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STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

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SUBMISSION OF THE UNITED STATES OF AMERICA ON TRANSFER

*Submitted by the United States of America**

* Submitted on April 5, 2000.

TRANSFER

1. The greatest impediment to the adoption of a globally accepted WIPO Performers' Rights Treaty seems centered around the issue of when and how the exclusive rights of authorization created by the Treaty are to be transferred from the performer to the producer. While a number of proposals have been made to the Standing Committee, no meaningful consensus has yet formed behind any of those proposals.
2. One of the purposes of any international treaty is to provide certainty as to the rights created by or recognized in the treaty. Unlike literary or musical works, audiovisual works involve contributions of many different individuals who may be of different nationalities. In addition, audiovisual works are increasingly produced and financed across national borders which makes consistency and certainty of transfer and rights ownership rules extremely important. The distribution of motion pictures is by necessity a global enterprise. Growing broadband internet access will increase the scope and pace of international distribution.
3. Furthermore, the rights being created by this Treaty will, in certain territories, be new rights which do not currently exist or which are not currently recognized as separate rights. With such newly created rights, where systems are not already established for dealing with those rights, it is particularly important that the Treaty which gives rise to those rights address the questions of transfer and control of those rights.
4. This paper will examine the critical elements for an effective transfer provision and analyze the current proposals in light of those elements.

A. CRITICAL ELEMENTS FOR AN EFFECTIVE TRANSFER PROVISION

5. In order to create an environment that: (i) preserves for performers the potential for bargaining for their rights and thereby encourages development of strong collective bargaining, (ii) further reserves to performers the vital income from equitable remuneration, (iii) permits adequate recovery for the uniquely significant economic investment in motion picture production, and (iv) provides certainty both for producers and performers, the following concerns need to be addressed:

(1) The transfer provision should not be applicable to rights of remuneration

6. One of the critical purposes of a performers' rights treaty is to ensure that performers have an opportunity to secure appropriate compensation for their creative contribution to motion pictures. In many countries this is accomplished by collective bargaining; in others, through legislative systems of rights of remuneration. In still others a combination of the two systems has proven effective. The transfer provision should not undermine the protections performers currently have in law or otherwise. Excluding rights of remuneration from the scope of the transfer provision will assure that performers whose protections are based in whole or in part on legislative rights of remuneration will be secured.

(2) The transfer provision should not be applicable to moral rights

7. Moral rights preserve a performer's individual right to the integrity of his or her performance and to be identified as the performer of his or her performance. These rights, to the extent they do not impinge on the normal exploitation of a motion picture, are not relevant to the needs of producers to distribute their motion pictures. In fact, the ability of performers to enforce their rights against violators of moral rights directly, supports the integrity of the motion picture.

8. The reservation of moral rights to performers is critical in this age where performances stored digitally can be manipulated by the use of universally available consumer equipment and easily distributed on the internet. The ability of performers to earn a living is based largely on their reputation. Without such reservation, performers would be unable to protect their most important assets—their image and reputation.

(3) Any presumption of transfer of rights should be subject to rebuttal by written contract

9. A rebuttable presumption provides the opportunity for reservation of rights to the performer and for contractual negotiations. The opportunity to bargain specific terms that reflect the particular circumstances of the production is necessary to give substance to performers' rights.

(4) The transfer provision should be applicable to a particular audiovisual production

10. At the time that a performer agrees to the fixation of his or her performance, he or she is doing so for a particular audiovisual production. The performer is compensated for the fixation of such performance for use in such production and the right to distribute such production, with further compensation assured for the distribution of such production by contract, collective bargaining, legislation, or a combination of the foregoing. A transfer provision should provide certainty to producers and distributors of such motion picture with respect to the rights of authorization. However, it is not desirable nor necessary to extend such provision to the inclusion of such performances in new audiovisual productions. Performers must have the right to bargain over whether their captured performances are included in new works.

(5) The transfer provision should not require countries to change their systems regarding transfers of rights from performers to producers.

11. Some countries have legal provisions that vest rights in producers, other countries do not. Some countries have well-developed collective bargaining arrangements between producers and performers, others do not. The transfer provision should not override existing legal systems and require changes in domestic laws, nor should it supercede collective bargaining agreements between performers and producers.

(6) The transfer provision should be simple and direct.

12. The transfer provision should be simple and direct. It should not give rise to uncertainty, particularly uncertainties that would have to be resolved through judicial proceedings, and should not be open to inappropriate manipulation.

- (7) The transfer provision should take into consideration the increasingly complex world of productions (with co-productions, co-financing arrangements, multi-national casts, multi-national shooting locations, etc.)

13. As noted above, for an international treaty to be effective it must provide clarity; if the crucial issue of transfer of the newly created rights is left entirely to national laws, then increased confusion will result. This is particularly true for the increasing number of audiovisual works which are not the product of a single country but rather involve producers, financiers, and casts of different nationalities. It should also be kept in mind that the importance of the issue of ownership of rights in cinematographic works has been recognized in Article 14bis of the Berne Convention.

