

**EUROPEAN DIRECTIVE 2001/29 OF MAY 2001
ON THE HARMONISATION OF CERTAIN ASPECTS OF COPYRIGHT AND
RELATED RIGHTS IN THE INFORMATION SOCIETY**

**Recommendations of the International Federation of Musicians
concerning the implementation of the Directive 2001/29
at national level**

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1. Definitions

“Fixation”

1. The notion of “fixation” is as crucial in the field of neighbouring rights as the notion of “work” in the field of copyright. Indeed, from the understanding of what a “fixation” is and where a “fixation” takes place will depend the understanding of what a “phonogram” is, what a “producer of phonogram” is, when the protection of the performers starts, where is the point of attachment to a country for the application of the rules relating to national treatment and international protection.

2. Problems arise because the word “fixation” is used to cover both the act of fixation and the content of what has been fixed.

3. There is no definition of “fixation”, either in the Rome Convention, or in the EU Directives relating to neighbouring rights; although these instruments provide an exclusive right of fixation (without distinction between the fixation of sounds, images or sounds and images) for performers.

4. The WPPT provides a definition of the act of “fixation” in article 2 (c), which is limited to the fixation of sounds:

“fixation means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device”.

5. The notion of “representation of sounds” refers to sounds which are fixed directly in a digital form such as MIDI without being necessarily perceived by the human ear in that format.

6. Concerning the act of fixation of sounds resulting from the performance done by performers, there is no doubt that the word “fixation” covers strictly the first or the original embodiment of such sounds in a material object, from an unfixed performance. The embodiment of an already fixed performance is a reproduction, not a fixation. This opinion is confirmed by the definition of “reproduction” in the Rome Convention, which says that “reproduction” means “*the making of a copy or copies of a fixation*”. It is also confirmed by the article 6 (ii) of the WPPT which provides to Performers an exclusive right of authorizing “*the fixation of their unfixed performances*”. Article 7 1.b) of the Rome Convention is drafted in a similar way.

7. The content of a fixation can result from the embodiment of sounds other than a performance, for instance: sounds produced by animals, nature, acoustic effects, noises of any kind, or sounds created by a synthesizer or a computer of any kind.

8. When a recording is done by manipulating a fixed performance or fixed performances in a way that is not itself a new performance, we consider that the compilation of such sounds is not a fixation. It is the reproduction of fixed performances which have been modified.

EXAMPLE OF DRAFTING:

“FIXATION MEANS THE ACT OF ORIGINAL EMBODIMENT OF SOUNDS, IMAGES, OR SOUNDS AND IMAGES OF A PERFORMANCE, OR OF THE REPRESENTATION THEREOF, OR OF OTHER SOUNDS, IMAGES OR SOUNDS AND IMAGES, FROM WHICH THEY CAN BE PERCEIVED, REPRODUCED OR COMMUNICATED THROUGH A DEVICE”.

“Phonogram”

9. According to the traditional definition provided by article 3 b) of the Rome Convention from which the WPPT must not derogate (cf. article 1.1. of the WPPT), “phonogram” means *“any exclusively aural fixation of sounds of a performance or of other sounds”*.

10. A question of major importance is increasingly arising, which can be expressed as follows: **do the Rome Convention, the WPPT, the EU Directives (92/100, 93/83 and 2001/29) and national laws protect performances fixed in a phonogram when such phonogram is exploited together with images, through its incorporation (i.e. its reproduction) in an audiovisual product?**

11. The FIM Congress of November 2001 adopted the following motion 23:

Motivation: Recently, for instance during the WIPO Diplomatic Conference, attempts were made by phonogram producers to diminish the rights of performers in sound recordings, in view of the future developments in the information society. There will be an increasing number of audio-visual carriers on the market in which the phonograms are incorporated. As we know, audio and audiovisual performances have different levels of protection, especially at the international level. Performers in phonograms are protected through the Rome Convention and the WPPT, and should remain protected when exclusively aural fixation of their performances are incorporated (i.e. reproduced) into audiovisual products.

Motion: The 17th FIM Congress acknowledges the leading role that FIM has always played in the creation and preservation of performers' rights. Therefore, Congress calls upon the Executive Committee to take all possible actions to preserve the protection of phonograms when incorporated in an audio-visual product.

12. This issue will be increasingly controversial during the next decades, and it is the responsibility of FIM and FIM members to be active in order to achieve the protection of music performances fixed in phonograms whether they are exploited together with images or not. To our knowledge, there are pending court cases about this issue in Denmark, France and Switzerland.

13. IFPI has developed a precise and arrogant strategy in this field, at international, regional and national level, in trying to impose a specific interpretation of the definition of “phonogram” provided for in the WPPT. We will see hereafter, when commenting on other legal concepts, that in general, IFPI develops a strategy of trying to influence the interpretation of norms, in a way which prejudice the interests of performers. Unfortunately, there are always in governmental circles some ears that are sympathetic to such “professional” views .

