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BACKGROUND DOCUMENT ON THE MAIN QUESTIONS AND POSITIONS CONCERNING THE INTERNATIONAL PROTECTION OF AUDIOVISUAL PERFORMANCES

prepared by the Secretariat

I. PROTECTION OF AUDIOVISUAL PERFORMANCES AT THE INTERNATIONAL AND NATIONAL LEVELS

1. 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), although in a very limited manner. In this respect, the Rome Convention grants rights to prevent broadcasting, communication to the public and fixation of live performances, and rights to prevent reproduction of a performance which was fixed without the consent of the performer (Article 7.1)[1]. 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 her performance in an audiovisual fixation, has a further limiting effect. As a consequence of this so-called *cut-off provision,* performances fixed in audiovisual media are deprived of any meaningful international protection.

2. However, as revealed by the 2005 World Intellectual Property Organization (WIPO) Survey on National Protection of Audiovisual Performances[2], a considerable number of countries provide a certain degree of protection to fixed audiovisual performances. This protection is often structured as neighboring or related rights, that is, intellectual property rights modeled after copyright for the benefit of relevant players in the process of creation and dissemination of creativity. Neighboring rights traditionally extend to performers, phonogram producers and broadcasting organizations. The protection of performances can also be structured by means of collective bargaining and individual contracts. This system applies to some of the countries with stronger audiovisual industries and greater numbers of actors, such as the United States of America. In this context trade unions negotiate with producers' associations not only labor conditions but notably the compensation for different uses of the audiovisual performances[3]. This compensation adopts at least two different forms; namely, lump sum payments in advance, which take place up-front when the contract is signed or consent is given to fixation of the performance; and residuals, which are payments proportional to the frequency of use of the performance in different media, such as open TV broadcast, cable broadcast, DVD sales, Internet streaming and downloading, etc.

3. Both neighboring rights systems and systems based on collective bargaining often contain legal mechanisms to ensure that audiovisual producers can undertake without obstacle the exploitation of rights in the performance both at national and international level. Under the work made for hire doctrine in the United States of America, as it applies to audiovisual works, where a work is specially ordered or commissioned by a producer for use as a contribution as a part of a motion picture or other audiovisual work and the parties agree in writing that the work is to be considered a work made for hire, all of the rights comprised in the copyright vest with the producer as a matter of law and the producer is considered the sole author of the work. No transfer or assignment of rights from the creator to the producer is

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[1] However, it seems less clear whether such limited protection is granted under the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and the WIPO Phonograms and Performances Treaty (WPPT).

[2] Document AVP/IM/03/2 Rev.2: *http://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_2_rev_2-main1.doc*

[3] As in collective bargaining agreements between Screen Actors Guild (SAG) and the Motion Picture Association of America (MPAA)

necessary[4]. In other countries, "presumption of transfer", under the rule of the creators themselves are also the original owners of rights, with a presumption, however, that, when they contribute to a cinematographic production, they transfer their rights to the producer (such a presumption, however, may be rebutted in some jurisdictions, being irrebuttable in others). In other countries there is no specific regulation of the transfer of rights from the performer to the producer and the matter is left to the contractual freedom of the parties involved.

4. The advantages found in protection of audiovisual performances at national and international level are often related to the need to structure the cinematographic and audiovisual sector by providing compensation and incentives to one of its main players; namely actors and actresses in cinema, TV and video. Secondly the convergence of media results in increasing use of music associated with images. While the first music videos date from the 1980s, the increasing prevalence of audiovisual images in music consumption has extended beyond open TV broadcasts, moving to pay TV in channels such as MTV, then to DVDs and most recently to the Internet, including the mobile environment. Protection of audiovisual performances is often seen as the safer means to ensure full protection of music videos in different jurisdictions.

