

## **ANALYSIS OF THE WPPT TREATY of the 20 December 1996**

This analysis is limited to the points which we felt to be essential, whether it be for an effective transcription of the WPPT Treaty to national laws, or later so that the new rights be used efficiently when carrying out contractual negotiations or during lawsuits.

This analysis is also intended to clear up the situation during the negotiation of the WIPO Protocol which should extend the protection provided by the WPPT Treaty to audiovisual performances and fixations.

We hope that this analysis will help to correct certain interpretations which are unfavourable to performers who will be present at both international and national levels.

We also hope that the FIM will be able to publish for professionals a complete and in-depth analysis of the WPPT Treaty as well as the additional Protocol which is due to be adopted shortly.

Such a detailed analysis will necessarily include developments with regards to the Rome Convention as well as for certain national laws that make particularly useful application of international texts.

Jean VINCENT  
General Secretary

## **Preamble**

As we are all aware, since the WPPT Treaty concerns fixed (i.e. recorded) performances, it is limited to the protection of «phonograms».

One of the essential aspects of the Treaty therefore is the definition of this notion of «phonogram» which determines the extent of protection actually provided to performers.

This definition is directly linked to another notion: that of «fixation».

To begin with, we should look at the analysis of these definitions (I).

This will make it easier afterwards to analyse moral rights (II) and economic rights (III).

We shall end by looking at limitations and exceptions (IV).

### **(I) Definition of «phonogram» and «fixation» (article 2)**

We should look at how «phonogram» is defined by the Rome Convention so as best to understand the definition in the WPPT Treaty.

**The Rome Convention** defines phonogram as follows: *«any exclusively sound fixation of sounds of a performance or of other sounds»*.

The notion of fixation is not defined by the Rome Convention, but the WIPO Glossary (published in 1981) stipulates that the word «fixation» signifies *«the original embodiment of sounds of a live performance or of any other sounds not taken from another existing fixation»*.

Consequently, the reproduction of such fixation on another medium, even if only one copy is made, (for example for technical reasons), is not a «fixation» in the sense of the Rome Convention.

It is a «reproduction». This notion of reproduction is moreover defined by the Rome Convention as follows: *«the making of a copy or copies of a fixation»*.

The act of fixation is therefore unique: it is the original act which gives rise to the recording.

**The WPPT Treaty** gives a definition of «phonogram» which is formulated in a different way to that of the Convention of Rome.

In reality it is identical.

In the WPPT Treaty there are two parts to the definition of «phonogram»:

- (1) *«the fixation of the sounds of a performance or of other sounds...»*
- (2) *«... other than in the form of a fixation incorporated in a cinematographic work or other audiovisual work»*.

The first part of the definition is near to that of the Rome Convention, but is not limited to «exclusively» aural fixations.

The second part, whose wording is clumsy, reintroduces this limitation by excluding those *«fixations in the form of a fixation incorporated in ... audiovisual work»*.

Certain were afraid that such wording might be interpreted as excluding the notion of «phonogram» from the moment an exclusively aural fixation was reproduced within an audiovisual medium.

Such an interpretation is inaccurate, not only because the word «reproduction» is not used in the second part of the definition of «phonogram», but also because it is impossible for a «phonogram» to be anything other than a «fixation».

In fact the notion of fixation is very restrictive.

The WPPT gives one definition as follows:

*«the embodiment of sounds or of the representations thereof, from which they can be perceived, reproduced or communicated through a device».*

(NB: the «representation of sounds» is aimed at sounds recreated by computer, and the notion of «device» is aimed at any technical or material process).

This definition of «fixation» is in compliance with that given by the WIPO Glossary.

It is the original and sole embodiment of an unfixated performance.

Consequently, in the WPPT Treaty, the second part of the definition of «phonogram» (*«other than in the form of a fixation incorporated in ... audiovisual work»*) only aims at excluding audiovisual fixations.

**The WPPT Treaty therefore protects aural fixations incorporated in audiovisual works, with regards to the sound parts of the audiovisual work which were fixed separately from the images.**

This is aimed essentially at music and probably voice dubbing.

This analysis is confirmed by two elements:

(1) the **agreed statement** adopted unanimously by the **Diplomatic Conference** for interpretation of this definition of «phonogram»:

*«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».*

This actually means that incorporation of an exclusively aural performance which is already fixed, that is to say the reproduction of an exclusively aural fixation, has no consequence on its definition and so its protection.

This aural fixation remains a phonogram, despite its incorporation in an audiovisual medium.

After all, to say the contrary would in fact lead to reduce to nothing the protection by the WPPT Treaty, for today it is easy and more and more common to reproduce phonograms on digital medium which also includes images (CD+, CD Extra, VCD, CD ROM etc...).

A radiostation or a discothèque can moreover transmit the sound of a commercial phonogram by using an audiovisual digital medium.

(2) The **resolution** adopted by the **Diplomatic Conference** stipulates:

*«the WIPO Performances and Phonograms Treaty does not cover performers rights in the audiovisual fixations of their performances».*

This confirms that «audiovisual» fixations only have been excluded from the protection provided by the WPPT Treaty.