14. You will find here attached, as an appendix, the documents provided by FIM on this issue during the WIPO Diplomatic Conference.

15. For the purpose of this memorandum, we raise the following points:

16. According to Article 3 b) of the Rome Convention, “phonogram” means *“any exclusively aural fixation of sounds of a performance or of other sounds”*. There is no doubt that this definition refers to what results from the exclusively aural fixation of an unfixed performance. What is protected through this notion of “phonogram” is the content of the fixation (i.e. the performance) and obviously not the medium or the carrier into which the original embodiment takes place.

17. It follows from the previous paragraphs that the act of “audiovisual fixation” (which has not yet been defined in any international instrument) consists of the simultaneous fixation of both the sounds and images of a performance. If the phrase is used correctly to denote the material result of such an act, it follows that it must still refer only to the two elements of the performance. A different phrase is required for the material result of both fixation and reproductions.

18. A music performance which is subject to the act of exclusively aural fixation should be protected as a “phonogram”, independently of the type of medium (Audio Tape, Video Tape, CD, CD Plus, DVD, CD-ROM, etc) from which it is reproduced, distributed, rented, communicated to the public, broadcasted, or made available on the internet.

19. The sound part of a music-video is a “phonogram”, except where the sounds of the performance used in such music video have been fixed together with the images of the same performance (for example during a concert).

20. Neither the Rome Convention, nor the WPPT provide any criterion other than the technical one of the original process of fixation, to define what a “phonogram” is.

Neither in these instruments nor in any other is the meaning of “phonogram” restricted to the commercial product of what describes itself as the phonographic industry.

21. For instance, there is no criterion referring to the purpose of the fixation in order to qualify what a “phonogram” is. The music part of a movie soundtrack is a “phonogram”, even concerning the soundtrack recorded for the purpose of the making of the film. Frequently, the music part of a movie soundtrack is produced by a phonographic producer, for the double purpose of being used in the film and being distributed as a CD.

22. Unfortunately, on a proposal from USA, the WIPO Diplomatic Conference of December 1996 adopted, for the purpose of the WPPT, a definition of the phonogram which creates some space for confusion.

23. Article 2.(b) of the WPPT says:

“ phonogram means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”

24. This definition excludes from the notion of “phonogram” the *“form of a fixation incorporated in a cinematographic or other audiovisual work”*.

25. Due to the fact that a “phonogram” is nothing else than the result of the act of fixation, which means the embodiment of an unfixed performance, we consider that the second part of the definition provided by the WPPT can only exclude “audiovisual fixation” (i.e. performances subject to the simultaneous fixation of sounds and images). Nothing else.

26. However, IFPI considers that the second part of the definition excludes, through a limitation of the scope of the definition of the phonogram, all the protection provided by the WPPT as soon as a phonogram is incorporated (i.e. reproduced) in an audiovisual “work”. This view correspond to a worldwide strategy.

The reasons why IFPI adopted such strategy are, in our opinion, the following:

(a). Phonographic producers consider that they can sufficiently manage their interests through the negotiation of contracts relating to the reproduction of the phonogram. From such contract, they can obtain remuneration from the audiovisual producer concerning the various types of uses of the audiovisual product.

(b). The phonographic producers are also involved in the production of audiovisual works, including films and music videos. They consider that they keep control of uses of the audiovisual works through the authors rights. This is the reason why audiovisual producers generally do not request to benefit neighbouring rights.

(c). To exclude the protection provided by the WPPT in case of incorporation of the phonograms in audiovisual products means to exclude the protection of the performers, with a double “advantage” (...) for the producer: (i) a total freedom of bargaining and (ii) no legal obligation to share the remuneration collected through the contracts signed with the audiovisual producers.

27. Dr. Reinbothe (see *“The WIPO Treaties 1996. Commentary and legal analysis”* by Jörg Reinbothe and Silke von Lewinski, published in 2002 by Butterworths), who was the representative of the EU during the main WIPO meetings, now follows the IFPI theory and tries to justify it in a legal way.

28. Indeed, he considers that, due to the article 2 (b) of the WPPT, the “*nature*” of the phonogram is “*suspended during its incorporation*”. Therefore, the protection of the WPPT would be, in this opinion, excluded “*where the soundtrack appears together with, or is otherwise connected to, the image track*”. In his opinion, “*only the “form” of being incorporated or not during the exploitation is relevant.*”

29. Dr. Reinbothe adds that the reference to the incorporation in an audiovisual “work” means that it does not cover audiovisual products which “*does not achieve the required originality standard*”. Therefore in his opinion, “*a festival including music, any concert or a theatre play simply filmed*” (...), or “*the live broadcast of a ski area filmed automatically by pre-fixed cameras and combined with music from a phonogram*” (...), or products such as CD plus “*where the recording of music may be combined with mere moving images showing a landscape or a like*” (...), shall be accepted as a phonogram.