II. THE NEGOTIATIONS ON THE INTERNATIONAL PROTECTION FOR AUDIOVISUAL PERFORMANCES

A. The 1996 WIPO Diplomatic Conference

5. The WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, which took place from December 2 to December 20, 1996, represented a serious attempt to overcome the exclusion of audiovisual performances from the international standard of protection. During the discussions leading to the 1996 Diplomatic Conference some countries preferred to focus on sound performances while others were ready to also consider the protection of audiovisual performances. It became clear from these deliberations that it would not be possible to present a basic proposal that would reasonably satisfy the interests of the advocates on each side of this issue. Accordingly, the proposed Treaty presented each position as an alternative. In each instance, Alternative A contained a proposal that was confined to sound, musical performances or musical performances fixed in phonograms only, and Alternative B contained a proposal extending protection to audiovisual fixations. This method of drafting acknowledged the disagreement and called upon the participants in the Diplomatic Conference to negotiate toward a solution[5], which was however not arrived at on that occasion.

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[4] The doctrine of work made for hire also applies in the employment context. Thus to the extent a work is created by an employee who is acting within the scope of his employment, the rights comprised in the copyright to any work he creates vest automatically with the employer. In such case, the employer is the lawful author of the work and no written agreement designating the work as a work made for hire, or transferring or assigning rights, is necessary.

[5] In order to facilitate consideration of this matter and provide another model for the possible resolution of the issue a further alternative, Alternative C, was presented. This alternative solution was based on the possibility of making a reservation concerning the scope of the rights of performers. This alternative could be used only if the Diplomatic Conference based its decision on this matter on Alternative B, extending the protection to audiovisual fixations of

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6. However, revisiting the 1996 Diplomatic Conference may be useful to understand the difficulties in the present situation. Many of the issues that feature in the debate on the protection of actors were already debated in December 1996, including the transfer of rights from the performer to the producer, moral rights of audiovisual performers and so-called flexible implementation, according to which Treaty obligations could have been implemented by means of collective bargaining instead of legal statute. Already at that time the difficulties were described as related to the international compatibility of two systems (neighboring rights and collective bargaining), the functioning of which was considered as satisfactory at national level by each of the groups of Member States concerned. The Diplomatic Conference finally adopted a Treaty, the WIPO Phonograms and Performances Treaty (WPPT), which only focused on the exploitation of performances on phonograms, and not in audiovisual media. However the 1996 Conference also adopted a resolution calling for the convening the following year of a Diplomatic Conference on the protection of audiovisual performances. Such a Diplomatic Conference did not take place until December 2000.

B. The Diplomatic Conference on the Protection of Audiovisual Performances

7. The Conference took place from December 7 to December 20, 2000. The discussions at the Diplomatic Conference were based on a Basic Proposal[6] with two alternatives, which reflected the two diverging views on the international protection of audiovisual performances. According to a group of countries, including the United States of America, the Treaty should be as self-standing as possible, without links to other existing Treaties. Other countries, such as the Members of the European Union, considered that the Treaty should be modeled after WPPT by means of reference to the different substantive provisions. This reference had a *mutatis mutandis* character, so the provisions in WPPT would apply with "the necessary changes having been made."

8. As a matter of fact the negotiations in the Diplomatic Conference showed that consensus was possible under the model offered by WPPT for a number of issues, including: right of reproduction; right of making available; right of rental (here the model was rather the TRIPS Agreement); right of distribution; limitations and exceptions; technological measures; rights management information and enforcement provisions. However for a number of other issues, where the divergence was broader, the provisional solutions tested differed notably from provisions in WPPT or contained some sort of compromise with them. This was the case regarding the definition of audiovisual fixation; moral rights of performers; application in time; national treatment and, above all, transfer of rights.

9. The Diplomatic Conference did not adopt a Treaty on the protection of audiovisual performances. While it reached provisional agreement on 19 Articles, no agreement was found on the issue of the transfer of rights from the audiovisual performer to the producer

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performances. By making the reservation provided for in Alternative C, a Contracting Party to the Treaty could limit the protection it granted according to the Treaty to sounds, musical performances and musical performances fixed in phonograms only.

[6] Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference: *http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1437*

./. (Article 12)[7]. A list of the 19 articles provisionally adopted is attached as an Annex to this document. The Diplomatic Conference recommended to the Assemblies of Member States of WIPO, in their September 2001 session, that they "reconvene the Diplomatic Conference for the purpose of reaching agreement on outstanding issues[8]." However, during the Assemblies of 2001, Member States considered that it was necessary to continue consultations to resolve the deadlock over the above-mentioned provision. They therefore decided to carry the issue over to the 2002 session of the WIPO Assemblies. Since then the issue has remained in the agenda of the General Assemblies but the reconvening of the Diplomatic Conference has not yet taken place.

