CHAPTER 6

PROTECTION OF THE PERFORMER THROUGH INTERNATIONAL INSTRUMENTS

Objective of the chapter: The chapter seeks to trace the evolution of international efforts to secure and promote the interests of the performer. It attempts to analyze the existing international instruments endeavoring to protect the performer and its advantages and disadvantages. It reveals the dynamics underlying the issues and the conflict of interests involved in attempting an international harmonisation. The inferences from the study should contribute to formulating a more credible protection for the performer without unfairly sacrificing the interests of other interests involved in the issue.

The Need for Protection of Performers Under International Instruments

The pivotal reasons for international initiatives for performers rights to gain momentum were not much different from that which impelled similar endeavors in international copyright. It was an accepted fact that the realm of movable property and the norms for its international treatment are different from that of the international norms for copyright or intellectual property. In other words with respect to copyright, the center of the work for all the legal consequences is the country where the protection is claimed. In this regard the circumstances could not be much different between copyright protected entities and entities like the performer.1 To cope with the Gresham law that bad money drives away good money a state has to provide some semblance of protection to the foreign work as only then a reciprocal protection can be expected2. No country would want to part away more than it receives3.

It was inevitable that the performers' rights movement had to have international wings as the problems of the performer in different nationalities began to have a

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1 S.M. Stewart, The International Law of Copyright and Neighboring Rights, Butterworths, London (2nd edn. - 1989), p.34. The idea that copyright exists from the act of creation and not from any formal administrative act leads naturally to the idea that once the right exists it should be valid anywhere.

2 Ibid.

3 Id., p.35. However the attempts at streamlining private international law has been laggard in other countries particularly in the U.K. and other common law countries.
common rationale especially with the fixed and live broadcasts crossing the national frontiers and making it an international commodity\(^4\). Internationalization of the problem would further the interests of the countries as those with a low level of protection would have to raise their level of protection with those of the performers enjoying higher protection. The impact of technology began to indicate a common pattern of unemployment the world over as live performers became unemployed.\(^5\) This led to what has been termed as technological unemployment\(^6\).

The concerns pointed were similar to those bothering the broadcasters as generally the television broadcasts were made on the basis of contracts in which the authors, composers, performers and other participants authorized the transmission and delimited the area where it was intended to be transmitted to. The problem was with respect to the area being limited to the area proportional to the amount of remuneration. The performers found themselves to be at a disadvantage in such an international situation in contrast to the authors and the others who were represented by the societies who could assert their rights against third parties and relaying organizations situated in countries where copyright was protected. They were aggrieved that they have lost an opportunity at either performing live in these countries where the program is relayed and can claim compensation for the loss of income\(^7\). In case rights existed then the originating organization would have to either compensate or would have to abandon the transmission altogether\(^8\).

The supra national organizations like the ILO (International Labor Organization) also took up cudgels on behalf of performers among many other sectors that it began to represent among workers. Thus the times were favorable for an international representation to performers concerns as the international mood was for a consolidated attempt at international solutions to international problems.


\(^5\) Ibid. The technological change had its impact on the working conditions as the cinema, the radio-broadcasting and the gramophone records became popular across the European and American continents.

\(^6\) Ibid., p.308. According to the author the television is a medium that insatiably devours its raw material—the creative efforts of the writers, composers, producers and performers.

\(^7\) Id., 309.

\(^8\) Id., 310.
The pressure from the traditional entities to extend the protection to the new media in the international conclaves for international treaty protection provided the incentive for the performers in these new media affixations to demand similar treatment. This not only brought for ward the question of protection with regard to the new media in itself but also the new intellectual creators within it. There were wide-ranging differences with regard to the treatment of these entities with respect to moral and economic rights as well as philosophical differences and variations in contractual practices. In this regard it would be pertinent to the distinctions between the Droit d' Auteur and the common law based copyright stream. Thus the underlying imperative was the realization that some kind of protection was essential but the question was how wide.

The Digital Revolution and the International Norms

The advent of digital communications further compounded the problem, as the traditional regulatory concepts could not fix itself onto the realities of the digital environment. The digital tools and its vastly different capabilities revolutionized the marketplace of ideas. Digitization postulated not only breaking of national frontiers even more effectively than broadcasting but also process of exploitation through a single medium as distinct from the trade in physical commodities or analogue distribution of the past. It facilitated convergence of markets; contents and businesses as well disinter mediation. With the level of legal development in terms of digital regulation very uneven in different countries, the authors are at

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9 The degrees of difference with the main concept were intended to be projected with the use of distinctive terminology. As early as 1941 using the term connected rights—Diritti Connessi, German law-related rights and the French law Droit Voisins—neighboring rights.

10 The contractual practices too differed from one country to another particularly polarized between the American and the European systems.


12 These raise challenges in the form of internet, interactive CD, information super highways, info bahns—the question is whether the current form of legal protection would be able to cope with the digital demands.

13 Id., p.9. The change has already impacted publishing and entertainments like video grams, music retailing, broadcasting and even distribution of films. Even though only in a limited way, with the arrival of the broadband technology, the possibilities are immense. Even though the present downloaded versions are inferior in quality—the future of cinema may be well online.
great danger of unauthorized exploitation. Greater access needed to be directly proportional to the security for the content.

