Copyright Law: Rights in Audiovisual Performances*

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In November 2003 the World Intellectual Property Organization convened an *ad hoc* informal meeting of the general assembly of WIPO member nations to revisit the protection of audiovisual performances begun but not completed in a WIPO diplomatic conference in December of 2000. This meeting signaled a continuing interest in an audiovisual performances treaty.

The International Federation of Actors (FIA) took on a significant role as a non-governmental organization (NGO) at the diplomatic convention convened by the World Intellectual Property Organization (WIPO) in December 2000 to conclude an international treaty for establishing rights for performers in audiovisual works. Ultimately the diplomatic conference narrowly failed to find consensus on the issue of transfer of rights, one of the twenty articles that would have formed the substance of a new treaty for the protection of audiovisual performances. The *ad hoc* meeting signifies that finishing the work begun at the diplomatic conference in 2000 has not been abandoned.

FIA represents hundreds of thousands of professional performers working in film, television, theatre, dance, music, variety and other significant fields of the cultural sector. FIA has been the voice of performers whose work is captured in audiovisual recordings. FIA strongly believes that the intellectual property rights of audiovisual performers need and deserve to be acknowledged and adequately protected at international level, in recognition of the quality of their creative work as well as, their key contribution to the success of a flourishing film, television and digital media industries.

During the a*d hoc* meeting, FIA, on behalf of more than 100 performers, trade unions, guilds and associations in 76 countries, called on WIPO member States:

> (1) to agree to reconvene a Diplomatic Conference in order to finalize without further delay a new treaty on audiovisual performances that will finally grant basic economic and moral rights to performers and contain no provision on the issue of rights' management (transfer of rights);
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> (2) to confirm the nineteen articles at least as they were provisionally approved in December 2000, and
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> (3) to endeavor, throughout this process, to ensure the widest possible ratification of the future performers audiovisual treaty.

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Given the wide gulf between the performers organizations and those of producers, the key protagonists, and that there has been only limited discussion among the WIPO members about the audiovisual performer issues since the failed WIPO Diplomatic Conference in 2000 the meeting progressed better than might have been expected

At the two day *ad hoc* meeting the WIPO General Assembly session was addressed by Melissa Gilbert, President of the Screen Actors Guild (SAG), Gerard Essomba an African actor living in Paris, as well as by two independent producers. Monitors throughout the WIPO hall played video statements from leading performers, such as Meryl Streep, Maggie Cheung and Samantha Bond, which urged delegates to support the treaty.

The successful politics of the *ad hoc* meeting revolved around Gilbert's announcement that SAG had withdrawn from its agreement with the Motion Picture Association of America and was now fully supporting the FIA position.[1] She read a strong FIA statement calling on WIPO member states to leave the issue of transfer of rights outside the treaty and conclude it on the basis of the nineteen articles agreed at the Diplomatic Conference in 2000.

Virtually all governments that took the floor spoke in favour of moving forward to conclude a treaty and several supported the FIA position. There was no speaker, either from a government or an NGO, who argued for opening up debate on any of the nineteen agreed articles, as had been rumoured prior to the meeting. The delegate for the European Union made a strong speech supporting the treaty and urged that the issue of transfer of rights be kept out of the final text. The delegate for the United States then took the floor to say that his delegation had come to the meeting to "learn" and would "reflect" on the information that had been provided. The joint FIA-SAG position may have prevented the United States from again openly arguing in favour of the transfer provision as it had at the Diplomatic Conference in 2000.

While there was no definitive conclusion to the *ad hoc* meeting, the Chair advised delegates that the Regional Coordinators would meet early in 2004 to consider how to move forward once again to complete the treaty.

Performers need intellectual property rights to protect their audiovisual fixations

The *ad hoc* meeting is a clear indication from WIPO that performers need intellectual property rights. At the December 2000, diplomatic conference the remarks of Mr. Bolme on behalf of FIA printed in the summary minutes of the plenary session encapsulated why performers should have rights in an audiovisual work.

> Mr. BOLME (FIA) stated that performers' work was integral to the internationalization of production and distribution of audiovisual performances, the development of digital technology, the huge reach of the Internet and the massive convergence of company ownership in the international media and entertainment sector. That work was a serious creative profession, which deserved to be treated with the same respect as that of other creative contributors.

