

# **Regional Meeting for Heads of Copyright Offices in Arab Countries on the Beijing and Marrakesh Treaties**

organized by  
the World Intellectual Property Organization (WIPO)  
in cooperation with  
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## **TRANSFER OF RIGHTS AND RIGHTS OF REMUNERATION**

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# **I. TRANSFER OF RIGHTS UNDER THE ROME CONVENTION AND THE TRIPS AGREEMENT**



The **Rome Convention**, when it was adopted in 1961, it was a „pioneer” treaty...

... but it has become out-of-date (and it was not nice to audiovisual performers).



# Rome Convention: rights flying away (1)

## Article 7

1. The protection provided for performers by this Convention shall include **the possibility of preventing:**

**(a) the broadcasting and the communication to the public, without their consent, of their performances, **except where the performance used... is itself already a broadcast performance or is made from a fixation;****

**(b) the fixation, without their consent, of their unfixed performance;**

**(c) the reproduction, without their consent, of a fixation of their performance:**

(i) if the original fixation itself was **made without their consent**;

(ii) if the reproduction is **made for purposes different** from those for which the performers gave their consent;

(iii) if the original fixation was **made in accordance with the provisions of Article 15, and the reproduction is made for purposes different** from those referred to in those provisions.

# Rome Convention: rights flying away (2)

## Article 19

Notwithstanding anything in this Convention, **once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.**

- Proposed by the **United States**.
- Amendments proposed by **Austria and Czechoslovakia** to **reduce the scope of application of Article 7** to performances incorporated into **films** (and not to extend it to audiovisual fixations intended for television), but the majority supported the U.S. proposal.
- However, it was made clear during the debate that **Article 19 has no effect upon performers' freedom of contract** in connection with the making of visual and audiovisual fixations, **nor does it affect their right to benefit by national treatment**, even in connection with such fixations.

## Rome Convention: rights flying away (3)

The Rome Convention has applied the „know how” of the „smart girl” of the folk tale who solved the conundrum task of giving a present and still not giving a present to the king.





**The TRIPS Agreement has been even harsher to audiovisual performers;...**

**... it has simply neglected their very existence.**



# TRIPS Agreement: the right of fixation does not extend to audiovisual performances (1)

## Article 14.1

In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

- The right of fixation and the reproduction of fixed performances only extend to fixations on phonograms and the reproduction of such fixations .



# TRIPS Agreement: audiovisual performances not covered (2)

- The **July 23, 1990, draft of the TRIPS Agreement** still included **an alternative on inclusion of the substantive provisions of the Rome Convention** to comply with **as it is provided in Article 9.1 concerning** the substantive provisions of **the Berne Convention** (Article 1 to 21 and the Appendix):
  - „PARTIES shall, as minimum substantive standards for the protection of performers, producers of phonograms and broadcasting organizations, provide protection consistent with the substantive provisions of the Rome Convention.” [Articles 1 to 20 of the Rome Convention...]

## **II. THE 19 ARTICLES ADOPTED IN 2000 (BUT NOT THE TWENTIETH) IN COMPARISON WITH THE WPPT**



**The 1996 and 2000 WIPO Diplomatic Conferences ended with failure from the viewpoint of the issue of transfer of rights...**

**... but the WPPT offered a model to apply for audiovisual performances and the 19 articles provisionally adopted in 2000 served as a basis in Beijing.**



# The 19 articles on exclusive economic rights in comparison with the WPPT (1)

## WPPT Article 6 - BTAP Article 6. Rights in 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.**

- Verbatim **the same.**
- Conflicting interpretations on whether or not WPPT Article 6 also covers audiovisual fixations. Those who argue that it does not, refer to **the definition of „fixation”** in Article 2(c): „'fixation' means the embodiment of sounds, or of the representations thereof,..;”. Counter-argument: in Article 2(c), „fixation” is subject matter of rights while in Article 6(ii), **it is an act covered by an exclusive right. BTAP Article 6 does not leave any doubt in this regard.**

# The 19 articles on exclusive economic rights in comparison with the WPPT (2)

## WPPT Article 7 – BTAP Article 7. Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed [in phonograms][in audiovisual fixations], in any manner or form.