30. We strongly reject such argumentation, which a) goes beyond the content of the WPPT and b) is not practicable, for the following reasons:

a) The idea of a “suspension” of the “*nature*” of the phonogram is a pure invention. There is no trace of such a legal principle in the records of the WIPO Diplomatic Conference of 1996. It would have been possible to get such rule in the WPPT through a specific provision similar to the formula included in article 19 of the Rome Convention. Such a rule would have said, for instance, that as soon the incorporation of a phonogram into an audiovisual work or product was authorised, the rights provided for by the WPPT to performers and producers “cease to be applicable”. But obviously, there is no such provision in the WPPT.

b) The consideration from which, “*only the “form” of being incorporated or not during the exploitation is relevant*” is clearly not practicable, especially in the digital environment. Any digital medium, including a CD or a DVD, can incorporate images together with sounds. These can be still and moving images, and the distinction made by Dr. Reinbothe, between “*audiovisual works*” on one hand and on the other audiovisual products which do not “*achieve the required originality standard*”, shows how far he is from the reality. Indeed, any type of audiovisual product, including a documentary, a cartoon, an advertising, a music video, and even the representation a sport event, can achieve the originality standard.

31. It is symptomatic that Dr. Reinbothe refers to some examples such as “ *a festival including music, any concert or a theatre play simply filmed*” which relate to fixations that are not exclusively aural, and therefore correspond to audiovisual fixations (which are obviously out of the scope of the WPPT). This reveals, in our opinion, a lack of legal rigor and a real confusion of reasoning.

32. Finally, according to such theory, a discotheque could use music videos in order to escape the payment of the equitable remuneration ! Similar practices could happen on the Internet, when technologies of digital transmission will afford an easy making available of moving images, to the detriment of both the performers and the producers of phonograms; especially whether the up-loading is done from a country where legislation does not protect neighbouring rights.

33. It is highly regrettable that Dr. Reinbothe, an official representative of the European Union, did not at all refer in his book to the position expressed in detail on this sensitive issue by FIM and other performers organisations during the Diplomatic Conference of December 2000; although he includes long developments on “*historical background*” (...).

34. Having in mind that USA and IFPI could probably try to get such result from the unclear drafting of article 2 (b) of the WPPT, FIM submitted at the end of the Diplomatic Conference of December 1996 that a clarification be adopted in the form of an “Agreed Statement”.

35. The Diplomatic Conference adopted the following Agreed Statement concerning article 2.(b) of the WPPT:

“it is understood that the definition of phonogram provided in article 2 (b) does not suggest that rights in the phonogram are in anyway affected through their incorporation into a cinematographic or other audiovisual work”

36. There appear to be two conflicting interpretations of this Agreed Statement.

a). FIM considers that this Agreed Statement confirms that the “rights in a phonogram” are not affected through the incorporation of such phonogram into an audiovisual work.

b). IFPI and the author mentioned here above (...) consider that the Agreed Statement only means that the phonogram “*does not lose its quality as a phonogram with a view of separate exploitation*” (see “*The WIPO Treaties 1996. Commentary and legal analysis*” by Jörg Reinbothe and Silke von Lewinski, published in 2002 by Butterworths).

37. This second interpretation is clearly not based on the wording of the Agreed Statement. It is more an extrapolation than an interpretation, and it is quite a surprising opinion ! For instance, no one could imagine seriously that in case 15 seconds of a famous Michael Jackson track (for instance: “bad”) is incorporated in the soundtrack of a documentary, a advertising, or a film produced in 2002, such incorporation could change the rights in this phonogram with a view of separate exploitation! This is a nonsense, and obviously, the purpose of the Agreed Statement was not adopted for that purpose.

38. We will add an final argument:

Article 1.(1) of the WPPT says:

“Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the “Rome Convention”).”

39. If the meaning of article 2 (b) of the WPPT was in reality that the incorporation of a phonogram into an audiovisual “work” could result in the “suspension” of the protection of the audio performances fixed in a phonogram, such rule would conflict with the definition of “phonogram” provided for in the Rome Convention. It would for instance result in the exclusion of the right to remuneration provided by article 12 of the Rome Convention where a commercial phonogram is broadcasted or communicated to the public together with images, or it would result in the exclusion of the right of reproduction provided by article 7 of the Rome Convention in case of the reproduction an audiovisual product which incorporated a phonogram illicitly.

EXAMPLE OF DRAFTING:

“PHONOGRAM MEANS THE MATERIAL RESULT OF ANY EXCLUSIVELY AURAL FIXATION OF A PERFORMANCE, OR OF THE REPRESENTATION THEREOF, OR OF OTHER SOUNDS”

“AUDIOVISUAL FIXATION MEANS THE MATERIAL RESULT OF ANY FIXATION OF A PERFORMANCE, OR OF THE REPRESENTATON THEREOF, OTHER THAN AN EXCLUSIVELY AURAL FIXATION“

“Producer of phonogram”

40. Article 3 c) of the Rome Convention says that “producer of phonograms” means *“the person who, or the legal entity which, first fixes the sounds”*.

41. Article 2 d) of the WPPT says that the producer of a phonogram is *“the person, or the legal entity; who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds”*.

