

## **WIPO Regional Workshop on the Beijing and Marrakesh Treaties**

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### **The Beijing Treaty:**

Performers' perspective

Transfer of rights and remuneration schemes

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## **Preamble: title and aim of the Beijing Treaty (BTAP)**

- a) A Treaty on audiovisual "performances"
- b) ... in order to "*develop and maintain the protection of the rights of performers in a manner as effective and uniform as possible*"
- c) Contrary to the opinion of some experts, the BTAP does not guarantee a consolidation of rights in the hands of the audiovisual producers, nor does it provide exclusive rights to such producers
- d) Producers already protect their interests thanks to the transfer of rights of the authors of the audiovisual work
- e) BTAP is one of the three WIPO Internet Treaties (together with WCT and WPPT) ; "*recognizing the need to fix new international rules*"
- f) BTAP completes the Rome Convention (1961) and the WPPT concerning the protection of performers
- g) BTAP is flexible concerning the sensitive issue of the transfer of rights to producers or users
- h) Obviously, such transfer of rights shall be financially compensated : the controversy about exclusive rights VS right to remuneration seems dogmatic

## **1. Relation to other Conventions and Treaties (Article 1)**

- a) Nothing in the BTAP shall derogate from obligations resulting from the WPPT and/or from the Rome Convention (1961)
- b) Some consequences:
  - The notion of "phonogram" is a limit to the notion of "audiovisual fixation"
  - The right of reproduction, as defined by the Rome Convention (article 7-1-c-(iii)), may be exercised per "*purpose*" or type of exploitation, despite article 19 of the Rome Convention (see infra)
- c) Article 19 of the Rome 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*") does not limit the performers' freedom of bargaining the content of contracts when they authorize the audiovisual fixation of their performances, nor does it affect their right to benefit national treatment (see M. Ficsor, WIPO Regional Meeting of Muscat, April 2015)

## 2. Definitions (Article 2)

### 2.1 - Who is protected ?

- a) “*performers*” : designate those who perform the work (including a work being in the public domain) or expression of folklore
- b) Agreed statement concerning Article 2 makes clear that such notion includes those who perform works created in the course of a performance (improvisations)
- c) *Extras, walk on actors or figurants* do not own performers’ rights (NB: in France, Court decisions say that there is no extra in the field of music performances)

### 2.2 - What is protected ?

- a) “*audiovisual fixation*”: designates the result of the act of audiovisual fixation (*i.e.* embodiment of moving images whether or not accompanied by sounds) of unfixed performances
- b) It is essential not to confuse the audiovisual fixation of an unfixed performance and the reproduction/incorporation of an already fixed performance (phonogram or audiovisual fixation) in an audiovisual product
- c) “*phonogram*”: designates the result of an exclusively aural fixation (see article 3-b of the Rome Convention), protected by the WPPT and/or the Rome Convention, not by the BTAP This is confirmed by the Agreed statement concerning article 2 of the BTAP
- d) Agreed statement concerning Article 2 (b) of the WPPT says “*it is understood that the definition of phonogram provided in Article 2 (b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work*”
- e) Therefore, the audiovisual broadcasting and communication to the public of a commercial phonogram incorporated in an audiovisual product is protected by article 15 of the WPPT (right to equitable remuneration)
- f) There are various categories of audiovisual fixations, taking into account the purpose of such fixation, and this may have an impact on contractual practices of transfer of rights and remuneration of the performers:
  - Cinematographic film
  - TV fictional movie
  - Recording of a show
  - Music video
  - Advertising
  - Short films intended for on line uses
- g) Specific regime at national level may coexist with performers’ right resulting from the BTAP

- Performances qualified as work
- Right of publicity (voice, likeness, name)
- Live music performances
- Other ?

- h) Question: what about the exclusively aural fixation of music performances for the purpose of an original movie soundtrack ?
- i) Question: what about dubbing for the purpose of international exploitation of a film?

### 2.3 - “communication to the public”

- a) Includes making an audiovisual fixation audible or visible to the public (see Article 2 (d))
- b) Question : would the act of making an audiovisual fixation only “audible” be protected by the BTAP or by the Rome Convention and the WPPT ?

