

MUSICIANS' UNION SUBMISSION
ON THE "BASIC PROPOSAL" (DC/3) FOR THE DIPLOMATIC CONFERENCE
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES

This submission continues the argument that we have advanced on a number of occasions during recent years as the attempts to develop a framework of statutory rights for performers appropriate to the digital age have proceeded. Although the technological context has continued to change at an increasing rate, the basic needs have been apparent for some years. During that time, of course, the political and economic power of the production and dissemination industries has continued to grow as has their capacity to hinder the development of performers' rights as they did during the emergence of the Rome Convention in 1961.

In these circumstances we call upon the UK government to recognise the social and economic value of the performers' professions in this country and to lend its support to a framework of rights that will enable them to obtain a fair return from the many new markets and opportunities for the exploitation of their performances.

We attach the comments of FIM on the basic Proposal. We have, as you may suppose, provided a substantial input to the FIM paper and we adopt it unreservedly. From our specific viewpoint, however, as the largest representative organisation of musicians in the UK and one that was extensively involved in the campaign for and adoption of the first international performers instrument (the Rome Convention), we add below some further comments on the issues that will be before the Diplomatic Conference. These comments are based on decades of experience in the realities of phonogram, film and other audiovisual production.

The Reality of Contractual Relations

Professional musicians wish to practice their profession by exploiting their performance for both economic and artistic satisfaction. In 'pre-media' times their performances were

inseparable from their physical presence and ‘live’ performance was the only mode of exploitation. Since the early 1920s, however, it has been both technically and commercially practicable first to separate the performance from the performer and then to exploit it in an ever increasing number of ways. Such uses can and do involve dividing, modifying and re-using the performance as raw material in the creation of new products. The professional musician (like all professionals) wishes to be able to trade, freely and openly, for these many uses of his or her creative output.

These rather obvious points are repeated here because in some of the earlier WIPO discussions and even in the “Basic Proposal” (see for example paragraph 12.03) it has been suggested that the introduction of exclusive rights for performers brings with it the danger that, presumably intoxicated by power, any one of them might forget that he or she wishes to continue in the profession, and arbitrarily prevent by some unspecified legal action the exploitation of, for example, an audiovisual production. The complete absence of any factual or historical evidence for this argument does not appear to inhibit its proponents.

Fortunately, the realities are evident and understood in the UK, where performers have had effectively a reproduction right since 1925 with no distinction being drawn between audio and audiovisual fixations. Equipped with these rights and protections they have contributed to successful phonogram, audiovisual and broadcasting industries through individual and collective bargaining over the uses of their performances.

International experience shows that the capacity to bargain effectively over all possible modes of exploitation exists in many other developed countries. Where it does not, however, (and this is crucial to the argument) producers are invariably able to acquire all conceivable rights to exploit their product. Neither logic nor experience supports the proposition that performers with inadequate bargaining power to obtain clear and adequate contracts or to resist the imposition of inequitable contracts would be able, at some later date, to challenge the transfer of rights made at the time of the original engagement.

Similarly inaccurate is the suggestion, made during some of the discussions and repeated in paragraph 12.04 of DC/3, that a rebuttable presumption of transfer of rights brings ‘legal certainty’. All that such a presumption does is to make even more unequal the bargaining power of the parties to the contract. To the extent that the presumption can be rebutted, however, it cannot produce ‘legal certainty’.

We have welcomed the position so far taken by the UK government on the inclusion of contractual and labour issues in the proposed Instrument. Should such a provision be included, despite these efforts, we would, on behalf of the music profession strongly oppose adherence to the resultant Instrument.

The Nature of the Proposed Instrument

The author of DC/3 spends some words on discussing whether the Instrument should be a Protocol or a Treaty. He deals in a rather cavalier manner with the expressed view of the 1996 Resolution that it should be a Protocol and then decides that it would ‘simplify’ presentation to follow the wishes of the United States by using the expression ‘Treaty’. The disingenuous arguments for this choice are not important. What is important is the nature and purpose of the Instrument.