**In conclusion to this important question**, we should like to make two comments of a general order:

(1) at a conceptual level, it is useful to recall that **the notion of «phonogram» should not be confused with the medium or carrier which enable it to be used**, regardless of the type of medium (sound or audiovisual, analog or digital etc...) and regardless of the reasons for which they exist (technical, commercial etc...).

What is protected under the name «phonogram» is the performance together with production investments (for producers), regardless of the characteristics of the medium which enable it to be used.

(2) **cinematographic works** and other audiovisual works almost always use a musical part which has been fixed separately.

This means that the musical part of a cinematographic film practically always comes from the incorporation of a «phonogram».

Consequence: the WPPT Treaty protects most sound parts of cinematographic works and other audiovisual works from the moment that the sound part was fixed separately from the images - ie. whenever the sound part results from an aural fixation and not from an audiovisual fixation.

**This means that the WPPT Treaty provides musical performers significant protection, including in the field of audiovisual works.**

When we examine the content of rights afforded by the WPPT Treaty, it is, however, regrettable not to find any remuneration right for private copying, any modification right and insufficient right for broadcasting and communication to the public of phonograms.

## (II) **Moral Rights (article 5)**

The moral rights recognized by the WPPT Treaty are independent of economic rights, which means that the performer who has transferred his economic rights may keep his moral rights and exercise them alone.

**Moral rights cover sound performances exclusively, whether fixed or unfixed.**

The incorporation of a phonogram in an audiovisual work does not, however, cause the moral rights attached to this phonogram to disappear for the reasons outlined in point (1).

Moral rights are as follows:

- (1) *the right 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».*
- (2) *the right to object any distortion, mutilation or other modification of his performance that would «be prejudicial to his reputation».*

At this point we should like to insist on three aspects:

- moral rights certainly constitute a fundamental aspect for protection provided by the WPPT Treaty, since they confirm that performers' rights are part of the intellectual property rights as author rights. **As a part of human rights, moral rights therefore deserve to benefit from guarantees which already exist for authors in numerous countries which are attached to the notion of human rights.**
- the right to object any distortion, mutilation or modification only in the event of «prejudice to reputation» is totally insufficient to constitute a standard for effective protection.

The performer is clearly the weak element in his professional milieu, and particularly so in the context of new technologies and internationalization of means (Internet, satellites, multimedia productions etc...).

Except on rare occasions, how can we seriously imagine performers taking the decision to «object» and bring lawsuits on the uncertain basis of «prejudice to reputation»? The larger the commercial and financial stakes, the more the performer would find himself obliged to give up his right.

It is clear that such a moral right is totally insufficient.

**This confirms that, in the present digital context which enables recordings to be manipulated very easily, performers should benefit from an economic right of modification.**

Clearly, any such right of modification is equally valid for audiovisual fixations.

- finally we must bring your attention to an unacceptable provision of the WPPT Treaty, which has probably gone unnoticed by many. This provision, in article 22(2) stipulates:

*«a contracting Party may limit the application of article 5 of this Treaty (which recognizes moral rights) to performances which occurred after the entry into force of this Treaty for that Party».*

Such a provision is unacceptable since the number of recordings existing at the time when the Treaty will come into force is so huge.

After all, it is difficult to justify mutilations of performances because they took place before the Treaty come into force!

How can such discrimination be explained?

It would have been more reasonable and probably less hypocritical to see that article 5 would not be applied to uses which took place prior to the Treaty's coming into force.

### (III) **Economic Rights (articles 6 to 10, and 15)**

#### (III/I) **Rights on unfixed performances (article 6)**

This is concerned with exclusive rights to authorize (or prohibit):

(1) *Broadcasting and communication to the public of unfixed performances*

(2) *Fixation of unfixed performances*

Unfortunately the definitions included in the treaty on notions of «broadcasting», «communication to the public» and «fixation» limit the scope of such rights.

The definition of «broadcasting» covers the broadcast of audiovisual performances, consequently the right to authorize broadcasting of performances of any type, including audiovisual.

The definition of «communication to the public» covers only the diffusion of sounds and is aimed at transmission processes other than broadcasting and interactive availability. It may be noted, however, that the protected sounds can come from an audiovisual performance. Consequently, the sound part of an interpretation (for example the voice of an actor) can only be communicated to the public after authorization, which in practice means that the whole of the performance is protected, except in the case of utilization of images without sound.

The definition of «fixation» is limited to aural fixations. It can, however, be noted that the right of fixation is not limited to fixation of a «phonogram» and therefore is not limited to exclusively sound fixation. The word «phonogram» does not appear in article 6. Consequently the right of fixation protects the sound part of performances of all types, including the sound part of audiovisual performances. Thus, the audiovisual fixation of a musical performance (for example a concert) may not take place without the authorization of the musicians with regards to the sound part of this performance. In practice, as with right of communication to the public, it is the whole of the performance which will be protected as it is difficult to imagine how the images of a concert can be used without the sound.

