



**SEMINAR ON THE WIPO COPYRIGHT TREATY (WCT) AND THE  
WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)**

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**OPPORTUNITIES AND CHALLENGES**

**Performers in the digital environment**

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## **1. Digital technologies upset the interpretation of certain traditional legal concepts.**

1.1. Performers now use computers and the digital fixation of sounds as a permanent working tool. They are thus more and more often "producers of phonograms" within the meaning of the Rome Convention and the WPPT, even if they seldom have the capacity to be the publishers and the distributors of such phonograms.

1.2. The digital carriers and means of reproduction, distribution and transmission of phonograms can very easily be used to associate images to these phonograms, for the purpose of distribution of copies, or for the purpose of transmission to the public with access on screens of various nature (portable computer, television, telephone, etc).

A major concern of music performers is to be protected by the WPPT, and national legislation, when phonograms are exploited together with images (either still images or moving images), in any manner or form.

**2. In the context of digital mass uses, a real and efficient enforcement of rights is of crucial importance for music performers.**

2.1. The facility with which digital sounds are reproduced, manipulated, compiled, or transmitted, opens the door to all kinds of abusive appropriations.

This is where the definitions of “fixation” and “producer of phonogram” are of a particular importance and should be interpreted in a rigorous way.

It is what I will name the " gray piracy " or the " silent piracy", i.e. a form of piracy about which no one talk.

The rights provided in the WPPT are of vital importance for those who create the sounds, as a profession, with all the precarious nature of an artistic profession.

2.2. However, old customs and the “ contractual practices ", are generally not in conformity with intended social purpose (i.e. to encourage creativity) and the actual significance of the rights provided for in the WPPT.

The entry into force of the WPPT creates the prospect of a long and difficult period of sensitization, education, and negotiation in this field.

**3. One can legitimately consider whether music performers have for example in the Fifties, Sixties, Seventies, or even the Eighties, in fact transferred their rights on interactive uses, since those rights did not exist at that time.**

3.1. In such cases, performers have retained the property in these rights, for each type of interactive transmission, even in those countries where the general concepts of " distribution " or " communication to the public " would cover such uses.

3.2. Article 22 of the WPPT provides for a rule of application in time which protects economic rights in phonograms produced prior the entry into force of the Treaty.

3.3. Collective bargaining will necessarily play an important role in the exercise of performers rights on interactive uses.

**4. FIM expresses grave reservation with regard to the theory sometime called the " umbrella solution ", according to which the States can fulfill their obligation in the WPPT through different legal concepts, specific to their national legislation.**

4.1. This theory, which was strongly propagated in 1996, can only, in our opinion, result in legal uncertainty , particularly to the prejudice of the weakest right owners.

4.2. Such a theory however is not contained in the WPPT itself.

It can in particular raise questions about the application of national treatment to performers whose rights are exercised in a foreign country, or the application to foreign performers who cannot benefit from the protection provided for in collective agreements in the country where the protection is claimed.

**4.3 We are of the opinion that a thorough study should be undertaken about the legal justification for the so-called umbrella solution for performers rights.**

**5. Any measure at national level aiming at influencing the transfer of performers rights is a “limitation” of these rights, within the meaning of article 16 of the WPPT, and should be permissible by this provision of the WPPT.**

5.1 This follows from the opinion of Professor Sam Ricketson, well-known author of an important book on the Berne Convention.

According to Professor Ricketson, the mechanism of Article 14 bis (2) (b) of the Berne Convention is a limitation. (*Art. 14 bis (2) (b) creates a presumption of legitimation by which certain authors of cinematographic work cannot oppose to certain forms of exploitation of such work*).

According to him, Article 14 bis (2) (b) is “ a specific limitation of protection “ (*see his statement during the ALAI Study days, September 14-17, 1998, under the following title " the boundaries of copyright: its proper limitations and exceptions", page 16*).

5.2. Article 16 of the WPPT states the limitations which are authorized by the Treaty, in particular concerning performers rights. It specifies more generally that limitations to performers rights cannot exceed those provided for, in the national legislation, in connection with the protection of copyright in works.

Therefore, a contracting party to the WPPT cannot go beyond this " red line " with regard to performers rights provided for in the Treaty.

It cannot impose for example any presumption of transfer of performers rights concerning forms of exploitation which go beyond the same kind of limitation in the copyright field.

5.3 In addition, the book published by WIPO in 1997 on the implications of the TRIPS Agreement on Treaties administered by WIPO mentions, in particular about article 14 bis (2) (b) of the Berne Convention, that " none of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the ... (three step test rules) “ .

This opinion means, *a contrario*, that any limitation relating to the transfer of the rights that goes beyond Article 12 bis (2) (b) of the Berne Convention, or is not “correctly applied”; would be incompatible with the “three step test” rule.

Moreover, it should be admitted that this " three step test " could result in the exclusion of exceptions which cause an unreasonable prejudice to the legitimate interests of the performers, even when such exceptions do not cause unreasonable prejudice to the interests of the producers.

5.4. With regard to the particular issue of phonograms exploited together with images, we insist on the fact that Article 16 of the WPPT does not authorize limitations that would go beyond the existing limitations in the field of copyright protection of musical works.

**6. A priority for music performers is to economically benefit from uses of their work, particularly in the context of growing mass uses.**

6.1. With regard to mass uses, FIM is in favor of the mechanisms of compulsory licenses and/or of compulsory collective management of rights, when the individual or collective exercise of exclusive rights cannot lead to an actual and equitable remuneration of the performers.

6.2. This type of mechanism imposes and therefore guarantees, by law, an equitable share of remuneration between performers and producers, including the remuneration for private copying (which is not part of the WPPT, but which each Member State is free to provide for).

6.3. It is of interest to note that laws of large countries (such as the USA) , have adopted similar mechanisms concerning mass uses of sound recordings on the Internet.

6.4. We think that this type of mechanism is particularly desirable in developing countries, and more generally in countries which do not have a legal tradition in the field of performers rights, written contracts and collective bargaining in the music and audio-visual sectors.

## **7. Internet will gradually change the trade relationship between music performers and the public.**

7.1. Today, only those performers who have achieved a high level of public recognition, are really visible on Internet.

7.2. For the immense majority of the other performers, the fact of having created their Web Site does not mean that they can reach a public, because their electronic address not widely is unknown and is lost in the ocean of information available on Internet.

7.3. In addition, music performers have been inexperienced as entrepreneurs and in general do not have the means, in terms of background and financial resources, to act in this capacity.

7.4. FIM is working on the creation and the networking of international models of co-operatives of musicians, which will allow a better level of professionalism and independence, through local micro companies created by them (including those in developing countries). Such micro companies would mainly create joint activities of promotion and distribution of the work of the musicians.

A Community Internet address could allow small local groupings of musicians to become visible and promote themselves in a professional way.

It would be an accessible tool, among others, to encourage the development of a musical industry in developing countries

7.5 The objective is also to network, in particular through the “ peer to peer ” technology, co-operatives that would meet certain standards of functioning; such standards being established at an international level.

Such a system could favor regional and international cooperation in the cultural field.

7.6. The WPPT can play a major role in this development as it will make it possible to protect performers apart from any contractual relation with an employer.

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