The issues of jurisdiction are even more complicated with the international element almost certain to arise with the content provider, the service provider and the user being situated in different countries and jurisdictions. This compounds the challenge in identifying the lex loci of the issue to be resolved. The need for a harmonization of the laws in diverse jurisdictions and also realize the use of the concept of national treatment is felt indispensable in the digital environment. But even with the adoption of the concept of national treatment variations between different countries can be quiet unsettling as the concept promises to provide only the same treatment as is provided by the protecting country to its own nationals. There was also the need to lay down more precise indicators to solve questions of private international law.

The same challenges that the traditionally protected copyright subject matter face are confronted by the performers as well. It can be considered more acute as the prevalence of preliminary protection to the performers interests are still in a process of acceptance and implementation in different countries of the world. The performer had not yet attained protection even in a world determined by the analogue medium. As for the rights granted by means of either collective contracts or individual contracts, many of these never spoke about the digital media exploitation. The need for proper acquisition of rights from the performer of the live performance or the recorded performance is essential in the digital media and the digital media producer would have to observe the need to acquire these rights. The rights holders would be reluctant to provide content for online and digital services if they are in doubt about the extent to which the rights apply

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14 There would no more be middlemen. In other words the traditional industry and market models would no longer sustain. With respect to intellectual commodities, the very product could be carried online to the user.

15 ld., p.323. The need for a level playing field has been identified as a reason for the European community initiates in this area. See the Green Paper on the Convergence of the Telecommunications, Media and Information Technology Sectors and the Implications of Regulation Towards an Information Society Approach (E.C.COM (97) 62303.12.97).

16 ld., p.176. Though, it was in certain specific collective agreements specified that new forms of exploitation would require fresh agreements. Of late provisions are made specifically taking into account the Internet medium of exploitation and the performers have to be compensated. However where no such collective strength exists the performer would be left to the exploitation of market forces in the absence of the law.

17 ld., p.177.
and can be enforced. In the absence of legal certainty, it might cause grave economic prejudice to rights holders. The need for certainty applies in full measure to the service providers and users as well. This might reduce the availability of the subject matter for exploitation and warp the development of online services. All these postulated the need for introduction and harmonization of rights and law in different countries of the world.

The aforementioned reasons point out to the growing concern that have given rise to demands for the international regulation of performers interests. The movements in this regard have been both from the formal international organizations as well as non-state international performers organizations. It was felt that the efforts at stoking international consciousness would naturally lead to much awareness, as the countries concerned would be influenced by the international initiative.

The elevation of the performers issues to the international status, it was believed would provide momentum nationally and the performers concerns the world over was common enough to have similar aspirations. Since their inception in the 1950's the international organizations representing the performers have played a pivotal role in upholding the welfare of the performer through well-crafted activities, programs and plans. The programs include the amelioration of the working conditions, provision of salaries that match the technical and artistic qualities, securing minimum security and social protection, development of norms in contractual deals while maintaining the sanctity of the performers volition with regard to the exploitation of his performances. Studies have been initiated, projects undertaken and training programs held in order to gauge the true picture of the performers status in society in coordination with other bodies integral to the

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18 *Id.*, p.333.
19 This would have a detrimental impact on the employment generation prospects of the digital segment.
20 The unions and the collective administration societies were forging alliances with similar bodies across national territories.
22 For instance International Federation of Actors (FIA) has affiliates in over 70 countries. With a well-coordinated organizational strength of over 65 national organizations spread out across the world there has been a rapid growth in the activities of the performers and notable achievements as a result of these efforts.
performers vocation. The activities have involved all regions of the world as the branches of performers representative networks are spread out all over the globe.

The work has concentrated around establishing international standards, norms and model collective agreements and coordination of performers initiative spread across a wide array of countries. The organizations have also associated with international organizations or supra national organizations in framing critical international Conventions and negotiating the formulation of legislative norms at both the regional and the national level. The representative character of the international performers organizations has covered both musicians as well as the actors in the widest sense of the term.

Evolution of Performers Rights in International Instruments Upto the Rome Convention

The Berne Convention and the Performer

Germane to the topic of performers' rights and its evolution through the international legislation would be the protection granted to the media that has spurred the audio and audio-visual performers claim for rights. Before the performers rights discourse had begun to be pronounced, there had been speculation that there existed enough spaces between the existing international instruments for the due recognition of new media and for the performances

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26 The effort has been to solve the problems posed by the new technologies, cultural funding and policy, social and professional protection of performers, IPR, taxation, social security and health of the performer, aiding the formulation of collective agreements and negotiating with collecting societies including the cost effective and easy manipulation and creation of new performances in a digital age. Striving to work for the equality of the women performer as also the freedom of the artist intimidated owing to political hostility, war or persecution.
27 See Edward Thompson, op.cit., p. 303. The representation of these organizations at all major international conclaves is evidence of their contribution to the cause of the performer. In fact the first international initiative by the international labor organization was undertaken upon the request by the international federation of musicians in the year 1926.
28 Stewart, op.cit., p. 104.
therein and the performers in it. The Berne instrument with its untrammeled
definitional width could be interpreted to include the performer within its ambit.
While protection under the Convention is provided to authors and their works
neither of these terms have been defined. This entitled several entities of creative
labor that can be brought under the ambit of the Convention. However, there was
conscious change over from this careless open-ended posture that could hold
within its width both the films as well as phonograms. The abolition of this
generous leeway in 1908 created a lot of practical difficulties. In fact even the
concept of the neighboring rights need not have been attempted at all if the
conscious amendment had not been carried out.
The Paris Additional Act Of 1896 took care of the requirement of according
recognition to the photographs, there does not appear to have been any mention
nor call for performers recognition to recognize their authorial talents. This could
be said to have sown the seeds towards further developments, it would be
pertinent to point out that it was only with the recognition of this visual medium
and cinema that a similar standard was desired to be established for the
performer particularly as certain other creative contributors had been required to
be distinctly recognized under art 14 and 14 b of the Berne Convention 20.
There had been great uncertainty whether the protection should be accorded at
the same level as those granted to other entities under the Berne Convention.
Some of the problematic areas included difficulties that are experienced with oral
works and of proof with respect to unfixed performances. The large number of
performers was also a cause of consternation. The major doubt was whether
what the performer does is fit only for a derivative status 31. The genesis of the
proposition in favor of record producers, performers and the broadcasters could
be found in the Berne revision conference at Rome in 1928. The Italian
government raised the issue in the context of equitable remuneration to be
provided to the performers 32. Though the proposition was not accepted the

