

Letter to the members of the WIPO Standing Committee on copyright and related rights, which will be held for a session during the 2 to the 10 November 1998.

20 October 1998

Sir, Madam,

The International Federation of Musicians has just celebrated its 50th Anniversary.

Since its creation, FIM has been in a continuing relationship with inter - governmental organisations for the setting up of international norms concerning the protection of performers.

As the working sessions for the elaboration of the Protocol concerning audiovisual performances are ending, and due to the decision to hold a Diplomatic Conference on the adoption of such Protocol that should be confirmed in the very near future, FIM wishes to give to the member states its further observations on the Protocol according the most recent developments.

Those observations are on the following issues:

1. The possible ratification of this Protocol by the USA
2. The main issues which are currently in the process of negotiation

Yours faithfully,

John MORTON
President

Jean VINCENT
General Secretary

1. A possible ratification of the Protocol by the USA

Some delegations, including European Union member states, have expressed the view that a Protocol on audiovisual can not be adopted without US participation, due to the importance of its audiovisual industry. Those delegations suggested therefore, that it is imperative to find a compromise with the US government.

We believe this opinion should be subject to several reservations :

- **The Rome Convention was the result of a compromise with the USA, which however did not ratify it.**

It seems to us, that this fact has not been taken sufficiently into consideration, although this non-ratification of the Rome Convention has had negative consequences, notably the lack of protection for foreign phonograms exploited on the US territory.

Indeed, we know that the exploitation of foreign phonograms on this territory is obviously important, in contrast to the foreign audiovisual productions which are rarely exploited in the USA.

- **A ratification of the Protocol on audiovisual performances by the USA would have no significant consequences, or would only have negatives consequences for performers, if the level of effective protection of their rights was insufficient.**

Indeed:

- Foreign audiovisual products are not very much exploited on the US territory. Therefore, exploitations on the US territory are essentially protected by laws and professional agreements enacted in this State, and would have little chance to be bound by the Protocol.
- Foreign audiovisual productions and co-productions financed by US funds are increasing, as well as performers' employment for US audiovisual productions made abroad. Performers employed for those productions are engaged under foreign laws. Therefore , the ratification of the Protocol by the USA would have limited consequences for performers who work for "re-located" US productions.

- The lower the level of effective protection in the Protocol, the less a ratification by the USA would have consequences for performers. This is particularly the case if the Protocol included a presumption of transfer of performers rights to the producers, and if the Protocol did not provide sufficient rights to performers in relation to broadcasting and communication to the public.

In the case of presumption of transfer of rights, the ratification of the Protocol by the US would mainly provide an extra benefit for American producers when they invest abroad, particularly when the audiovisual fixation of performances on their productions is made abroad, including in States which have no presumption of transfer of rights for their nationals.

In case of insufficient right of broadcasting and communication to the public on audiovisual fixations, the ratification by the USA would have low economic consequences for performers of US productions exploited abroad, and would confirm the potential of commercial benefits made by the producers for their own profit.

- **Nevertheless, it would be desirable for the USA to ratify a Protocol providing to performers a high level of effective protection.**

If we only consider the right of broadcasting and communication to the public, a high effective protection in a Protocol ratified by a significant number of large producing States, would have important economic consequences due to the amounts distributed by broadcasters and cable distributors. Those amounts dedicated to performers would make their professional and social situation much more favourable and would have an indirect positive impact on the national production of their country. Furthermore, performers which would depend on the ratification by the USA, would not accept very easily to be excluded of such legitimate protection abroad. At last, this ratification would bind the US to give a high level of protection to foreigners in their territory, which is perfectly justified, but would have low economic consequences, as foreign audiovisual productions are not very much exploited in the USA.

2. The main issues which are currently in the process of negotiation

We will only refer to three main issues (the nature of the Protocol; presumption of transfer of exclusive rights; the right of broadcasting and communication to the public); as FIM has already made observations on other questions concerning the Protocol.

The nature of the Protocol

A Protocol linked to the WPPT or an independent Treaty, that is the fundamental issue for three main reasons :

- The distinction between audio and audiovisual productions is more and more artificial in practice (1). It is furthermore inaccurate to speak of audiovisual productions as a homogeneous group. Indeed, cinematographic productions can not be compared to video-records, Cds-rom, TV ads, TV films, shows retransmission, or variety programmes. Nor are phonograms productions now part of a homogeneous group, notably due to the increasing number of productions made by the performers themselves, or the increasing use of images incorporated onto CDs.

Therefore, several States are in favour of a mutatis mutandis extension of exclusive rights provided by the WPPT to the performers; which of course supposes the Protocol to be directly linked to the WPPT Treaty.

- If the Protocol did not consist of a mutatis mutandis extension of exclusive rights given to performers by the WPPT Treaty, the adoption of such Protocol considered as an independent Treaty would favour differences of protection' levels (Rome Convention, Trips agreement, WPPT, Independent Protocol), as the Protocol could be ratified by a non - WPPT ratifying State. The objective of WIPO is ,on the contrary, to harmonise national laws by way of international norms. This harmonisation is clearly essential in the context of digital technologies and world - trade.