10. Meanwhile, the WIPO Secretariat has maintained a close dialogue with governments and NGOs to bridge the existing gaps and to find possible ways for an evolution in the negotiations. In that regard the issues discussed in the year 2000, have continued to play a relevant role in the seminars and research undertaken by the WIPO Secretariat. Analysis of those issues serves to highlight the specific challenges in the international protection of audiovisual performances and to measure the extent of diverging views in crucial areas. A brief summary of those topics follows.

(a) The Definition of Audiovisual Fixation (Article 2 (b) of the Provisional Agreement

11. According to the Basic Proposal "audiovisual fixation" means the "embodiment of moving images, whether or not accompanied by sound or by the representations thereof, from which they can be perceived, reproduced or communicated through a device." This definition combined with the WPPT definition of phonogram – which excludes fixations incorporated in a cinematographic or audiovisual work – led to the interpretation that music videos and other instances where a music fixation is incorporated in an audiovisual work are not to be considered as phonograms but as audiovisual fixations, subject to the new proposed Treaty. This approach was disputed, among others, by music performers who were concerned by the possibility that they might be subject to the new Treaty, which they considered closer to the interests of producers and less favorable for performers than WPPT.

12. In order to overcome the controversy the solution was found in an agreed statement according to which the definition of audiovisual fixation was without prejudice to the definition of phonogram in WPPT. Accordingly WPPT – and its also disputed interpretations of the notion of phonogram – should be analyzed in delimitating phonograms from audiovisual fixations.

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[7] Outcome of the discussions on Main Committee I (document AVP/DC/34): *http://www.wipo.int/edocs/mdocs/govbody/en/a_36/a_36_9_rev.doc*

[8] See Summary Minutes of the Plenary (document IAVP/DC/36**,** numbers 96 and 97): *http://www.wipo.int/edocs/mdocs/copyright/en/iavp_dc/iavp_dc_36.doc*. For the proposal actually submitted to the General Assembly of 2001, please see document A/36/9 which contains as an annex the 19 articles provisionally agreed in the 2000 Diplomatic Conference: *http://www.wipo.int/edocs/mdocs/govbody/en/a_36/a_36_9_rev.doc*

(b) Moral rights (Article 5 Provisional Agreement)

13. WPPT is the first international Treaty recognizing moral rights for performers (only for aural performances). In the outcome of the 2000 Diplomatic Conference there was a provision on moral rights that followed the model of the WPPT. However, the position of some Governments and stakeholders, including the United States of America and the film studios, contributed to distance the proposal from its WPPT model. According to their proponents these changes were justified to accommodate current practices in the audiovisual industry, such as special formats and editing that takes place in movies shown on airplanes, or advertisements inserted during TV programs in the lower part of the screen.

14. While there were no changes regarding the right of paternity or attribution over the performance, two drafting changes aimed at reducing the scope of the right to integrity contained in WPPT. First, the possibility to object to any distortion, mutilation or other modification of the performance that would be prejudicial to the reputation of the performer was softened by inserting a final tempering expression, that is, "taking due account of the nature of audiovisual fixations[9]." Secondly, an agreed statement was introduced clarifying that modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications.

(c) National Treatment (Article 4 Provisional Agreement)

15. Generally speaking the national treatment provisions negotiated for the proposed Treaty were modeled after WPPT. However in the discussions on this provision there was a lively debate on the principle of "no collection without distribution". During the negotiations the United States of America submitted a proposal stating that no Contracting Party should allow collection of remuneration in respect of performances of nationals of another Contracting Party, unless distribution of such remuneration was made to those nationals. Such a provision was not included in the proposed Treaty and the President of the Committee where the discussion in substance took place (Main Committee I) asked Member States whether the provision on national treatment could be adopted with the understanding that the principle be included in the Records of the Diplomatic Conference.