> Performers wanted to be able to negotiate with producers about the terms on which their creative work could be exploited now and in the future in the worldwide digital marketplace. In some countries, they had achieved protection through collective bargaining, through statutory rights or through a mix of the two systems. The instrument should allow these systems to co-exist and flourish together. Moral rights should be applied retrospectively to protect the integrity of performers and their images. The focus should be on performers, not on the producer whose economic strength was always greater than that of the individual performer and even that of the collective organizations of performers. [2]

Performers are the only significant contributors of the creative process in an audiovisual work that do not have rights internationally to receive financial compensation for the on-going exploitation of their work, after it is fixed on any kind of medium. Since the Rome Convention was concluded in 1961 audiovisual works are exploited more and more, through an increasing variety of channels. Each of those generates revenue, sometimes a long time after the first fixation. The structure of the audiovisual industry dictates that as a rule performers shift from one employment to the next and may often have to endure long periods without work, during which they often receive no compensation. Audiovisual performances are not limited to feature film; they also include television production, and newer platforms including multimedia, videogames and interactive media.

As with many creators in the arts, performers have little individual bargaining power, therefore they must have the economic rights to authorise or prohibit each and every use of their work. It is a misconception however that performers are all rich and famous and should not be allowed to increase the "burden" of the cost of production of a film television show or digital medium. Most performers earn a very low, below average, income and cannot make ends meet without supplementing their revenues from other employment. Star performers are certainly a minority. The stars income may be more important in the financial structure of a television show or movie but they are also the main reason behind the success of these entertainment products. Given the stars economic strength, new rights would probably not change anything for them but for the vast majority of performers that currently often work under unacceptable financial terms and conditions these new rights would provide a little more bargaining power when there is no powerful union to protect them.

Even if performers enjoy the protection of an efficient union and/or protection offered by intellectual property rights in their national law, they are often unprotected when working abroad, especially in the framework of co-productions where the least protective legal system is usually applied to them. Performers need the entertainment industry to be prosperous and their performances to sell as much as possible, especially if they are granted the right to benefit financially from this success. Producers, on the other hand, always have the possibility to secure the legal certainty they need to exploit a given performance by contract.

Performers could, provided they have sufficient bargaining power, ensure that their contracts offer them a sufficient degree of protection. However, many performers still work without a contract, at least a written one (this is very often the case in Asia and in Africa). Furthermore, a contract can only be enforced between the parties. It offers no protection whatsoever in relation to third parties. This is becoming a serious problem now that new digital technologies and media convergence give way to widespread illegal copying of audiovisual works.

The Rome Convention (1961) provided limited rights for performers in Article 7 and although that treaty is often considered to only protect performances in audio recordings it does extend to performances on audiovisual media in respect of the definition of performers in Article 3.[3] Unfortunately Article 19 of the Rome Convention provides that all the rights referenced in Article 7 cannot be exercised by the performer once she/he has agreed to, or consented to, the fixation of the performance in an audiovisual recording. Only audiovisual recordings made without the performers consent are subject to the exclusive rights of the performer.

Protection of performances fixed in audio recordings was extended in 1996 to encompass the way new technologies are changing the dynamics of consumption of materials protected by copyrighted and related rights. Expanding the scope of both rights and protections in response to new means of exploiting audio recordings and audiovisual works was a significant movement forward. While the WIPO Copyright Treaty (WCT) provides new rights for authors and producers, the WIPO Performances and Phonograms Treaty (WPPT) does not address performer's rights in audiovisual works.

Although a number of countries have granted some form of intellectual property rights to performers, regardless of whether their fixed performances are sound recordings only or audiovisual, the global audiovisual market calls for an international treaty. The absence of an international legal framework is a barrier to the harmonisation of those national rights and their application not only to national performers but also to foreign performers. One of the most important aspects of an international treaty is to ensure through national treatment rules that foreign nationals can enjoy the same level of protection as "locals".

In addition to economic rights, performers also need to protect the integrity of their work and to be identified with their performance. A performer's essence is defined by her/his performance(s) and it is essential that they have a legal right to maintain and prevent the misuse of their performance(s). Moral rights or rights personal to the artist have long been available to authors in Article 6^{bis} of the Berne Convention for protection against any misuse of the artist's creation that may prejudice their reputation[4]. This is particularly important for performers in the audiovisual sector, as not only the voice of a performer but also her/his image is at stake. The moral right established by Article 5 of the WPPT was a ground breaking precedent for performers in their audio recordings and stands as a template for moral rights in audiovisual performances, not withstanding the disappointing inclusion in Article 22(2), which allows signatories to the treaty the option to introduce moral rights in their national legislation with only prospective application. The

application in time, in respect of moral rights in the proposed audiovisual performances treaty allows for retrospective application, which is crucial in the audiovisual industries[5].

The state of performers' rights

The little protection that performers may claim to have at the international level on their audiovisual performances, as noted previously, relates back to the 1961 Rome Convention. The TRIPS agreement has possibly widened the geographical spread of these rules but it has not increased the protection. Quite the contrary, in fact[6]. The same is true for the 1996 WPPT, which does not provide protection of performers rights in audiovisual performances fixed with their authorization.