## 3. Beneficiaries (Article 3)

3.1 - The single criterion of nationality of each performer: difficult to apply as an audiovisual product can be the result of a vast collaboration involving performers from various countries, including for instance in case of the audiovisual recording of an opera show

3.2 - The assimilation to nationals of those who have their “*habitual residence*” in the country where the protection is claimed

- a) “*habitual residence*”: when ?! (the same criterion in the Berne Convention is interpreted as designating the habitual residence at the time of the publication of the work...)
- b) “*habitual residence*”: how to secure such information ? (national legislation could clarify this, for instance in connection with the tax regime of identification of the main residence)
- c) This criterion will be difficult to implement concerning equitable remuneration paid by the users in any country of exploitation which is not the country of production

3.3 - Rome Convention and WPPT refer mainly to the nationality of the producer, with an easy implementation

3.4 - Question : may BTAP Contracting Parties adopt a wider (and more simple) criterion of designation of beneficiaries of the national treatment (see for instance the rule provided for in article 5 (3) of the Berne Convention when the author is not a national of the country of origin of the work) ?

#### **4. National Treatment (Article 4)**

4.1 - Assimilation of nationals of other Contracting Parties to nationals of the each Contracting Party

4.2 - Possible limitation of the extent and term of national treatment in relation with reciprocity, according to the rights granted in Article 11 (1) and (2)

4.3 - BTAP does not impose national treatment concerning rights which are not granted by the Treaty (for example: right to remuneration for private copying, right to remuneration for rental)

4.4 – A national legislation may provide for a wider national treatment than the one imposed by the BTAP

#### **5. Moral Right (Article 5)**

5.1 - Right to be named (except when impossible for technical reasons)

a) When an audiovisual fixation is exploited

b) When a live performance (*i.e.* unfixed) is communicated to the public (during a show)

5.2 - Right to object the modification of the performance that would be prejudicial to the reputation of the performer (“*taking due account of the nature of audiovisual fixations*”). The Agreed statement concerning Article 5 clarifies the limit of such right: it does not concern modifications made in the normal course of exploitation such as editing, compression, dubbing or formatting in existing or new media or formats

#### **6. Economic Rights in their Unfixed Performances (Article 6)**

6.1 - Exclusive right !

6.2 - Direct broadcasting and communication to the public (of sounds or of images or of images and sounds), including non-interactive on line transmission to the public

6.3 - Audiovisual fixation

#### **7. Right of Reproduction (Article 7)**

7.1 - Exclusive right !

7.2 – “*direct or indirect*” reproduction : includes the reproduction of an audiovisual fixation from a broadcast or from a communication to the public

7.3 - Agreed statement concerning Article 7: the notion of “*reproduction*” includes the storage

7.4 - Question : shall we take into account the purpose of the reproduction (see Article 7 -1-(c)(iii) of the Rome Convention) when the right of reproduction is exercised ?

## **8. Right of Distribution (Article 8)**

8.1 - Exclusive right !

8.2 - Sale or other transfer of ownership of the original or a copy (tangibles objects)

8.3 - Possible exhaustion of the right, at national level, after the first sale or other transfer of ownership

## **9. Right of Rental (Article 9)**

9.1 - Exclusive right !

9.2 - Rental of tangible original or copy (not the on line making available)

9.3 - Possible exemption at national level unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction

9.4 - No option in the BTAP for a system of equitable remuneration (contrary to the WPPT)

## **10. Right of Making Available (Article 10)**

10.1 - Exclusive right !

10.2 - Idem WPPT

10.3 - Does not include non-interactive on line transmission (*i.e.* communication to the public)

## **11. Right of Broadcasting and Communication to the Public (Article 11)**

11.1 - Exclusive right !

11.2 - Possible alternative at national level (subject to notification to WIPO) : right to equitable remuneration, with possible conditions for the exercise of such right (mandatory collective management, specific regime of determination of scale, etc.)

11.3 - Any Contracting Party may declare that it will apply the exclusive right or the right to remuneration only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply at all exclusive right and right to equitable remuneration

11.4 - Such declaration shall have an influence on national treatment (see Article 4 (3))

## 12. Transfer of Rights (Article 12)

12.1 - Three options that may be adopted at national level :

- a) Rebuttable presumption of transfer to the producer of exclusive rights provided for in Article 7 to 11 once a performer has consented the fixation
- b) Obligation that exclusive rights be exercised in writing
- c) *“Independent of the transfer of exclusive rights described above, national laws or individual, collective or 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”*

12.2 - These options may be cumulative

12.3 - The presumption of transfer of exclusive rights is not admitted concerning the exclusive rights of performers in their unfixed performances (see Article 6)

12.4 - The presumption of transfer of exclusive rights shall be rebuttable (see Article 12 (1): *“...subject to any contract to the contrary”*) (idem Article 14bis (2) (b) of the Berne Convention: *“in the absence of any contrary or special stipulation”*)

12.5 - A presumption of transfer of exclusive rights is a limitation (see Professor Samuel Ricketson). Therefore, the Three Steps Test of Article 13 (2) shall apply and the presumption shall be confined *“to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interest of the performer”*. In our view, a transfer imposed by law to the performer without adequate remuneration would prejudice the legitimate interest of the performer

12.6 - Contracting by written provides legal security to the producer, especially when the applicable law is the law of the country of exploitation of the audiovisual fixation.

