# Protection, Exercise and Enforcement of Performers' Rights after the 1996 and 2000 WIPO Diplomatic Conferences Summary and Analysis of the Answers to the Questionnaire

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### The closest neighbours – so near and yet so far

"A real soprano tour de force […] a most demanding role, only the greatest, the cantatrice-queens, a *Callas*, a *Caballé* can handle it" – exclaimed in admiration an art critic in a Hungarian daily newspaper[1] on the occasion that after more than twenty years Bellini's Norma was put on stage again in Budapest with soprano *Gyöngyi Lukács* in the titular role.

Indeed, at the beginning of the third millennium, in an era when several hours of music can be stored in and replayed from a pocket-size digital device and a globally televised concert can reach millions of spectators, the very essence of performing arts as perceived by the public is still the same: an artistic achievement to personify and thus convey to an audience the thoughts and emotions expressed in a literary or artistic work.

This is perhaps that makes more than anything else performers the closest neighbours of authors. That the performance, unlike the subject matter of other "neighbours", is not in itself technology dependent. That as long as there is an audience with eyes and ears the performance can live and spread without recordings or television or the Internet. That it roots in and emerges from the ancient, instinctive need of artistic self-expression.

While the essence of the performance has not changed with time and with the technological development it brought along, the way performances are offered to the public very much has. It was a long march from the period performers tried to prevent technology from taking control over their traditional channels to audiences to the times they took control over technology through legislation. Today, their status as intellectual property rights owners at international level is more established than ever, yet still burdened with serious controversies. Such major

[1] Gyöngyi Kálmán: Egy főpapnő – királynőknek ("A high-priestess - for queens") – in the August 8, 2003 issue of Magyar Nemzet.

policy making achievements as the consensus reached on the content of the WIPO Performances and Phonograms Treaty ("WPPT") during the 1996 Diplomatic Conference seem to indicate that the issues of their protection are becoming globally inherent to legislative thinking. The failure of reaching a similar consensus on the protection of audiovisual performances during the 2000 WIPO Diplomatic Conference suggests, on the other hand, that a "visible" part of the concept of closest neighbours is yet to be filled with content.

## Up to and beyond the WPPT

For the purposes of the questionnaire preparing this paper the WPPT was considered, at least in terms of consensual policy making, as the globally agreed minimum standard for the protection of performers' rights. The primary objective of the questionnaire was therefore to map out the territories beyond the WPPT and to examine to what extent the various national laws deemed it necessary to surpass these minimum standards.

Nevertheless, in view of the information provided in the national reports[2] certain preconditions were set in exploring this issue:

a) A provision or another measure or solution granting higher protection to performers under national law was not regarded irrelevant just because it did not directly suggest that the protection of performers under international law should be re-established on a higher level than the WPPT minimum standards or because it was not adopted specifically in view of surpassing the WPPT minimum standards. Also, as for many countries the WPPT is not yet more than policy making achievement, but none of them were or are prevented from granting higher protection to performers under national law, any such provisions, measures or solutions were taken into account irrespective of the actual ratification status of the WPPT.

b) Admittedly with a somewhat arbitrary selection from the numerous points of interest offering themselves in the information received, the report only focuses on certain aspects of

– the definition of performers,
– the moral rights of performers,
– the protection of audiovisual performances,
– the legislative provisions on the contractual terms of exploitation.

[2] Up to the date of completing this summary, twelve national reports were received in response to the questionnaire from Australia, Austria, Canada, France, Germany, Greece, Italy, Hungary, Japan, Mexico, the Netherlands, and the United States of America.

## 1. The definition of performers: the entranceway to protection

Most national legislations contain some kind of definition of the term "performers" or similar terms[3] in order to set the eligibility criteria for protection under their respective performers' rights regimes. The structure of the definitions more or less follows the pattern found in Article 2(a) of the WPPT and Article 3(a) of the Rome Convention and consists of

a) a list of typical examples as to who and by carrying out what activities can, in particular, be qualified as "performers"; though in some cases the list seems to be exhaustive[4];

b) if the list is not exhaustive then an indication to the effect that protection may also be granted to "other persons" who "otherwise perform" literary or artistic works or other objects of performances;

c) a list of the objects of performances that is almost always exhaustive (see however the examples from Australia and Japan quoted in paragraph ad c) below); and

d) eventually, certain exceptions in respect of persons or activities expressly excluded from protection.

It is by way of these eligibility criteria, whether or not their usage is endorsed by Article 2(a) of the WPPT or by Articles 3(a) and 9 of the Rome Convention in relation to other contracting parties, that national laws may either go beyond or not even as far as the WPPT, determining ultimately that this entranceway to protection leads to a large portal or just to a one-wing door.

Ad a) The definition of performers may be somewhat broadened by complementing the list of most typical examples[5] with other expressly named categories of performers and activities. These categories include, for example theatrical stage directors, conductors or choirmasters as performers and narration or dubbing into another language as eligible activities. While these categories could and by all means should also be deemed eligible for protection within the meaning of the terms "other persons" and "otherwise perform", the complemented list leaves no room, however limited this would be, for interpretation to the contrary. In such undisputed cases as, for example, a conductor, the complemented list may perhaps be of little importance but once it comes to such off-stage or otherwise indirect contributors as a lighting operator or a sound engineer (see in paragraph

[3] See, e.g., the definition of "performances" in Section 248A(1) of the Australian Copyright Act (National Report of Australia – 1.1) or the definition of a "performer's performance" in Section 2 of the Canadian Copyright Act (National Report of Canada – 1.1)

[4] Ibid.

[5] Actors, singers, musicians and dancers who act, sing, deliver, declaim or play seem to be among the core elements of these definitions.

ad b) below), their presence or, in fact, rather absence in a list of expressly named categories prevailing against interpretation may already have more decisive regulatory effect.

Ad b) In the case of an open-ended list, the interpretation of the terms "other persons" and "otherwise perform" offers further opportunities to extend the coverage of the definition. As a commentary to the WPPT[6] indicates, the interpretation of these terms, at least within the meaning of Article 2(a) of the WPPT, may be inclusive also of persons and activities one would deem rather distant from the traditional concept of performing arts and artists:

"Particular activities, such as the lighting and the sound engineering may or may not be a relevant performance, depending on the concrete input […] to the actual performance. If, for example the lighting operator not only executes the indications given by the stage director, but decides about the concrete employment of light at the performance, this activity must be considered as a performance within the meaning of Article 2(a) WPPT. If a sound engineer not only fulfils a mere technical task but employs a technique to directly influence the performance of the work, as a kind of musical instrument, he is to be considered a performer under Article 2(a) WPPT."[7]

However, the adoption of sound producers into the performers' rights regime was denied in the Netherlands, amongst other motivations, on the ground that the sound producer's activities are solely related to and aiming at the making of the recording and not of the performance fixed therein[8].

Though neither national laws nor international law seem to contain any explicit originality criterion for performers, the expressions "decides about the concrete employment" and "employs a technique" in the excerpt above suggest that some level of intellectual independence (originality?) or artistic quality may also be relevant in assessing the eligible activities. Particularly in cases where the definition includes such qualitative elements as in the German law: "A performing artist in the meaning of this law is someone who performs ("aufführt"), sings,

[6] Jörg Reinbothe, Silke von Lewinsky "The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis", Butterworths, 2002 – page 255 para 25

[7] Ibid.

