awards and agreements for performers are reviewed in Appendix I, while Appendix II includes extracts from the two major awards providing residuals, the ATRRA award and the Actors' Feature Film Award. Of the main awards for performers in sound recording, TV or film fixations (actors, musicians, singers, dancers and other performers), a considerable number include what might be described as comprehensive arrangements for repeat uses. Others give lesser, but possibly "adequate" consideration in light of what might be expected from ongoing returns for further use. Performers not operating under awards may still receive compensation for repeat use. [...] This would be expected to be the case for "star" performers; while performers employed by parties not party to awards may nevertheless be paid according to award conditions.

To assess the impact of the proposed performers' rights regime granting equitable remuneration, on the assumption that existing award conditions granting remuneration for repeat and residual uses would be superseded, it would be necessary to define the performers who would be eligible for equitable remuneration, consider where they are currently employed, and whether they presently receive "adequate" remuneration for repeat use of fixations. The net direct effect of the equitable remuneration rights on performers, (and hence on users) assuming they would not grant more favourable terms than the awards, would be the increase in remuneration going to performers who might be eligible for rights, and who were not already receiving such remuneration. That is, performers receiving less than award rates, and performers on awards which provide no remuneration for repeat uses.

Available data indicates that there may be some 5,000 performers, other than musicians, of whom 3,500 may involved in audiovisual fixations. With musicians the data is very uncertain, with estimates varying from around 8,000 to 26, 000. [...]

It appears that actors who have performances fixed, whether in feature film or TV, (ABC/SBS and commercial), and to a lesser extent advertising, receive significant payments for repeat use, and most of these performers appear to be covered by awards. [...] Actors in live theatre rarely have performances fixed.

Other performers in live theatre, Australian ballet, dance companies and the Australian opera, do fixations, and there is apparently increasing interest in producing these. However at present the number is not high. For example the Australian opera makes two per year. Performers in the ballet and the opera are all paid extra for fixations, and are paid a share of income from use of fixations. Dance companies do not receive payment for repeats.

With musicians, there is less provision for ongoing or upfront remuneration, except in the case of individual recording artists who negotiate contracts which usually include some payment of a royalty nature. Musicians who are employed on a casual basis for sound recordings, or in TV productions by TV networks, and probably those in TV commercials, receive no remuneration for repeats. It appears, however, that these session musicians may be defined as employees in many cases. [...]

Orchestras, excepting the Canberra symphony, typically do not receive additional remuneration for fixations. However the number of such fixations is limited; moreover, these performers, along with ballet, dance and opera, would also fall into the class of "employees," where equitable remuneration rights may be limited.

Those employed in film and productions for TV by film production houses get an additional upfront payment where fixations are used in sound recordings or in TV or radio commercials. Those employed under the general award (mostly live performance area) also receive an upfront additional payment for fixations. It is not clear that this upfront payment would return less than the sum of returns for ongoing use of the commercials or sales of records. However there is no return for musicians each time a film is shown.

Musicians with the Australian opera and ballet receive a share of revenue from fixed performances.

The Bureau has not been able to ascertain the number of musicians covered by each award.

In summary, the main area where rewards might be sought, ("employees" excluded) and where present remuneration for use of fixations does not exist or is limited, includes musicians under a contract arrangement or employed on a casual basis in making sound recordings, film and TV productions, or in casual work for TV stations, and commercials. It is not known what proportion of performers these constitute, but session musicians might be expected to make up a significant part of the total. [...]

BRAZIL

Rights of Performers in Relation to Audiovisual Works

Legal Instrument	Rights Conferred
Law No. 4.944 of April 6, 1966	Article 1. It shall be the exclusive right of the performer, his authorized representative or his heir or successor to prevent the fixation, reproduction, broadcasting or rebroadcasting by broadcasting organizations or the communication to the public in any other way, whether for consideration or free of charge, of his public performances, where he has not given his express prior consent thereto. Article 2. For the purposes of this Law: (a) "performer" means the actor, announcer, narrator, declaimer, singer, choreographer, dancer, musician or any other person who performs a literary, artistic or scientific work (.....).

