The Protection of Audiovisual Performances
(Translation)

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Introduction

First of all I would like to thank the organizers of this Congress, the Hungarian ALAI group, for the invitation. The federation that I represent has existed since 1952, and it regroups more than 100 trade unions, guilds and associations of actors, dancers, singers, choreographs, circus and variety artists of more than 75 countries of the entire world. Our members, the performing artists have been recognized under the international norms since 1961 as owners of "rights neighboring to copyright", but, unfortunately, until now they have been unable to fully enjoy those rights. At least this is the case in the audiovisual domain, since the aural field was the object of an appropriate international regulation in 1996.

The artists have to face nowadays two challenges: on the one hand, the thousand-and-one different forms of exploitations of audiovisual fixations have an impact on the employment of artists. These fixations, on the other hand, continue being exploited through multiple formats and channels and produce important revenues. The remuneration of "no work" for the artists, therefore, obtains an outstanding importance for their ability to survive during the long periods of unemployment. Thus, it should be permitted to them to share the revenues generated thanks to their talents. The intellectual property law, and more precisely the copyright law, offers to the performing artists appropriate remuneration for their creation.

Having been promoted – with good reasons – to the rank of owners of intellectual property rights since 1961, thanks to the Rome Convention, the performers of the audiovisual domain do not benefit, at present, other than some very much insufficient rights in the face of the accelerating technological progress.

In this presentation, I am going to review the level of protection accorded to performances at the international level and to offer some points for discussion. In view of the limited time available, I limit myself to the international protection in the audiovisual domain, setting aside the aural domain.

Why is there a need for intellectual property rights in favor of audiovisual performances at the international level?

Nobody has any doubts nowadays that audiovisual performances deserve being protected. An audiovisual performance is a work. It is the fruit of a collective effort. Each one is original. Each one is unique.

The technological developments that have followed each other since the invention of the silent film until the recent means of interactive, digital exploitation constitute an excellent occasion for performers to become known around the world by millions of people through a multitude of formats and channels which permits to accede to a much larger public. The economic existence of an audiovisual work – its capacity to generate profit in the new markets – has been extended spectacularly.

These new forms of exploitation of the creative works of performers, however, have led to a significant *diminution of control* by them concerning the use of their image and the commercial exploitation of their audiovisual performances, in particular those which are fixed on a carrier. The performing artists should have protection against all direct or secondary use of their image and the results of their work not authorized by them and be remunerated in an adequate manner either by their producers or by third parties. They need a form of protection that permits for them to negotiate on the use of their work and to be protected against any non-authorized exploitation outside their contractual relations, not only in their country of origin but also elsewhere.

Within the ensemble of means at the disposal of the artists, intellectual property rights are supposed to play an outstanding role. Of course, there are also some other means that may be used by them to protect their interests but they alone do not seem sufficient to offer a real solution.

In the majority of cases, an artist signs a *contract* with his employer or the person who commissions his work. Ideally, he can demand an appropriate remuneration for the direct utilization of his performance and for all forms of secondary exploitation thereof. It is possible to define in the contract the geographical scope of the validity of the agreement, the applicable law in case of disputes, the duration of the contract as well as all circumstances that have an impact on the environment in which he is supposed to deliver his performance.

However, the protection offered by a contract has numerous limitations: first of all, it presupposes the existence of a valid agreement and *it cannot be claimed outside this accord*. Very frequently, the performers *do not have a contract* which they could use in any situation. Furthermore, the negotiating power of the artist in his relation with his employer is often very limited. The majority of them cannot use anything else but the power of their respective trade union or professional organization to benefit from a minimal treatment, which frequently also becomes

the maximum they can hope. Finally, a contract remains only have *a binding effect for those who have signed it and not for third parties*, who, by definition, have not entered into an agreement with the contracting parties. This problem is particularly serious at present, when the global distribution of programs – by satellites, cable, Internet and other means – is the source of widespread piracy. And even if we presume that from now on the contracts and the *technological protection measures* may limit the non-authorized exploitation of audiovisual works, it is quite unlikely that finally the artists will benefit from this.