[9] Peters c.s. / SENA, Rechtbank Amsterdam, 14 June 2000, in, e.g., Mediaforum 2000–7/8. Peters c.s. and other individual sound producers claimed to be recognised as performers and/or producers of phonograms under the Dutch Law on Neighbouring Rights and, consequently, as the beneficiaries of the equitable remuneration for the communication to the public of phonograms published for commercial purposes. The decision taken at first instance, now of full binding force, denied both claims.

plays or otherwise performs ("darbietet") a work or an expression of folklore or who *participates artistically* in such a performance."[9]

Ad c) Protection may also be granted to performances whose object is not a literary or artistic work and the typical example in this respect seems to be a circus or a variety act. Some national laws though go even as far as to extend this criterion not only to a circus or variety act but also to "any similar presentation or show"[10] (Australia), or to include in the definition of performance "acts not involving the performance of a work which have the nature of public entertainment"[11] (Japan).

The application of this criterion, at the very least in respect of circus and variety acts, does not appear to be unreasonably generous. It merely reflects that the traditional concept of (performing) arts and artists, of which the Japanese reference to "public entertainment" seems to be a convincing example, has always been more accommodating and, in such early fora of live performances as fairs and other public gatherings, drama, music, dance and circus or other performances were not distinctly separated. Moreover, the solution of the French law[12], however exceptional, including the performance of a variety or circus act in the definition of performers, on the one hand, and protecting circus acts or tours whose implementation is recorded in writing or otherwise as intellectual creations proper, on the other hand, shows that this more accommodating approach, reminiscent of the early concept of arts and artists, may be relevant in respect of literary and artistic works, too.

This criterion now gained a fresh momentum with Article 2(a) of the WPPT that extended the definition of performers also to those performing an expression of folklore, rectifying thus an "unjustified restriction of the concept of 'performers' and 'performances'"[13]. If one is to interpret the practical application of this definition in the context of the WPPT, it is with some regret, however, that one has to note, notwithstanding the significance of adopting a broader concept of performers at international level, that any forms of performing expressions of folklore insufficiently or not at all perceivable through the sounds they generate such as, for example, traditional dances, typical in those communities in view of which this broader concept was primarily adopted, remain ineligible for any meaningful protection under the WPPT.

[9] § 73 of the German Copyright Act (National Report of Germany – 1.1.)

[10] Subsection 248A(1) (e) of the Copyright Act (National Report of Australia – 1.1.)

[11] Article 2 (1) item (iii) of the Copyright Act.

[12] See National Report of France – 1.1.

[13] Mihály Ficsor "The Law of Copyright and the Internet: The 1996 WIPO Treaties, their Interpretation and Implementation" Oxford University Press, 2002 – page 596 para. PP2.04.

Ad d) A limited number of national laws, somewhat departing from the structural pattern found in Article 2(a) of the WPPT and Article 3(a) of the Rome Convention, deem it necessary to expressly exclude from the definition of performers certain persons or activities.

Amongst the examples found in the information received, the issue of so-called "extras" appearing in collective performances seems to be of more general concern. Obviously, the mere fact that the performance is the result of a collective achievement does not make the issue of exceptions relevant. In some cases, however, a collective performance may involve certain activities whose individual influence to the performance as a whole is so incidental or indirect that they may not constitute a performance proper, a typical example raised in this respect being the appearance of "extras" or "walk-ons" in a film.

Of course, it is not easy to draw the thin line between a performer and another person appearing in a performance with a definite purpose yet not performing, and perhaps it should not be a matter for statutory law in the first place. That was also the conclusion of the Basic Proposal[14] submitted to the 2000 WIPO Diplomatic Conference on the protection of audiovisual performances:

"During the work of the Committee of Experts and the SCCR, proposals were made to exclude 'extras' from the protection of the proposed Instrument. It was also proposed that the definition should expressly exclude 'performers whose performances are casual or incidental in nature such as extras.' In general, 'extras', 'ancillary performers' or 'ancillary participants' do not qualify for protection because they do not, in the proper sense, perform literary or artistic work or expression of folklore. Thus, it appears that no explicit provision concerning extras is necessary in the proposed Instrument. Accordingly, when implementing the proposed Instrument, Contracting Parties may determine in their national legislation the threshold at which a person becomes a performer entitled to protection. When making this determination, Contracting Parties may take into consideration established industry practice and, *inter alia*, whether a person has a speaking role or forms a background to the acting."[15]

It is most likely on the same ground that most national laws refrain from adopting explicit provisions in respect of "extras", tacitly sub-delegating the matter to jurisprudence or to professional practice where, one may conclude, it really belongs.

[14] Basic Proposal for the substantive provisions of an instrument on the protection of audiovisual performances to be considered by the Diplomatic Conference (WIPO – IAVP/DC/3)

[15] Ibid, Notes on Article 2, item 2.03.

Referring the matter though, tacitly or explicitly, for example to professional practice may still not be the end of all troubles in interpretation, as shown in the example of France. Under the French law, performers are exclusive of "ancillary artists, considered as such by professional practice"[16]. However, according to the French report, this reference does not make the implementation of this provision entirely unambiguous. The expression "professional practice" itself, to start with, is still too vague a term to be a reliable point of reference for statutory law, an instrument of public order whose infringement may eventually entail criminal sanctions. Also, such seemingly exact criteria as the artist having a speaking role may not prove failsafe in practice, let alone the undesirable consequences it may have on performances mute by nature (such as the performance of mime artists or, sometimes, clowns). It would be a more sensible approach therefore to identify on a case-to-case basis whether or not the presence of the performer's personality, rather than merely of his image, is evident in the performance, this being the very essence of the notion "performance". In conclusion, the report states that the reference to ancillary artists should not be considered as aiming at the exclusion of a category of performers from protection but rather as a clarification to the effect that some of the entertainment artists are simply lacking the prerogatives to be regarded as performers.[17]

The difference between a performer and a non-performer is of course not always as subtle as that, yet the qualification of certain professional activities, however seemingly distant from the concept of performers, such as the activities of sportsmen or fashion models may also raise, although for different reasons, some borderline issues. The Australian law for example includes in the notion of eligible performances the "performance of a dance" and the "performance of a circus or a variety act or any other similar presentation or show" but expressly excludes from it the "performance of a sporting activity"[18]. Should then the choreographed motions of a figure skater be eligible for protection or, eventually, only depending on whether they are delivered as part of a sporting competition or of an ice show in a circus? How the choreographed motions of a eurhythmics competitor or those of synchronised swimmers should be assessed? These questions may well arise not just under Australian law. Since the length of the performance is rarely decisive, the category of fashion models, as the French report evokes, may also be difficult to detach from the concept of performers, for example in the case of a very short appearance in a commercial. A commentary to a

[16] Article L.212-1 of the Code of Intellectual Property (National Report of France – 1.1)

[17] See National Report of France – 1.1.

[18] Subsections 248A(1)(d) and (e) and 248A(2)(c) of the Copyright Act (National Report of Australia – 1.1).

judicial decision in France quoted in this respect[19] assumed that the court's approach was correct when it expressly refused to take into account someone's fashion model status as a factor in assessing this person's eligibility for the status of performer (dancer) and used, as a basis for evaluation, only the actual characteristics of her performance.