Law No. 6.533 of May 24, 1978	Article 13. The assignment or pledging of copyright or neighboring rights deriving from the rendering of professional services shall not be permitted. Sole paragraph. The copyright and neighboring rights of the professionals concerned shall be payable on the occasion of every presentation of the work.
Law No. 5.988 of December 14, 1973.	Article 94. The rules on copyright shall apply, where appropriate, to the rights that are related to it. Article 95. The performer, his heir or his successor shall have the right to prevent the recording, reproduction, transmission or retransmission by a broadcasting organization, or the use in any form of communication to the public, whether for a consideration or free of charge, of his performances when he has not given his express prior consent thereto. Article 102. The duration of the protection of related rights shall be 60 years from the first of January of the year following fixation for phonograms, following transmission for broadcasts of broadcasting organizations and following the holding of the event in other cases. Article 126. Any person who, on using an intellectual work by any means or process, fails to indicate or announce as such the name, pseudonym or conventional mark of the author or performer, apart from being liable for moral injury, shall be obliged to disclose the identity of the author or performer: (a) in the case of a broadcasting organization, for three consecutive days at the time of day at which the offense was committed (.....).

Article 127. The owner of the author's economic rights or of the related rights may apply to the competent police authority for a prohibition on the performance, transmission or retransmission of the intellectual work, phonogram included, made without authorization in due form, as well as the seizure of the gross receipts as a guarantee for his royalties.

COLOMBIA

On receipt of Note C.L. 1268-082-50, this Directorate engaged in consultations [...] with television producers and performers on the audiovisual question.

The result of our enquiries was as follows:

(i) a number of television producers said that they made use of a contract known as a contract "for the rendering of services," which entailed a single payment for the first stage or other performance and the recognition of monetary remuneration for the assignment of the economic rights in the performance for future purposes.

(ii) One television producer pointed out that, where disputes arose during the implementation of the contract or thereafter, the parties could refer the matter to the Arbitration and Conciliation Center of the Chamber of Commerce of Bogotá.

(iii) The same television producer said that the remuneration of performers was negotiated independently, and that contracts were entered into for a term corresponding to the duration of the production, while exclusive rights contracts were signed with the leading actors.

(iv) One group of performers pointed to the importance of achieving progress, in negotiations with producers, towards greater transparency, equality and equity. In addition, they wanted the relationship between them and producers to be given the legal character of an employment relationship, with the recognition of certain social rights (such as disability, old age and widows' pensions, for instance).

In the foregoing we have consolidated the replies received to date as our response to the survey conducted by you.

CROATIA

The rights of performers of audiovisual works in Croatia are regulated by the special provisions of the Copyright Law, particularly by Articles 99b, 99c, 99d, 99e, 99g, 99h, 99k, 99l and 99m. (Enclosed, please find the mentioned provisions of the Copyright Law–Enclosure 1.)

As it can be seen from the quoted provisions, the legal protection of performers, which was introduced by the changes and amendments of the Copyright Law of 1990, is similar to the legal protection of copyright and refers to the civil, penal and criminal protection.

Any forms of the legal or presumed cession was not adopted, but the form of contractual cession was adopted.

The administration of the rights of performers of audiovisual works is regulated by the provisions of the Copyright Law particularly by Articles 99f, 99p, 99r, 99s and 99t. (Enclosed, please find the mentioned provisions of the Copyright Law–Enclosure 2.)

As it can be seen from the mentioned provisions, a performer of audiovisual works may exercise his rights of performance directly or through an authorized agent. Such an agent may be an association or a specialized organization for the administration of the rights of performers, which fulfills the professional criteria for the administration of copyrights.

In Croatia, such a criteria is fulfilled by the Croatian Performers' Rights Collecting Society and the Croatian Authors' Agency.

As regards the *de facto* situation existing in our country concerning contractual practices and official statistics with respect to the protection of performers in the field of audiovisual performances, we can inform you of the following:

The relations between the Croatian Radio and Television–HRT and performing actors are regulated by the individual performing contracts between the HRT and an individual actor for each acting performance.

In the course of 1996, the HRT made approximately 1340 individual performing contracts with the actors, 1178 performing contracts for the purpose of the radio program, and approximately 162 for the purpose of the television drama program.