The rules of copyright may, in certain cases, be exploited by performers, since they permit for them to authorize or prohibit the exploitation of the works created by them on the basis of the international norms, and in particular of the Berne Convention. However, the latter does not consider the performers as authors. Beyond the case where a performer is *also the author* (or the co-author) of a literary or artistic work, it would, therefore, be impossible for him to get access to such protection and to benefit from *national treatment outside the borders* of his country. Furthermore, even where a performer may exercise his rights as author, under certain national laws he looses his rights in favor of his employer or the person who has commissioned the work.

Without the intention of entering more details on the question of the alternative forms of protection on the basis of which a performer – under certain conditions – may maintain the control over his image, his creation, and the exploitation thereof, and may get remuneration, it has to be stated that all the available means are insufficient, certainly unable to fulfill the tasks of an efficient intellectual property system. Such a system should be not only national *but also international,* taking into account the global dimension of the audiovisual market, and the need to be protected in another country as the performers of that country. Although a growing number of countries around the world grant already intellectual property rights to national performers, the absence of a framework for international regulation emerges as an obstacle to the harmonization of these rights and their application for the benefit not only of the national artists but also of the foreign artists.

The present situation: the Rome Convention, the TRIPS Agreement and the WPPT

Although the 1961 Rome Convention recognized, for the first time, rights "neighboring to authors' rights" in favor of performers, it should also be regarded as the beginning of a long discrimination which still continues to separate artificially on the basis of whether their performances are aural or audiovisual.

Our organization has not ceased to denounce this artificial division which, taken into account the growing integration of the aural and audiovisual domains,

is getting ever more anachronistic. The technological development has generated a multitude of forms of exploitation of audiovisual works in respect of which the performers do not have any right. And this reflects that the requirement of maintaining a balance between the various categories of owners of rights is not taken into account.

So how is the present situation? We have to see that it is still the 1961 Rome Convention which offers a little protection for the performers of the audiovisual domain at the international level. The TRIPS Agreement, adopted as one of the annexes of the Treaty on the World Trade Organization, has not improved the protection of audiovisual performers; just to the contrary, it has further decreased the minimum level of protection for audiovisual performances. The new WIPO Treaty in 1996 (the WPPT) has brought about improvements more in respect of form than regarding substance.

National treatment: It should be noted that the principle of national treatment is one of the most important elements of international treaties. In our case, this principle determines the extent of the obligations that each country should fulfill with respect to foreign performers. In principle, and in an ideal world, these obligations should correspond to the treatment granted by a country to its own performers. In the reality, taking into account the degree of harmonization obtained by the existing international treaties, and the numerous legal techniques to reduce the protection for foreign performers to a level lower than that granted to national performers, the protection that foreign performers enjoy is quite limited.

Article 2(2) of the *Rome Convention* provides as follows:
National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

Consequently, the countries party to the Convention are obliged to grant to foreign performers, at least, the minimum level of protection foreseen in it, but they may also offer to them a treatment at a level lower than that granted to their own nationals, if they make use of the reservations allowed under the Convention.

Under Article 4, a foreign artist may benefit from "national treatment" when:
a) the performance takes place in another Contracting State;
b) the performance is incorporated in a *phonogram* which is protected under Article 5 of this Convention;
c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected *by Article 6 of this Convention.*

Taking into account that, according to Article 3 "*'phonogram' means any exclusively aural fixation of sound of a performer or of other sound"* , the point

of attachment foreseen in Article 4(b) (fixation) may hardly be used by audiovisual performers. Only the place of the performance (in another Contracting State) or the fact that the performance is carried by a broadcast of a broadcasting organization whose headquarters is in another Contracting State (Article 6(1)(a)) and/or a broadcast transmitted from a transmitter situated in another Contracting State (Article 6(1)(b)) may open the way to the application of national treatment.

The *TRIPS Agreement*, under its Article 1(3), applies the same criteria of protection as those foreseen in the Rome Convention for the Members of the WCT, but it limits the obligation to grant treatment national to the rights foreseen in the Agreement (that is at a level lower than in the Rome Convention).

The *WPPT* adopts the same criteria of protection. National treatment is clearly combined with material reciprocity in the case of the right of performers to remuneration for the broadcasting or communication to the public of *phonograms* published for commercial purposes.