Undoubtedly, the exclusive rights granted to performers under the various national laws to control the distribution and other forms of allowing access to their performances may well appear attractive also to those professionals, such as sportsmen or fashion models, whose activities are exploited to a large extent on a "pay-per-access" basis. A pressure therefore coming from these professions to broaden the coverage of the definition of performers in their direction, obtaining thus an additional, intellectual property based access control over their activities, would not be surprising. Unlike, however, in most of the examples evoked so far, this is perhaps the point where the ground for any extension starts thinning and becomes slippery. The pure physical appearance or sporting skills of a person, if accepted as eligibility criteria, would flex even the original, more accommodating concept of performing arts and artists to its extreme limits and beyond. And this, with a trifle of exaggeration, could easily convert performers from the closest neighbours into the furthest.

## 2. The moral rights of performers: the game of the name

The moral rights granted in Article 5 of the WPPT represent a breakthrough in the international recognition of performer's rights. The way they were formulated, taking Article 6bis of the Berne Convention as the model, is equally important, constituting yet again an acknowledgement of the concept of closest neighbours. Indeed, the "fact that moral rights of performers are now recognised at the international level underlines the difference between the neighbouring rights of performers on the one hand and producers and other exploiting businesses on the other hand."[20]

Naturally, the fact that moral rights of performers were recognised in the form of an international policy making consensus does not automatically entail that all the countries party to this consensus already recognised moral rights for performers under their respective national laws. In Australia and Canada, for example performers are not covered by the moral rights provisions[21]. Just as naturally,

[19] See Denise Gaudel "Les droits voisins, étude 139, Droit des médias et de la communication" Lamy tome 1 (as quoted in the National Report of France – 1.1)

[20] Jörg Reinbothe, Silke von Lewinsky op. cit. – page 294 para 8

[21] See National Reports of Australia (2.1) and Canada (2.1).

however, a number of national legislations either go (or have gone already) beyond the consensual minimum in favour of the performer or may recognise some moral rights through a combination of legal instruments other than solely the copyright act, among others and not necessarily in order of importance, in the following respects:

a) moral rights are also granted in respect of performances other than just live aural performances or performances fixed in phonograms;

b) moral rights are expressly granted as inalienable rights;

c) the right to respect the integrity of the performance is not conditional on it being prejudicial to the reputation of the performer or, if some prejudice has to be proved, it may also affect the honour and not only the reputation of the performer;

d) as shown in the example of the United States, some moral rights, for example certain elements of a paternity right may also be recognised through unfair competition law or assumed to be included in the provisions related to the protection of rights management information;

e) in some cases the rights granted seem to be suitable to take into account such typical, though not easy to grasp, aspects of a performer's reputation as "fame" or "celebrity".

Ad a) National laws that recognise moral rights for performers usually recognise them in respect of audiovisual performances, too, simply by omitting in this respect any reference to the performance being aural or audiovisual. Nevertheless, as in the case of Germany, the scope of moral rights may be somewhat more limited when the performer participates in an audiovisual work: "performers who participate in the production of an audio-visual work or whose achievements are used therefor may prohibit, in respect of the production and exploitation of the audiovisual work, only gross distortions or other gross mutilations of their performances"[22] and also, "they shall take the other contributors (authors and neighbouring right holders) and the film producer into due account when exercising the integrity right under § 75 CA"[23].

Ad b) The expression "independently of a performer's economic rights, and even after the transfer of those rights" in Article 5 of the WPPT suggests that the independence of moral rights prevails not only in their enjoyment but in their disposal, too, and moral and economic rights are "independent of each other in such a way that the transfer of any or all economic rights by the performer does not automatically bring about the transfer of moral rights. A transfer or an undertaking not to exercise moral rights […] must be separately and explicitly stipulated

[22] National Report of Germany – 2.3.

[23] Ibid.

in order to be valid"[24]. Moral rights, however, may expressly be granted as inalienable rights, as in the case of France[25] or the Netherlands[26]. Although to be treated with the recommended caution, a judicial decision and commentary related thereto, as quoted in the French report, give a clear example of the basic differences between an independent and an inalienable moral right. The decision evoked held that the inalienability of "the right to respect" prevents the artist from waiving, preliminarily and in a general way in favour of his licensee, the right to exclusively and discretionally decide upon any utilisation, dissemination, adaptation, withdrawal, supplement and alteration. True, the sweeping effect of the decision was somewhat softened by the commentary emphasising that it concerns preliminary and general waivers only, yet such a waiver would not at all be limited, let alone prevented in case of a merely "independent" moral right[27].

Ad c) The moral right to respect the integrity of the performance may be granted so that it is not conditional on it being prejudicial to the reputation of the performer, France again excelling as the example. While a prejudice is not a precondition, the French jurisdiction seem nevertheless to use this criterion in affirming a prejudice or assessing its impact: the moral rights of the artist were held to have been respected, among others, when the reproduction on disc of the songs recorded were unabridged and in conformity with the original quality of the recording and the name of the artists was credited on the discs[28].

Even if some prejudice has to be proved, the model of Article 6*bis* of the Berne Convention is more consistently followed by those national laws which include in the protected personal aspects of the performer not only his reputation but his honour, too, as is the case, for example in Italy, the Netherlands or Hungary[29]. As a commentary to the WPPT notes, the justification of omitting in the WPPT the reference to the honour of the performer "is not sufficiently clear. Also, it seems

[24] Jörg Reinbothe, Silke von Lewinsky op. cit. – page 295 para 12

[25] Article L.212-2 of the Code of Intellectual Property (National Report of France – 2.1.)

[26] National Report of the Netherlands – 5.3.

[27] Jean FERRAT / Universal Music, the Cour de cassation annulling the May 16, 1999 ruling of the Cour d'appel of Paris and C. Caron, JCP Entreprise et affaires, n° 46, 14 November 2002, p. 1824 (as quoted in the National Report of France – 2.1). The report recommends to treat the motivation of the decision with caution insofar as it was taken by the social chamber of the Cour de cassation, not specialised in intellectual property matters; further it refers to provisions related to author's rights and not to neighbouring rights and, in addition, it concerns a litigation that is still pending.

[28] Ruling of the tribunal de grande instance de Paris – 11 February 1994 (as quoted in the National Report of France – 2.1).

[29] See National Reports of Italy (2.1), the Netherlands (2.1) and Hungary (2.1)

to be quite rare that an action prejudicing the reputation of a performer does not have any similar impact on his honour. Nevertheless, during the informal negotiations, reference was made to parodies […] and it was emphasized that it would be not appropriate to allow performers to oppose parodies citing possible prejudice to their honour."[30] No information was received in this regard but it seems unlikely that by the inclusion of the term "honour", parody as a genre would be jeopardised.

Ad d) The example of the U.S. shows, consistently by the way with its strong traditions to protect the rights of personality, that some moral rights may be also be recognised through a combination of legal instruments not specifically designed for or adopted in view of protecting moral rights. As stated in the report, "while collective bargaining agreements and state law may provide for certain moral rights for performers (including the right to be identified as the performer), these moral rights are not set forth in U.S. copyright legislation"[31]. Yet, with a rather genuine and convincing interpretation, the report assumes that some elements of a paternity right are included in the provisions related to the protection of the integrity of copyright management information as provided for in Section 1202 of the U.S. Copyright Act. Indeed, insofar as the primary purpose of the rights management information is to "identify", among others, "the name of and other identifying information about a performer"[32], once the name of the performer becomes part of copyright management information, an act, however, over which he may have little control, the storage and retrieval of this information may fulfill some of the requirements of a paternity right.