16. The principle was described as an understanding "that there is no legal basis for collection of remuneration in a Contracting Party in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they received the remuneration collected on their behalf." In the absence of oral opposition the President considered this understanding adopted by consensus. However, the European Community and its Member States submitted

[9] WPPT represents in turn a softer version of the Berne Convention Article 6 *bis*, which contains moral rights for authors and covers not only prejudice to the reputation but also to the honor of the author.

a document stating that the Declaration by the President of Main Committee I was of a unilateral nature and did not imply any commitment for the members of the Committee.

17. The principle of no collection without distribution revealed an area of divergence among Member States, one that was connected to the issue of transfer of rights from the performer to the producer and to the general compatibility of neighboring rights of performers with systems based on collective bargaining but also to the operation of collective management organizations. In this regard, the rule enunciated by the President of Main Committee I is not without precedent. WIPO and its Member States have addressed in several instances the issue of fairness in collective management, both in the relation between rightsholders and users and in the relations among different groups of right holders. Already in 1991, a Memorandum prepared by the International Bureau of WIPO and submitted to the first session of the Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works, stated that it should be required that the license fees collected by a collective administration organization be distributed to the interested copyright owners according to the actual use of their works[10]. The best tradition in collective management has long since taken into account such concerns often not embodied in particular legislation but emanating from the self-regulatory activities of collective management societies. However there is also a legislative tendency to address such concerns in copyright law. The Swiss Federal Copyright Law details in article 60, under the heading of "Principle of Equitableness" the applicable criteria for compensation of right holders[11]. These criteria bound both collective management societies and the administrative body charged of their control. More recently, copyright legislation in Colombia established a series of conditions for the determination of royalties and the distribution of remuneration which should be proportional, among others, to the effective use of the work or performance in question[12]. The European Union (EU) and its Member States have engaged in a process directed to increase transparency, equity, non-discrimination and accountability in collective management, adopting measures that partly reflect the concerns expressed in the principle of no collection without distribution. Among these initiatives feature the April 2004 Communication on the Management of Copyright and Related Rights in the Internal Market and the related consultation to stakeholders; the July 7, 2005, Study on a community initiative on the cross-border collective management of copyright; and the Recommendation of October 18, 2005, on collective cross-border management of copyright and related rights for legitimate online music services. It is yet to be seen whether these developments and

[10] Document BCP/CE/I/3 Questions Concerning a Possible Protocol to the Berne Convention (Part II), page 33). The Memorandum further recommended that the provisions on collective management should forbid the use without authorization of the copyright owners concerned of any license fees collected by such an organization for purposes other than distributing the fees according to the actual use, and covering the actual costs of administration of the rights concerned. The provisions on collective management should require strictly equal treatment for nationals and foreigners whose rights are administered by such organizations.

[11] Criteria include, besides gross proceeds derived from the use of the work or performance, and nature and quantity of the works or performances used, the so called *rule pro rata temporis*, according to which, the ratio of protected to unprotected works or performances has to be considered when determining the proper compensation for right holders.

[12] Law 719, 2001. Article 1 deals with proportionality of tariffs and article 2 with fair distribution. A copy in Spanish is available at: *http://www.wipo.int/clea/en/details.jsp?id=879*

related initiatives in other jurisdictions have an influence on the way that the principle of no collection without distribution is interpreted today by Member States and stakeholders.

(d) Application in Time (Article 19 Provisional Agreement)

18. The general rule in international Treaties on copyright and related rights, reflected originally in Article 18 of the Berne Convention, is that protection applies to subject matter that has not entered the public domain at the moment of the coming into force of a given Instrument and not only to creations and contributions that come into existence after its entry into force. This principle is known as "retrospective" protection. The protection thus extends to both "old" and "new" subject matter, performances in this case. "Old" performances can, of necessity, only exist if fixed.

19. However several groups of producers were of the view, a position latter assumed by the United States of America, that the introduction of new rights might be disruptive to established agreements in the audiovisual industry and that it was necessary to introduce an option not to apply the provisions of the proposed Instrument to fixed performances that exist at the moment of its entry into force. The tentative agreement was based on this new rule, which allowed granting protection only in respect of performances that took place after entry into force of the Treaty.