20 The real impact of technology on the performers rights appears to have taken time to realize
and at the highest international level it seems to have taken a meaningful turn within 20 years
from the time recognition was accorded to the cinematography as a medium amenable to
protection under the copyright norms.
31 Sam Ricketson, The Berne Convention for the protection of Literary and Artistic Works:
1886–1996, Centre for Commercial Studies, Queen Mary College, Kluwer, London (1st edn. -
32 The committee called upon the states to consider measures to protect the performers.
conclave expressed a *voue* that the government consider the advisability of adopting measures intended to protect the rights of performing artists. These matters were discussed at the Rome conference where the Italian delegation proposed that the performers should be protected against unauthorized broadcasts and recordings of the performances (1928 at Rome conference). There were also supplementary proposals to include performances under article 2 of the Convention. However there was no consensus in this regard. No general acceptance to the view that performances could be included among productions in the literary, scientific and dramatic works. But no general agreement could be reached with respect to this.  

This was followed in 1948 at the Brussels Conference where in the Belgian government urged the adoption of a new Article obligating the contracting states to provide protection to performing artists. But leaving the means and the modalities to national treatment. But the author-publisher interests vehemently opposed this and it had to be dropped. It was U.K at the Berne revision conference of 1928 at Rome and 1948 at Brussels that sought protection for sound recordings. The representatives of producers and broadcasters pressed for international action. In fact the French Government in 1948 used the phrase phonographic works. Finally the performers had to be satisfied with a *voue* recommending the respective states to study the means to assure without prejudice the rights of the author the protectionist instruments for the mechanical reproduction of musical works. There were a lot of hostile resolutions from author's organizations. A compromise proposal was mooted at the Brussels conference, which left it to each member to identify the conditions to be fulfilled in order to accord protection. A more specific British amendment provided that unauthorized recordings of performances of dramatic and musical works should

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34 Sam Ricketson, *op.cit.*, p.311. The French delegation took the extreme view that the performers were not authors and that performances were not works. The matter was left after a request to the member countries to find what measures could be taken towards the same.  
be prevented. The Convention after observing the division of opinion came to the conclusion that by now the protection of performers belonged outside the Convention. This suggested the path towards an alternate course and the necessity of a separate treatment of the performer outside the ambit of the Berne Convention. Thus it can be discerned that there was immense opposition from the authors' coterie to apportion new rights and the states too seemed to share their sympathies and was inclined towards the protection of mechanical instruments. There appears to have been no inclination to recognize another creator within the constellation of copyrights. But the performers could take heart that despite this; the vœu carried the sentiment that interpretations of the performer have an artistic character and that study on performing artists in the context of neighboring rights need to be pursued.

A sympathetic outlook towards the plight of the performer began to emanate from other international forums. The International Literary And Artistic Association (ALAI) at its congress in Weimar in 1903, looked sympathetically at the plight of the performers. They assessed the plight of solo performers and found that while new technological inventions provided a wide dispersion to the performance of the artist, it has upset the pattern of his professional life by unemployment. As a response the organizations that represented them turned to the International Labor Office.

The development of the League of Nations in the aftermath of the First World War and the establishment of the international labor office provided a further gusto to these efforts. The International Labor Organization was working on this since 1920's. The work of ILO from the 1926 to the conclusion of the Rome treaty in 1961 is of prime importance in the matter of safeguarding opportunities for employment and preserving the standard of living of a distinguished category of workers, the ILO could not ignore the serious economic problems that had arisen and that called for international action. As early as the year 1940, the question of rights for performers in relation to broadcasting and recording was mooted but the interruption of the war slowed down this resolve. The earnestness

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38 Sam Ricketson, op. cit.,p.311.
39 Ibid.
41 Ibid.
42 Ibid.,p.8.
of the body could be gauged by the constitution of a separate committee on employees and intellectual workers that concentrated on performers’ protection. During the 1930s, it was realized that the interests and activities of the phonogram producers and those of the performers are in so many ways interlinked that any international solution to the problem of phonogram and the performer would have to represent a compromise of interests. The Brussels conference ruled out protection under the copyright act. It stressed that any effort in this direction should not affect authors’ rights and that the protection if any should be based on the artistic quality of performances and the emphasis came to be on rights neighboring on copyrights. The international non-government organizations, those representing performers and authors strove in the search for solutions. They in fact signed an agreement with the international phonographic industry in 1934. A meeting of experts in Samadan, Switzerland in 1939, by the Secretariat of the Berne union and International Institutes for the Unification of Private Law was fruitful.