As regards the *economic rights* recognized by these three international instruments for performers in respect of their audiovisual performances, we cannot speak about too much.

Article 7(1) of the *Rome Convention* accords to performers (implicitly in respect of both aural and audiovisual performances) the *possibility of preventing the broadcasting and the communication to the public, without their consent, of their performances.* No authorization is, however, obligatory, *inter alia*, when broadcasting or communication to the public is made. This means that we cannot speak about an exclusive right, which makes the position of performers vulnerable during collective negotiations. Furthermore, the wording of this provision is not fortunate: taking into account that Article 7(1) sanctions the non-authorized broadcasting of a performance (and not of a non-authorized fixation), this Article *permits indirectly the broadcasting and communication to the public of a non-authorized audiovisual fixation* (bootleg).

The *WPPT* (Article 2(f)) includes explicitly in the definition of "broadcasting" the audiovisual performances (without including, however, images without sounds). Article 6 recognizes for performers an *exclusive right concerning the broadcasting of their unfixed performances*. In this way, the not too precise wording of Article 7(1) of the Rome Convention is improved.

However, according to the *WPPT* (Article 2(g)):

> "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 in a phonogram.

Considering that this definition only concerns the transmission of *sounds,* even if they originate from an audiovisual performance, it is justified to ask whether this provision means a real progress for audiovisual performances. It seems, however, that what these performers rather enjoy at present is an *exclusive right concerning the broadcasting of their unfixed performances* (on the basis of the WPPT) and a *right to oppose the communication to the public of their performances without their consent, except "where the performance used (...) in the communication to the public (...) is made from a fixation"* (Article 7(a) of the Rome Convention).

Article 7(b) of the *Rome Convention* foresees the right of performers (irrespective of which sector) *to oppose the fixation* of their unfixed performances on a material support without their consent. The *TRIPS Agreement* (in its Article 14(1)) only provides for a right to oppose the fixation, without prior authorization, on a *phonogram*, excluding in this way from this right any audiovisual fixation. Finally Article 6(ii) of the *WPPT* seems to grant performers an exclusive right for the fixation of their unfixed performances (both aural and audiovisual). However, Article 2(c) of the treaty defines fixation as "*... the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device",* and by this it limits the protection to aural performances (to which we may add perhaps – in quite an artificial way – the purely aural components of audiovisual performances).

It is in this stage that the rights of performance may be found in the audiovisual sector. No form of secondary use of their fixations is covered, at present, by any intellectual property right. In spite of the possibility of obtaining all the necessary authorizations for the commercial exploitation of audiovisual fixations (in particular on the basis of collective agreements), the pressure exercised by the audiovisual industry so far has resulted in a situation where performers do not have either an exclusive right, or a right to oppose a use non-authorized, or a right to remuneration once their performances are included in an audiovisual fixation with their consent.

Thus, Article 19 of the Rome Convention provides as follows:

> Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

Neither the TRIPS Agreement nor the WPPT has changed this situation.

The Diplomatic Conference in 2000

Even before the beginning of the preparatory work of a possible treaty on audiovisual treaty, it was quite clear that the problem of the transfer of the rights of performers would be the most difficult to resolve. An important risk was taken by this, but, in order to proceed with the preparatory work, it was decided, therefore to begin with the negotiation on the economic and moral rights of audiovisual performers.

It was possible to reach provisional agreement on a number of important principles and economic rights, which represents, beyond any doubts, a historical – even if only partial – result. In this stage it would not seem necessary to analyze the provisionally adopted articles in detail, since the negotiations have not been concluded officially and still many things may change. It is sufficient to recall that the audiovisual performers were granted for the first time exclusive rights with respect to their unfixed performances; an exclusive right of reproduction in any manner and form; an exclusive right of distribution; and an exclusive right of on-demand making available of their performances to the public. These rights correspond to a large extent to the rights foreseen in the WPPT for aural performances.

As regards the *beneficiaries* of protection, the provisional agreement differs from the WPPT and the Rome Convention, and provides (in Article 3) that those performers enjoy national treatments who are the nationals of one of the Contracting Parties, or who at least have their habitual residence in one of them.