➤ *Mutatis mutandis* the same.

# The 19 articles on exclusive economic rights in comparison with the WPPT (3)

## WPPT Article 8 – BTAP 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 phonograms][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.

➤ ***Mutatis mutandis*** the same.

# The 19 articles on exclusive economic rights in comparison with the WPPT (4)

## WPPT Article 9 – BTAP 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 phonograms][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.

[(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, **on April 15, 1994**, had and continues to have in force a system of **equitable remuneration** of performers for the rental of copies of their **performances fixed in phonograms**, may **maintain** that system **provided** that the commercial rental of phonograms is **not giving rise to the material impairment of the exclusive right of reproduction** of performers.]

[(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.]

- **Paragraph (1) is *mutatis mutandis* the same. WPPT paragraph (2) corresponds to TRIPS Article 14.4, while BTAP paragraph (2) is the adaptation of TRIPS Article 11 concerning cinematographic works to audiovisual performances.**

# The 19 articles on exclusive economic rights in comparison with the WPPT (5)

## WPPT Article 10 – BTAP 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 phonograms][in audiovisual fixation]**, 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.**

➤ *Mutatis mutandis* the same.



# The 19 articles on the right of broadcasting and communication to the public in comparison with the WPPT (1)

## **WPPT Article 15. Right to Remuneration for Broadcasting and Communication to the Public**

(1) **Performers and producers of phonograms shall enjoy the right to a single equitable remuneration** for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties **may establish** in their national legislation that the single equitable remuneration **shall be claimed from the user by the performer or by the producer of a phonogram or by both**. Contracting Parties may enact national legislation that, **in the absence of an agreement** between the performer and the producer of a phonogram, **sets the terms according to which** performers and producers of phonograms **shall share the single equitable remuneration**.

(3) Any Contracting Party **may**, in a notification deposited with the Director General of WIPO, **declare that it will apply** the provisions of paragraph (1) **only in respect of certain uses**, or that it **will limit** their application **in some other way**, or that it **will not apply** these provisions at all...

# The 19 articles on the right of broadcasting and communication to the public in comparison with the WPPT (2)

## **BTAP 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 WIPO **declare that**, instead of the right of authorization provided for in paragraph (1), they will 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 will **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.

# The 19 articles on the right of broadcasting and communication to the public in comparison with the WPPT (3)

## Main differences between WPPT Article 15 and BTAP Article 11

- WPPT Article 15 provides for a single equitable remuneration jointly to two categories of owners of related rights: performers and producers of phonograms, while BTAP Article 11 provides for a stand-alone right to performers (since audiovisual producers enjoy exclusive rights under the Berne Convention).
- BTAP Article 11 first provides for an exclusive right and then for the possibility of rather granting a mere right to equitable remuneration. WPPT Article 15 does not provide for an exclusive right.

## Main similarity between WPPT Article 15 and BTAP Article 11

- Both Treaties allow different kinds of reservations which may also go so far as declaring that the Contracting Party does not provide for such a right

# Right to remuneration, reservations and national treatment (1)

## WPPT Article 4. National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals **with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.**

(2) The obligation provided for in paragraph (1) **does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.**

- **The right of reproduction is specifically provided in the Treaty. When it is limited to a right to remuneration (e.g. for private copying) under Article 16 on the three-step test it, the obligation to grant national treatment is not eliminated.**