(e) Transfer of rights

20. The Basic Proposal for the Treaty offered four alternatives regarding the transfer or entitlement to exercise rights of audiovisual performers. One such alternative was based on a rebuttable presumption of transfer of rights from performers to producers. Another was based on the model of Article 14*bis* (2) of the Berne Convention with slight adjustments. It established in favor of the producer an entitlement to exercise the rights of the performers. A third alternative related to the principles of private international law. The definition of the law applicable to transfer was based on the well-known concept of the law of the country most closely connected to the subject matter. The fourth alternative indicated that there should be no provision in the Treaty related to transfers or other similar operations, based on the assumption that the national solutions should prevail[13].

21. Many delegations at the Diplomatic Conference did not seem convinced of the justification for the inclusion of rules on private international law in the Treaty. Apart from the fact that such rules are of horizontal character, they are only found in a limited manner in other copyright treaties. Nevertheless, at the end of the Conference, this alternative (Alternative G) seemed to provide the basis for a compromise solution. It offered a model which did not require any clauses on transfer or entitlement in national law, but brought about an obligation of the Contracting Parties to recognize the transfer of the exclusive rights of authorization by agreement or by operation of law in other Contracting Parties[14].

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[13] The initial position of the United States was based on the presumption of transfer (Alternative E) while the EU advocated an absence of provision (Alternative H).

[14] The main function of Alternative G was to guarantee the recognition of different arrangements for the transfer of rights that are in use in different Contracting Parties. It did so by providing that a transfer of any of the exclusive rights of authorization to the producer shall be governed by the law of the country most closely connected with the audiovisual fixation. This rule would have applied in all cases of transfer of rights, whether by agreement or by operation of law. The rule

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22. However the numerous versions drafted on the basis of Alternative G demonstrated both political difficulties and legal complexities regarding the application of rules on private international law *vis-à-vis* the protection of audiovisual performances. The deadlock was related to the consequences that international recognition of statutory transfers of exclusive rights could entail. Those countries in favor of such recognition demanded certainty and clarity for the producer's ability to exercise exclusive rights of authorization for effective exploitation of films in a global environment. Opposition to that recognition was mainly founded on concerns about the consequences of application of foreign rules on transfer on the domestic exploitation of films. It was feared that such rules could conflict with national legislation in areas such as initial ownership, contract law, content of the rights and the modalities of exercise of rights, including by collective management. Opponents further considered that such international private law rules could affect the international flow of monies derived from exploitation of films, benefiting the countries whose legislation was designated as applicable.

III. RECENT DEVELOPMENTS AT WIPO

A. Development of Information Material

23. Since the 2000 Diplomatic Conference WIPO has undertaken an extensive activity of fact finding and analysis in order to structure a comprehensive, documented view on the present situation. Information provided by the Secretariat includes:

- results of a worldwide survey on national legislation protecting fixed audiovisual performances, which was prepared by the WIPO Secretariat in cooperation with Member States[15];

- two studies on the treatment accorded to performers in current audiovisual production contracts and collective bargaining agreements in several countries[16];

- the results of a study on provisions relating to transfer of copyright and related rights and private international law rules on transfer under the legislation of eight countries. This "Study on Transfer of the Rights of Performers to Producers of Audiovisual Fixations" was undertaken on two stages. The first stage presented an analysis of domestic and private international law in France and the

- United States of America, as well as under relevant multilateral treaties[17]. The first stage included a questionnaire addressed to local experts, in order to develop responses to the same questions in different countries. Subsequently, experts

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would be rebuttable: it would be applicable only in the absence of any contractual clauses to the contrary, and like the previous alternatives, it would apply only to exclusive rights of authorization and only to the particular audiovisual fixation.

[15] *http://www.wipo.int/documents/en/meetings/2003/avp_im/doc/avp_im_03_2.doc*

[16] *http://www.wipo.int/documents/en/meetings/2003/avp_im/doc/avp_im_03_3a.doc*
http://www.wipo.int/documents/en/meetings/2003/avp_im/doc/avp_im_03_3b.doc

[17] *http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=18348*

from Egypt, Germany, India, Japan, Mexico and the United Kingdom provided analyses of their domestic and private international law rules concerning ownership and transfer of audiovisual performer's rights. As stated in the conclusions of the Study the analysis of the authors leads to some skepticism regarding the effectiveness of any choice of law rule, even if one could be agreed upon[18].