Run up to the Rome Convention

The ILO through its committee on employees and intellectual workers attempted to coordinate with Berne union. The drafts emanating from Rome (1951), Geneva (1956) and Monaco (1957) and Hague (1960) contained profound

43 Ibid.
44 Sterling, op.cit., p.503. Since then in the formation of an international consensus all the major international nongovernmental organizations were involved including the International Federation of Musicians, The International Federation of the Phonographic Industry Representing the Producers, The European Broadcasting Industry, and The International Federation of Actors and The International Federation of Variety Artists.
45 Sterling, op.cit., p.503. At forming an international consensus the International Federation of Musicians representing performers, The International Federation of Phonographic Industry, representing the producers, the European Broadcasting Industry representing the broadcasting industry, the International Federation of Actors and the International Federation of Variety Artists were all involved in the process towards evolving an international consensus.
46 Claude Masouye, op.cit., p.8*. The reports of their meetings are full of resolutions and recommendations on the matter. Some bargains were struck, for instance in 1934 at Stresa, The International Confederation of Authors and Composers Societies (CISAC) that signed an agreement with the International Federation of the Phonographic Industry. The war interrupted the efforts
47 Kevin Garnett, Jonathan Rayner James, Gillian Davies (Eds.), Copinger and Skone James on Copyright, Sweet and Maxwell, London (14th edn. - 1999), p.1180. Two draft treaties were produced one on performers and producers of phonograms and the other on broadcasting organizations
differences. Finally at Hague in 1960 a single draft emerged upon which the first of the international Conventions held in Rome in 1961 was based.

The drafts of two international Conventions both stemming from the Rome draft of 1951 were completely at variance with the structure and content and there are difficulties to reconcile them. The implementation of either of them would have been premature. While the ILO Draft was inspired by social concepts and lead to a recognition of a collective right of a trade union character dealing particularly with relations between employers and employees. It also intended to regulate relationships that are truly international in character but also situations that might be termed national.

The second draft on the other hand seeks to protect rights conceived as rights of a strictly individual nature. This was limited to aural performances and audio products only and not those that are visual and oral. (Motion pictures and television broadcasts were thus excluded). The structure of the latter draft was inspired by recognized concepts, which form the basis of international copyright Conventions concerned with international situations excluding only the law of the country of origin that includes a minimum protection and national treatment. Nothing was stated in either draft about these other rights neighboring to copyright but the title of the Berne UNESCO draft on the protection of certain rights called neighboring on copyrights implied a creative content as to the contribution of the creative artist. A strong connection was laid between the rights of the authors and rights of the creative performing artists. The protection was limited to performances of literary and artistic works. The states that are parties to the Universal Copyright Convention (UCC) and the Berne become eligible to enjoy the membership of this treaty. The draft also contained a provision with respect to the fair use provisions with general principles relating to private use, reporting of current events and ephemeral broadcasting. Particularly striking was the proposal of the Italian delegation not to grant protection to the

49 Claude Masouye, op.cit., p.9. The Universal Copyright Convention with its secretariat at the UNESCO at Geneva from 1952 and the ILO in 1956 convened a meeting of interested parties that produced an explanatory report.
50 Valerio De Sanctis, "Copyright in Relation to Rights of the Performing Artist", 5 BULL CR. SOC. 64-70(Oct 1957 -August 1958), p.68. The two drafts are the Geneva draft of July 1956 drawn by the Italian Labor Organization and the Berne UNESCO draft of March 1957 under scrutiny by the respective countries.
performers any more than that granted to the authors by the state. But the majority did not accept this.

One of the criticisms of the drafts were that without knowing before hand what copyright legislation would be provided in a given country that is a party to the Convention, the existence of a general assimilation clause and the minimal nature of the rights granted was to permit the states to legislate liberally in favor of one of the other groups in question and as a consequence profoundly disturb the equilibrium of interests. The two drafts in other words reflected distinctive approaches with one leaning on individual rights and the other on labor rights.\textsuperscript{51}

It is noteworthy that the concept of reasonable compensation to be paid to the performer was prevalent even at the stage of the infant discussions on performers right on the international realm. The Rome draft (1951) contained the requirement of reasonable remuneration to be paid in the event of the records being used for the purpose of broadcasting and communication to the public and prompted a large number of countries to suggest that the artists be given a share of the proceeds.\textsuperscript{52} There were many differences between the Geneva and the Monaco drafts. The former centered on the principle of national treatment. Minimum rights were not given undue emphasis particularly the notion of remuneration related to secondary utilizations of the records. This was to be left entirely to the discretion of the national legislations. The Geneva draft was much more detailed that was the result of compromises between the groups representing the three interests. The Geneva draft incorporated the provisions relating to secondary utilization of the commercial records and the need for the reasonable remuneration to be paid to the producers for the use of records for broadcasting and communication to the public, subject to the qualification that they should (that is the producers) should allow the performing artists, by means of direct arrangement between performers and producers, a share in the proceeds.

\textsuperscript{51} Id., p.70. This Article observed and suggests that it would be a combination of both these approaches that would best serve the interests of the performer.