Unfair competition law is also referred to as being at the roots of recognising some moral rights for performers in the U.S. Section 43(a) of the Lanham Act, which prohibits false designation of origin, proved to be suitable for the court to hold "that an actor whose name was removed (and replaced with another actor's name) from the film credits and advertising material of the film he starred in, had a right against 'express reverse passing off' and had standing to sue in federal court based on the film distributors' alleged violation of the Lanham Act."[33]

Performers' protection in the U.S. is traditionally based on collective bargaining agreements rather than on statutory law. Although these very detailed contractual conventions were born and are operational in an environment that is substantially different from the regulatory models of continental Europe, in a num-

[30] Mihály Ficsor op. cit. – page 619 para. PP5.05.

[31] National Report of the U.S. – 2.2.

[32] Section 1202(c)(4) of the U.S. Copyright Act (as quoted in the National Report of the U.S. – 2.1).

[33] Paul Smith v. Edward L. Montoro and Film Ventures International, Inc., 648 F.2d 602, 9th Cir. 1981 (as quoted in the National Report of the U.S. – 2.2).

ber of cases they seem to be better suited to the practical needs of performers insofar as they are based on existing industry practices and are tailor-made to adequately deal with them. The Screen Actors' Guild (SAG) Basic Agreement, as the U.S. report evokes, for example not only sets forth the minimum terms to credit performers and foresees remedies if they are not met but it also requires, in order to become effective, the prior consent of SAG for any waiver of a term related to crediting performers.[34]

Ad e) Stardom is perhaps more inherent to performers than to any other category of artists. While artistic talent is of course not any more specific, let alone exclusive to performers than to any other categories of artists, the situations through which this talent becomes manifest already is. A performing artist works and lives in a constant interrelation with the audience for this is the substance fuelling and justifying his art. In this interrelation, the performer often becomes the focal point of an otherwise collectively achieved artistic impact: the thoughts and emotions expressed in the work, the directorial instructions on how to present them and the performer's own talent are all personified in the performance. Resembling somewhat to the messenger of good news: the message may not be his, the appreciation, however, for bringing and so eloquently conveying it very often is. This phenomenon is only enhanced by the widespread media practice, especially in the field of broadcasting popular music, of consistently identifying the work and its performance as a whole with the name of the performer.

Once a star is born, his fame becomes a commercially exploitable commodity that, to some extent, prevails in all public related situations, be it a performance proper or just a nonchalant conversation in a talk show. It attracts audience, in some cases without the public having any substantial information of the performance, and it also attracts investment. It may even initiate works specifically created to suite the abilities and characteristics of the performer. Interestingly however, while the artistic achievements of the performer are an obvious subject for the performer's right regime, the fame generated with it very rarely is.

Two national reports nevertheless, those of France and the U.S contained information to the effect that in some cases the rights granted (also) to performers seem to be suitable to take into account such abstract elements of the performer's reputation as "fame" or "celebrity". Under French law, moral rights compel to respect not only the name and the performance of a performer but also his status or quality („*qualité*") as a performer. This latter was found by the court to be embracing enough to also include in the elements of assessment of the scope of moral rights the "world fame" of a performer[35].

[34] SAGSG Codified Basic Agreement of 1995, Clause 25. Screen Credits, and Clause 11.C. (as quoted in the National Report of the U.S. – 2.2).

[35] See National Report of France – 2.1.

The right of publicity, as presented in the U.S. report, is a more general instrument not specifically related to performers or to celebrities and shows the characteristics of a right transitional between moral and economic rights:

"Most states[36] recognize (under common law, statute, or both) the right of publicity, the 'inherent right of every human being to control the commercial use of his or her identity.' Under the majority view in the U.S., right of publicity laws protect every person (not just performers or celebrities) from the unauthorized commercial use of his/her name or likeness (See Restatement (Third) of Unfair Competition). Under the right of publicity, a performer has the right to control the commercial use of his or her identity and persona (including but not limited to name, voice, image or performing style, and any other characteristics which identify that person's 'persona') to recover the commercial value of an 'unpermitted taking' and to recover damages in court. The right of publicity protects the performer regardless of the medium or form in which her person is exploited. Thus, using a performer's voice without her permission on a sound recording or in an audiovisual work would violate her right of publicity in both instances. As the right of publicity is an exclusive right, a performer may assign the right to others or may grant exclusive or nonexclusive licenses to commercialize her name, likeness or persona.

"In addition to protecting a performer's name, performing style and other identifiable attributes, the right of publicity can also protect a performer's performance. In Zacchini v. Scripps-Howard, the Supreme Court upheld the application of the Ohio right of publicity to the unauthorized broadcast of a circus performer's 'entire act' (of being shot out of a cannon). The Court held:

"Thus, in this case, Ohio has recognized what may be the strongest case for a 'right of publicity' involving, not the appropriation of an entertainer's reputation to enhance the attractiveness of a commercial product, but the appropriation of the very activity by which the entertainer acquired his reputation in the first place.'

"As the right of publicity is a state law right, rather than a federal one, its scope of protection varies from state to state. California, home to major producers of audiovisual works, provides for the right of publicity in its statutes and under common law. California Civil Code Section 3344(a) provides in relevant part that:

"any person who knowingly uses another's name, voice, signature, photograph, or likeness in any manner … for the purposes of advertising or selling …

[36] According to the facts published in a recent WIPO Survey "there are approximately 28 states that currently recognize publicity rights" (WIPO Survey on National Protection of Audiovisual Performances – AVP/IM/03/02 – ANNEX III. p. 675).

without such person's prior consent … shall be liable for any damages sustained by the person or persons injured as a result thereof.'

"California's common law right of publicity has a larger scope of protection than Civ. Code Sec. 3344. [...*and*...] has been held to extend to 'sound alikes' and 'look alikes' while at least one court has held that the statute did not extend to imitations of a singer's voice."[37]

Although the examples above offer no ground to draw far-reaching conclusions but, acting with due care, one may nevertheless note that in case of a right owner such as the performer, maintaining a continuous relationship with the audience, it may be justified to recognise, in addition to the basically passive components of "reputation", the importance of such active ingredients as "fame", too.

### 3. The protection of audiovisual performances: is there life after fixation?

According to a recent WIPO Survey, covering 97 of its Member States' national legislation, 41 of them "includes neither provisions regarding the presumption of transfer of rights, nor legal assignments of the same. Thirty-five Member States include in their legislation a rebuttable presumption of transfer. In seven other Member States this presumption of transfer is mandatory. The legislation in six Member States includes a legal assignment to the producer of the rights in audiovisual performances"[38]. So it seems that the solution according to which, by consenting to audiovisual fixation, the performer transfers his economic rights subsisting in the performance either by way of a (rebuttable) presumption or by virtue of the law can not by far be regarded, at least statistically, as dominant, let alone exclusive.