42. In the context of the growing number of audio recordings produced by performers themselves, we think that musicians unions should advise their members on the ownership of the rights relating to the qualification of “producer”.

43. The criterion, added by the WPPT, of “responsibility”, can be problematic where licensing contract between performers and a company, relating to the distribution and the promotion of one or several phonograms recorded by performers, provide a payment in advance that will be recoupable on the royalties. Indeed, we know that through many of such contracts, the company tries to get the qualification of “producer” and the related intellectual property rights.

44. It should always be recalled that the qualification of the original ownership of intellectual property rights is established by legal criteria, not by contract. A company which takes some economic risk or even grants a credit is not as such a producer. A Bank is not a producer. Therefore, the criterion of “Responsibility” does not necessarily designate the entity which provides the budget of the recording.

It designates the entity which engages labour and talents, get the equipment, decide on what shall be recorded and when, etc. Therefore, performers who make the fixation in a home studio are “producers” even if they receive some financial support, for instance from a studio company concerning specific parts of the recording.

45. Moreover, the notion of producer is directly linked to the notion of (first) fixation, which means for instance that performers keep there quality of producer of the recording made in a home studio even where the final mixing and mastering is done by a third party.

EXAMPLE OF DRAFTING:

“ PRODUCER OF A PHONOGRAM MEANS THE PERSON WHO, TAKES THE RESPONSIBILITY FOR THE FIXATION OF THE SOUNDS OF THE RELEVANT PERFORMANCE OR OF THE REPRESENTATION THEREOF, OR OF OTHER SOUNDS “

“Broadcasting”

46. In all international and regional instruments, “broadcasting” means the transmission by wireless means for public reception by the public. Broadcasting covers the transmission by satellite. It even covers the transmission of encrypted signals where the means for decrypting are provided to the public in a legal way.

47. The notion of “broadcasting” relates to analogue and digital non interactive services, even where programs are transmitted “near on demand”, i.e. targeted through multi channel systems where the public can know in advance what will be transmitted. Indeed, the public can know in advance the time of the transmission of a specific recording, but cannot decide that time and therefore at what time it will access the broadcast.

48. In our opinion, the right to an equitable remuneration for the broadcasting of commercial phonograms should be granted to the performers in case of “near on demand” broadcasting; contrary to the opinion of IFPI (see hereafter our comments about such right to remuneration).

49. The understanding of the non interactive aspect is obviously important (see hereafter our comments about the notion of “interactivity” when dealing with the definition of “making available”).

EXAMPLE OF DRAFTING:

“BROADCASTING MEANS THE TRANSMISSION BY WIRELESS MEANS FOR PUBLIC RECEPTION, OF SOUNDS, IMAGES, OR SOUNDS AND IMAGES OF A PERFORMANCE, OR OF THE REPRESENTATION THEREOF, OR OF OTHER SOUNDS, IMAGES OR SOUNDS AND IMAGES SOUNDS, INCLUDING THE TRANSMISSION BY SATELLITE AND THE TRANSMISSION BY WIRELESS OF ENCRYPTED SIGNALS WHERE THE MEANS FOR DECRYPTING ARE PROVIDED TO THE PUBLIC BY THE BROADCASTING ORGANISATION OR WITH ITS CONSENT“

“ Communication to the public “

50. Article 2 (g), first sentence, of the WPPT provides the following definition:

“ communication to the public of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram ”.

51. Surprisingly, this definition refers only to the communication to the public of sounds, meanwhile the WPPT provides a definition of “broadcasting” which includes the transmission images (...). In our opinion, providing any non interactive access by wire is covered by this definition, including non interactive simultaneous access through the Internet in case of “simulcasting”, which means the access to a broadcast through the Internet. Indeed, we consider that the simulcasting is simply a way of provide access by wire a broadcast, simultaneously with its broadcasting (or even simultaneously with its transmission by cable). Again, IFPI is against this opinion.

(On simulcasting and the argument which oppose FIM to IFPI, please read “current events” on the FIM Web Site: www.fim-musicians.com).

EXAMPLE OF DRAFTING (similar to Article 2 (g) of the WPPT):

“COMMUNICATION TO THE PUBLIC MEANS THE TRANSMISSION TO THE PUBLIC BY ANY MEDIUM, OTHERWISE THAN BY BROADCASTING, OF SOUNDS, IMAGES, OR SOUNDS AND IMAGES OF A PERFORMANCE, OR OF THE REPRESENTATION THEREOF, OR OF OTHER SOUNDS, IMAGES OR SOUNDS AND IMAGES “

“Making available“

52. This concept was obviously not provided for in the Rome Convention (1961), which was adopted at a time when the Internet was not available to the public.

53. Article 10 of the WPPT provides a definition of this new right within the provision creating it. It says:

“ Performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, 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”.