\textsuperscript{52} See Eugen Ulmer, "The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations", 10 BULL.CR.SOC. 90(1963), p.91. Mr. Lenoble, Inspector General of the French broadcasting organizations proposed that while the right to a remuneration should be granted to the producers, they in turn should be obliged to allow the performers a share in the proceeds.
The differences between the Geneva and the Monaco drafts were reconciled and that produced a new draft called the Hague draft (1960). While it incorporated notions on the national treatment from the Geneva draft, other rights were incorporated from the Monaco draft. Most importantly provision was made for the incorporation of the right to reasonable remuneration. However this was left to the discretion of the concerned nation states whether the right to remuneration belonged to the performers, the producers or to both jointly. The contracting countries were to have a right to declare in their instruments of accession that they abstained, wholly or partially, from granting the right to remuneration provided under the Convention in the event of commercial records being used for communication to the public. The concept of reasonable remuneration in the Hague draft found a lot of opposition in the months ahead of the Rome Convention.

The concern of the authors had been that in case an international agreement on neighboring rights should materialize, it should have a guarantee based on the principle of primacy of copyright to the effect that the authors' interests would not be adversely affected. The authors associations were satisfied that the drafts did not grant a right of authorization to the performers and producers of phonograms. This eliminated the scope of the obstruction posed to the authors right to royalties whenever records were broadcast by means of the exercise of the right of authorization by the performing artists.

The authors also saw a danger in the principle of right to remuneration and felt that the additional burden on the consumers would lead to a reduction in the royalties that they enjoy. Though this was confined to uses or communication to the public other than broadcasting. The authors adopted a hard line stand (CISAC), that the international instrument was unnecessary as the general legal principles were sufficient to this end through the possibility of contractual arrangements. Similarly, the ALAI also felt that the international resolve was

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53 Id., p.92
54 Id., p.93
55 The resistance came from the authors associations and from the Confederation Internationale Des Sociétés d'Auteurs et Compositeurs (CISAC) and The Association Littéraire et Artistique Internationale (ALAI) and from the European Broadcasting Union that opposed the right to compensation provided with respect to secondary uses.
56 At a meeting of authors held in 1956 at the invitation of the director of the Berne bureau, these were laid down in the so-called principes interauteurs. Id., p.95.
uncalled for, useless and premature. This was supported by certain countries like France that had reservations about neighboring rights and felt that safeguarding the interests of performers and others could also be achieved through contractual arrangements and not through any special Convention. The difference in the rights of the entities in the same instrument was also pointed out by the organizational think tanks. Prime broadcasters union like the European Broadcasters Union who were against any secondary use fees being paid supported them. It was an irony that the authors' opposition to the neighboring rights resulted in opposition to performers' interests whose nature of the work had close affinity to the authors' status. The difference between performers, producers and the broadcasters was not being stressed by the interests' involved.

There was considerable opposition to the idea of doing away with the initiative to grant even secondary use rights to the entities concerned as envisaged in the Hague draft. The performers, however, found the backing of several countries that included countries like U.K and Germany but also Australia, India and Israel, the Latin American states and the countries of the eastern block. These countries felt that the reservation clause took care of those countries that still nursed doubts regarding the implementation of the envisaged remuneration system. The prevalence of a remunerative system either by way of statute or through the means of contract in several European countries and in a modulated manner in the United States of America gave considerable impetus to the idea.

The Rome Convention

The Identification of the Performer under the Rome Convention

The Rome Convention has attempted a definition of the performer though no attempt has been made at all to define performance. It was generally felt that the new right owners were those whose involvement were derivative from that of the author in that by their contribution (performance, recording, broadcast) they

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57 Id., p.98.
56 Id., p.99.
converted the original work into a new form. The performer in the Rome Convention is defined as meaning actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works. The definition of the performer has been inseparably connected to the literary and artistic works and the performance of these works. For example the conductor of an orchestra or chorus comes within the concept of performers because he is performing a musical work. The difficulty appears to have been to draw a categorization without recourse to the dependence to the literary and artistic works. With the difficulties to draw a subjective criteria, in order to qualify as a performance the only way to accredit a performance as being amenable to protection was perhaps to connect it with the literary and artistic works that enjoyed or is enjoying copyright credentials. There was never any lack of proposals at the Rome conference for extending the protection to variety stage and circus artistes, acrobats, equestrian performers and lion tamers etc. A waiver of the criteria of literary and artistic works was disfavored as otherwise the concept as to who was a performer would lose all clarity.

There is a reprieve for this closed approach in that a wider approach has not been restricted. That is the nation states desirous of extending protection to performances other than those of the literary and artistic realm have not been prevented from doing so. Rather they have been provided under Article 9 to do otherwise. From this expression of intent two aspects stand out, one, that the Rome Convention was never against extension of the subject matter and two, the respective nation states have been provided the freedom to provide for the same.

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50 Richard Arnold, *Performers' Rights*, Sweet and Maxwell, London (2nd edn.-1997), p.17. It may be pointed out that the nearest right owners under the Berne Convention were translators and arrangers.


52 Eugene Ulmer, *op.cit.*, p.176. The concepts of literary and artistic works have to be explained in the same manner, as they are understood in the revised Berne Convention and the universal copyright Convention. It thus includes dramatic, musical and dramatic musical works.


54 See Stewart, *op.cit.*, p.236, it was indicated at the conference that certain countries wished to include sportsmen such as footballers, ice skaters or golfers (though no country had done this so far) the extension was intended to cover variety artists like clowns, acrobats and jugglers.