#### (III/2) **Exclusive rights on unfixed performances (articles 7 to 10)**

This concerns the exclusive right to authorize (or prohibit) reproduction (article 7), distribution (article 8), commercial rental (article 9) or the interactive making available (article 10) of phonograms.

We must insist here once more on the fact that, by «phonogram» exclusively aural fixations are aimed at regardless of the type of medium which reproduces them, including for example sound fixations reproduced in a cinematographic film provided that the sounds were fixed separately from the images.

Only «audiovisual» fixations are not covered by the protection afforded by the Treaty.

Consequently the four previously mentioned rights will have an important effect in the audiovisual field, mainly to the benefit of musical performers or performers dubbing actors' voices.

- **The right of reproduction** covers the reproduction of phonograms «in any manner or form», which includes, according to the Agreed Statement adopted by the Diplomatic Conference, the digital storage.
- **The right of distribution** specifically covers making available to the public of copies of phonograms, ie. the sales of carriers (CDs etc...). This right is important in the fight against piracy, as it covers

phonograms that are fixed or reproduced without authorization under the auspices of a foreign law and then imported.

- **The right of commercial rental** covers exclusively rental by making copies of phonograms temporarily available. Given the definition of «phonogram», the right of rental benefits, for example, performers of cinematographic film music, provided that the recording of the music was carried out separately from the images.
- **The right of making available** covers access «on request», regardless of whether such access is by wire or wireless means.

The definition of this notion of «making available» remains ambiguous. It is the making available of phonograms «in such a way that members of the public may access them from a place and at a time individually chosen by them».

With regards to wireless transmissions, this definition is difficult to interpret.

Insofar as performers have few rights in matters of broadcasting and communication to the public of phonograms, as we shall be seeing under point (III/3), we might wonder whether it is not in the performer's interest that the notion of making available be widely interpreted in case of wireless transmissions...

Such a wide interpretation should not, however, prejudice the right to fair remuneration for broadcasting and communication to the public of commercial phonograms.

### **(III/3) The right to equitable remuneration for radiobroadcasting and communication to the public of phonograms published for commercial purposes**

This right is similar to that recognized by article 12 of the Convention of Rome. Similar but not identical. Points specific to the WPPT Treaty are mainly the following:

- (1) The right to remuneration necessarily benefits performers and producers of phonograms, whereas the Convention of Rome allows only one of these categories of rightful claimants to be a beneficiary.
- (2) The notion of «phonogram published for commercial purposes» is widened by the Treaty, which may have significant consequences. Point 4 of article 15 stipulates that «phonograms made available to the public, 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, shall be considered as if they had been published for commercial purposes».

Thus, all film or TV film music made available via an interactive service must, within the scope of the WPPT Treaty, be considered as phonograms published for commercial purposes, even if they are not commercialized in the form of copies sold in shops.

- (3) In relation to the Convention of Rome, the WPPT Treaty stipulates that remuneration is due for any direct or indirect use. This includes for example rebroadcasting, or communication to the public in a place from a radio or television.

Unfortunately the WPPT Treaty entitles States to exclude all or part of the right to equitable remuneration, by notifying reservations.

This point is today essential if we place ourselves in the perspective of an «extension» of the WPPT Treaty to audiovisual fixations.

An extension of the possibility of excluding the right to remuneration with regards to broadcasting and communication to the public of audiovisual fixations would reduce to nothing the impact of the Protocol.

Moreover, it is far from certain that a simple right to remuneration (and not an exclusive right of authorization) would be sufficient to achieve an effective protection of audiovisual fixations.

Finally, we may note that point 2 of article 15 which deals with the collecting and distribution of equitable and single remuneration, is both laxist and obscure.

It is laxist insofar as it does not impose an equal sharing of remuneration between performers and producers of phonograms, contrary to what had been proposed by the Committee of Experts.

It is obscure with regards to the collecting of the remuneration. It seems that one category of rightful claimants can receive remuneration on behalf of the other. We feel that such a mechanism is not compatible with the very principle of « equitable» remuneration, if collecting all rights by producers in the end dispossesses performers from their right notably when no payment is made or when payment is made late by the user. This comment takes into particular account the fact that the major record companies are often, either directly or indirectly, co-owners of private radios.

As a consequence, they are not necessarily willing to collect rights and above all share them with performers.

#### **(IV) Limitations and exceptions (article 16)**

It is known that the objective of limitations and exceptions is to limit or exclude rights in certain specific cases.

In the WPPT Treaty, States have the possibility of including in their national legislation limitations and exceptions of the same nature as those provided for in connection with the protection of copyright in literary and artistic works.

The Treaty stipulates however (point 2 article 16) that States must «confine» any limitations or exceptions by respecting the 3 following criteria:

- *limiting them to certain special cases...*
- *... which do not conflict with a normal exploitation of performances...*
- *... and do not unreasonably prejudice to the legitimate interests of the performers.*

In the context of digital technologies and of the «information society», the question of limitations and exceptions has become fundamental.

Negotiations are certainly going to intensify on these questions as from the time when the protection of performers increases...

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