Enclosure 1

Article 99 b.

For the purposes of this Law, performers are individuals and groups that in an artistic manner present, recite, declaim, sing, play, dance or in any other way perform literary or musical and other artistic works.

Article 99 c.

The performer who is a citizen of the Republic of Croatia, or a foreign citizen who has a usual residence in the Republic of Croatia, shall enjoy the rights provided by this Law in respect of his performances given or used in the Republic of Croatia.

Within the limits of the obligations that the Republic of Croatia has assumed under international treaties or on the basis of reciprocity, the performer who is a foreign citizen or stateless shall enjoy the rights provided by this Law in respect of his performances given or used in the Republic of Croatia.

Article 99 d.

The performer shall enjoy the economic and moral rights provided by this Law.

The economic rights referred to in the first paragraph of this Article shall be understood to be the rights of the performer in relation to the exploitation of his performance.

The moral rights referred to in the first paragraph of this Article shall be understood to be the performer's right to have his name or pseudonym mentioned on any communication of his performance to the public, and also on any recording or on the cover of any recording thereof, and his right to object to any distortion, mutilation of other alteration of his performance, to the use and distribution of his recorded performance if the recording has technical or other defects, and also to improper use of recordings that are prejudicial to his honor and reputation.

Article 99 e.

Unless otherwise provided by this Law, the performance of the performer may not be subjected to the following without his consent:

1. radio or television broadcasting;
2. sound or visual or audiovisual recording;
3. –in the form of such recordings–reproduction;
4. distribution in the form of copies of such recordings;
5. direct communication to the public by loudspeaker or other technical systems outside of the room or place in which the performance is given.

In the cases reffered to in the first paragraph of this Article, the performer shall be entitled to remuneration, except where otherwise provided by this Law or agreed.

Except where otherwise agred, all performers shall be entitled to remuneration.

Any member of a group of performers who leaves the group shall be entitled to a share in the remuneration for the performance in which he participated.

Article 99 g.

The following shall be permitted without the authorization of the performer and without payment of remuneration:

1. use of the performance for the purposes of teaching and scientific research;
2. use of short fragments of the performance in the reporting of current events;
3. recording of the performance by the organization for broadcasting, by means of its own facilities and for its own broadcasts alone (ephemeral recordings), provided that the said organization has been authorized to broadcast the performance.

The recordings referred to in the first paragraph of this Article, item 3, may after boradcasting be entrusted to public archives as documentary material or be rebroadcast against payment of remuneration.

Article 99 h.

When a recorded performance that had been placed on sale is used for communication to the public other than by radio or televison broadcasting (secondary use), the user shall pay a special remuneration to the organizations of performers.

A special remuneration referred to in the previous paragraph shall be paid by the user in the amount determined by the performers' organization in its general act. The amount cannot be higher than 40% of the author's remuneration provided for such uses in Article 91 a. of this Law.

Article k.

The performer may, during the term of the right of exploitation that is granted him in relation to his performance, transfer that right by contract to another person (performer's contract), either wholly or in part, for a consideration or free of charge.

Ther person to whom the right to exploit a performance has been transferred may not, without the consent of the performer, transfer that right to a third party unless otherwise provided by the performer's contract.

Article 99 l.

The performer's contract shall be concluded in writing.

The performer's contract that is not concluded in writing shall have no legal effect.

Article m.

The performer's contract shall contain the following particulars: the names of the contracting parties, the medium and manner in which the performance is to be used, the name of the author, the title of the work performed, the amount of remuneration and also the mode of and time limits for payment.

In addition to the particulars mentioned in the first paragraph of this Article, the performer's contract relating to the recording of the performance and to the broadcasting of the said recording by radio or television shall also state the number of broadcasts and the period during which broadcasting may take place, while the performer's contract relating to the reproduction of the recording shall state the number of copies that may be made.

Enclosure 2

Article 99 f.

The organization for broadcasting may also, without the authorization of the performer, broadcast performances recorded in permitted way by instruments for mechanical reproduction, but they are obligated to respect all other rights of the performer.

If, for the administration of right referred to in paragraph 1 of this Article, the performance remuneration is not provided for by contract, the organization of the performer may determine the performance remuneration in a general act.