56 Id., p.177.

57 Article 9 of the Rome Convention says that any contracting state may, by its domestic laws and regulations, extend the protection provided for in the Convention to artists who do not perform literary or artistic works.
Thirdly, no subjective criterion has been drawn by the Convention as well as no vertical stratification has been suggested and no objections to the same uttered. Several countries have either prior to the Rome Convention and after it brought a lot of performing entities under the ambit of the protection that might look ridiculous to the conservative for whom a performer had a traditional mooring in literary and artistic works. The Rome Convention had however identified the weakness of these absolute criteria of classification. This was sought to be made-up, bridged, balanced by the provision of Article 9 of the Rome Convention. The ostensible reason for this would be that there ought not to be any confusion inherent in Article 3 with regard to the ambit of performers protection. The grant of exceptions does not appear to qualify the preliminary grant of protection to performers of literary and artistic works. Thus there is no right to exceptions emanating from the main rule. The states it appears have to provide for separate legislation in order to extend the protection to others. On weighing the consequences it may be seen that while the provision permits the states to extend by legislation it does not permit legislate to negate art3. Thus the bare minimum of protection granted primarily in Art 3 must be kept intact. A vital question arises as to why the link with literary and artistic rights has been maintained. It can be surmised that it has been stated to be ostensibly for identifiably, So that literary and artistic works are not overwhelmed by performers preeminence as otherwise courts and executives would have to interpret according to circumstances, which would prove to be cumbersome in the long run.

National Treatment in the Rome Convention

The objective of the Rome Convention was to lay down a set of minimum rights to be observed across geographical frontiers and also see to it that nationals and foreigners are not discriminated in the application of the national law if any that is adopted with respect to the performers, the phonogram producers and the

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69 Article 9 of the Convention shows the mixed sentiment of the Rome Convention to this and says that the contracting state may by its domestic laws and regulation extend the protection provided for in this Convention to artists who do not perform literary and artistic works.
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broadcasters. The Rome Convention was based on the idea of national treatment and the grant of minimum rights\textsuperscript{70}. According to it, by national treatment is meant the protection granted by the domestic law of a contracting country to performers who are its nationals with respect to performances taking place, first fixed in, or broadcast from its territory; to producers of phonograms who are its nationals with respect to phonograms first fixed or published on its territory; and to broadcasting organizations who have their headquarters in its territory with respect to broadcasts transmitted from, transmitters situated on its territory. The protection granted may be based on different criteria in different countries order to grant protection to their nationals. The provisions regarding minimum rights as contained in Articles, 7,10,12,13,14, supplement the principle of national treatment\textsuperscript{71}. Article 2(2) of the Rome Convention makes specific reference to this supplemental provision as also to the exceptions. This was ostensibly incorporated for the reason that the protection afforded by the Convention may in certain cases be greater or less than domestic protection. The Rome Convention contains features where in the minimum rights are directly applicable to the national laws (where it is so possible) and provisions that are not so applicable. The latter circumstance is particularly striking with respect to the provisions regarding performers rights granted under Article 7 of the Rome Convention. Even with respect to countries that admit of a direct assimilation of rights granted under the Convention into the national law, Article 7 pertaining to performers rights would only provide a panel of options as it does not mandate a clear cut stipulation as to the rights to be bestowed on the performer and only grants a possibility of prevention\textsuperscript{72}.

\textit{Rome and the Point of Attachment in Order to Invoke National Treatment}

The point of attachment that was finally endorsed in the Rome Convention was that of the country where the performance takes place should be a contracting

\textsuperscript{70} Article 2(1)(a)(b)(c) and (2).


\textsuperscript{72} /d.,p.170.
state. If the performance was incorporated in a phonogram, which is protected under Article 5, and if the performance not being fixed on phonogram, is carried by a broadcast, which is protected under Article 6. Thus the performers are protected even if their performance does not take place in another contracting country. If the conditions for the protection of phonograms and the broadcasts have been fulfilled. The question that was bothering the participants at the conference was whether the circumstances of attachment that was being taken into account was regarding international situations or domestic situations were being taken into consideration. With respect to broadcasting organizations the criterion for points of attachment are the headquarters of the broadcasting organization is in a contracting state and two, the broadcast was made from a transmitter situated in a contracting state. Seen in this perspective it can be surmised that national treatment of the performer is assured on the fulfillment of criteria that covers a variety of circumstances and the dangers of being exposed without legal cover is few and far between. The criticism was with regard to the lack of clarity with regard to the chemistry between provisions of the national laws and those of the minimum guarantees provided under the Convention. The question would be if the provisions of law in the state where in protection is sought for is lesser than that proposed by the Convention then should the minimum guarantee apply to the foreigner. Similarly if the parent state does not provide the same protection as given by the state in which protection is sought for then will that disqualify the foreigner from a higher protective treatment.

Thus under the aegis of the Rome Convention a person who is not a national of a contracting state or who is from a contracting state that does not provide an equal character of protection to the performer as is imparted in the state were the demand of protection is made by the performing artist can avail of the protection granted to him by the latter to their own nationals. Further, the applicant can also

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73 Article 4(a)(b)(c) deals with performers, Article 5 91)(a)(b)(c), 5(2) and 5(3) deal with phonograms and article 6(1)(a)(b) and 6(2) deal with broadcasting organizations.

74 Id., p.172. There was this proposition from the German delegation to stipulate that the performance of the nationals must be taken into consideration as a criterion and that the there was need for mutuality in that respect as well.

75 Claude Masouye, op.cit., p.29. The criterion for the qualifying phonogram lists nationality of the producer, the place of fixation of the sound, and that of first publication of the phonogram.

76 Id., p.32.
invoke the minimum guarantee in the Convention as national treatment in the Rome Convention encompasses the minimum guarantees laid down in the Convention ratified by the contracting state.