54. The WPPT provision is limited to the making available of performances fixed in phonograms.

55. Article 3 of the EU Directive 2001/29 provides a similar provision, but is obviously more protective as it covers the making available of any type of fixed performances. This provision is drafted as follows:

“Member States shall provide for the exclusive right to authorise or prohibit the making 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”: (a) for performers, of fixations of their performances“.

56. Obviously, the meaning of this provision depends on an understanding of the notion of interactivity.

However, the criteria provided for in the WPPT and in the EU Directive are not drafted with sufficient clarity, because the interactivity do not result only from the fact that the place from which and the time at which there is access is chosen individually. In our opinion, the main criterion is that a member of the public chooses individually the protected material he or she wants to access.

57. Therefore, we consider that there is “making available” where the following conditions are fulfilled:

- . each member of the public
- . can individually chose
- . at any time
- . and from any place
- . the protected material he or she wants to access.

There is no interactivity when one of these elements is missing.

EXAMPLE OF DRAFTING:

“ MAKING AVAILABLE MEANS THE INTERACTIVE POSSIBILITY GIVEN TO EACH MEMBER OF THE PUBLIC TO ACCESS, BY WIRE OR WIRELESS MEANS, SOUNDS, IMAGES, OR SOUNDS AND IMAGES OF A PERFORMANCE, OR THE REPRESENTATION THEREOF, OR OTHER SOUNDS, IMAGES OR SOUNDS AND IMAGES , INDIVIDUALLY CHOSEN BY THEM, FROM ANY PLACE AND AT ANY TIME “

2. Right of reproduction

58. Article 7 of the WPPT says:

“Performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form

59. A positive aspect of The WPPT is that its adoption confirmed the wide scope of the right of reproduction, through the following Agreed Statement: *“the reproduction right (...) fully applies in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of [the WPPT]”*

60. However, it covers only the reproduction of phonograms.

61. The EU Directive 2001/29 formulation has strengthened the protection, as it says in article 2:

“Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (...) for performers, of fixations of their performances “.

62. The wording of the Directive is more protective than the one used in the WPPT since it applies to all performers (sound and audiovisual alike).

63. Article 7.1.c) (ii) of the Rome Convention refers to a right of the performer to oppose a reproduction *“made for purposes different from those for which the performers gave their consent”.*

64. This provision can be interpreted in different ways, but it reminds us that any type of reproduction should be authorised by the performers for each specific purpose or destination of such reproduction, in particular concerning a type of exploitation did not exist at the time of the signature of the recording contract.

EXAMPLE OF DRAFTING:

“ PERFORMERS SHALL ENJOY THE EXCLUSIVE RIGHT OF AUTHORISING THE DIRECT OR INDIRECT, TEMPORARY OR PERMANENT REPRODUCTION, BY ANY MEANS AND IN ANY FORM, OF THEIR FIXED PERFORMANCES; FOR EACH PURPOSE OF EXPLOITATION OF SUCH REPRODUCTION “

3. Right of broadcasting and communication to the public

65. Article 15 of the WPPT says:

“(1). Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2). Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the users by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3). Any contracting party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4). For the purpose of this Article, 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 purpose ”

66. The UE Directives 1992/100 and 1993/83 provided a similar right, limited to uses of phonograms, as in Article 12 of the Rome Convention.

67. A positive aspect of Article 15 of the WPPT is paragraph (4) which extends the protection through a wide interpretation of the notion of “phonogram published for commercial purpose”, which now covers phonograms made available on the Internet even when copies of such phonograms are not released or marketed.

68. A negative aspect of Article 15 of the WPPT is paragraph (2), first sentence, which creates an important confusion concerning the meaning of the notion of “single” remuneration. Probably for the purpose of being flexible (...), this provision of the WPPT creates the possibility to have a single remuneration, to the benefit of both the performers and the producers of phonograms, being claimed from the users by the producers only (...).

69. Obviously, performers should, as a matter of justice, have a legal claim against the user for an equal share of the equitable remuneration. As a consequence of this principle, performers should claim equitable remuneration to be paid for uses of broadcasting and communication to the public of phonograms where incorporated in audiovisual products.

70. Therefore, musicians unions should make all efforts in order to oppose that an equitable remuneration to both the performers and the producers be claimed from the users by the producers only.

71. The right to an equitable remuneration do not exclude the possibility to provide also at national level exclusive rights to the performers. The two types of rights (right to an equitable remuneration, and exclusive right) can co-exist, subject to the right to a single equitable remuneration being fulfilled. However, when dealing with mass uses, such solution seems appropriate only in countries where the performers are very strongly represented collectively. In Spain for instance, such system resulted in a mass conflict between performers and producers, where that latest claimed to benefit collectively through contract (means the exercise of an exclusive right) the transfer of the right to remuneration. A court case is pending at the moment on this conflict.

72. The Directive 2001/29 does not provide any right for the broadcasting and for the communication to the public of performances in audiovisual fixations (other than the interactive making available to the public), which means that an immense number of uses of performances in audiovisual fixation remain unprotected by the EU norms! This is obviously an unbalanced situation, and we should always remind governments that the Directive do not preclude member States from providing rights to the performers beyond those required to be provided under such instrument.