If it is a question of broadcasting by the Croatian Radio and Television Company, the remuneration provided in a general act of the performer's organization must be approved by the State Intellectual Property Office.

Article 99 p.

The performer may administer his rights directly or through a representative.

Article 99 r.

The organizations of performers and other specialized organizations for the administration of the rights of performers may carry out such activities with a permit of the State Intellectual Property Office.

In order to administer the rights of performers, the organizations referred to in paragraph 1 of this Article need to have the performer's power of attorney.

The State Intellectual Property Office shall issue a permit referred to in paragraph 1 of this Article to an institution, association or other organization that fulfills the professional criteria for the administration of copyrights.

The professional criteria referred to in paragraph 4 of this Article shall be determined in an enactment by the State Intellectual Property Office.

Article 99 s.

Organizations for broadcasting and other users shall be obliged to provide the organization representing the performer with full particulars on the use of his performance.

The users referred to in the first paragraph of this Article are also obliged to submit to the organization representing the performer a copy of the performer's contract.

Article 99 t.

Groups of performers shall administer their rights through the agency of persons mandated by themselves.

When, in addition to the group of performers, a conductor, soloists and leading actors who are not members of the group take part in the performance of a musical work or the presentation of any other artistic work, the right of authorization referred to in Article 99 e. of this Law shall belong also to those additional performers, in the absence of any agreement to the contrary between them and the group.

CZECH REPUBLIC

The currently valid Copyright Act No. 35/1965 in the reading of the later substantial amendment which entered into force on April 22, 1996, provides for equal legal regulations of rights of performers both in respect of sound recordings and audiovisual performances. The Czech Copyright Act is characteristic of the high level of rights of performers, entitling them to both moral and economic rights. In its scope, it exceeds in a number of cases the regulation of these rights as applied abroad.

The contractual practice in the field of audiovisual performances should be divided into two periods. A special regime applies to film production distributed in the years 1965-1991. The production and distribution of films in this period was subject to state monopoly. This meant that film authors and some performers had concluded employment contracts with film studios while copyright contracts were practically non-existent. Within the privatization of film studios, a special law provided for the transfer of rights of producers exercising copyright under Section 6 of the said law to the State Fund of the Czech Republic for the Promotion and Development of Czech Cinematography. In order to basically establish a market for video cassettes distribution of Czech and foreign films, and to facilitate the presentation of films made during this period by all TV companies, a special regime was set up exclusively for films produced in this period in respect of financial settlement provided to authors and performers. Agreements on financial settlement are concluded between the State Fund on one side and organizations protecting copyright, representing authors, performers and producers of sound recordings on the other side, with the moral rights of performers remaining preserved.

While before 1991 there existed within the state monopoly just a few film studios, in 1996 the Ministry of Culture registered some 45 companies producing feature films and 12 companies producing animated cartoons. In 1996 alone, Czech film studios produced a total of 20 full-length feature films, *i.e.*, about half of the average production before 1989. The contractual practice of production companies in relation to performers is not standardized. The costly production of audiovisual works makes production companies press for such terms of contracts concluded with performers which in many cases fail to respect the rights of performers embodied in the Copyright Act. At present, there exists no specific trend in the

Czech Republic towards establishing a strong professional organization of performers to press for collective contracts and interest in concluding individual contracts rather prevails.

There exist no official statistics in the Czech Republic as regards the protection of performers in audiovisual performances. Lawsuits are rare in this field. Infringements of copyright and neighbouring rights concerning duplication of sound and audiovisual recordings are dealt within the competencies of the respective ministries (in particular the Ministry of Culture, the Ministry of Trade and Industry, the Ministry of the Interior, the Ministry of Justice and the Ministry of Finance administering customs matters), and by administrative bodies within the competencies to deal with minor offences or by law enforcement bodies.

An independent association of performers and producers of sound and audiovisual recordings–INTERGRAM–was established in the Czech Republic in 1990. Beside representing performers, it has been licensed by the Ministry of Culture to administer within its competencies the neighbouring rights. The organization is a member of the international forum of European and non-European organizations protection performing artists SCAPR and the original member of the international association of European protection organizations of performers AEPO.