**Article 7 of the Rome Convention**

The most significant or cardinal feature of the Convention or achievement of the Rome connection is enshrined in art 7 of the Convention. The most noteworthy characteristic has been the endowment of the right of possibility of prevention. This status is in contrast to the more unambiguous and precise conferment of rights to the producer of phonograms and the broadcasters who are also beneficiaries of the same Convention. The reason and the fallout of the word on is that it leaves complete freedom of discretion on the countries to decide on the course of action to beget the preventive result.

There were differences and opposition from countries that had not bestowed any rights in to the performer till now to those who had some semblance of protection on the subject of the legal nature of the right to be bestowed. The, major questions debated with respect to the rights to be granted to the performers revolved around. The legal nature of the protection, the definition of the general scope of the protection, the special question of rights of the performers in connection with the further use in broadcasting of performances whose broadcast was authorized by them, the transferability of rights and the exercise of rights in case of group performances.

There were delegations that mooted a personal property right in favor of the performer sanctioned by a civil cause of action. There were other jurisdictions

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77 Article 7 of the Rome Convention - minimum protection for performers – Art. 7 Paragraph 1: particular rights 1. The protection provided for performers by this Convention shall include the possibility of preventing: a) the broadcasting and communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or public communication is itself already a broadcast performance or is made from a fixation; (b) the fixation, without their consent, of their unfixed performance; (c) the reproduction, without their consent, of a fixation of their performance (I) if the original fixation itself was made without their consent; (ii) if the reproduction is made for purposes different from those for which the performers gave their consent.; (iii) if the original fixation was made in accordance with the provisions of article 15, and the reproduction is made for purposes different from those referred in those provisions.

78 It affords an array of legal methods from law of employment, unfair competition, criminal law to the most advanced of the intellectual property rights protection or positive authorization property rights. See Claude Masouye, op. cit., pp. 34-35.
who were vehemently opposed to this and were happy at the administration by means of criminal law. Interestingly, the droite d’ auteur countries heeded the authors organizations and preferred a regime falling short of the positive attribution of rights. Finally in keeping with line proposed by the draft at Hague the possibility of prevention with necessary exceptions was broached and accepted.

One of the major areas of conflict was in the kind of right to be granted. Majority of the countries were against the grant of property rights as these are assignable and this could facilitate tall claims by the assignee and deprive the users of the use of performances. Both the authors and the producers of phonograms raised these fears. The broadcasters feared that the grant of an exclusive right would embolden the performers to create difficulties with respect to both original broadcasts as well as rebroadcasts. The activity of the performance has been likened to a wage earning activity, which made it to be at loggerheads with the exclusive right.

The delegations were divided over the following questions-

Live performances - The Rome Convention mainly spreads around the regulation of the exploitation of live performances and its various means of exploitation. The Rome Convention mainly gives confidence to the performer of live performances that live performances can only be exploited subject to their consent. However owing to the different ways in which the word has been used in different countries. The Convention has desisted from the application of the word. This could raise difficulties in the countries that intend to apply the terms of the Convention, as the extent of rights would be uncertain.

79 The Czechoslovakian delegation was for a civil right of personal property while the British delegation was for retaining its present criminal law framework to tackle violations of performers rights. The authors rights countries like France and Germany were circumspect because of the equanimity with which incorporeal entities like companies which produced audio visual products and the performer who was a personal entity.

80 Eugene Ulmer, op.cit., p.220 even the term performers rights as being applied to the status granted under the Rome Convention has been considered to be a misnomer rather it is proposed that it refers to merely the legal position of the performers.

81 Claude Masouye, op.cit., p.36. For instance in France the word used in France means – directe. Secondly most of the broadcast performances are also recorded rather than live. However this interpretation could confound any settled interpretation particularly with respect to repeats.

82 The Hague draft was specific on the question of the performance being qualified by the word “live”. However this ran into difficulties at Rome. The Present draft was upon the proposition by Dr. Bogsch of the United States that qualification can be conveyed through the exceptions than through the use of the prefix live. Eugene Ulmer, op.cit., p. 221.
By the term possibility of prevention it does not mean that the states concerned cannot grant any of the proprietary rights or that the states cannot grant a status of a copy right entity to the performer. But rather the states have been granted a wide discretion to select the manner and method to protect the interests of the performers. It ought to be pointed out that there is no discretionary power or option on the states whether to provide any protection or not at all. That there shall be protection granted to the performer is mandated by the use of the word "shall" in article 7 (1) of the Rome Convention. The article further lists out the activities whose possibility of prevention is to be explored by the states concerned. There is no further guideline as to what the method ought to be. Thus it can either be a petty fine and even a warning. The possibility of prevention includes the broadcast and communication to the public of the performance without the consent of the performer. Most of the commentators have not noticed the conjunctive use of and between broadcast and the communication to the public. This can only ostensibly mean communication that follows a broadcast and not communication to the public otherwise. But the common understanding has been that the communication to the public as used in the Convention caters to situations within the nation and not across national frontiers either by loudspeakers or by wire. The word communication to the public has not been defined but this sentiment of constraint is carried in the general report. However the word broadcasting has been defined in the Convention as meaning the transmission by wireless means for public reception of sounds or of images and sounds. Some commentators have attempted to understand the true meaning of the term communication to the public as provided for in the Rome Convention. It has been thought to include the transmission of performances by other technical means other than radio electric waves. However the technological possibilities available at that time appears to have pointed out a situation of terrestrial dispersion of short distances particularly within the geographical proximity of the original performance. The idea of a deferred broadcast or a broadcast that had been relayed over the borders and then disseminated

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83 Ibid.
84 Article 3 (f) to the Rome Convention
through wires after it has been received by any apparatus had been remote in the minds of the policy makers\textsuperscript{85}.