73. We do not propose any drafting of provisions relating to the management of such rights relating to broadcasting and communication to the public, due to the various existing traditions in the field of collective bargaining, compulsory licences and collective management. However, we recommend certain principles.

74. FIM recommends the following principles:

- a). The rule of sharing the equitable remuneration between performers and producers should be imposed by law which should also provide that the right to equitable remuneration shall not be transferable from the performer to the producer.
- b). “near on demand” and “simulcasting” uses should be respectively qualified as “broadcasting” and “communication to the public” acts; which means that they are subject to the right to equitable remuneration of Article 12 of the Rome Convention, Article 15 of the WPPT, and Article 8 of the EU Directive 1992/100.
- c). Performers organisations should keep the right to claim from the users the equitable remuneration together with producers when they also benefit from this right.
- d). By law, exclusive rights of broadcasting and communication to the public should be provided together with provisions supporting social dialogue and collective agreements; particularly concerning the determination of minimum standards of remuneration in the case of retransmission and more generally for secondary uses.

EXAMPLE OF DRAFTING:

Alternative A:

PERFORMERS SHALL ENJOY THE EXCLUSIVE RIGHT OF AUTHORISING THE DIRECT OR INDIRECT BROADCASTING AND COMMUNICATION TO THE PUBLIC OF THEIR FIXED PERFORMANCES, IN ANY MANNER OR FORM, WHICH SHALL NOT AFFECT THE RIGHT TO A SINGLE EQUITABLE REMUNERATION IN CASE OF BROADCASTING AND COMMUNICATION TO THE PUBLIC OF PHONOGRAMS PUBLISHED FOR COMMERCIAL PURPOSE.

Alternative B

PERFORMERS SHALL ENJOY THE EXCLUSIVE RIGHT OF AUTHORIZING THE DIRECT OR INDIRECT BROADCASTING AND COMMUNICATION TO THE PUBLIC OF THEIR FIXED PERFORMANCES, IN ANY MANNER OR FORM, WHICH SHALL NOT AFFECT THE RIGHT TO AN EQUITABLE REMUNERATION.

4. Right of making available

75. See above our comments and proposal concerning the definition of “making available”.

76. Our proposal concerning the right itself is obviously complementary to the definition of what “making available” means.

EXAMPLE OF DRAFTING:

“ PERFORMERS SHALL ENJOY THE EXCLUSIVE RIGHT OF MAKING AVAILABLE TO THE PUBLIC , BY WIRE OR WIRELESS MEANS, OF THEIR FIXED PERFORMANCES “

5. Exceptions and limitations to the rights

General comments

77. The very long list of exceptions in the EU Directive 2001/29 has been highly criticised both by rights holders and by the users. Users have said it does not harmonise anything, since most exceptions or limitations are voluntary rather than compulsory. Rights holders, on the other hand, called for a smaller number of exceptions to their rights, without success. They also deplored the lack of harmonisation emerging from the text.

78. The Directive provides for one compulsory exception (see hereafter our comments on “*Temporary acts of reproduction which are transient or incidental as part of a technological process*”), and an exhaustive list of voluntary exceptions.

Recital 32 of the Directive states:

“This Directive provides for an exhaustive enumeration of exceptions and limitations to the reproduction right and the right of communication to the public. (...) This list takes due account of the different legal traditions in Member States (...)

79. This means that after the 22 December 2002, members States are not allowed to provide exceptions and limitations that are not listed in the Directive.

80. Musicians unions should check whether existing exceptions and limitations provided for in national legislation are compatible with the exhaustive list provided for by the Directive.

81. Moreover, Article 5.5 of the Directive provides for a general rule of safeguard which is the following:

“ The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 (of Article 5) shall only be applied in certain special cases which do not conflict with a normal

exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the right holder.”

82. This principle, usually named **the “three-step test”** is a well known rule in international norms. In our opinion, this system comes from the common law tradition and does not actually represent a safeguard in civil law countries. However, performers organisations will have to use it as much as possible, and try to get advantage from it.

83. Therefore, FIM strongly recommend that the provision on the “three step tests”, as drafted in Article 5.5., be formally reproduced in national laws. There are some current attempts from EU governments not to do this as the European Commission seems to consider that its formal introduction in national legislation is not compulsory.

84. However, the adoption of this provision should never “justify” the adoption of unbalanced exceptions, as it did very unfortunately in the process of adopting the Directive. Very few performers can, for financial and professional reasons, argue and go to court on the basis of this provision.

85. Article 5(2) of the Directive lists a number of voluntary exceptions to the right of reproduction, among which is included private copying.

86. Article 5(3) of the Directive lists a number of voluntary exceptions to the right of reproduction **and** the right of making available.

87. Recital 36 of the EU Directive says:
“The Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation” (our underlining).

88. This means that at national level, musicians unions should systematically establish whether each exception or limitation could be compensated for an actual and equitable remuneration.