14. Also, as noted in the introduction, the rights being created by this Treaty will, in certain territories, be new rights which do not currently exist or which are not currently recognized as separate rights. With such newly created rights, where systems are not already established for dealing with such new rights, it is particularly important that the Treaty which gives rise to those rights address the questions of transfer and control of those rights.

- (8) The transfer provision should provide certainty for the distribution of audiovisual works around the world.

15. Producers and distributors of audiovisual works should be able to determine the ownership and control of the performers' rights in the work based on the provisions of the Treaty and on written agreements. Producers should not be left, under the Treaty, with the bewildering task of trying to interpret which domestic laws of which countries are applicable when the work is being distributed around the world. Without certainty, it will become far more difficult for producers to secure financing for international productions, which in turn will decrease employment opportunities for performers.

B. VARIOUS APPROACHES TO TRANSFER

16. None of the current proposals on transfer meet all of the criteria set forth above and, as a result, it has not been possible to form a consensus behind any of the proposals.

- (1) Silence on transfer – *The E.U. has proposed that the Treaty remain silent on transfer, leaving the question of ownership and control of the rights created by the Treaty to the domestic law of each country. This approach does not provide the necessary certainty and predictability. Bargaining over the value of the new rights becomes impaired by an inability to ascertain the scope of these rights. This approach also fails to assure a base level of protection for performers relating to the transfer of rights, e.g., in the areas of remuneration rights and moral rights. In addition, it would result in constant disputes and uncertainty over which countries' laws are applicable to a production and how those laws are to be interpreted.*
- (2) A rebuttable presumption of transfer – *The U.S. has proposed a rebuttable presumption of transfer from the performer to the producer of the exclusive rights of authorization created by the Treaty that is limited to exclusive rights of authorization with respect to a particular audiovisual work. While many countries have a presumption of transfer in their domestic laws, this approach would require some*

countries to change their laws, and might impose a new system of rights transfers on their domestic audiovisual production industries.

- (3) Rules of transfer determined by the country of origin of the work – *Canada has proposed that the country of origin of the audiovisual work should control whether the exclusive rights of authorization should be presumed transferred subject to rebuttal by written agreement. That is, countries may opt in or opt out for a presumption. This approach does not require any countries to change their laws for their domestic productions and insures producers that one uniform system of transfer will apply to a given work regardless of where it is exploited. The great drawback, however, is the extremely complicated question of determining the country of origin of a work, which could be subject to improper manipulation. Such a determination may have to consider nationality of the performers, the producer, the screenwriter, the underlying material, as well as the country of principal photography, etc. – and would be compounded by the fact that each of those categories may involve multiple nationalities, such as a multi-national cast. Objections were also raised to the application within one country of the differing transfer provisions of another country.*
- (4) Berne Article 14bis2 approach – *GRULAC, India, Japan and others have suggested an approach based on Article 14bis2 of the Berne Convention. Concern has been expressed that this approach decreases the bargaining power of performers, since it precludes performers from objecting to the exploitation by the producer of any of the exclusive rights set forth in the Treaty. However, the Berne provision does provide for rebuttal by written contract. These proposals do have the drawback of being broad in scope, i.e., not limiting the preclusion from objection to the work for which a performer rendered services.*

Japan has suggested a variation on the Article 14bis2 approach by adding an "opt-out" provision. The addition of an "opt-in" or "opt-out" approach for nationals of the "opting" country would solve the concern about certain countries having to change the way they treat transfers of rights for national productions (for example, this might avoid overriding those systems requiring written agreements for the transfer of exclusive rights). If countries are able to select participation in the system for their own nationals, however, the result would be that the rights of performers from different nations might be treated differently in the same production.

- (5) Choice of law/ Recognition of transfer arrangements – *There has been a great deal of discussion of trying to find a compromise through a choice-of-law or a recognition-of-transfer approach, although no formal proposal of that type has been made to the Standing Committee. Such a proposal might provide "In the absence of a determination by the parties as to the applicable law, an agreement by a performer to transfer of the exclusive economic rights of authorization granted under this Treaty shall be governed by the law of the Contracting Party most closely connected to this agreement." This approach has the advantages of not requiring any country to change its laws applicable to its own audio-visual productions and does not decrease the bargaining power of performers (as it has been argued that an Article 14bis2 approach might), However, this proposal raises the complicated issue of determining the country "most closely connected to the agreement."*

CONCLUSION

17. We believe that on-going consultations are critical to progress on this important issue. Resolution on the issue of transfer is necessary if a new instrument is to be widely adopted. Based on the foregoing, governments are urged to support discussion and proposals which will lead to consensus on this issue.

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