

The Definition of “Phonogram” in the WPPT (Translation)

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1. Today, the international instruments dealing with the intellectual property rights of performers confer on them, to a certain degree, elements of satisfactory protection in a significant number of countries. At the moment, 76 states belong to the Rome Convention (1961) and 42 to the WPPT (1996).

2. Adopted in 1996, the WPPT aims to update and improve the protection offered by the Rome Convention (from which, according to Article 1, one cannot derogate), taking into account the evolution of Internet technology.

3. It protects the rights of performers whose performances are recorded on phonograms; as well as the right of the producers of phonograms and grants them an appropriate and effective degree of protection where their works are distributed on the Internet.

4. The main progress brought about by the WPPT is:

- The *moral right* which means the recognition at the international level fact that the rights of performing artists belong, together with the rights of authors, to the family of human rights, and attempts to protect the creative activity of artists;
- The *distribution right* (of copies) of phonograms, which is necessary in the struggle against traditional piracy, including the cases where CDs are imported from a country where they have been illicitly manufactured;
- The *right of (interactive) making availability* of phonograms, which targets use on the Internet through which a phonogram is made accessible to all individuals, from a place and at a time of their choice;
- The *right to fair remuneration* in the case of broadcasting and communication to the public of phonograms “published for commercial purposes”. This idea is very significant because it includes all phonograms made available to the public on the Internet.

5. It is important to emphasize that the simulcasting of radio and TV programs is protected by a right to equitable remuneration since it is a case of a non-interactive act of public communication.

6. The protection depends on the content of what is recorded on a “phonogram”; that is to say all performances of which the original recording is exclusively audio. In reality, the WPPT unfortunately does not protect audiovisual

recordings of visual or audiovisual performances. Performers are still waiting for a treaty which would bring them effective protection for their recorded audiovisual performances.

7. With regard to the question of the protection brought by the WPPT to performers concerning their phonograms, I would like to raise the very interesting question of the definition of phonogram, as stated by the WPPT. We are concerned with a fundamental point here, since there still remain some analytic divergences and the very substance of the treaty can hang on this fact. Such divergences are regrettable because it seems absolutely essential that the lawyers of the entire world should have one simple, non-ambiguous definition.

8. Under the definition given in Article 3(b) of the Rome Convention, a convention from which the WPPT cannot derogate (cf. Article 1.1 of this treaty), a “phonogram” means “the exclusively aural fixation of sounds or other sounds”.

9. We can pose a major question in the following terms: Do the Rome Convention, the WPPT, and the appropriate national laws protect a performance fixed on a phonogram when this is used in conjunction with images following its incorporation (that is to say its reproduction) in an audiovisual production?

10. This question will probably form the object of controversy in the coming years and, it seems, performers of music and the organizations representing them will be actively seeking to guarantee that their recorded performances be suitably protected when they are used with images.

11. As far as we know, there are examples for court cases about this issue in at least three countries and there will necessarily be more in the near future. The High Court of Australia already took a decision in 1998 which confirms that the broadcasting of commercial phonograms incorporated in audiovisual programs is subject to a right of remuneration in favor of the performers and producers of such phonograms.

12. A regrettable strategy had been developed regarding this issue at the international, regional and national levels; a strategy which attempts to impose a specific interpretation of the definition of phonogram given by the WPPT. According to this interpretation, the statutory protection of a fixed audio performance will be suspended as soon as such a fixation is exploited along with images. We think that it is a result of an erroneous reading of the Rome Convention and of the WPPT for the following reasons.

13. As we have seen, Article 3(b) of the Rome Convention defines a “phonogram” as “the exclusively aural fixation of sounds or other sounds”. There is no doubt that this definition refers to the *act* of making an exclusively audio fixation of a non-fixed performance. What is protected according to this concept of phonogram is the content of the fixation (that is to say, the performance which, from the moment of its fixation, continues to exist as the contents of the phonogram which is its result) and obviously not the support on which the performance is incorporated.

14. As a consequence, the act of *audiovisual fixation* (which has still not been defined in any international instrument) consists only of the simultaneous fixation of the sounds and images of a performance. If the term *audiovisual fixation* is utilized to describe the material product of such an act, it can only refer to the two elements of the performance being simultaneously recorded.

15. It follows that all use of an exclusively audio fixation of a performance implies the use of an already protected phonogram, even if it is associated with images (the audio part of a music video or a film) subsequent to its fixation. In this last case, we can speak about the reproduction of a phonogram.