At the international level performers currently enjoy the following economic rights in audiovisual performances:

- the right to oppose the unauthorised communication to the public of their unfixed performance – Rome Convention;
- the right to authorise or prohibit the broadcasting of their unfixed performance. – WPPT;
- the right to oppose the fixation of their unfixed performance without their consent – Rome Convention (the exclusive right granted by the WPPT only applies to sound performances).

The 2000 Diplomatic Conference reached a provisional agreement on nineteen articles, by consensus (See Annex I to this paper)[7]. This was a groundbreaking achievement. For the first time ever, performers were to be granted exclusive rights on several forms of exploitation of their work, whether it is the reproduction, the distribution, and the making available on demand. These rights correspond, to a large extent, to those that had been established by the WPPT as far as audio performances are concerned. Wherever the rights in the new treaty were shaped differently – e.g. in the case of the moral right or of the rental right, this reflected the fact that sound and audiovisual recordings are really the products of two industries that have much in common but also have peculiarities of their own. On some other cases, e.g. the "à la carte" broadcasting and communication to the public right, the approved article was the result of a necessary – and acceptable - compromise, which is inherent in all forms of negotiation.

It is legitimate to acknowledge that the legal value of those "provisionally approved" rights is weak. Most certainly they are not written in stone and could be re-negotiated, if the WIPO member States wished it. However, this seems unlikely given the strong support voiced for maintaining the nineteen articles at the *ad hoc* meeting of the WIPO General Assembly this past November 2003.

The European Union and the United States remain divided on the issue of transfer of rights and choice of law

The impediment that prevented the completion of a performer's audiovisual treaty at the conclusion of the diplomatic conference in 2000 was the inability to find an agreement on the issue of the transfer of rights of performers to producers. No previous international treaty has included a similar provision, not the Berne Convention, even though article 14*bis* could be characterised as a qualification on rights it is not a transfer of rights provision as was proposed in the preparatory documents for an audiovisual performances treaty.

The Rome Convention and the WPPT do not include an article for the transfer of performer's rights in audio recordings to producers. Although these two treaties are silent on the issue of transfer, this has not prevented record companies from producing and distributing records everywhere around the world. A transfer clause proposed for audiovisual performances treaty would act like a Trojan horse, which once invited within the walls of international copyright treaties could take hold as a dangerous precedent.

Different legal systems are not a valid reason to include a transfer of rights clause in an audiovisual performances treaty. For the most part the legal systems of the member states of the European Union - with the exception of the United Kingdom and Ireland - have a different conception of copyright than the law of the United States, Canada, Australia and New Zealand[8]. The European concept, derived from the French "droit d'auteur", aims at protecting the creator (the performer). In contrast, the Anglo-American system emphasises protections for investment (the producer). Clearly, this leads to two completely different extremes. The contradiction is on the one hand vesting rights in the performer to give the performer a chance to bargain for her/his economic rights, and on the other the attempt to concentrate all the rights in the creative content in the hands of the producer – say by means of a presumption of transfer of all rights to the producer. This latter solution would practically amount to extending the US "work for hire" system to the rest of the world. This was, and is still, unacceptable to many WIPO member States, including the European Union, who have rightly opposed it.

Any presumption of transfer in an audiovisual performances treaty would considerably worsen the contractual conditions of performers around the world, particularly where they do not have a powerful and representative union to protect them. Producers do not need a presumption of transfer in the treaty and despite performers repeated requests, have never given convincing evidence to support their claim. They can secure these rights in any way they like by contract. Therefore it is up to the member states of WIPO to take a position as to whether there is a need to agree on a minimum intellectual property protection of audiovisual performances, or whether by not doing so to increase the intellectual property rights of producers. In order for a new treaty on the intellectual property rights of performers in their audiovisual performances to be meaningful, there should be no mention of transfer of rights. This is a matter of private international law, in respect of the legal and contractual traditions of each country. The studies recently commissioned by WIPO in preparation of the *ad hoc* meeting all point in this direction.[9]

The study by Professors Ginsberg and Lucas also shows that any choice of law provision on this issue would be problematic and unlikely to be of any practical use.

Will the stalemate continue?

As noted previously, Melissa Gilbert's statement on behalf of FIA at the *ad hoc* meeting may have helped weaken the United States government's traditional opposition to an audiovisual performances treaty without a transfer clause, or so it seemed at the time. There are (or have been) many changes at key positions in the United States, the European Union, WIPO, the Motion Picture Association and it remains to be seen whether this will bring along something new[10].

