

# WIPO



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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
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## **STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS**

**Third Session**  
**Geneva, November 16 to 20, 1999**

AGENDA ITEM 4: PROTECTION OF AUDIOVISUAL PERFORMANCES

SUBMISSION OF THE UNITED STATES OF AMERICA\*

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\* Received on November 2, 1999.

## SUBMISSION OF THE UNITED STATES OF AMERICA

The United States is pleased to make this, its third, substantive submission on the protection of audiovisual performers rights. In early 1998, the United States concluded that it would be appropriate to submit a proposal to further advance the discussions which had been taking place on audiovisual performers rights in the Committee of Experts. Consequently, on May, 18, 1998, we submitted a basic proposal (AP/CE/2/4, May 18, 1998 and AP/CE/2/4 Corr., May 27, 1998) which was a substantial change from the position of the United States at the end of the 1996 Diplomatic Conference. That proposal was widely discussed at the June 8-12, 1998 final meeting of the Committee of Experts on the Protection of Audiovisual Works. In November of 1998, at the first Meeting of the Standing Committee on Copyright and Related Rights, in response to concerns raised at the June Meeting and after further consideration of the issues, we amended our proposal to clarify points where drafting had been questioned and to make changes to our proposal to seek to achieve a position acceptable to a wider range of participants (SCCR/1/4). Now, we make our third submission, amending our proposal again and noting significant proposals made by others. We hope these changes stimulate further discussion and facilitate achieving a broader agreement on the objectives to be attained.

This submission of the United States is in two parts. Part 1 includes general statements regarding transfer of rights and on national treatment and Part 2 is a revised text of the U.S. Proposal which includes clarifications of language and suggestions from earlier discussions of the text. In Part 2, the newly added material is underscored and deleted text is struck out. It should be noted that the proposed changes also include the addition of a provision on a rental right and a revised provision on application in time, which we believe is a complex issue requiring further discussion.

### **Part 1**

#### STATEMENT ON TRANSFER OF RIGHTS

The United States believes that the discussions to date in the Standing Committee regarding the transfer of rights have been thoughtful and productive. Several delegations, including those from Canada, India, and Japan, along with those delegations in the Latin American and Caribbean Group, have put forward proposals that recognize the need for this treaty to address the fundamental issue of transfer of rights. We also recognize the statement submitted by the International Federation of Actors (FIA) at the May 1999 Meeting of the Standing Committee concerning the need to introduce rights for performers where they do not exist while maintaining certainty for all parties in the production and distribution of audiovisual works in a global market. FIA's suggestions for further discussion of a transfer provision are helpful.

We appreciate that a key element of some of the proposals involves the recognition and respect by Contracting Parties of appropriate transfer rules adopted by another Contracting Party. We also understand that while many countries already include a presumption of transfer in their national laws, some countries do not and would prefer not to adopt such a presumption with respect to their own nationals. The foregoing points must be balanced with the need for a simple rule that will achieve a requisite level of certainty as audiovisual production and distribution increasingly continues to cross national boundaries.

The proposed presumption set forth in the current U.S. proposal is quite limited in several important respects. First, it is rebuttable. Second, it applies only to exclusive rights of authorization; it does not apply to moral rights or to rights of remuneration that may be established under national law. Third, it accommodates various legal systems and traditions, including those based on collective agreements and those based on the establishment of equitable remuneration rights for performers. The U.S. proposal enjoys the wide support of performers, producers and distributors in the U.S. and represents a careful balance of critical interests.

While the U.S. continues to believe that its current proposal on transfer of rights provides a necessary minimum level of international harmonization, we are continuing to study the various proposals on transfer submitted by the other delegations and welcome further discussion on this issue. The United States is convinced that this essential element of the treaty can be addressed in a manner that provides adequate protection of the interests of performers and also creates certainty and clarity with respect to the production and distribution of audiovisual works.

#### STATEMENT ON NATIONAL TREATMENT

The United States recognizes that national treatment is a problematic issue and that striking an appropriate balance may take some time to achieve.

It is a fundamental principle that performers should be compensated for their performances. The concept of national treatment needs to accommodate the different systems by which performers are compensated, including collective bargaining agreements and systems of equitable remuneration.

The International Federation of Actors (FIA) at the May 1999 Standing Committee Meeting submitted a statement that money that is collected on account of performances must be distributed to the individuals appearing in those performances. We agree that this is also a fundamental principle. If such distributions are not made, then collections ought not be made with respect to such performances.

## **Part 2**

# **SUBSTANTIVE PROVISIONS OF A TREATY FOR THE PROTECTION OF PERFORMERS IN AUDIOVISUAL WORKS**

## **Preamble**

*The Contracting Parties,*

*Noting* that the development and convergence of new information and communication technologies will allow for rapid growth of audiovisual services and that this will increase the opportunities for performing artists to exploit their performances;

*Recognizing* the great importance of ensuring an adequate level of protection for these performances, in particular when they are exploited in the new digital environment;

*Recognizing* that the WIPO Performances and Phonograms Treaty (WPPT) does not cover the rights of performers in the audiovisual fixations of their performances, but that many provisions of the WPPT can be used or adapted as the basis for a new treaty protecting performers with respect to their audiovisual performances;

*Have agreed as follows:*

## **CHAPTER I GENERAL PROVISIONS**

### **Article 1**

#### **Relation to Other Conventions**

- (1) 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.
- (2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (3) This Treaty shall not have any connection with, nor shall it prejudice, any rights and obligations under any other treaties.