HOLY SEE

In the matter of [...] the protection of performers in the field of audiovisual performances [...], the Vatican City State is regulated by its Law on the Rights of Authorship N.XII. of 12th January 1960 (cf.: enclosure). Furthermore, the Vatican City State adopted Italian norms in the question of the protection of the right of authorship and of other rights connected with its exercise, and did so on the same date, in the same sense and within the limitations specified by those norms; the main disposition referred to is Law No. 633, of 23rd. April 1941.

No. XII - Copyright Law of January 12, 1960

Article 1. In the Vatican City, as far as matters of copyright in respect of intellectual works are concerned, the legislation of the Italian State shall be observed, including the Regulations in force on the entry into force of this Law, provided that the provisions of the said legislation are not contrary to the precepts of divine law or to the general principles of canon law, or to the terms of the Treaty and Concordat concluded between the Holy See and the Italian State on February 11, 1929, and provided also that, in relation to the actual situation obtaining in the Vatican City, they are susceptible of application.

Article 2. The provisions relating to the protection of copyright shall apply to the texts of laws and of official acts published by the Holy See and by the State of the Vatican City.

Article 3. Paragraph 2(c) of Article 20 of the Law on the Sources of Law of June 7, 1929, No. II, published in the Supplement to the “Acta Apostolicae Sedis” of June 8, 1929, is repealed.

Article 4. This Law shall enter into force on the date of its publication.

HUNGARY

1. A consise chart presenting the *de facto* situation in Hungary concerning contractual practices with respect to the protection of performers in the field of audiovisual performances

	Cinematographic films	Films made for television
Content of individual agreements with respect to the protection of performers	- Standard contracts provide for the exhaustion of the performer's exclusive and equitable remuneration rights upon the first fixation of his audiovisual performance. - Under such contracts no further authorization is required from and no further remuneration is due to the performer for any subsequent use of his fixed audiovisual performance - Exemption: copying of audiovisual performances for private purposes ("home taping")	- Standard contracts provide for the exhaustion of the performer's exclusive rights upon the first fixation of his audiovisual performance. - Under such contracts, however, an equitable remuneration is due to the performer for any subsequent use of his fixed audiovisual performance. - The enforcement of equitable remuneration rights is entirely based on collective administration.

2. Official statistics with respect to the protection of performers in the field of audiovisual performances

Information for the purposes of this document was provided by the *Elöadómüvészi Jogvédö Iroda*–EJI ("the Bureau for the Protection of Performers' Rights"), the registered collective rights management organization of performers under Hungarian law. The statistics contain the number of individual performers obtaining equitable remuneration for the subsequent use of their audiovisual performances under the distribution scheme of EJI. Please note that statistics for the purposes of this document (i) cover Hungarian performers only; (ii) do not include performers' groups or ensembles obtaining such remuneration; and (iii) do not include performers obtaining such remuneration for their professional or welfare purposes.

A) Home taping levy (video tapes only) and remuneration for simultaneous and unaltered re-transmission of broadcasts

Year	Number of performers
1992	532
1993	505
1994	366
1995	630
1996	592

B) Remuneration for repeated broadcasts

Year	Number of performers concerned
1990	646
1991	412
1992	285
1993	283
1994	300
1995	377

KAZAKSTAN

In accordance with the Law of the Republic of Kazakstan “on copyright and neighbouring rights” of June 10, 1996, the protection of performers in the field of audiovisual performances is not foreseen.

SLOVENIA

In Slovenia, performers in the field of audiovisual performances enjoy protection within the framework or related (neighbouring) rights, that in principle corresponds to solutions of Alternative B of the Basic Proposal for the substantive provisions of the Treaty, prepared for the Diplomatic Conference of December 1996 (see WIPO document CRNR/DC/5 of 30 August 1996 and Articles 118-127 of the Slovenian Copyright and Related Rights Act).

The *de facto* situation, including contractual practices, corresponds to this legal system. The contractual assignment of audiovisual performers rights is in principle governed by a rebuttable presumption of transfer (Article 124 of the Act): by entering into a contract for the film production, the performer shall be presumed to have assigned to the film producer, exclusively and without limitations, all economic rights in his performance. This presumption

can be excluded by contract; furthermore, for each economic right which was assigned according to the presumption, the audiovisual performer retains an unwaivable right to demand equitable remuneration from the film producer.