That is, the *nationality or the place of the habitual residence* of the performers has been adopted as the criteria of protection. This is a new solution and certain confusion appears in it between the protection of audiovisual performances and that of the performers themselves. On the basis of such criteria, it is possible that in respect of the same production, there are performers who are protected and there are others who are deprived of protection. And then we have not spoken yet about the inherent difficulty concerning the determination of the habitual residence of some performers.

The continuation of the work of the Diplomatic Conference proved to be more difficult. Nevertheless, a provisional agreement has been reached on the following points: the nature of the instrument (an independent treaty rather than a simple protocol to the WPPT); national treatment (limited to the exclusive rights specifically provided for in the Treaty, with the application of material reciprocity concerning the right to remuneration for broadcasting and communication to the public (I add that the latter could be extended also to the right of rental, the application of which was to up to the countries whether they apply it or not). As regards *moral rights*, such rights have been recognized for the first time for audiovisual performers, extending to both the right of paternity and the right to

the integrity of their performances. However, an agreed statement has been added *in extremis* which may reduce in a sensible way the importance of the right of integrity: it is stated in it that certain modifications, such as dubbing or the change of format – under certain conditions – may not be regarded as prejudicial to moral rights. Only the changes that are "o*bjectively prejudicial to the performer's reputation in a substantial way*" would be covered by moral rights. The burden of proof seems to be on the side of the performer, which constitutes a major inconvenience.

Also an *exclusive right of rental* has been recognized for audiovisual performers, although it is more limited in comparison with the right foreseen in Article 9 of the WPPT. It may only apply if the commercial rental has led to widespread copying of audiovisual fixations materially impairing the exclusive right of rental of performers. Even if this right is not transferred or licensed to the producer, it may easily be imagined how difficult it would be for the performers to present the necessary proofs for this. If it is transferred or licensed there is a risk that this right may only have a minor "commercial value", or simply "non existent".

Finally as regards the *broadcasting and communication to the public* of audiovisual fixations, the text provisionally approved (Article 11) foresees an exclusive right for the performers. There is no reference, however, to the "direct or indirect" nature of such broadcasting or communication to the public. The article also permits to the Contracting Parties to only grant a simple right to equitable remuneration, and to apply specific conditions for the exercise of this right. Finally, in the same way as in the WPPT, the Parties are allowed to only apply this right in respect of certain uses, or to limit its application in some other way, or to not apply it at all.

It should be noted that in the above-mentioned article there is no reference to fixations "published for commercial purposes", which does not seem to reflect the current practice in the audiovisual industry. It is also interesting to note that, with all the broad freedom available for the Contracting Parties (as under Article 15 of the WPPT), Article 11 in the provisional text, nevertheless, also foresees the possibility for the performers of benefiting from an exclusive right. Finally, this article does not seem to be so complex as Article 15 of the WPPT, in respect of the obligation of users to pay a single payment for the producers and the performers to be distributed then between them.

As regards *application in time*, Article 19 raises serious questions. This article foresees the application of the protection provided for under the Treaty for the performances fixed either before or after the entry into force of the Treaty. This principle, however, is weakened by the possibility of the Contracting Parties to only apply the *economic rights* exclusively in respect of the performances fixed *after the entry into force of the Treaty* (with the possibility of the other Contracting Parties to introduce material reciprocity in such a case). This possi-

bility is difficult to explain taking into account the guarantees which – in the rest of the article – against any prejudice of *"any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty"*. The article even authorizes Contracting Parties to establish transitional provisions under which any person who, prior to the entry into force of the Treaty, engaged in lawful acts with respect to a performance, may undertake (transitionally and with respect to the same performance) acts within the scope of the rights provided for in the Treaty after the entry into force of the Treaty.

After the Diplomatic Conference of 2000

The Diplomatic Conference ended with a failure due to the unsolved divergence regarding the question of exercise of rights, in particular their transfer to the producers. There was a demand to introduce a presumption of transfer of all rights of the performers to the producers – which, in fact would have transferred the treaty into an instrument to protect the interests of the latter – as respond to which the position emerged that no provision should be included on this issue.

It is true that neither the Rome Convention, nor the TRIPS Agreement and nor the WPPT has dealt with this question. What is only possible is to deduce from certain articles (for example, from Article 5 of the WPPT) that the economic rights (perhaps also the moral rights) are transferable, but there is no explicit rule which would transform this possibility into an obligation.