# Right to remuneration, reservations and national treatment (2)

## BTAP Article 4. National Treatment

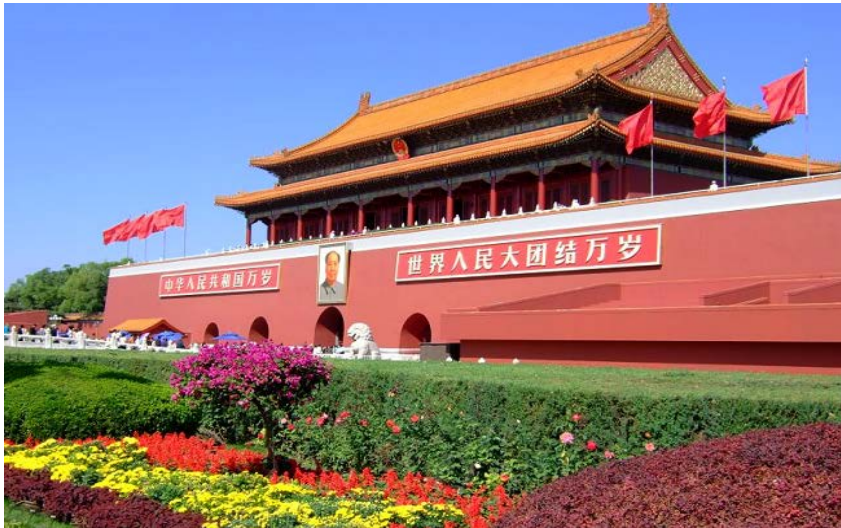
(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals **with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.**

(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.

- For the **limitation of the right of reproduction to a right to remuneration, the same applies as in the case of WPPT Article 4.**
- The **reciprocity provisions are similar to those included in Rome Article 16.**

# **III. BEIJING – AUDIOVISUAL PERFORMERS ARE NOT IP-OUTCASTS ANYMORE**



**In the beneficial atmosphere created by the „Beijing spirit” ...**

**... audiovisual performers, at last, were let in the world of IP rights.**



**AND NOW, LADIES AND GENTLEMEN,**

# ***WIPO PRESENTS***

**THE LONG-EXPECTED FINAL PART OF ITS POPULAR SERIES**



***THE  
TWENTIETH  
ARTICLE***

***From Failure to Success***

# The 20th article – Article 12 of the BTAP (1)

## Article 12 on Transfer of Rights

(1) A Contracting Party **may provide** in its national law **that once a performer has consented** to fixation of his or her performance in an audiovisual fixation, **the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be [1] owned or [2] exercised by or [3] transferred to the producer** of such audiovisual fixation **subject to any contract to the contrary** between the performer and the producer of the audiovisual fixation as determined by the national law.

(2) A Contracting Party **may require** with respect to audiovisual fixations produced under its national law that **such consent or contract be in writing** and signed by both parties to the contract or by their duly authorized representatives.

(3) **Independent of the transfer** of exclusive rights described above, **[1] national laws or [2] individual, [3] collective or [4] other agreements may provide** the performer with the **right to receive royalties or equitable remuneration** for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

(Inner numbering inserted.)

## The 20th article – Article 12 of the BTAP (2)

- Under paragraph (1) of Article 12, in those cases where the performers consent to the fixation of their performances in audiovisual fixations, **the freedom of Contracting Parties extends to the possibility of providing**, in the absence of any contract to the contrary, for (i) **the producers' original ownership** of the exclusive rights under Articles 7 to 11 of the Treaty; (ii) **the producers' right to exercise those rights** (“eligibility to exercise”); or (iii) the **transfer** of those rights to the producers.
- Paragraph (2) allows subjecting the validity of the “**consent or contract**” to **written form**.
- Paragraph (3) is about the **possibility (but not an obligation)** of national laws or individual, collective or other agreements **to provide performers with a right to receive “royalties or equitable remuneration,”** independently of the **transfer of their rights**.
- These provisions, as regards the possibility and effect of the transfer of rights, **differ both from Article 19 of the Rome Convention and from the alternatives considered in 2000** – although they use certain elements of some of those alternatives.

## The 20th article – Article 12 of the BTAP (3)

- The provisions of Article 12 of the new Treaty **differ from the provision of Article 19 of the Rome Convention** since, contrary to the latter, **the rights provided in the new Treaty do have “further application”** for their full term of protection **irrespective of** whether they are **(i) owned and fully maintained by a performer** (which, in the case of audiovisual works, hardly probable); **(ii) exercisable by the producer; (iii) transferred to the producer;** or **(iv)** (as soon as the performer consented to the fixation of his or her performance) **owned by the producer.**
- The Basic Proposal submitted to the **2000 Diplomatic Conference** contained **four alternatives** concerning the transfer of rights. **Article 12 of the new Treaty covers two of those alternatives: Alternative E on “Transfer”** about a **rebuttable presumption** of transfer of rights; and **Alternative F on “Entitlement to Exercise Rights”** the essence of which is indicated by the title.

