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AD HOC INFORMAL MEETING ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES

Geneva, November 6 and 7, 2003

SURVEY ON NATIONAL PROTECTION OF AUDIOVISUAL PERFORMANCES

prepared by the Secretariat

INTRODUCTION

The present Survey of National Legislation on the Protection of Fixed Audiovisual Performances (“the Survey”) has been prepared by the Secretariat of the World Intellectual Property Organization (WIPO) in cooperation with its Member States. The WIPO Secretariat had prepared a questionnaire covering the main issues related to protection of fixed audiovisual performances, then completed it for each of the Member States that in its national legislation grants protection to audiovisual performances. In the questionnaires, the Secretariat reproduced the relevant legal provisions, as identified through the WIPO Collection of Legislation for Electronic Access (CLEA) and other legislative texts available to the Secretariat in either English, French or Spanish. After completion, the questionnaires were circulated to the concerned Member States for their comments.

The Secretariat distributed until May 20, 2002, a total of 125 questionnaires. Comments were received until April 25, 2003, from 42 Member States. For a number of countries, relevant legislation was not identified, mainly because it was not available in one of the three languages (English, French and Spanish) used in the survey. Also in some instances the Secretariat may have based its assessment on outdated legislation, due to the delays involved in the process of communication by Member States to WIPO of their most recent legislation and translation thereof. Moreover, as the analysis of legislation has been limited to the copyright law and to some extent to decrees and other ancillary copyright regulations, some relevant provisions contained in other statutes may have been omitted, such as general rules on national treatment, or rules related to the general operation of transfer of rights. In this context the comments made by the 42 responding Member States were most helpful in enabling the Secretariat to correct omissions and errors of fact. In a number of cases a final reassessment was made by the Secretariat to determine whether, given the information available and the comments received, certain legislation effectively comes within the scope of the survey.

In its present form the survey covers the national legislation of 98 Member States. It contains three Annexes: an Overview of Main Provisions on the Protection of Fixed Audiovisual Performances (Annex I); an Overview of National Legislation on the Protection of Fixed Audiovisual Performances (Annex II); and the National Questionnaires on the Protection of Audiovisual Performances (Annex III). Annex I summarizes information on the main features of protection of fixed audiovisual performances for all Member States concerned. It provides a global picture of the protection by listing the countries in the same format as the questionnaire. Annex II, summarizes the main elements of the legislation in each Member State, by means of a table in which all countries concerned are listed. These two annexes are the result of the Secretariat’s analysis of the National Questionnaires.

REVISION

The Secretariat will prepare a revised version of the survey after the *ad hoc* informal meeting (from June 18 to 20, 2003), based on additional corrections and comments received from the Member States, all of which are urged to respond to the questionnaires that they have received. The final version will be made available in electronic form on the WIPO website. Thereafter, any other further revision, based on new legislation within the scope of the survey, will be made gradually as information is received from Member States.

SCOPE OF THE SURVEY

The survey aims at reflecting the extent to which national legislation of WIPO Member States provides protection to fixed audiovisual performances. The international protection of audiovisual performances is clearly recognized by the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention). However, it seems less amply documented whether such protection in relation to live performances is granted under the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and the WIPO Phonograms and Performances Treaty (WPPT). In this respect, the Rome Convention grants rights to prevent audiovisual broadcasting, communication to the public and fixation of live performances, and rights to prevent reproduction of performances which are incorporated in a visual or audiovisual fixation without their consent (Articles 7.1 and 19).

Following the approach mentioned, the survey does not cover the legislation of Member States that includes provisions similar to Article 19 of the Rome Convention, concerning the non applicability of the economic rights in fixed performances once a performer has consented to incorporation of his/her live performance in an audiovisual fixation. However, the survey includes legislation with such a “cut off” effect in cases where some rights in audiovisually fixed performances are not affected, for instance moral rights and remuneration rights.

The survey aims to cover all national legislation conferring protection on fixed audiovisual performances, irrespective of whether that protection is granted as exclusive rights, a right to authorize or prohibit, or as a possibility of preventing a certain use. The survey also covers legislation stating that a certain act undertaken without the consent of the performer is prohibited, or amounts to an infringement of the performer’s rights. Finally, the survey covers the protection afforded by means of rights of equitable remuneration, as opposed to exclusive rights.

MAIN FEATURES OF THE PROTECTION OF FIXED AUDIOVISUAL PERFORMANCES

Right of Reproduction

As appears in the Overview of Main Provisions on the Protection of Fixed Audiovisual Performances (Annex I), 88 Member States have been identified which include in their national legislation a right of reproduction of fixed audiovisual performances. Thirteen of these formulate the right as a right to prevent unauthorized reproduction of the fixation.

Right of Distribution

National legislation differs in respect of the scope of the right of distribution. In some cases, the right of distribution includes the right of making available to the public the original and copies of fixed audiovisual performances through sale or other transfer of ownership. In other legislation, the distribution right also covers forms of making available fixations that do not involve a transfer of ownership, but a transfer of possession, such as lending and rental. In the latter case, Annex I lists the relevant Member States under both the right of distribution

and that of rental. Furthermore, some legislation limits the scope of the right of distribution to fixed copies that can be put into circulation as tangible objects. The survey covers all these different possibilities, showing that legislation in 59 Member States includes a distribution right in respect of fixed audiovisual performances. Out of these, legislation in 13 Member States grants the right as a right to prevent the unauthorized distribution.

Right of Rental

The legislation in 57 Member States includes the right of rental, either as a separate right or as a modality of the right of distribution. In the legislation of 13 Member States, the right is granted as a right to prevent the unauthorized rental of fixations. In some of those countries, the scope of the right of rental is limited to fixed copies that can be put into circulation as tangible objects.