It is clear that we have to try to find a just compromise. The producers would like to avoid being constrained to obtain authorization systematically from each performer for each form of exploitation. This certainly would make it difficult to commercialize the audiovisual works and uncertain the recouping of investments.

At the same time, it should be recognized that an intellectual property right is only valuable if it may be exercised the way its owner considers the best. A presumption, even a rebuttable presumption, of transfer of the rights of performers to the producers means zero rights and zero negotiating power. In general, the performers have the same interest as the producers, that is to obtain the maximum profit by all possible commercial means. But they want also to be remunerated in an equitable manner. The rejection of granting licenses or transferring their rights is not in their interest. The system of collective negotiation simplifies the task of the producer, guaranteeing, at the same time, a major negotiating power to the performers. This, however, presupposes that the artists may retain their rights and trust their trade unions or management societies with the management of those rights or transfer them to the latter under certain conditions.

To resume the dialogue concerning the possible formulation of Article 12 seems difficult at present. Several options were already considered in December 2000 without success. We passed from an absolute presumption to a rebuttable

presumption, to the recognition of transferability or to a multitude of *ad hoc* principles of private international law. The latter solution aimed at preserving the rules of each country raised important difficulties related to the very specific dynamic nature of the audiovisual sector. Finally none of these solutions was found satisfactory.

Nevertheless, performers have in front of them a historical occasion which (now after two failures) should be made use of. In comparison with 1996, we have made a progress. We have provisional agreement on 19 articles, which was never the case before. It is true that some of them are far from being perfect, but it is also important to establish a precedence and then to improve the things on that basis. Did it not happen in this way also with the Rome Convention and the 1996 treaty? If we restart on the basis of a firm standpoint – as we wish to do – that no legal or rebuttable presumption of transfer of performers' rights would be acceptable (which otherwise is confirmed by a number of national laws), what possibilities may remain for us?

1. To reopen the negotiation only on one single issue (Article 12) – preserving or not the principle of consensus – in order to try to develop, for example, a rule to determine the applicable law. This option seems quite improbable: a negotiation only on one single issue would not leave any room for negotiation and any possibility for a compromise to the would-be contracting parties.

2. To reopen the negotiation and to proceed to a vote in ensemble (that is on the 19 provisionally approved articles, without Article 19). This would mean that we would lose one of the most important Contracting Parties, namely the United States. It is true that the latter has never acceded to the Rome Convention, but it has contributed to the improvement of the protection of the performers of the aural domain at the international level. The film industry, however, is very concentrated, and the loss of an important partner would be detrimental. Otherwise, it is not sure that certain other would-be contracting parties (such as the European Communities) would accept this solution.

3. To reopen the negotiation on all the issues sticking to the principle of *consensus*: the question of transfer of rights would emerge again as a decisive issue and would hold hostage any result. It depends on whether or not the party which so much stuck to the presumption of transfer of rights is ready to change its position. Such presumption would reduce performers' rights to a ridiculous minimum (and this probably would not be accepted by numerous other contracting parties). The failure would be, therefore, probable.

4. To reopen the negotiation on all the points, and to adopt the *majority* principle. This way would be, in our opinion, extremely dangerous. In view of the impossibility of adopting a provision on the transfer of rights, there would be a pressure to delude the rights of performers to a great extent which would be difficult to resist.

5. To reopen the negotiation on a *limited number of issues* and to proceed to vote on each of them. This is certainly a possibility, but my organization is not in favor of it – not as a matter of principle, but rather because there is no sufficient guarantee that in this way we could obtain a better treaty than the one that we nearly have in our hands. But this may leave more room for negotiation. This might require, however, that the performers would have to be ready to accept some major compromises and it is difficult to foresee how many articles would be concerned by this.

6. Finally, the last alternative: let the process of negotiation die. We, of course, are not ready to accept such a solution. We are not ready to do so since the economic liberalization continues, in particular on a bilateral level, and new bilateral agreements are about to be adopted, to the detriment of our rights.

I thank you for your kind attention. Certainly many of you have considered already these questions, and it would be extremely interesting to use your thought for the profit of this Congress.