Certainly, the lack of a legal presumption and/or assignment clause does not mean that in these cases a broad or even exhaustive acquiring of rights would not prevail in the course of contractually arranging the terms of exploitation. As it is noted in the report of the United States, on the one hand, the performer in certain cases may be considered 'joint author' of a work and thus an initial owner of the copyright, being subject himself, too, to the work-made-for-hire doctrine. On the other hand, however, even he is not covered by the work-made-for-hire doctrine, contracting practices typical of performers may, ultimately, also lead to an almost identical outcome: "[…] contract practice in the television and motion picture industry indicates that individual performers enter into individual performer employment contracts which are generally drafted as 'employee for hire' con-

[37] National Report of the U.S. – 3.3.

[38] WIPO Survey on National Protection of Audiovisual Performances – AVP/IM/03/02 – p. 5.

tracts and characterize performers' services as 'works for hire'. The producer is generally deemed the 'employer for hire' in these agreements and the initial owner of all the 'results and proceeds' of the performer's services and all rights therein. Often, such agreements provide that if the producer is unable to own the rights to the performer's services on a 'work for hire basis', all rights will be deemed transferred to the producer in perpetuity. These agreements tend to be drafted in broad terms to cover the broadest possible scope and duration of rights. The grant of rights in most of these agreements states that it covers any and all rights in the performer's services and typically also states that the grant of rights includes but is not limited to copyright (as the performer's services may or may not be deemed copyrightable). Often, such contracts will include a right of first refusal or right of first negotiation to account for the possibility that a performer's contribution could be characterized as a transfer of copyright, rather than a work for hire. Such right of first negotiation grants the producer the right to exclusively negotiate with the author regarding the repurchase of the terminated rights and, if third party buyers exist, re-purchase such rights by matching third party offers."[39]

However, the opposite of the above may also be true as the acquisition of rights, when supported by a more or less decisive legislative power, does not necessarily mean either that, after consenting to fixation, the performer can no longer exercise any further rights or obtain any further remuneration. While there can be many reasons for, and forms of appearance of, a right surviving fixation, only some typical examples will be mentioned below, primarily the ones the particular aspects of which were included in the information received.

a) First of all, the (presumed) transfer of rights subsisting in audiovisual fixations, to the extent it exists at all under the various national laws, is not always of so crudely and peremptorily exhaustive nature as implied by the model included in Article 19 of the Rome Convention, according to which the whole set of previously granted exclusive rights, as if with a stroke of the pen, "shall have no further application".

The provision stipulating the presumed transfer of rights itself may also designate certain instances of exploitation that are expressly exempted from the scope of transfer. The separate use of simultaneously fixed sounds and images may, among others, be such an exemption, set forth, for example, in the Mexican law as follows: "Unless otherwise agreed, the conclusion of a contract between a performer and a producer of audiovisual works with a view to the production of an audiovisual work shall include the right to fix and reproduce the performer's performances and communicate them to the public. The foregoing does

[39] National Report of the U.S. – 5.6.

not include the right to use the sounds and the images fixed in the audiovisual work separately, unless agreed otherwise."[40] A similar provision is included in the French law where, again, in the case of simultaneously fixed sounds and images the consent of the performer is required for using, later on, either of them independently[41].

In the United Kingdom, the presumption of the transfer of rights itself has solely been incorporated into national law for the purposes of transposing the EEC Rental and Lending Directive[42] and its scope has so remained confined to rental right. It should, however, be noted that, in view of the objective of the presumption of the transfer of rights, that is assuming that, based on such presumption, the producer should have the opportunity to carry out in respect of the audiovisual fixation the acts of exploitations regarded as "normal", it may also occur that such presumption is interpreted in a broader sense and is regarded as having an effect encompassing manners of use beyond those specifically described in it. In Spanish law, for instance, the presumption clause specifically covers only the reproduction of the performance and its communication to the public while it fails to mention among the rights presumably transferred either the fixation or the distribution of the performance. Despite this limited presumption clause, a commentary to it interprets this to be only the outcome of negligent work on the part of legislators, as fixation and distribution – so it argues – do have to be included among the rights covered by the presumption of the transfer of rights principle, among others, for the reason because this is what is really in line with the actual objective of legislators and, further, because an *a contrario* interpretation would lead to taxonomic disorders and to the disintegration of the homogeneity of the performers' rights regime [43].

Finally, it has to be noted briefly that – due, among others, to the different objectives and roots of the two legal institutions – the transfer of reproduction right that is typically included in the scope of rights (presumably) conveyed generally does not have an impact on such compensatory claims as the so called blank tape remuneration for private copying.

b) Audiovisual fixations originally made for the purposes of broadcasting or other (e.g., wire) transmission to the public may, in a number of cases, be subject

[40] Article 121 of the Mexican Federal Copyright Act (as quoted in Katherine M. Sand "Study on audiovisual performers' contract and remuneration practices in Mexico, the United Kingdom and the United States of America" – WIPO AVO/IM/03/3A, p. 50).

[41] National Report of France – 3.4.

[42] Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property

[43] Angel Fernández-Albor Baltar "Audio-Visual Performers' Rights Under the Spanish Copyright Act" – IIC 2002, Vol. 33, p. 946.

to rules different from those applicable in the case of cinematographic works. As the Japanese report outlines: "Performers' exclusive right of 'reproduction (Sec 91)' will apply, if their performances being fixed in an audio-visual fixation which was originally made for the purpose of broadcasting or wire diffusion (with performers' authorization of their right of 'broadcasting and wire diffusion (Sec 92)' only) but later were tended to be used for purposes (e.g., make into video cassettes and etc,) other than broadcasting or wire diffusion. In other words, in such cases performers authorization of 'reproduction (Sec 91)' is required."[44]

"Further, performers' right to remuneration also apply when broadcasting organizations have rebroadcast or syndicated network broadcast an audio-visual fixation (Sec 94) which was originally made for the purpose of broadcasting (with performers' authorization of their right of 'broadcasting and wire diffusion (Sec 92)'). However, performers do not have rights to remuneration when broadcasting organizations and wire diffusion organizations have broadcast or diffused by wire a cinematographic work which was made with performers' authorization of their right of 'reproduction (Sec 91)' "[45].

In Brazil, where the presumption clause is otherwise quite comprehensive, as it provides a general right for the "commercial exploitation"[46] of audiovisual fixations, in the case of broadcasting organisations, the right to use an audiovisual fixations is also limited in a number of aspects: "Broadcasting organizations may fix the performances of performers who have authorized such fixation with a view to their use in a certain number of broadcasts; fixations made in that way may be preserved in public archives. The subsequent re-use of a fixation in Brazil or abroad shall be lawful only with the written authorization of the owners of the intellectual property embodied in the program, and additional remuneration shall be payable to the owners for each new use"[47].

In this context, the Hungarian solution can also be mentioned insofar as it equally provides for, regarding the fixation of a performance, including audiovisual fixations, made for broadcasting or communication to the public, a remuneration related to uses subsequent to the fixation enabling repeated broadcast that can be enforced by the performer separately and in the frame of collective administration of rights.

[44] National Report of Japan – 3.4.

[45] Ibid. 4.3.

[46] Article 81 of the Law on Copyright and Neighbouring Rights, in: WIPO Survey – ANNEX III. p. 99.