24. The Study further concluded that "designating a choice of law rule, even were agreement possible, will not resolve the essential difficulties. On the one hand, the solution is likely to be too complex and unpredictable. On the other hand, simpler solutions may prove unpalatable to performers, because they will tend to favor application of laws chosen by producers. ("Chosen" either as a matter of contract, or by virtue of the producer's selection of the country of its business establishment). It would be easier to resolve questions of applicable law if the process of substantive harmonization were more advanced[19]."

B. National and Regional Seminars

25. Since the year 2000, the WIPO Secretariat has conducted informal consultations among Member States and key stakeholders in the private sector, in order to identify ways and means

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[18] *http://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_4_add.doc*

According to the authors four scenarios explained that skepticism (pages 6 and 7):

1. The treaty would fix a choice of law rule characterizing all rules relevant to transfers as matters of contract, and then would direct application of the law of the contract. This solution would have the merit of uniformity and predictability. But the designated law may be overridden by local mandatory rules or ordre public, unless the treaty also limits their application to extreme cases. (This may be a trend in multilateral choice of law treaties). However, local neighboring rights norms may increasingly be characterized as mandatory; this is the case in Germany, by virtue of the law of 2002, and in France through the combination of the Codes of Intellectual Property and of Labor relations.
2. The treaty would characterize all rules relevant to transfers as matters of substance, and would further designate the law of the country of the work's origin (defined as the country of the producer's effective establishment) as the law applicable to transfers. This too would simplify and enhance predictability. But the forum's mandatory rules and ordre public remain a problem.
3. The treaty would characterize all rules relevant to transfers as matters of substance, and would further designate the law of the country/countries of the work's exploitation (receipt of work) as the law applicable to transfers. This would mean that the laws of each country of exploitation would determine the validity and scope of the transfer. This would alleviate the problem of mandatory rules, because these would be incorporated in the applicable laws. But this approach would greatly complicate exploitation.
4. The treaty would maintain the distinction between law of the contract and law of the substance of the right, but would define what matters fall under each heading. The treaty might further provide that, presumptively, matters concerning the scope of the transfer are governed by the law of the contract. We will not endeavor to articulate what the division between the domains of the contract and of the substantive law should be, particularly, as the national reports indicate, it is not at all clear, even as a matter of domestic law, what constitutes "validity and effects" and what constitutes "substance and alienability."

[19] *http://www.wipo.int/edocs/mdocs/copyright/en/avp_im_03/avp_im_03_4_add.doc*

for making progress on outstanding issues. At the last General Assembly it was decided that the issue remain on the agenda of the General Assembly for its session in September 2009. The General Assembly also decided to organize national and regional seminars in order to promote developments in this area, both at the levels of national legislation and international consensus-building. In fact such seminars already began in 2006, following a similar decision of the General Assembly of that year. So far, seminars have been organized in Asia, Africa, Europe and Latin America. In some cases the issue of audiovisual performances was part of the agenda in events not exclusively focused on performers' rights but with a larger scope and purpose. In preparing these events the WIPO Secretariat has followed a flexible and balanced approach. National and regional seminars have followed different formats depending on the interest expressed by Member States and the stakeholders involved. In all Seminars, Member States and audiovisual performers were involved. However in some of them music performers were also involved; in others, producers and authors of audiovisual content were also invited to speak. Both approaches – one focusing on the audiovisual sector and the whole value chain for audiovisual content; the other focused on performances in a broad sense, covering both music and audiovisual performances – helped to analyze performances in a larger and more meaningful context.

26. In order to assess the results of these activities, in 2008, the Secretariat presented a Summary of the Outcome of the National and Regional Seminars on the Protection of Audiovisual Performances and Stocktaking of Positions (document SCCR 17/3)[20]. The Summary shows that the Seminars have so far achieved a promising degree of meaningful exchange among governments and stakeholders in three key areas, which correspond to three relations that are crucial for the activity of the performer; namely, the relation of the performer to her performance (subject and object of protection); the relation of the performer to other performers (organizations of performers); and the relation of the performer to other stakeholders and the public at large (rights over the performance and exercise thereof). In all these areas interesting experiences were shared and different models and practices were outlined to the benefit of Governments and stakeholders, including the following:

(a) Subject and object of protection

27. Under this cluster a number of topics were debated, including the notion of "performer" and how to delimit an audiovisual performance from other types of performances, either ancillary or not clearly connected to literary and artistic works or expressions of folklore. Also discussed were the nature of performances as objects of protection under related rights and whether it was the creative character of the performance or other features that justified granting intellectual property (IP) protection.