12.7- Article 12 refers to *“royalties or equitable remuneration”*. In fact, an equitable remuneration scale can be based on the sharing of incomes (i.e. royalties). Some national regulation or collective agreements may adopt such scale for the benefit of “principal” performers (i.e. feature artists)

12.8 - Equitable remuneration may be paid to performers (via an organization) by the users (see Article 12 of the Rome Convention and Article 15 of the WPPT concerning the broadcasting and communication to the public of commercial phonograms). Such regime may be mandatory in any country of exploitation of audiovisual fixations, with mandatory collective management of such performer’s right to equitable remuneration

12.9 - Equitable remuneration may be paid to performers by the producer and result from a collective agreement. Such collective agreement may designate a collecting society in order to collect the equitable remuneration and distribute it to the performers

12.10 - Question : a right to “equitable remuneration” means that the minimum scale of the remuneration shall be fixed collectively through regulation or collective bargaining ?

12.11 - Equitable remuneration regime is compatible with a transfer of exclusive rights to the producer

- a) When the payment is done by the users in countries of exploitation
- b) When the scale of the remuneration is a minimum wage to be fulfilled in the individual contract signed by both parties (performer and producer)
- c) When the scale result in royalties or more generally differed remuneration to be paid in proportion of the incomes or in proportion of the volume of exploitation

12.12 - Producers could be in favor of a payment of equitable remuneration to the performers directly by the users through collecting societies in countries of exploitation, as it does not prejudice their bargaining power generally based on the ownership of the exclusive rights of authors and performers

### **13. Remuneration schemes**

13.1 - Individual contracts, independently of a possible right to equitable remuneration

- a) Remuneration of the labour (the performer being an employee or a self-employed worker) shall be governed by labour laws and collective agreements
- b) Remuneration of the transfer of intellectual property rights shall be additional (not included in the remuneration of the labour)
- c) An adequate scheme of such remuneration of intellectual property rights may be :
  - A flat fee taking into account the importance of the performance, the importance of the budget of the production, the nature of the rights transferred to the producer and each purpose or destination of such transfer
  - Royalties to the benefit of “principal” performers and paid on a regular basis

13.2 - Individual contracts, in the framework of collective agreements

- a) Minimum wages per session or day of rehearsal and recording
- b) “residuals” paid on a regular basis and based on the volume of exploitation or on shares of “net” incomes
- c) Royalties to the benefit of performers and paid on a regular basis

13.3 - Mandatory schemes of equitable remuneration to be paid by users

- a) Idem Article 12 of Rome Convention and Article 15 of WPPT, but only for performers
- b) Mandatory collective management



- c) Scale (rate) fixed through collective regulation or collective agreement

#### 13.4 - Compulsory license

- a) Only concerning uses covered by a right to equitable remuneration (a compulsory license is not compatible with exclusive rights)
- b) Mandatory collective management
- c) Scale (rate) fixed through collective regulation

#### 13.5 - Social regime of remuneration relating to intellectual property rights

- a) Salary with national insurance contribution ?
- b) Scheme similar to copyright fee ?
- c) Other schemes ?

#### 13.6 – Some specific cases

- a) Music videos
  - The audiovisual producer is generally the producer of the phonogram incorporated in the video
  - Exclusive contracts signed by “principal” music performers include stipulations dealing with audiovisual fixation of their performances and the exploitation of such audiovisual fixation
  - Collective agreements and/or collective management dealing with rights of the other performers (musicians and dancers)
  - Question : Are the broadcasting and the communication to the public of such music video submitted to the equitable remuneration right of Article 15 of the WPPT ?
- b) Recording of shows
  - The participation in a show that it obviously recorded shall not mean that performers on stage authorize the fixation of their performances
  - The audiovisual fixation of such performances shall be authorized by each performer, subject to specific domestic laws and regulation relating to the manner into which performers be represented in connection with the exercise of their rights if several of them participate in the same performance (see Article 8 of the Rome Convention)
  - Permanent ensemble (orchestra, ballet, etc.) : the authorization is given to the producer by the employer of the performers

#### 13.7 – Free of charge transfer of rights

- a) Fixation of performances shall be nevertheless submitted to authorization

- b) Some uses covered by an exception to the rights are free of charge (educational purpose, archives, etc.)
- c) Some uses covered by an exception to the rights are not free of charge (private copying, educational purpose, etc.)
- d) Non-commercial uses may be authorized free of charge by written
- e) Donation : submitted to specific contract ?

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