Right of Broadcasting

In 65 Member States, performers enjoy a right of broadcasting the fixation of their audiovisual performances. The notion of broadcasting varies in different legislation. Its most basic expression, covering the transmission by wireless means for public reception of images and sounds, is sometimes supplemented by provisions clarifying that the transmission for public reception by satellite is “broadcasting,” if it fulfils the same requirements, and also that encrypted satellite broadcasting is broadcasting under certain conditions. Some legislation assimilates, under certain circumstances, cable broadcasting to wireless broadcasting. All these possibilities are included under the right of broadcasting in Annex I, and can be analyzed for each particular national law in the National Questionnaires (Annex III). In the legislation of 13 Member States, the broadcasting right is formulated as a right to prevent the unauthorized broadcasting of fixed audiovisual performances. In 14 Member States, performers do not enjoy the possibility of authorizing or prohibiting broadcasting of their fixed audiovisual performances, but they benefit from a right of remuneration.

Right of Communication to the Public

National legislation differs in respect of the scope of the right of communication to the public. In its most reduced form, communication to the public covers any transmission by wire of a performance played from an audiovisual fixation when the public is not present at the place where the playing of the audiovisual fixation occurs. It can also cover all retransmissions by wire of any other such transmissions. In some cases, wireless transmissions for public reception, i.e., broadcasting, is considered as a modality of communication to the public. Under some legislation the scope of this right also covers the rendering of an audiovisual fixation before a live audience, such as playing an audiovisual fixation in a place accessible to the public. In its broadest form, communication to the public covers any act whereby the public may perceive the fixed performances without prior distribution of copies to each of them. Annex I covers all these possibilities under the right of communication to the public. The legislation of 54 Member States includes a right of communication to the public. In the legislation of eight Member States it is formulated as a right to prevent the unauthorized communication to the public of fixed audiovisual performances. In the legislation of 16 Member States, performers do not enjoy a right to authorize or prohibit the communication to the public of the audiovisual fixation, but benefit

from a right of remuneration. In the case of broadcasting, the remuneration is sometimes established as a right to equitable remuneration, as provided for by Article 12 of the Rome Convention in respect of phonograms.

Right of Authorizing the Making Available to the Public

In the legislation of 24 Member States, a right of authorizing the making available to the public of fixed performances has been identified. This right covers the interactive digital transmission of fixed audiovisual performances. Its most common expression, derived from the equivalent protection of aural performances in the WPPT, refers to making available 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.” In the legislation of some Member States, the making available right may be considered covered by a broad right of communication to the public, or by a right of distribution to the public.

Moral Rights

In the legislation of 77 Member States, performers enjoy to some extent moral rights in respect of their fixed audiovisual performances. In some cases the protection covers both rights of attribution or paternity over the performance and rights related to its integrity. In other cases the rights are weaker than the similar rights of authors under the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and are subject to conditions, such as contractual arrangements to the contrary and specifications related to the normal operation of the market.

Legal Assignment and Presumptions of Transfer

Annex I summarizes legislation regarding legal assignment and presumptions of transfer of performer’s rights by distinguishing legal assignment of rights from presumptions of transfer. For purposes of the survey, legal assignment is understood as involving cases in which the legislation attributes *ab initio* ownership of the rights in the performance to a third party, normally the producer or employer. This *ab initio* attribution takes place by direct operation of law as opposed to legislation under which the rights initially lay in the hands of performers, but are presumed transferred to the producer or employer once the performer has consented to the fixation of her/his performance. The presumption of transfer is either rebuttable, when the transfer is subject to contractual arrangements to the contrary, or mandatory, when the presumption of transfer of rights from the performer to the producer takes place automatically and inevitably upon consent of the performer to fixation of the performance. Legislation in 42 Member States includes neither provisions regarding the presumption of transfer of rights, nor legal assignments of the same. Thirty-five Member States include in their legislation a rebuttable presumption of transfer. In seven other Member States this presumption of transfer is mandatory. The legislation in seven Member States includes a legal assignment to the producer of the rights in audiovisual performances.

Retroactive Protection

Under the terms retroactive protection the rules on the application in time of the protection are addressed. For the purpose of the Survey retroactive protection refers to the fact that the protection is accorded to fixed performances that exist at the moment of the coming into force of legislation, but which have not yet entered the public domain. It does not refer to whether protection is accorded without prejudice to any acts performed before the entry into force of the legislation. It does not refer, either, to whether previously acquired rights and previously concluded agreements are safeguarded. Sixty one Member States have been identified as including in their legislation provisions ensuring the protection of fixed audiovisual performances that exist at the moment of the coming into force of legislation.

Treatment Accorded to Nationals of Other Countries

The survey finally addresses the issue of the treatment accorded to nationals of other countries in respect of the protection of audiovisual performances. Eighty-nine Member States have been identified as including in their legislation provisions on the treatment of nationals of other countries. The Overview of Main Provisions on the Protection of Fixed Audiovisual Performances (Annex I) lists the countries under three categories, depending on whether the treatment of nationals of other countries follows the principle of national treatment, that of reciprocity, or a combination of the two. In the legislation of 40 Member States the treatment accorded to nationals of other countries appears to be governed by the principle of national treatment. In the legislation of 12 Member States the treatment of nationals of other countries follows the principle of reciprocity. In the legislation of 37 Member States national treatment and reciprocity are accorded with a limited scope, as part of a mixed regime that includes a combination of both principles.

[Annex I follows]