(b) Organizations of performers

28. Another group of issues addressed how performers organize themselves to protect their rights and interests. Under this cluster the following topics were discussed: the development of guilds and unions, on the one hand, and collective management organizations, on the other; the relationship between both types of entities and more generally between labor law and intellectual property and the role of governments and stakeholders in the promotion of

[20] *http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=110712*

efficient performers' organizations. During the Seminars these topics were developed in close cooperation with the organizations of performers and notably with the International Federation of Actors (FIA), the International Federation of Musicians (FIM), as well as organizations for collective management of the rights of performers, such as the Association of European Performers' Organisations (AEPO-ARTIS) and its member societies.

(c) Rights in audiovisual performances and exercise thereof

29. The third big area under discussion covers the relationship between performers and other stakeholders, and the public at large. It refers to the rights granted to performers and how they are transferred and exercised in order to undertake the commercial exploitation of the performances. In every seminar, presentations were made covering national and regional legislation. Debate on the existing legal framework of protection mostly focused on compliance with the international standard, on the one hand, and on prospects for reform of national and regional legislation, on the other.

30. During the Seminars, presentations were made by the WIPO Secretariat on the international protection of audiovisual performances, describing the current lack of protection for fixed audiovisual performances. On several occasions during the Seminars, performers called on governments to re-engage in negotiations with a view to adopt a Treaty on the protection of audiovisual performances. While many governments expressed general support for improving the protection of audiovisual performances at international level, there was no indication that the positions of parties had evolved since December 2000, and that, as a consequence, the prospects for a satisfactory conclusion of negotiations had improved. At the level of developments in the private sector, a recent agreement between FIA and FIM urges Member States to restart negotiations on the basis of the 19 articles provisionally adopted in the year 2000.

C. The Standing Committee on Copyright and Related Rights (SCCR)

31. The 18th session of the SCCR, which took place from May 25 to 29, 2008, debated the issue of the protection of audiovisual performances and decided to keep the issue on the agenda of the SCCR for its next session. The Committee expressed its appreciation for the seminars organized by the Secretariat and encouraged the Secretariat to continue that activity. Presentations were made by the Copyright Offices which had most recently hosted regional seminars[21]. The SCCR reaffirmed its commitment to work on developing the international protection of performances in audiovisual media. It requested the Secretariat to prepare a background document on the main questions and positions. More importantly, it also requested the Secretariat to organize, in Geneva, informal, open-ended consultations among all members of the Committee on possible solutions to the current deadlock.

[21] The Government of Malawi reported on the WIPO Regional Seminar on the Protection of the Rights of Performers in Africa, which took place in Lilongwe, Malawi in January 2009. The Government of Colombia reported about the V International Forum on the Protection of Audiovisual Performances in a Globalized Market which took place in Bogotá in December 2008. The Government of Ukraine hosted in Kyv, from June 22, 2009 to June 23, 2009, the Sub-regional Seminar on the Protection of Works and Performances in the Audiovisual Sector: *http://www.wipo.int/meetings/en/details.jsp?meeting_id=18065*.

32. The protection of audiovisual performances will be maintained on the Agenda of the nineteenth session of the SCCR, which will take place from December 14 to 18, 2009.

D. The Informal Open- Ended Consultations and the WIPO General Assembly.

33. At its session in May 2008 the SCCR had requested that informal, open- ended consultations take place on the issue of the protection of audiovisual performances. Those consultations took place in WIPO on September 8, 2009. According to the informal report presented before the WIPO General Assembly[22] by the Chair of those consultations, Mr. Ositadinma Anaedu, of Nigeria, Governments had stressed their commitment to achieve an international Instrument on the protection of audiovisual performers. The producers and performers had briefed the delegations on their on-going discussions on issues such as transfer of rights from the performer to the producer and the different modalities for the remuneration of actors. Furthermore, the delegations had highlighted the importance of the international protection of audiovisual performers for the cultural and economic development of their countries and the promotion of cultural diversity therein. Some delegations expressed their wish that the Standing Committee in December 2009, would recommend that an extraordinary session of the General Assembly take place in the first semester of 2010, for the purpose of convening a Diplomatic Conference at the end of that year. The discussions during the WIPO General Assembly confirmed the positive trend of the consultations. Again, all delegations who took the floor reiterated their commitment to achieving an international protection for audiovisual performers and several of them referred to concrete practical steps in that regard.

