

## **The relevance of article 14 bis of the Bern Convention to performers rights**

*(30 October 1998)*

### **General**

The “presumption of legitimation” (i.e. not a transfer or assignment of all rights) in 14 bis (2) and (3) was intended to achieve a uniform system for the exploitation of cinematographic works.

Ricketson, in his authoritative work on the Bern Convention, concludes (a) that it only applies to a limited number of legislations (b) that it leaves different national systems of determining copyright ownership in such works unchanged and (c) that provisions regulating agreements on the exploitation of rights do not belong in a Convention which essentially concerned with the recognition and protection of substantive rights. Private agreements, he says, remain a matter for national legislation.

### **Scope of Article 14 bis**

Ricketson identifies three types of legislation:

- (1) film copyright countries (common law systems), i.e. rights in the film to the producer who needs agreement with right owners in pre-existing works (script, music, etc) to exploit;
- (2) legal assignment systems (ref. French law 1957);
- (3) rebuttable presumption of assignment by co-authors of the cinematographic work (where contributors are deemed to be co-authors).

Article 14 bis only affects (3) above (see wording of 14 bis 2 (b)).

Further, unless national legislation provides otherwise, the presumption of legitimation does not apply to the authors of scenarios, dialogues or musical works (or the principal director) (see 14 bis 3).

Thus, the presumption is limited to the authors claim, under national legislation, to be a co-owner of the copyright in the cinematographic works.

### **Relevance to performers rights**

In relation to the simple proposition that performers should not be in a better position than authors, we maintain that the contrary must also be true, they should not be in a worse position.

This would mean:

- (a) the presumption (of legitimation – not transfer which would leave open the question of remuneration for national decision) would only apply in those countries which include performers as owners of copyright in cinematographic works.
- (b) it would not apply to performers of musical works – unless this is a result of national legislation. The Convention is neutral on whether there should be such legislation
- (c) the presumption would only apply to the exploitation of performances through the use of the specific cinematographic work.

**Relevance to performers rights of an application mutatis mutandis of Article 14 bis 2 (b) only?**

It is not possible to apply 14 bis 2 (b), even mutatis mutandis, without 14 bis 2 (c), 14 bis 2 (d) and 14 bis 3 which are substantial parts of 14 bis and complete 14 bis 2 (b). Such a solution would be subject to multiple interpretation of a paragraph that would have been extracted of a general provision.

This would moreover create directly and internationally a discrimination between authors and performers on the same issue (transfer of rights or contractual arrangements), which would have no justification and could not be the result of a request from the majority of the members of the WIPO Committee of Experts or WIPO Permanent Committee.

Finally, an application “mutatis mutandis” of such provision is simply not practicable because it would be subject to many different interpretations. Any proposal on this issue should be completely formulated in the terms of the Protocol.