WIPO REGIONAL WORKSHOP ON THE OPPORTUNITIES AND CHALLENGES IN THE IMPLEMENTATION OF THE BEIJING AND MARRAKESH TREATIES

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COLLECTIVE MANAGEMENT FOR AUDIOVISUAL PERFORMERS

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Allow me to start by pointing out that a strong and efficient copyright system rests on three pillars: (i) an appropriate legal framework, providing substantive rights to creators; (ii) efficient mechanisms for enforcing such rights – not just at Court level, but also at public Administration and customs level; and (iii) a developed collective management system.

Lack or weakness of any of these three pillars would lead to the failure of the whole system, but as per today's topic, I will briefly focus on the third one: the collective management of rights on audiovisual performances.

History shows us that as from the enactment in 1710 of the Statute of Queen Anne, copyright has been considered as the most efficient mechanism for encouraging creativity and, thus, social and technological progress. As it enhances welfare, growth and development, the protection of the results of human creativity and intellectual effort represents an indisputable advantage for any society.

Thus, the need for an efficient copyright system represents an imperative for the modern society. Governments should therefore secure copyright protection, not just by enacting the corresponding rights, but also by ensuring that such legislation works in practice, serving the interests for which it was adopted – namely to stimulate creativity and thereby promote the cultural, social and economic development.

The public authorities have therefore an interest in ensuring that the copyright legislation is fully implemented. This presupposes that there are appropriate

mechanisms for the management of rights in such situations where individual exercise by the right holder is not possible or feasible – the case of mass uses, such as public performance or broadcasting of audiovisual and musical works, or cable retransmission of TV programs.

It is therefore in these situations (where individual exercise is not possible or feasible) that collective management plays its role, at the center stage of copyright protection – as one of the three pillars on which the whole system rests. As such, collective management should be a matter of public policy, in so far as it serves the interests for which copyright legislation itself is adopted. As provided under Spanish Copyright Act, *collective management organizations serve the public interest of copyright protection*.

So let me be clear in this point: collective management does not only benefit right holders or users, or both, but the whole society, as it serves as a tool for protecting copyright – which, as stated before, has proven to be the most efficient mechanism for encouraging creativity and, thus, for enhancing welfare, growth and development.

Therefore, collective management has a significant role to play and, consequently, it is important for the public authorities to encourage and support such activity, as the most important factor for the effective operation and protection of copyright and related rights.

Practical reasons for the collective management are well known, notably with regard to audiovisual performances:

- There are a **large number of *users*** of Audiovisual works: TV stations, cable and satellite operators, digital platforms, etc.

- Audiovisual works are **massively used**: TV programs, on demand services, for instance.

- There are **multiple right holders** concerned by the same exploitation: an audiovisual works may have several authors (director, script writer, music composer, etc.), a producer and many performers.

No one can expect from every right holder to monitor the use of his or her works and performances by every single TV station, cable operator, and so on. And the other way

round, users cannot contact each and every right holder when using their works and performances.

But before entering into the collective management, I shall briefly recall the typology of the rights most commonly granted to performers on their audiovisual performances:

1. **MORAL RIGHTS:** Provided under article 5 of the Beijing Treaty, moral rights tend to protect the personal and unique contribution of the performer to the work, because each performer imprints his own personality when performing. These rights are:

   - The **paternity right**, or the performer's right to be identified as the performer of his performance; and

   - The **integrity right**, or the performer's right to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

2. **ECONOMIC RIGHTS:** Provided under article 6 through 11 of the Beijing Treaty, the economic rights grant the participation of performers in the exploitation of their performances, most commonly by granting them the exclusive right of authorizing such exploitation, but also, in certain cases, by granting them a remuneration right.

   - The **exclusive right** is the performer's right to authorize the exploitation of his performance, more specifically the communication to the public and the fixation of such performance, as well as the reproduction, distribution, rental, communication to the public and making available of their fixed performances.