WIPO member States may agree to proceed to a "package vote" of the nineteen articles, as provisionally approved in December 2000 without a provision on the transfer of rights. This solution may imply losing one, or possibly more major parties, including the United States. Considering the high degree of concentration in the audiovisual industry, losing even one large producer country could limit the magnitude of this treaty. That would not however be an historical anomaly, as the United States have not ratified the Rome Convention and have only within the last fifteen years signed and ratified the Berne Convention, despite its prominent role in the production of sound recordings and in other media and information industries that arguably benefit from the international protection of the Berne Convention. Without the United States it is not certain whether other parties including the European Union would be ready to accept the prospect of what might amount to a "regional" treaty without trying to reshape it to bring it up to their (higher) standards. However, the consensus reached on the nineteen articles at the end of the diplomatic conference in 2000 and the recent support for moving the process forward at the *ad hoc* WIPO informal meeting in November 2003 indicates that there would be strong reticence in the international community to reopen the discussion.

It is impossible to anticipate any outcomes. Some of them will clearly require a change in the decision-taking procedures and a shift in favour of majority voting. FIA believes, at this stage, that the scenario above may be the most probable way out from this deadlock. We are however conscious that this may end up in the United States not being a party to this treaty, at least in the immediate term.

The *ad hoc* meeting was encouraging and a large majority of countries spoke in favour of a treaty for "audiovisual performers". A small working group could still be set up in the immediate future, gathering a restricted number of WIPO member States and the most important NGOs. While it is unlikely for this outstanding issue to be decided in that forum – as this may expose WIPO to serious criticism from all other member States - this working group would be the right place to test the ground on the way forward and possibly, grow an understanding to conclude an audiovisual performances treaty.

The role other countries can play

All other WIPO member States have a role to play. They have been often over shadowed by the United States and the European Union and until now they have mainly sat and waited for them to come to terms. However, the protection of performers is everyone's business. Pressure should pile up within WIPO to tackle unfinished business before the organisation is allowed to make serious progress on any other issue. WIPO member States should make the Secretariat understand that, if consensus is desirable, it must not be considered necessary in the long run, especially when a handful of countries are using it to hamper progress. There were strong interventions at the *ad hoc* informal meeting in November by several African countries. Brazil, Norway, and China coupled their support for performers' rights with clear statements calling on WIPO to conclude the audiovisual performances treaty before moving on to a diplomatic conference on Broadcasters' Rights. We believe that these calls must be addressed.

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[1] The Screen Actors Guild and the Motion Picture Association had attempted a compromise solution to the transfer or right issue.

[2] Diplomatic Conference on the Protection of Audiovisual Performances Geneva, December 7 to 20,2000 Summary Minutes(Plenary) IAVP/DC/36 March 6, 2002 p.9

[3] International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention 1961)

[4] Berne Convention for the Protection of Literary and Artistic Works, Paris Act of July 24, 1971, as amended on September 28, 1979

[5] Diplomatic Conference on the Protection of Audiovisual Performances Geneva, December 7 to 20,2000 Summary Minutes(Main Committee I) IAVP/DC/37 March 6, 2002 p.65

[6] Implications of the TRIPS Agreements on Treaties Administered by WIPO, WIPO 1997, p 23.

[7] Assemblies Of The Member States Of WIPO Thirty-Sixth Series Of Meetings Geneva, September 24 To October 3, 2001 Memorandum Of The Director General; Diplomatic Conference On The Protection Of Audiovisual Performances A/36/9 Rev. September 24, 2001.

[8] The statutory origins of copyright law in Canada, Australia and New Zealand. and most former Commonwealth countries copyright legislation is derived from the United Kingdom Imperial Copyright Act 1911.

[9] Study On Audiovisual Performers' Contracts And Remuneration Practices In Mexico, The United Kingdom And The United States Of America, prepared by Katherine M. Sand, AVP/IM/03/3a (April 8, 2003); Study On Audiovisual Performers' Contracts And Remuneration Practices In France And Germany, prepared by Ms. Marjut Salokannel, AVP/IM/03/3B (March 31, 2003); Study On Transfer Of The Rights Of Performers To Producers Of Audiovisual Fixations-Multilateral Instruments; United States Of America; France, prepared by. Jane C. Ginsburg, and André Lucas, AVP/IM/03/4 (April 30, 2003); Survey On National Protection of Audiovisual Performances prepared by the Secretariat, AVP/IM/03/2 (April 15, 2003).

[10] Jack Valente has announced his retirement after thirty eight years leading the Motion Picture Association. Jorge Reinbothe Head of the European Commission's Unit DG XV/E-4, which handles all copyright and neighboring rights issues is moving from his current responsibilities in DG Internal Markets, there have been changes at WIPO Secretariat all of which could forecast changes in respect of the Audiovisual Performers Treaty.