89. It is important to recall that Member States are not compelled to introduce this voluntary exception in their own legal systems. Indeed, it seems that most of the EU member states will decide of a status quo solution.

90. Finally, we mention that once such exceptions or limitations are introduced at national level, the Directive requires that their beneficiaries must be given the means of benefiting from them. This is a new principle and one which represent serious dangers to right owners interests.

Temporary acts of reproduction which are transient or incidental as part of a technological process

91. This exception to the right of reproduction is the only compulsory one.

Article 5. 1. says:

” Temporary acts of reproduction ... which are transient or incidental and an integral and essential part of a technological process and whose sole purpose is to enable:

(a) a transmission in a network between third parties by an intermediary, or

(b) a lawful use

of a work or other subject-matter to be made, and which have no independent

economic significance, shall be exempted from the reproduction right provided for in Article 2 “ (Article 2 provides the right of reproduction).

EXAMPLE OF DRAFTING:

In order to be able to prevent stop such temporary reproduction the purpose of which is to enable “*transmission in a network between third parties by an intermediary* “, when such transmission relates to a use which is not lawful, we recommend to replace in national legislation the expression “...or a lawful use ...” by “...AND A LAWFUL USE”.

“Fair compensation” for private copying vs technological measures limiting copies

92. In the new digital environment, right owners tend to fear the loss of control resulting from free access on the Internet to protected material, due to a lack of technological measures that would be efficient at a world level.

This feeling exists mainly at the moment in music, literature and visual arts fields. It will probably grow in the audiovisual field as soon as new technologies create an easy (i.e. high speed) access on the Internet to moving images.

93. Meanwhile, performers organisations (and also organisations representing the authors) fear an unbalanced bargaining position when dealing with remuneration to be paid in order to compensate for such mass uses. The main difficulty, when dealing with mass uses, is to get paid rather than to keep total control of the uses, whatever the legal system is.

94. This is the reason that , in general, simply to contrast a “right to remuneration” to an “exclusive right” is not a satisfactory approach. The exclusive right can be a solution where performers can exercise it, individually and/or collectively (e.g. with minimum standards fixed through collective bargaining process).

95. Concerning Internet uses, exclusive right of making available should not be simplistically opposed to a system of remuneration for private copying. Both systems should co-exist.

96. The situation resulting generally from international norms is that the making available should be protected at national level by an exclusive right provided for to the performers; and that the private copying should be subject to a financial compensation through compulsory licence systems.

97. Some countries still resist to the adoption of such compulsory licence system (for instance UK), even concerning the traditional private copying from carrier to carrier, but these countries are more and more in a minority position.

98. A major issue is the implementation of compulsory licence systems relating to the private copying on computer hard disks and similar devices. Here again, we have an approach which conflicts with the IFPI views.

99. IFPI wants mainly to control and limit uses through exclusive right and technological measures, and therefore oppose to the development of compulsory

licence system . IFPI also wants to impose the rules of sharing of remuneration with the performers under the free individual bargaining process.

100. We consider that a priority for the performers is to guarantee that they will benefit at minimum of an equal sharing of the remuneration to be paid for the downloading of music recordings and more generally private copying of them.

101. We also consider that as internet providers as VIVENDI and AOL own Major recording companies as UNIVERSAL and WARNER, and as the other Majors belong to wide conglomerates dealing with communication, the financial interests of the performers could be more and more opposed by the major companies represented by IFPI. Indeed, music is likely to be used more and more by Internet providers as a cheap attractive service, and both the providers and the producers would like to avoid payment to performers.

102. The further development of a free contractual practices process in this field could damage performers interests. This is why we have long advocated rigorous legal provisions designed to protect performers interests in contractual transfers of rights.

We recommend that the exclusive right of making available (with the related technological measures) should not be opposed to a system of remuneration for private copying. Both systems should co-exist.

103. Article 5.2 (b) of the EU Directive says:

“ Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:(...)

in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the right holders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned ”

104. The notion of “fair compensation” seems to have been chosen with the objective of being flexible, and if recital 35 is taken into account, might not necessarily lead to financial compensation (see below).

EXAMPLE OF DRAFTING

We recommend using the expression “equitable remuneration” in any provision relating to private copying.

105. Recital 35 of the EU Directive says:

“ In certain cases of exceptions or limitations, right holders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, (...) and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the right holders resulting from the act in question. In cases where right holders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological

protection measures referred to in this Directive. In certain situations where the prejudice to the right holder would be minimal, no obligation for payment may arise “

106. Please note carefully this Recital, which represents, in our opinion, a **great danger** for performers. It links the compensation for private copying to (a) contractual practices and (b) technological measures. This link is potentially damaging because performers are generally in a weak bargaining position and at the moment do not invest collectively into technological measures.

107. It follows the IFPI approach, the producers not wishing to be obliged to share with performers (and authors) any remuneration for Internet uses, and to keep a commercial control of what could be copied and in which quantity.