# The 20th article – Article 12 of the BTAP (4)

- Under **Alternative G in the 2000 Basic Proposal on “Law Applicable for Transfers,”** “in the absence of any contractual clauses to the contrary,” the transfer would have been governed “**by the law of the country most closely connected** with the particular audiovisual fixation” (and, the alternative included a detailed definition of such a country). **Article 12** of the new Treaty **is not based on such a private international law solution.**
- In 2000, **Alternative H seemed to be the most simple**; it consisted in not including any provision in the Treaty on the issue of transfer of rights and, thus, **leaving it completely to national laws. Certain opinions: Article 12 corresponds to Alternative H** since it also offers flexibility for national laws. It is submitted that, **although Article 12 is truly flexible to a certain extent, this is not the case.**
  - Under Article 12, the **options are limited.**
  - **No possibility of not recognizing transfer of rights on a „public order” basis.**

# Comparison with Article 14*bis* of the Berne Convention (1)

## Article 14*bis* of the Berne Convention

(1) Without prejudice to the copyright in any work which may have been adapted or reproduced, a cinematographic work shall be protected as an original work. The owner of copyright in a cinematographic work shall enjoy the same rights as the author of an original work, including the rights referred to in the preceding Article.

(2)(a) Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed.

(b) However, in the countries of the Union which, by legislation, include among the owners of copyright in a cinematographic work authors who have brought contributions to the making of the work, such authors, if they have undertaken to bring such contributions, may not, in the absence of any contrary or special stipulation, object to the reproduction, distribution, public performance, communication to the public by wire, broadcasting or any other communication to the public, or to the subtitling or dubbing of texts, of the work... (continues)

# Comparison with Article 14*bis* of the Berne Convention (2)

## Article 14*bis* of the Berne Convention (continued)

**(3) Unless the national legislation provides to the contrary, the provisions of paragraph (2)(b) above shall not be applicable to authors of scenarios, dialogues and musical works created for the making of the cinematographic work, or to the principal director thereof. However, those countries of the Union whose legislation does not contain rules providing for the application of the said paragraph (2)(b) to such director shall notify the Director General by means of a written declaration, which will be immediately communicated by him to all the other countries of the Union.**

# Peaceful coexistence or mutual protection? (1)

## Study on transfer of the rights of performers to producers of audiovisual fixations

(Jane Ginsburg – André Lucas; WIPO document AVP/IM/03/4 )

„Audiovisual performers’ rights... divide **roughly into two categories**: (1) countries having a developed system of **neighboring rights** that constitute **exclusive rights and/or remuneration rights independent of contract**; (2) countries in which audiovisual performers’ protections (to the extent they exist) are essentially **creatures of contract**.

„In the **first group**, neighboring rights protections **may supplement or override contractual arrangements**. In the **second group**, the **principal right** which may be asserted “against the world” (*opposable à tous*) is **the right to authorize the fixation and incorporation of the performance in an audiovisual work**; any rights the performer enjoys thereafter **must be negotiated by contract** with the producer... To the extent a United States of America audiovisual performer might be considered a co-author of the work (the characterization of U.S. performers’ rights is in fact unclear), she will not in practice enjoy a property right, because her contribution to the work will almost inevitably be deemed “for hire”, in which case all rights will vest in the producer.”



# Peaceful coexistence or mutual protection? (2)

- Statutory rights (also „unwaivable” rights) v. contract-based rights (including residuals”)
- Collective management organizations v. guilds. How they may cooperate?
- Membership as a condition?
- „Unclaimed” remuneration – „undistributable” remuneration.
- „No collection without distribution!”
- National treatment and reciprocity implications.

**THANK YOU**

شكرا

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