[47] Article 91 of the Law on Copyright and Neighbouring Rights, in: WIPO Survey – ANNEX III. p. 96.

c) Certain countries such as Switzerland or Greece extend the model deriving from Article 12 of the Rome Convention and Article 15 of WPPT also to cover audiovisual fixations. Under Swiss law, "if commercially available phonograms or videograms are used for the purpose of broadcasting, rebroadcasting, public reception (Article 33.2.e) or presentation, the performers shall have a right to remuneration"[48]. The Greek law goes even further insofar as it does not require that the fixation be at all commercially available: "When sound or visual or audiovisual recordings are used for a radio or television broadcast by any means, such as wireless waves, satellite or cable, or for communication to the public, the user shall pay a single and equitable remuneration to the performers whose performances are carried on the recordings and to the producers of the recordings"[49]. In both cases, the right to remuneration is to be exercised by collective administration.

d) Even if there is life after fixation, for practical reasons, the survival of rights often assumes some kind of collective arrangement either in the form collective administration or collective bargaining agreements. Both studies[50] relating to the already mentioned WIPO Survey, irrespectively in effect of whether continental European or other legislation was examined and of whether, in the given case, statutory law has a primary or a secondary role, refer to the fact that collective bargaining schemes play an important role in the exercise of audiovisual rights. If the presumption clause also includes a stipulation to the effect that remuneration has to be paid for each use of the audiovisual fixation, it is frequently the case that the practical implementation thereof is provided for in collective agreements. In countries, such as the United Kingdom or the United States, where collective agreements are the traditional pillars of the performer-producer relationship, these collective schemes may find solutions even for situations not explicitly dealt with by statutory law (e.g., the recognition of certain moral rights).

Collective administration is also a substantial element of the enforcement of rights surviving audiovisual fixation. As the chart compiled from the answers found in the WIPO Survey shows (see chart on last page) rights relating to the public performance, broadcasting, cable re-transmission or other exploitation of audiovisual fixations are frequently entrusted to collective administration.

Based on examples above, one may conclude that although fixation is a moment of predominant importance in the lifespan of audiovisual performances, the survival of at least certain economic rights is becoming more a rule than an exception.

[48] Article 33 of the Federal Law on Copyright and Neighbouring rights, in: WIPO Survey Annex III, P. 634.

[49] Article 49 of Law No. 2121/1993, in: WIPO Survey, Annex III, p. 243.

[50] Katherine M. Sand, op. cit. and Marjut Salokannel "Study on audiovisual performers contracts and remuneration practices in France and Germany" – WIPO AVP/IM/03/3B.

## 4. Legislative provisions on the contractual terms of exploitation: the last line of defense

The exploitation of performers rights inevitably involves contractual arrangements in which, representing a somewhat less attractive aspect of the concept of closest neighbours, the performer is almost invariably the weaker bargaining party, not only in terms of sheer economic power but also in terms of available information and expertise. The importance of legislative provisions on the contractual terms of exploitation cannot, therefore, be over-emphasised as they may well be the last line of defence against an unreasonably exhaustive transfer of rights. Indeed, without statutory law strongly backing up performers in these contractual arrangements (and without appropriate rules of enforcement[51]) the performer may easily find himself in a situation where "what is given […] by the right hand (or the legislator) is often taken from him at a ridiculous consideration by the left hand (or his contractual partner)"[52].

[51] The National Report of France appended the following additional comments to its answers: "The questionnaire is short of studying the means of enforcement of the rights neighbouring to author's right, although Article 23(2) of the WPPT states very clearly that *'Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.'*

"Yet in a time when piracy is generalised on the "peer-to-peer" services of the Internet this is certainly the most important problem to date. Indeed, what is the point of granting a making available right to authors, performing artists and phonogram producers if they find themselves stripped both in practice and under the law of the means to enforce this right?

"Because of this piracy the phonographic industry sector came to an unprecedented global crisis, detrimental to all contributors of the musical field. IFPI, the International Federation of the Phonographic Industry estimates the number of unlawful downloadings of musical files on the "peer-to-peer" services to be in excess of 3 billion per month. How much time is needed until the authorities will actually compel the telecommunication providers and the manufacturers of electronic and information technology equipments to co-operate with the right owners in enforcing the law and, in particular, the WPPT?

"At the pace this phenomenon develops the whole benefit of the WPPT, consisting of the assertion of both a full reproduction right and a right of making available to public by electronic way, may already have become dead letter in the moment of its transposition into the legislation of those major states that supported it.

"The issue is not to fight against technological progress but to create a 'virtuous circle' through which creativity and production resources are reinforced by technical developments, to the benefit of all and, in particular, of the digital industry."

[52] Adolf Dietz "Amendment of German Copyright Law in Order to Strengthen the Contractual Position of Authors and Performers" – IIC 2002, Vol. 33, p. 832.

The apparent fragility of the bargaining position of authors and performers in these contractual situations undoubtedly contributed to the fact that copyright contract law "[...*together with the law of collecting societies*...] at least in continental Europe […] have developed into two additional, relatively independent and comprehensively regulated parts or subsystems of modern copyright legislation"[53].

Even if not always in the form of fully bloomed "subsystems" but, according to the majority of answers received, national laws do contain specific legislative provisions on the contractual terms of exploitation applicable (also) to performers. Exceptions include Australia, Japan and, to a certain extent, the United States where these provisions win acceptance only in such (otherwise not typical) cases if the performer is also the "co-author" of the work. In national laws where such provisions do exist they are generally included in the copyright act indicating that these provisions, compared to the general contractual terms and conditions of civil law, are specific ones directly considering the relationship between the performing artist and the user.

Of the specific provisions applicable to such exploitation agreements, the present paper will address only those specifically designed to counterbalance the positional disadvantage of the performer. The scope of related provisions is extremely comprehensive ranging from stipulations merely calling for written form to complex regulatory models of genuine subsystem nature. Although it is not easy to classify, into hermetically separated categories, the rules falling into this department, as they often include interrelated or jointly implemented conditions, in terms of their objective, being one possible ground for classification, it is probably still possible to group them into the following more generic categories:

a) provisions calling for written form;

b) provisions regarding the interpretation of contractual representations depending, for example, on whether or not they explicitly and unambiguously reflect the contractual will of the parties involved; and

c) provisions purporting to limit to a certain extent the disposal of rights.

Finally, not so much as independent categories rather than examples, on the one hand, of compounding copyright legislation with a modern approach to labour law and, on the other hand, of the appearance of an attitude of social sensitivity aimed at better reflecting the particular interests of (authors and) performers in exercising their rights under copyright law, one is to mention

d) the French solution that connects the contractual arrangement of the terms of exploitation with certain elements of labour law; and

[53] Ibid., pp. 831–832.

e) the German solution that adopted certain rules specifically in view of strengthening the contractual position of authors and performers.

Ad a) The requirement of written form in case of immaterial rights such as intellectual property seems to be particularly justified. Nevertheless, under the various national laws, this is not necessarily a general rule covering each and every method of exploitation and is not necessarily always a requisite of validity but only a mean of evidence.