No official statistics are available on this matter.

SPAIN

With reference to your Note of April 1, 1997, on the submission to the International Bureau of WIPO of information on the factual situation prevailing in Spain concerning especially contractual practices and available official statistics regarding the protection of performers in connection with audiovisual performances [...], I wish to inform you that the reply of Spain to that request will be incorporated in the reply that will be submitted to the International Bureau by the Commission of the European Communities and the Presidency of the Council of the same institution on behalf of the European Union and its Member States.

SWEDEN

With reference to the circular letter requesting factual information about the protection of performers in relation to audiovisual performances and about the protection of data bases, I have the honor to submit the following.

[...] As regards the first-mentioned question, we have obtained some information on contractual practices and remunerations paid in this country, primarily from the Swedish Union of Theatrical Employees. The English part of that information–contained in a cover letter–is enclosed, while the contracts attached to that letter are available only in Swedish and therefore less usefull in an international context.

Contractual practices with respect to protection of performers in the field of audiovisual performances in Sweden

Background

Contractual practices in respect to performers rights have always been guidlined by our copyright legislation through extended collective agreements licensing with distributors and through primary contracts guidlined by the copyright laws in collective agreement bargaining between employers and employees and their organizations.

It has been a calm and stabile development concurrently with the continuing development of the Swedish copyright legislation.

We have from the early nineteen sixtees been able to incorporate, make agreements on tariffs or royalties, agree on how to manage the rights and how to effectively distribute remuneration to individual right holders.

History

Copyright legislation	Major agreements and contracts
1960 recording right, reproduction right, broadcasting right	1) 1960 (61) repeat fees through collective agreements with the public broadcasters (1991) repeat fees when private television was introduced
Copyright legislation	**Agreements and contracts**
The 1960 legislation on reproduction right	1975 the first royalty agreement the film producers for secondary use of cinema film
Copyright legislation	**Agreements**
1984 cable transmission right	1984/85 extended collective agreement licensing agreement with the cable operators for remuneration for simultaneous cable transmission
Copyright legislation	**Agreements**
1995 Communication to the public and distribution right Television satellite right Rental and lending 1997 Equitable remuneration	1996 For remuneration for public television transmission of cinema films/programs 1997 Collective agreement for remuneration for satellite transmission by 12 million SEK public broadcasters

Annual distribution of collected remuneration to performers for audiovisual (musicians excluded) performances

On behalf of the reproduction and distribution right
9 million SEK

On behalf of the recording and broadcasting right (repeat fees)
8 million SEK

On behalf of the cable transmission right
9 million SEK

Presumption of transfer of rights from the performers to the film producers

The positive and constructive legislative tradition in Sweden that has guaranted stability and fare bargaining on the copyright area was broken 1995 with the introduction of the presumption of transfer of rights to the film producer that was stipulated in the rental and lending directive from the EG. This presumption was extended to the new distribution and communication to the public right with no right for equitable remuneration. This has lead to great tension between the bargaining parties and the individual performer and his producer on the media area.

The performer organizations strongly disapprove this development. Presumption of transfer of rights does not lead to a sound and fair bargaining situation but will instead lead to conflicts and instability on the media/the copyright area.

The Nordic countries with their long history of handling exclusive rights and bargaining through extended collective agreement licensening must show as an example that perormers can handle rights on the same level as authors.

THAILAND

Regarding the protection of performances in the field of audiovisual performances, the Thai Copyright Act B.B.2537 provides protection to performers under Article 44 and 45. Article 44 is in line with Article 14 of the TRIPS Agreement, dealing mainly with fixation of live performances. Article 45 is in line with Article 12 of the Rome Convention. In practice, serious problems remain in the area of enforcement, particularly the right owners' inability to exercise their rights since many performers are not fully aware of the extent of such rights. Even if they have required knowledge, they do not have enough bargaining strength when entering into agreement withmore powerful parties. Their ability to negotiate is also limited because of the industry's advantage in legal knowledge.