     Generally speaking, the holder of an exclusive right is entitled to license the use or exploitation of his work or performance. However, day-to-day practice shows that performers usually agree the conditions for their authorization regarding the exploitation of their performances from a position of clear inferiority vis-à-vis the producer. Therefore, and also because of the nature of audiovisual works (in which the producer needs to consolidate all rights securing him the peaceful exploitation of the work), it is usual for national legislations to provide for a presumption of transfer of the performers'

exclusive rights to the producer while, at the same time, granting performers the unwaivable right to receive a fair and equitable remuneration for the exploitation of his performances.

- The way **remuneration rights** provide for protection is governed, therefore, not by means of granting the performer the right to authorize any specific use [such power has been transferred to the producer], but by retaining [because of such transfer] the right to receive an equitable remuneration for each use [licensed by the producer]. The user, who benefits from the exploitation of the work, pays this remuneration.

  This solution is reflected in article 12 of the Beijing Treaty, whose third paragraph provides that "i*ndependent of the transfer of exclusive rights*" to the producer, "*national laws (…) may provide the performer with the right to receive (…) equitable remuneration for any use of the performance*", specifically including the communication to the public and the making available.

In most countries, and because of the practical issues I have already mentioned, the remuneration rights are subject to compulsory collective management, as the only possible way of making them effective, as collective management organizations are in a much better position for:

- Monitoring the use of the performances, despite the large number of users;

- Negotiating with such users and obtaining global arrangements providing for a satisfactory remuneration for performers;

- Control the revenues; and

- Distribute such revenues accordingly.

The **collection** depends on the tariffs, which can be of various forms (lump sum, percentage of the user's income, fixed amount per time unit, etc.). As to their determination, there are many possibilities – depending on the national law:

- Determination by the collective management organization,

- Determination by negotiation with the user, with recourse to arbitration or a court when no agreement can be reached, or to an administrative commission,

- Determination directly by a jurisdiction or an administrative commission.

For the **distribution** of rights, it is very important that users (from which the collective management organization have collected the remuneration) inform about the uses made and of the identity of participating performers – the "play lists", or lists of works broadcasted or exploited by the user. Where playing lists are not available, surveys are carried out. It may be possible to compare different sectors, or to do a mix of different systems.

In any case, the distribution must be as accurate as possible, securing each performer a fair and equitable participation in the collection, proportional to the use of their performances. Also, it is worth mentioning the "*no collection without distribution*" principle, by virtue of which the collecting society shall not exclude from the distribution any performer on whose behalf has already collected.

As to the trans-border activity, i.e. payments to foreign performers, collecting societies conclude reciprocal agreements for the exchange of remuneration collected in their respective territories on behalf of the members of the other Party. For a more transparent, efficient and cost-effective trans-border management, performers societies from all over the World incorporated SCAPR, the Societies´ Council for the Administration of Performers Rights, as a collaboration platform aiming to develop practical cooperation between them in order to improve the exchange of data and performers' rights payments across the borders. For such purpose, SCAPR sets administrative, technical and legal standards in relation to the collective management of performers' rights, on such items as administrative procedures, legal proceedings and arbitrations, collecting procedures, tariffs and distribution schemes.

Within such objectives, and bearing in mind that collective management is at the center stage of rights protection, SCAPR also carries out international development activities, mainly by helping to build collective management organizations for performers in countries where there are none or, where they already exist, but still young or emerging, by organizing (and funding) staff-training sessions, and by assisting them in setting up licensing and distribution schemes.

I cannot finish my intervention without saying that the work of SCAPR and its Cooperation and Development Working Group is only possible through the cooperation, support and coordination received from national authorities in each country (such as the Copyright Office) and the World Intellectual Property Organization, WIPO – with whom, for instance, SCAPR is currently implementing the use of a software specifically designed for the distribution of performers' rights, the WIPOCOS, which facilitates compatibility of rights management systems in developing countries with international technical standards and systems as well as the integration of digital technologies in collective management operations.

Of course, should anyone wish to learn more about our cooperation and development activities, please don't hesitate to contact me or our General Secretary – for more information you may visit our Web page, at www.scapr.org.

And, lastly, I think its worth mentioning that collective management organizations, by means of their social function (sometimes imposed by the law), promote culture and participate directly in funding number of cultural events in order to contribute to preserving the cultural diversity and artistic vitality in the different countries.