In the United States, certainly only in the case already referred to above where the performer is also the co-author of the work, the written form is a requisite of validity from which the parties may not depart even by mutual will. This provision, however only applies to the transfer of exclusive rights. The assignment of rights shall be recorded in writing also in the Netherlands. According to the Italian report, although the provision requiring written form was adopted in view of authors only, "this rule may be deemed to apply to neighbouring rights, too"[54]. Under Canadian law, not the terms of exploitation in general only the transfer of (intellectual) property subsisting in the performance has to be recorded in writing. At the same time, even this latter condition is somewhat weakened by the prevailing legal practice: "this provision has been consistently held to be, on the one hand, a substantive requirement to the transfer of rights but, on the other hand, a provision that does not require explicit assignment language or even an explicit reference to copyright"[55]. In German law, those agreements have to be concluded in writing "by which the performer obliges himself to grant exploitation rights in future performances that are in no way specified or only referred to by *genre*"[56]. In this case written form is a requisite of validity from which parties may not depart even by mutual will. In Greece, the principal rule is also that the terms of exploitation have to be established in writing, the parties, however, are free to depart from this provision anytime[57]. Under French law, the written form is only a matter of proof (*ad probationem*) and not of validity (*ad validationem*)[58]. However, as the study, related to the WIPO Survey, analysing the protection of audiovisual performances in France (and Germany) concludes in respect of the formalities associated with the presumed transfer of rights: "if no written contract exists, there is no assignment of rights and the presumption rule is not effective"[59].

Ad b) The specific legislative provisions on the contractual terms of exploita-

[54] National Report of Italy – 5.3.
[55] National Report of Canada – 5.5.
[56] National Report of Germany – 5.3.
[57] National Report of Greece – 5.3.
[58] National Report of France – 5.3.
[59] Marjut Salokannel, op. cit., p. 6.

tion play an important role also in interpreting contractual representations. A most typical case of this when, considering the situation of the party being in a weaker negotiating position, representations that are incomplete, inexplicit or ambiguous have to be interpreted in favour of the party allowing the right and not in favour of the party acquiring the right. Accordingly, when identifying the acts of exploitation covered by the right transferred or the license granted, generally the rule of strict interpretation have to be followed. In Dutch law, for instance: "the assignment shall comprise only such rights as are recorded in the deed or necessarily derive from the nature or purpose of the title"[60]. A similar solution is applied by German law where the granting of exploitation rights must also be associated with specific objectives and "if the types of use were not specifically designated when an exploitation right was granted, the types of use to which the right extends shall be determined in accordance with the purpose envisaged by both parties to the contract. A corresponding rule shall apply to the questions of whether an exploitation right has been granted at all, whether it shall be a non-exclusive or an exclusive exploitation right, how far the right to use and the right to forbid extend, how far the exploitation right shall be limited"[61]. At the same time, as the German report comments, these rules are applicable under the Copyright Act to authors and although it refers to the fact that they may also be applied to performers, due to the different set of rights provided to authors and performers, this application is difficult to implement in practice or, in some cases, cannot be implemented at all[62]. The Greek solution also follows the principle according to which contractual objectives have to be pinpointed, stating that "if any contractual term is unspecified it shall deemed that the exploitation refers to the extent and the means necessary for the fulfillment of the purpose of the contract"[63]. According to the French report, it is an established position in legal doctrine, supported by several decisions of the jurisprudence, that the principle of strict interpretation of representations about the transfer of rights also have to be applied to neighbouring rights[64]. Under Italian case law, certain interpretation principles derived from copyright law (e.g., the principle of the independence of rights) can also be applied to performing artists. Accordingly, "no performer's right can be presumed to be assigned, if not expressly stated in the contract or established by law"[65]. Hungarian law also requires that contractual representations specifically refer to the scope of rights allowed to be exercised

[60] National Report of the Netherlands – 5.3.
[61] § 31 (5) of the Copyright Act (as quoted in the National Report of Germany – 5.4).
[62] Ibid. – 5.4.
[63] National Report of Greece – 5.4.
[64] National Report of France – 5.4.
[65] National Report of Italy – 5.4.

and "if the agreement does not provide for the manners of use which the authorization is intended to apply to or does not provide for the authorized extent of use, the authorization shall be limited to the manner and extent of use indispensably necessary for the implementation of the objectives of the agreement"[66]. This, however, is further embedded into the general interpretation principle that "if the contents of the license agreement cannot be interpreted unambiguously, the interpretation most favourable for the author (performer) shall be accepted"[67]. Under Austrian law, "in the case of doubt the transfer of ownership in the original or a copy of (the fixation) of a performance is not to be understood as license to use such fixation in any way as reserved to the performer"[68].

Ad c) Although a definitely strong intervention in the free devising of the contractual will of parties, the limiting to a certain extent of the disposal over rights may become necessary to ensure that the obviously unbalanced bargaining position of the parties does not lead to contractual arrangements unilaterally detrimental to the performer.

While being essentially an institution related to the nature and legal philosophy of copyright rather than a tool to resolve contractual issues, it undoubtedly also constitutes an effective limitation on the disposal of rights when the substance of the right itself cannot be transferred but only exclusive or non-exclusive licenses to exercise such right may be granted. However, as the Austrian report notes in this respect, this basic conceptual difference in legal theories is less evident in terms of day-to-day contractual arrangements: if licenses to exercise a right are permitted to be more or less unlimited in content, geographical coverage and duration, including even future performances, as is the case under Austrian law, the practical effect of so granting them may be similar to the transfer of rights.[69]

National laws may also prohibit transactions that, based on their content, are – with good reason – susceptible of having been concluded by abusing the dominant position of the party acquiring the right. For instance, in Greece, contracts based on which a performer would transfer the right subsisting in all his future performances for the entire duration of his life, practically stripping him of the position of right holder once and for all, have to be regarded unlawful[70].

The disposal of rights may also be limited by sustaining, even after the transfer of the right, a right to obtain an equitable remuneration that cannot be waived.

[66] Article 43(5) of the Copyright Act
[67] Article 42(3) of the Copyright Act
[68] National Report of Austria – 5.4.
[69] Ibid. – 5.5.
[70] National Report of Greece – 5.5.

The full structure of this regulatory model is well reflected in the EEC Rental and Lending Directive in respect of the rental right, whereby

– the exclusive rental right covering both aural and audiovisual fixations may, in general, be transferred, assigned or subject to the granting of contractual licences [Article 2 paragraph (4)];
– depending on how the Directive is transposed into national law, at least a rebuttable (i.e., subject to contractual clauses to the contrary) presumption of transfer shall prevail when a contract concerning film production is concluded by performers with a film producer [Articles 2 paragraphs (5) and (7)];
– irrespective, however, of the legal mechanism by which the right is conveyed concerning a phonogram or an original or copy of a film to a phonogram or film producer the performer shall retain the right to obtain an equitable remuneration for the rental that cannot be waived (but may be entrusted to collective administration) [Articles 4 paragraphs (1)–(3)].

Entrusting the management of rights to collective administration was also mentioned among the measures purporting to restrict the disposal of economic rights subsisting in performances[71], and rightly so. Even if the other side of this coin, notably that collective administration is also understood as being a limitation on the exercise of rights in favour of the user, should not be neglected, it is very often the only practical way through which a right to obtain an equitable remuneration can effectively be enforced.