### **Article 2**

#### **Definitions**

For the purposes of this Treaty:

(a) “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore, ~~but not including ancillary performers considered such by professional practice~~ with the exception of extras, the definition of the latter term being left to the legislation of each Contracting Party;

(b) “fixation” means the embodiment of images, or of images and sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

(c) “broadcasting” means the transmission by wireless means for public reception of images, or of images and sounds, or the representations thereof; such transmission by satellite is also “broadcasting;” transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(d) “communication to the public” means the transmission to the public by any medium, otherwise than by broadcasting, of the images, or the sounds and images, or the representations thereof, comprised in an unfixed performance or in a fixed performance;

(e) an “audiovisual work” is a work consisting of a series of related images that impart an impression of motion and ~~are~~ is intended to be shown by the use of a device, together with any accompanying sounds.

### Article 3

#### Beneficiaries of Protection

(1) Contracting Parties shall accord the protection provided under this Treaty to ~~performers of other Contracting Parties as defined in paragraph (2) of this Article.:~~

~~(2) Performers of other Contracting Parties shall be understood to be performers who meet any of the following conditions:~~

(a) those performers who are nationals of a Contracting Party and whose performance is unfixed or is fixed ~~in an audiovisual work~~ (other than in a phonogram) regardless of the place of performance or fixation;

(b) those performers whose unfixed performance takes place on the territory of a Contracting Party;

(c) those performers whose performance is ~~first-fixed in an audiovisual work~~ (other than in a phonogram) on the territory of another Contracting Party.

~~(3)~~(2) Performers who are not nationals of one of the Contracting Parties but who have their habitual residence in one of them shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

## **Article 4**

### **National Treatment**

With respect to performances for which they are protected under this Treaty as provided in Article 3, performers shall enjoy, in other Contracting Parties, the treatment that the laws of such parties do now or may hereafter grant to their own nationals, as well as the rights specifically granted by this Treaty.

## **CHAPTER II RIGHTS OF PERFORMERS**

## **Article 5**

### **Moral Rights of Performers**

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his or her live performances or performances fixed in an audiovisual fixation, have the right to claim to be identified as the performer of such performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation, or other modification of his or her performance that would be seriously prejudicial to the performer's reputation. Modifications consistent with the normal exploitation of an audiovisual work undertaken by the producer of the work or the producer's successors in interest, pursuant to the exercise of rights of authorization acquired by the producer in the performance, shall not be considered seriously prejudicial to the performer's reputation.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after the said performer's death, be maintained, at least until the expiry of the rights of authorization set forth in Articles 6 through ~~10~~11, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, these Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph, may provide that some of these rights will, after the performer's death, ceased to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

(4) The "normal exploitation of an audiovisual work" shall include the use of new or changed technology, media, formats, and/or methods of distribution, dissemination, making available or communication to the public. A performer shall give reasonable consideration to the interests of the other performers in the work, the writers of scenarios, dialogues or musical works created for the work, and the principal director of the work when seeking to exercise the above described rights with respect to such work.

## **Article 6**

### **Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances, except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

## **Article 7**

### **Right of Reproduction**

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their fixed performances in any manner or form.

## **Article 8**

### **Right of Distribution**

- (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their fixed performances through sale or other transfer of ownership.
- (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

## **Article 9**

### **Right of Making Available**

Performers shall enjoy the exclusive right of authorizing the making available to the public of their fixed performances, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

## **Article 10**

### **Right of Broadcasting and Communication to the Public**

Except for conditions on the exercise of the right that are permissible for audiovisual works under Article 11*bis* of the Berne Convention for the Protection of Literary and Artistic Works, performers shall enjoy the exclusive right of authorizing, as regards their fixed

performances ~~fixed in audiovisual works~~, the broadcasting and communication to the public of such performances, ~~except where such a performance is already a broadcast performance.~~

## **Article 11**

### **Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing commercial rental to the public of originals or copies of their fixed performances as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Paragraph (1) shall not apply unless such commercial rental has led to widespread copying of such performances materially impairing the exclusive right of reproduction.

## **CHAPTER III ADDITIONAL PROVISIONS**

### **Article ~~11~~12**

#### **Transfer of Rights**

Once a performer has consented to the fixation of his or her performance in an audiovisual work, he or she shall be deemed to have transferred all exclusive rights of authorization granted under this Treaty with respect to that particular audiovisual work to the producer of that work and its successors in interest, subject to written contractual clauses to the contrary. The foregoing sentence shall not apply to any rights of remuneration a performer may have under the law of any Contracting Party, nor shall it require a Contracting Party to establish any such rights of remuneration.

### **Article ~~12~~13**

#### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.



## **Article 1314**

### **Term of Protection**

The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years from the end of the year in which the performance was fixed.

## **Article 1415**

### **Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or their transferees in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, that are not authorized by the performers or that are not permitted by law.

## **Article 1516**

### **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances or copies of fixed performances knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information that identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or appears in connection with the broadcast, public communication, or making available to the public of a fixed performance.

## **Article 1617**

### **Formalities**

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

## **Article 1718**

### **Reservations**

No reservations to this Treaty shall be permitted.

## **Article 1819**

### **Application in Time**

~~(1) — Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers provided for in this Treaty.~~

~~(2) — Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances that occurred after the entry into force of this Treaty for that Party.~~

(1) This Treaty shall not prejudice, except as noted in paragraph (3) below, rights acquired in any Contracting Party before the date of coming into force of this Treaty for that Contracting Party.

(2) No Contracting Party, except as noted in paragraph (3) below, shall apply the provisions of this Treaty to unfixed performances that took place, or to performances that were fixed, before the coming into force of this Treaty for that Contracting Party.

(3) Contracting Parties shall apply Article 5 of this Treaty to all fixed performances in existence on the date of coming into force of this Treaty where such performances were fixed no earlier than 50 years before such date, but only where the prejudicial conduct first occurs after the effective date of this Treaty.

## **Article 1920**

### **Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringement and remedies which constitute a deterrent to further infringements.

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