(1) The resolution concerning audiovisual performances adopted by the Diplomatic Conference on December 20, 1996, confirms that: “sound and audiovisual performances are increasingly related”.

- Some provisions of the WPPT are difficult to interpret in relation to their scope of application. For example, this is the case for the right of fixation.

The Protocol provided the opportunity to correct those difficulties, and must therefore be directly linked to the WPPT.

Presumption of transfer of exclusive rights

We are opposed to such legal mechanism for the following reasons:

- Such presumption would create a discrimination between audio and audiovisual performances. In practice, audio performances (for example musical ones) would be more and more artificially considered as involving the presumption of transfer of right as they would, when necessary, be subject to audiovisual fixations. Therefore, the presumption of transfer of rights on audiovisual performances could have a negative impact on the audio field.
- A system of presumption is not a necessity, when the transfer of rights is achievable by a written contract; which is more and more often the case in current national laws. The presumption is indeed only a way of proof. It is not fortunately, including in the last US proposal, a system of compulsory transfer of rights. The presumption is useless if the written proof is compulsory. Concerning the transfer of rights in relation to product which existed before new protection is enacted, the Protocol should impose or propose to States a rule of the law application in time. Retrospective legislation (including retrospective modification of contracts) is generally deplored.
- Such provision would be inequitable, according the situation of most performers when they negotiate a contract with a producer. The presumption would have for effect to alter the bargaining freedom of performers. In practice, it would abolish the effect of exclusive rights which are given to the performers by the Protocol. It could also prejudice collective bargaining.

In conclusion, FIM is entirely opposed to the notion of presumption which would, in effect, to create extra protection for producers, to the detriment of performers.

If the true purpose of the Protocol – to give the necessary rights to performers- is to be achieved, even contractual transfers of rights should be subject to certain formalities.

Furthermore, in relation to conditions of transfer of rights of performers, FIM requires that the Protocol includes provisions on the following points:

- Compulsory written form
- Specification of the types of exploitation covered by the transfer of rights
- The mention on the contract of tariffs of remuneration allocated to the performers for each type of exploitation
- Limited duration of transfer of rights
- Compulsory information that have to be communicated to performers on the exploitation of their fixed performances and on their contracts.

Right of broadcasting and communication to the public

The various solutions proposed (simple rights of remuneration, exclusive rights limited to the first broadcasting, absence of right) are not satisfactory.

Broadcasting is no longer provided mainly by “public service” organisation. Commercial incomes realised by broadcasters have increased rapidly over the last 20 years. Furthermore, the frequency of re-broadcasting has regularly increased over this period, and will highly increase in the future as well as multi-channel digital broadcasting. We are at the start of an explosion in broadcasting channels.

Despite the high increase of incomes produced by the exploitation of TV programmes, and therefore the exploitation of performances (actors, musicians, dancers, ...), the global amount of remuneration distributed to performers in relation to broadcasting and communication to the public of audiovisual programmes did not change.

As it was stressed at the recent European Conference held in Birmingham (April 1998) performers employment is becoming more precarious, social protection is decreasing as contractual practices tend to progressively decrease the salaried status of performers.

One of the solutions which could restore a highly unstable and worrying situation, is that broadcasters remunerate performers for the exploitations of their performances.

The European Commission appeared to reject such protection to be included in the Protocol, as it considered during the last Committee of Experts that it would be premature by lack of complementary works done in the framework of WIPO on this issue.

This argumentation is difficult to follow in relation to analogue broadcasting and cable distribution, considering that this type of exploitation has been used for a long of time.

It is particularly more difficult to understand this argumentation considering digital broadcasting, as this technology will have for main consequence to multiply the exploitation of programmes with the massive use of re-broadcasting and multi broadcasting.

Many proposals include in the Protocol an exclusive right for performers in relation to communication to the public by way of making available, and we can notice that the adoption of this right in the framework of the WPPT took place without major difficulties.

Due to this recognition, we can not understand why such exclusive right could not be provided in case of broadcasting, particularly for digital broadcasting which is similar to the making available with reservation of the use of a different technology.

Indeed, the development of digital multi-broadcasting will lead to supply identical programmes, similar to the interactive making available by wire.

According to the importance of practice of collective bargaining among member states, which can afford organisations to establish tariffs of remuneration for broadcasting and communication to the public of fixed performances, it should be possible to add to this exclusive rights some provisions which would favour this collective bargaining.

The following provision could be included in the Protocol:

“Performers shall enjoy the exclusive right to authorise the broadcasting and the communication to the public of their fixed performances ”

“the Contracting parties may provide that the statutory minimum amount of remuneration to be paid to performers, individually or collectively, with regard to the broadcasting and the communication to the public of their fixed

performances shall be subject to collective agreements drawn up between organizations representative of performers and organizations representative of users”.