Ad d) If the activity of the creative or performing artist is pursued in the framework of a traditional employer-employee relationship, then under a number of national laws this entails the otherwise not entirely unjustified consequence that the exploitation rights subsisting in the result of such activity, be it either a work or a performance, achieved using the assets and working at the risk and under the instructions of the employer, shall belong mostly or fully to the employer.

The legislator however, as demonstrated by the French example, may also call upon labour law in aid of strengthening the contractual position of the performing artist[72]. According to French law, the conditions under which the performer gives authorisation to exploit his rights and obtains remuneration in return for it are partly subject to labour law provisions. It has to be emphasised, being an essential element of this regulatory model consistently supported by jurisprudence, that the invoking of labour law provisions does not derogate or reclassifies the nature of rights granted to performers and despite the existence of a con-

[71] National Report of Germany – 5.5.

[72] See however the view that the exercise of performers' rights is rather “tempered” then reinforced by making it partly conditional on labour legislation (Marjut Salokannel op. cit. p. 5).

tract of employment the performing artist continues to fully enjoy the intellectual property right ascribed to him[73].

Of the numerous consequences of invoking labour law, one has to mention, for example, that, as a general rule, an individual contract must be concluded with every performer and even in the case of including several performers in one common agreement, the name and remuneration of the performer must be specified individually. Also, as pointed out by the French report, the fact that the reference invoking labour law provisions uses the term "remuneration" in plural form ("*les rémunérations*") implies, as per the interpretation of the performers at least, the obligation to pay a remuneration independently and separately after each mode of exploitation[74] (this obligation is already expressly set forth in respect of remunerating the exploitation of audiovisual fixations).

In fact, there are two directions in which the realm of labour law can be escaped. On the one hand, a contract of employment is not required if the circumstances imply that the performer is retained as an entrepreneur[75]. On the other hand, the performer's remuneration is no longer regarded as "salary" obtained under a contract of employment if it is distinctly separated from what was paid to him for the "making" of the performance and is paid by the producer specifically for the sale or other such exploitation of the fixed performance for the purposes of which the physical presence of the performer is already not required.

Ad e) With some exaggeration, the most telling and attractive feature of the recently adopted amendment to the German Copyright Act is probably in the general commitment represented by its title: a Law on Strengthening the Contractual Position of Authors and Performers. Simplified extremely, the essence of this law is in a fairly ingenious, "double bottomed" solution that connects the concept of equitable remuneration with the conditions and implications of agreeing thereupon. On the one side, the law reinforces the concept of equitable remuneration in a number of ways, among others, by making it clear that

[73] National Report of France – 5.1.

[74] Ibid.

[75] It seems appropriate to note here that according to a study prepared by FIM, the International Federation of Musicians, an alarming phenomenon is gaining grounds at least in Europe: artists are often encouraged by their contracting parties to enter into agreements as entrepreneurs or as members of small partnerships to minimise, on the one hand, the social security obligations of this latter contracting party and to maximise, on the other hand, the scope of intellectual property rights acquired from the artist, that are no longer "authorised" by him but rather "sold" by his business. [See Jean Vincent 'Employment and social protection schemes for cultural workers in the entertainment and audio-visual fields within member countries of the European Union' – 24 February 2002 – www.fim-musicians.com]

the parties are mutually bound to observe it as an essential element of assessing the equity of a contractual arrangement but also by enabling the author or the performer to even subsequently challenge any such arrangement if the remuneration agreed upon proves to be inequitable. On the other side however, it also stipulates that the remuneration cannot be challenged as inequitable it was defined by way of "common remuneration standards" reached between the professional representative bodies of the parties concerned either by negotiations or in the framework of the mediation process provided for in the law[76]. The law offers therefore an efficient adhesive for what seems to be traditionally the weakest chain-link in the right owner – user relationship: a stimulation to settle opposing interests by creating a mutual incentive to institutionalise – using a term that is perhaps not a profanity even in this context – a certain "social dialogue" in copyright.

An example from national law that suggests, yet again, obvious similarities in the position of authors and performers is probably an appropriate final word to conclude a paper that repeatedly refers to the concept of closest neighbours. Further, it is perhaps also suitable to demonstrate, together with the many other examples quoted from national laws above, that the proper balance based upon equity, fair access and the public interest can also be achieved while protecting performers on a higher level.

**Collective administration of rights in audiovisual performances**

The following countries answered affirmatively, in the WIPO Survey on National Protection of Audiovisual Performances, to the question whether or not their respective national laws contain provisions on collective management in relation to audiovisual performances. The symbol ■ indicates which rights were designated in this respect, if any.

| Country | Public performance | Broadcasting | Blank tape levy | Cable retransmission | Others (incl. rental) |
|---|---|---|---|---|---|
| Algeria | | | ■ | | |
| Austria | | | ■ | ■ | |
| Belgium | | | ■ | ■ | |
| Belize | | | | | ■ |
| Bosnia and Herzegovina | | | | | ■ |
| Brazil | | | | | ■ |
| Bulgaria | ■ | | ■ | ■ | ■ |

| Country | Public performance | Broadcasting | Blank tape levy | Cable retransmission | Others (incl. rental) |
|---|---|---|---|---|---|
| China | | | | | ■ |
| Croatia | | | | | ■ |
| Czech Republic | | | ■ | ■ | ■ |
| Denmark | ■ | ■ | ■ | ■ | ■ |
| Ecuador | ■ | ■ | ■ | ■ | ■ |
| Estonia | ■ | ■ | ■ | ■ | ■ |
| Finland | | | ■ | ■ | |
| Georgia | | | ■ | | |
| Greece | ■ | ■ | ■ | ■ | |
| Guinea | | | | | ■ |
| Hungary | ■ | ■ | ■ | ■ | ■ |
| Iceland | | | ■ | | |
| Ireland | | | | ■ | ■ |
| Israel | | | ■ | | |
| Italy | | | | ■ | ■ |
| Japan | | | ■ | | |
| Kazakhstan | ■ | ■ | ■ | ■ | ■ |
| Kyrgyzstan | | | ■ | | |
| Republic of Latvia | ■ | ■ | ■ | ■ | ■ |
| Liechtenstein | | | | ■ | ■ |
| Lithuania | | | | | |
| Luxembourg | | | | ■ | |
| Madagascar | | | | | |
| Republic of Moldova | | | ■ | | |
| Netherlands | | | ■ | ■ | |
| Norway | | | | ■ | ■ |
| Panama | ■ | ■ | | ■ | ■ |
| Poland | | | | | |

| Country | Public performance | Broadcasting | Blank tape levy | Cable retransmission | Others (incl. rental) |
|---|---|---|---|---|---|
| Romania | ■ | ■ | ■ | ■ | ■ |
| Russian Federation | | | ■ | | |
| Saint Luca | | | | | ■ |
| Serbia and Montenegro | | | | | |
| Slovakia | | | | | ■ |
| Slovenia | | | ■ | ■ | ■ |
| Spain | | ■ | ■ | ■ | ■ |
| Sweden | | | | ■ | ■ |
| Switzerland | ■ | ■ | ■ | ■ | ■ |
| The former Yugoslav Republic of Macedonia | | | | ■ | |
| Turkey | | ■ | ■ | | |
| Ukraine | | | ■ | | |
| USA | | | | | ■ |
| ***48 countries*** | **11** | **12** | **27** | **24** | **29** |