108. This provision is very questionable and could open the door to a claim, at any time, against existing tariffs of remuneration for private copying, on the basis of one or several of the following arguments:

- . the prejudice of the producers (not the performers) is becoming “minimal” (...);
- . as the right holders (mainly the producers) have already received payment in some other form, for instance as part of a licence fee;
- . because the degree of use of technological protection measures is satisfactory.

FIM strongly recommends that national legislation should not provide for any of the principles expressed in Recital 35 of the EU Directive 2001/29 that we have here above underlined (see here above point 105 of the memorandum) .

109. We do not propose any provisions relating to systems of tariffs and management of the rights to remuneration for private copying, due to the various existing legal traditions in the field of compulsory licences and compulsory collective management.

“Ephemeral recordings” by broadcasting organisations

110. Article 5.2 (d) of the EU Directive says:

“ Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases: ... in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted ”

111. Article 15.1 of the Rome Convention says:

“ Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

...

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcast “.

112. The exception proposed by the EU Directive is drafted more widely than the one of the Rome Convention since it refers to “ephemeral recording” and not to “ephemeral fixation”, and comes within a part of the Directive which deals with exceptions to the right of reproduction.

WE BELIEVE THAT THIS EXCEPTION IS NOT COMPATIBLE WITH THE ROME CONVENTION, IN COUNTRIES WHERE THE SAME KIND OF EXCEPTION DOES NOT EXIST IN CONNECTION WITH THE PROTECTION OF COPYRIGHT IN LITERARY AND ARTISTIC WORKS (see Article 15.2 of the Rome Convention), AS

IT CREATES A NEW EXCEPTION TO THE RIGHT OF REPRODUCTION OF PHONOGRAMS NOT PROVIDED FOR IN THE ROME CONVENTION.

In our opinion concerning performers rights, such exception cannot be introduced in the legislation of countries which ratified the Rome Convention and do not provide for the same kind of exception in connection with the protection of copyright in literary and artistic works.

Indeed, Article 22 of the Rome Convention says: *“Contracting States reserve the right to enter into special agreement among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention”*

113. Moreover, the exception proposed by Article 5.2 (d) of the EU Directive refers to the preservation in “official archives”, without any definition of that phrase, which can open the door to many abuses.

114. Finally, this exception refers the “exceptional documentary character” of the related recordings, which can obviously be interpreted in various ways in the cultural field. Would for instance a concert of a famous opera singer, or the last concert of the Rolling Stones, be identified as an event of exceptional documentary character?

FIM recommends to oppose any exception for broadcasters other than the exception granted by Article 15 c) of the Rome Convention.

Distribution of reproductions which result from an exception to the right of reproduction

115. Article 5.4 of the EU Directive says:

“ Where the member States may provide for an exception or limitation to the right of reproduction (...) they may provide similarly for an exception or limitation to the right of distribution (...) to the extent justified by the purpose of the authorised act of reproduction ”

116. This exception, phrased in a vague way, can be dangerous; for instance if applied to recordings made by broadcasting organisations for the purpose of “official archives”.

Moreover, WE BELIEVE THAT THIS EXCEPTION IS NOT COMPATIBLE WITH THE WPPT IN COUNTRIES WHERE THE SAME KIND OF EXCEPTION DOES NOT EXIST IN CONNECTION WITH THE PROTECTION OF COPYRIGHT IN LITERARY AND ARTISTIC WORKS (see Article 16 of the WPPT).

117. In our opinion, such exception is not needed since few if any of the permissible exceptions require distribution to fulfil their purpose, and the distribution of recordings for social or collective purposes can be easily achieved by professional agreements.

118. We should keep in mind that some broadcasting organisations, including public service organisations, have for years exploited in a commercial way so called “archives”, without prior agreement from performers organisations. Such exceptions looks like an award to them!

FIM recommends to oppose to such exceptions to the right of distribution.

6. Moral rights

119. The EU Directive does not provide any moral rights to performers, although Whereas 15 of this Directive refers to its objective to implement new obligations resulting from the WPPT Treaty which does provide such rights.

120. Article 5.1 of the WPPT says:

“ Independently of performer’s economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performance or performances fixed in phonograms, have the right to claim to be identified as the performer of his performance, except where omission is dictated by the manner of the use, and to object to any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation “.

121. The positive aspect of this provision is that it provides the two moral rights for the performer:

- a). the right to have his or her name mentioned to the public;
- b). the right to object any distortion, mutilation or modification of his or her performance.

122. The negative aspect of this provision is that it includes some limitations to the rights:

- a). an omission of the name can be dictated by the *“manner of the use”*
- b). the right to object distortion, mutilation or modification is subject to the evidence that such alteration would be *“prejudicial to (the) reputation”* of the performer.

123. The second limitation can mean that the performer should be able to prove prejudice to his or her reputation before being able to object distortion, mutilation or modification of the performance.

FIM recommends the inclusion:

- . in national legislation of the two moral rights of performers to apply as do the other rights in the Directive to all performances including audiovisual, and;
- . limit as much as possible (subject to the national legal tradition) the two limitations mentioned above.

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