16. A certain number of key points should be considered as far as this act of reproduction is concerned:

- a) Whatever is contained in the Rome Convention or the WPPT, the only criterion for defining a “phonogram” is the original process of fixation; that is to say the initial act of fixation of the performance.
- b) Neither of the instruments anticipates that the definition of a “phonogram” can be modified or suspended when it is the object of particular uses.
- c) As has been previously established, a phonogram is defined uniquely by the process of its making and not by the uses to which it can be put. The text of both instruments is clear on this point. All the while, in order to minimize any doubts, the Diplomatic Conference adopted, along with the WPPT, an agreed statement relative to Article 2(b) to read as follows: “It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in phonograms are in any way affected through their incorporation in a cinematographic work or other audiovisual”. We should note that this statement refers to the incorporation of rights and intends to avoid any incorrect “suggestion” based on the text of the Article.

17. Despite these clear texts, commentators have advanced an argument according to which, as a result of Article 2(b) of the WPPT, the “nature” of the phonogram would be “suspended during its incorporation”. The protection afforded by the WPPT would be thus excluded when “the sound is brought together with visual elements”. According to this argument, the simple fact that this incorporation takes place during the use of the phonogram is enough to suspend its nature.

18. We categorically reject this argument, which abandons the content of the WPPT, and is not practical for the following reasons:

- a) From the moment when a performance is fixed, it comes under the protection of the WPPT because it is the contents of a phonogram no matter what it is being used for. All incorporation of the fixed performance in an audiovisual production is an act of reproduction of a protected phonogram.

- b) The idea of the suspension of the nature of a phonogram is a pure invention. There is no trace of such a principle mentioned in the Diplomatic Conference of 1996. Besides, owing to lack of time, no debate took place during this diplomatic conference regarding the formulation of a definition of phonograms. The WPPT would then have been able to anticipate such a rule of “suspension”, under a form similar to the formula used in Article 19 of the Convention of Rome concerning reproduction rights. A similar rule would have been able to stipulate, for example, that from the moment that the incorporation of a phonogram in a cinematographic work or other audiovisual production is authorized, certain rights guaranteed to the performers by the WPPT “would cease to be applicable”. The evidence shows that nothing of the sort exists within the WPPT.
- c) The consideration, according to which “the simple fact that the incorporation takes place during the use of the phonogram is enough to suspend its nature” is clearly not practical, in particular in the digital world. All digital media, including CDs, can incorporate still or moving images with sounds. What is more, such a principle could facilitate abuse, the consumers being able to systematically use phonograms in conjunction with images in order to bypass their protection by the WPPT. Such a use could take place, for example, in a country where the right of reproduction is not exercised by the artist.

19. A very simple example would be that of a disco possessing a screen displaying images somewhere in the auditorium in order to escape payment of the fair remuneration foreseen by the Rome Convention and the WPPT. Similar practices could appear on the Internet to the detriment at one and the same time of the performers and producers, in particular where the uploading takes place in a country where the legislation does not protect neighboring rights or a country where the protection of these rights is not applied in practice.

20. I would like to add one final argument: Article 1.1 of the WPPT stipulates: “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, 26 October, 1961 (hereinafter the Rome Convention)”.

21. If the meaning of Article 2(b) of the WPPT was that the incorporation of a phonogram in an audiovisual work could result in the suspension of the protection of fixed audio performances on a phonogram, such a rule would be in conflict with the definition of phonogram under the Rome Convention.

22. For example, this would result in the exclusion of the right to remuneration provided for by Article 12 of the Rome Convention when a commercial phonogram is broadcast or communicated to the public with images, or the right of reproduction under Article 7 of the Convention in the case of reproduction of an audiovisual production which illegally incorporates a phonogram.

23. This question shows how problematic the distinction between audio recording and audiovisual recording is in the WPPT. Taking into account that performers are not protected at the international level, as far as their fixed audiovisual performances are concerned (except by the Rome Convention for the reproduction of non-authorized audiovisual fixations), this distinction encourages the employers of artists as well as the users of audiovisual recordings to prolong this situation.

24. What is more, this distinction can lead to incoherency. For example, an actor who authorizes the audiovisual fixation of his performance has no rights at the international level, while an actor who authorizes the fixation of his voice alone is protected by the WPPT, even when the phonogram in which his voice had been fixed is reproduced in an audiovisual production, for example, for narration or through dubbing.

25. In conclusion, I would like to emphasize the necessity of calling, as soon as possible, a new diplomatic conference in order to adopt an international instrument dedicated to the protection of performers regarding their fixed audiovisual performances.