ZAMBIA

Zambia's Copyright and Performance Rights Act No. 44 of 1994 provides provisions for protection of performers inthe field of audiovisual performances. WIPO may refer to part V of the Act on Zambia's file held by their good offices.

[...] However, no statistics have been compiled with regard to audiovisual works due to logistics.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

A Protocol to the WIPO Performances and Phonograms Treaty concerning audiovisual performances

The question of the protection of audiovisual performances was raised first in the World Intellectual Property Organization (WIPO) in the context of the Committee of Experts on a New Instrument on the Rights of Performers and Producers of Phonograms, established in 1992. Although discussions in this Committee firstly concentrated on the protection of phonograms producers, the issue of the rights of performers was later the subject of discussion at several sessions of the Committee.

In this regard, following a hearing of interested circles in 1993, the European Community stressed on several occasions that, in order to take full account of the interests of all parties concerned, the New Instrument should have covered adequately the rights of performers in all performances, whether of an audio, visual, or audiovisual character, and in fixation of these performances.

This position has been consistent with the protection already granted at international level by the Rome Convention, and, at European Community level, by Council Directive 92/100 on rental right and lending right and on certain rights related to copyright in the field of intellectual property.[1] Both texts recognize in fact that performances, whatever their character, deserve protection.

Under European Community law, performers enjoy exclusive rights of fixation, reproduction, live broadcasting, distribution and rental, irrespective of the character of their performances. Also in the audiovisual field, they have these rights toghether with the other rightholders concerned such as authors, phonogram producers, film producers, broadcasting organizations or other performers.

These rights may be transferred, assigned or subject to the granting of contractual licences. However, this contractual freedom, as regards film productions, is limited by a mandatory rebuttable presumption of assignment of the rental right combined with an unwaivable right to remuneration. Furthermore, Member States may limit such freedom by rules on a non-rebuttable presumption of assignment of all the performers' rights mentioned above combined with a right to remuneration.

Also with a view to the development of new technologies and the rapid growth of new audiovisual services, differentiating protection according to the nature of the performance would appear to be less justified, notably due to the blurred borderline between audio and audiovisual productions (cf. videoclips).

During the Diplomatic Conference held by WIPO in December 1996, the European Community and its Member States reiterated this position, and stressed that the protection of

---

[1] Dir. 92/100/EEC of 19 November 1992 (OJEC No. L 346/61 of 27.11.1992)

audiovisual performances is of world-wide interest and benefit and a high level of protection should apply to all kinds of performers.

In this perspective, with a view to reaching a compromise, the European Community and its Member States submitted during the Conference an amendment to Art. 25 (reservations) of the draft WIPO Performances and Phonograms Treaty (WPPT) that would have allowed the possibility for Contracting Parties, while accepting the coverage of audiovisual performances by the new Treaty, to apply reservations as regards audiovisual performances.

This proposal would have been a very pragmatic, flexible and appropriate solution which could have accomodated the needs of all Contracting Parties, as it would have provided the necessary flexibility to enable countries that were reluctant, to be party to the WPPT without being obliged to grant protection to audiovisual performances.

However the Conference was unable to reach agreement on this issue, and as far as fixed performacnes are concerned, the WPPT adopted by the Conference grants certain rights toperformers only where the fixation is a purely aural one, that is, is a fixation in a phonogram.

As a result the European Comunity and its Member States have strongly supported the adoption of the resolution of the Diplomatic Conference in which Delegations regretted that the WPPT did not cover the rights of performers in the audiovisual fixations of their performances, and called for the adoption of a Protocol to the Treaty concerning audiovisual performances not later than in 1998.

Following the decision of the extraordinary meeting of the Governing Bodies held in March this year, the issue will now be discussed in a Committee of Experts meeting to be held on 15 and 16 September, 1997.[2]

In this respect, the European Community and its Member States wish to reaffirm the utmost relevance of the protection of audiovisual performances in the future environment, and reiterate their attachment to a solution that should provide a high level of protection and allow the necessary flexibility to be acceptable to all countries, and, at the same time, avoid any unjustified differentiation on the basis of the nature of the performance.

[End of Annex and of document]

[2] Documents CRNR/DC/100 of 23 December, 1996 and AB/XXX/4 of 21 March, 1997.