Throughout the Committee of Experts prior to the 1996 Diplomatic Conference all performers’ organisations and the majority of states’ representatives sought a Treaty that covered all aspects of a performance, both aural and visual. This was widely recognised to be essential for any Instrument that purported to deal with the technical realities of the twentieth, and even more of the twenty first, centuries. Unfortunately the USA again took the stance that it had taken in the 1961 Diplomatic Conference for the Rome Convention (which it did not subsequently ratify) and effectively prevented agreement on this objective. Nevertheless, the Resolution adopted in 1996 clearly proposed that the PPT should be completed or extended by a Protocol. It was not the intention that all aspects of performances and performers should be re-examined. It was not suggested, for example, that the same performer would need to be differently defined for the visual aspects of the performance than for the aural aspects. Nor was it stated that the moral rights of a performer should be reduced if more of the performance

(i.e. the visual aspect) was included in a fixation. It was also supposed that ratification of the PPT would be an essential prerequisite to the ratification of the Protocol, thus strengthening the total protection of the performer. With these considerations in mind we trust that the UK government will maintain its support for a Protocol rather than a Treaty.

The Realities (and Legalities) of Performers' Rights

The technical aspects of the 'fixation' right and the 'reproduction' right are dealt with at some length in the FIM submission. We make a few further comments here because we believe that Mr Liedes (DC/3) displays confusion about these rights, as they are expressed in the Rome Convention, in the PPT, and now in the 'Protocol'.

It helps us to clarify our position if we can start at the basics. Any single note of a musical performance begins in 'unfixed' form, sometimes called 'live'. The act of fixation (translating the note into a material form) produces a qualitative and irreversible change in that note. It ceases to be ephemeral and can be used, modified or manipulated in a variety of ways. All these acts involve reproduction of the fixed note. The fixation and any of its reproductions can of course be destroyed but the note can never be unfixed and resurrected as a 'live' note. It follows that for all or any part of a given musical performance there can only be one act, time and place of 'fixation' and all subsequent 'incorporations' or 'embodiments' of the fixed performance will be acts of reproduction. The performer has distinct and separate rights over the acts of fixation and reproduction.

There is, in parenthesis, some lack of clarity over the use of the work 'fixation' which may be used to describe the act or the product of that act. The product may, of course, result from the act of fixation of a live performance (e.g. a pop concert or opera), or from the reproduction of existing fixations (e.g. when a phonogram is incorporated into a music video), or from both processes.

We apologise for the tedium of the foregoing analysis, but it has been obvious in WIPO discussions (and indeed from the Proposal, see for example paragraph 2.05) that these matters

are not fully understood. We trust that UK representatives will be able to assist in ensuring that these matters are not confused in the outcome of the Diplomatic Conference.

The Scope of the 'Audiovisual'

As FIM representatives have frequently pointed out at WIPO meetings, the 'audiovisual field' is not synonymous with the (Hollywood or Indian) 'film' industry. In the FIM submission (page 12) a few of the many other audiovisual products are mentioned. The BBC was recently reported as intending to expand its 'bi-media' production by adding a visual element to its radio productions. Paragraph 2.03 of the Proposal illustrates the limited approach to the audiovisual referred to above. In these circumstances the frequent references to the alleged significant differences between the logistics and finances of the feature film and the phonogram industries can be seen to be irrelevant to an Instrument intended to deal with the whole 'audiovisual' field.

The Relationship between the Proposed Instrument and Other International Instruments

The proposed Instrument has to fit in with and effectively relate to the Rome Convention and the PPT. Because of this it is essential to examine closely the scope and nature of those instruments. The Rome Convention is not confined to musicians' and other performers' aural performances. It provides, for example, a fixation right for audiovisual performances and a reproduction right in respect of audiovisual fixations made without the performers' consent. The frequently misrepresented Article 19 of the Rome Convention (see for example paragraph 12.05 DC/3) does not affect Article 12 rights, a matter much more important now than in 1961 since many commercial phonograms are now broadcast and communicated to the public from carriers that include images. Nor, of course, does Article 19 either suggest or require any transfer of rights to the producer. Mention of the fixation right in the Rome Convention reflects the inter-relationship between these Instruments since a state ratifying the PPT would, in the light of Article 1(i) of that Treaty need to define 'fixation' more comprehensively than is stated in Article 2(c) if it needed also to satisfy the obligations of the Rome Convention.

Similarly, Articles 2(f) and 6(i) of the PPT provide performers with a right over the audiovisual broadcasting of live performances except in the case of re-broadcasts.

Consideration of a possible Protocol to the PPT now produces an unprecedented need to fully and accurately analyse the two existing international performers' Instruments not, in any sense, to re-write them but, it is suggested, in some cases to understand them more clearly.

We hope very much that a Protocol to the PPT can be achieved which will take account of the above points. It will not represent perfection: there are many consequences of the digital revolution that will still not be covered, but it will be a valuable step forward.

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