[Annex follows]

[22] Thirty Eight (19th Ordinary) Session, Geneva, September 22 to October 2.

ANNEX

Provisional Agreement on a
WIPO Audiovisual Performances Treaty

CONTENTS

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances,

Recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information,

Recognizing that the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty done in Geneva, December 20, 1996, does not extend protection to performers in respect of their performances, fixed in audiovisual fixations,

Referring to the Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 20, 1996,

Have agreed as follows:

Article 1
Relation to Other Conventions and Treaties

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Performances and Phonograms Treaty or 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 treaties other than the WIPO Performances and Phonograms Treaty, 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;

(b) "audiovisual fixation" means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device[23];

(c) "broadcasting" means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations of sounds; 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" of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation. For the purposes of Article 11, "communication to the public" includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.

Article 3
Beneficiaries of Protection

(1) Contracting Parties shall accord the protection granted under this Treaty to performers who are nationals of other Contracting Parties.

(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

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.

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[23] *Agreed statement concerning Article 2(b):* It is hereby confirmed that the definition of "audiovisual fixation" contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT.

(2) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.

(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.

Article 5
Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right

(i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

(ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those 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 his death, cease 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.[24]

[24] *Agreed statement concerning Article 5*: For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

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 performances fixed in audiovisual fixations, in any manner or form[25].

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 performances fixed in audiovisual fixations 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[26].

Article 9
Right of Rental

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

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[25] *Agreed statement concerning Article 7:* The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.

[26] *Agreed statement concerning Articles 8 and 9:* As used in these Articles, the expression "original and copies", being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

(2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers[27].

Article 10
Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, 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 11
Right of Broadcasting and Communication to the Public

(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.

(2) Contracting Parties may in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that, instead of the right of authorization provided for in paragraph (1), they establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they set conditions in their legislation for the exercise of the right to equitable remuneration.

(3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all.

Article 12

Article 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[28].

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[27] *Agreed statement concerning Articles 8 and 9:* As used in these Articles, the expression “original and copies”, being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Article 14
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 computed from the end of the year in which the performance was fixed.

Article 15
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 in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law[29].

Article 16
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 performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.

[Footnote continued from previous page]

[28] *Agreed statement concerning Article 13:* The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 13 (on Limitations and Exceptions) of the Treaty.

[29] *Agreed statement concerning Article 15:* The expression "technological measures *used by performers*" [emphasis added] should, as this is the case regarding the WIPO Performances and Phonograms Treaty, be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.

(2) As used in this Article, "rights management information" means information which 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 performance fixed in an audiovisual fixation[30].

Article 17
Formalities

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

Article 18
Reservations and Notifications

(1) Subject to provisions of Article 11(3), no reservations to this Treaty shall be permitted.

(2) Any declaration under Article 11(2) or 19(2) may be made in the instruments referred to in Article (…), and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

Article 19
Application in Time

(1) Contracting Parties shall accord the protection granted under this Treaty to fixed performances that exist at the moment of the entry into force of this Treaty and to all performances that occur after the entry into force of this Treaty for each Contracting Party.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party may declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 7 to 11 of this Treaty, or any one or more of those, to fixed performances that existed at the moment of the entry into force of this Treaty for each Contracting Party. In respect of such Contracting Party, other Contracting Parties may limit the application of the said Articles to performances that occurred after the entry into force of this Treaty for that Contracting Party.

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[30] *Agreed statement concerning Article 16:* The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 16 (on Obligations concerning Rights Management Information) of the Treaty.

(3) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(4) Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of the rights provided for in Articles 5 and 7 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

Article 20
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 infringements and remedies which constitute a deterrent to further infringements.

[End of Annex and of document]