The extent of the word performance that can be restrained or possibly prevented is qualified through the exceptions to the minimum right. The performer cannot prevent the broadcast and the communication to the public of the performance if the performance has already been broadcast or is made from a fixation. This could mean that a repeat performance by the artist of a live performance that has already been broadcast can be broadcast by any one yet again without the consent of the performer. It could mean that the broadcast of either a live performance or an affixed performance can be rebroadcast if it has been already broadcast from an affixed performance but what it does not mention is that only the person who has broadcast it first might be allowed to rebroadcast the same without any further consent.

The inclusion of communication to the public together with broadcasting found opposition from certain delegations. It was not found to be important in the context of an international instrument being prepared. However the majority of countries were of the opinion that the contingency should be taken into consideration. This was also considered to point out to future legislation towards the domestic acceptability of the concept.

*Right of Consent for Fixation*

Besides the protection against the conveyance of their performance (live) by means of broadcast and communication to the public, the performers consent is required in order to affix their performance (live). This is a minimum guarantee advanced by the Rome Convention. It is to be noted that what has been granted is not a positive right of authorization but rather protection against affixation without the consent of the performer. The limitation is evident as a fixation made from an already existing fixation is exempt from the terms of violation or would not amount to violation. Films as well as phonograms are in need of observing these clauses but broadcast from a fixation does not invite a further consent from

\textsuperscript{85} The British delegation opposed the inclusion of communication to the public on the ground of it having no relevance in international relations. Eugene Ulmer, *op.cit.*, p. 221.
the performer provided there was consent for the initial fixation. Rome Convention encompasses the basic concerns of the performer in both audio as well as the audiovisual media.

**Affixations and Reproductions**

One of most heavily contested issues at the Convention was with respect to the right to stop reproduction without authorization from the performer. The Hague draft extended protection with respect to reproduction only in certain circumstances. The opinion was divided over the issue with the United States and German diplomats calling for a protection against reproduction of their affixed performances. The broadcasters vehemently opposed the proposition, as the broadcasters were for technical reasons dependent upon the need for reproducing the records. They felt it to be too burdensome to elicit the consent of the producers as well as the performers in this regard. The detractors felt that the consent of the producer alone would suffice and that any remuneration for the performer could be settled through the means of contract between the producer and the performer. The producer could proceed against the third parties in the interest of performers as well.

However Rome Convention takes care of the reproduction without the consent of the performer in three instances—when the original fixation has been made without the consent of the performer, when the reproduction has been rendered for purposes different from those for which the performers gave their consent. And if the original fixation was under art 15 and the reproduction of the fixation was different from those referred to in art 15. (Whether against third party unauthorized fixations under the perms of the Convention.) The second possibility of exercise of the rights is significant in that the reproduction from an affixation for purposes different from those for which consent was provide gives a significant empowerment to the performer from unauthorized reproductions. (The meaning of the word reproduction as to whether it is a direct reproduction or an indirect reproduction would need to be explored). Though the Convention does

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86 For instance Dr. Straschov (Monaco) and Professor Bodenhausen of Netherlands were all against the filing of necessary consent. Eugene Ulmer, *op.cit.*, p.222.
not provide illustrations for the same it applies to derived exploitation in the nature of commercial records being produced by the broadcasting organization from tapes given to it for broadcast or the use of records for use in soundtracks without their consent. This could also provide a reprieve to unsolicited use of soundtrack performances as commercial records without their consent.

The question of rebroadcast and reproduction for broadcasting purposes—both these very important usages of the affixed performance has been left to the domestic legislation of the respective countries. The Convention provides a wide rope to these countries. This means that once the performer has consented to the broadcast he may with hold any further protection of his performance. Countries had mooted the proposition extend the protection to rebroadcasts on an *ex entrepreneurship* basis but this proved unsuccessful. There was also a plea not to have any special rules regarding the relationship between the broadcaster and the performer since it was for the broadcasting organization to secure by contract the rights from the performer. However this proposition too did not meet with any success. The proposal to safeguard contractual agreements and desist from any compulsory licensing in the domestic legislation met with success. A positive feature of the provisions incorporated has been the fact that domestic legislation cannot restrict the right of the performer to negotiate contractually his rights with the broadcaster though the he might not be vested with any statutory rights with the mandate of the Convention.

There is no provision with respect to assignment or transfer of rights nor does the Convention make any mention against the same. Therefore it is left to the domestic legislations to provide for it. The absence of the same need not beguile one to conclude that it was not a contested issue rather on the other hand it was the most fiercely debated issue as it was connected to the civil rights and authorization rights application. (Though it does not seem the case that transferability arises only in case the positive right of authorization is granted). A lot of propositions were voiced to bring out a balanced bestowal of the right of

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87 Id., p.223.
88 Ibid. The German proposal on the basis of that performers be granted protection from rebroadcast
89 The American proposal. Eugene Ulmer, op.cit., p.223.
90 This includes collective agreements too. This was clarified in the general report upon persuasion from the Belgian and Dutch delegations. Eugene Ulmer, op.cit., p.223.
transferability. One of the worst fears that were voiced was one regarding the transfer to performing right society or the trade union unconditionally that might result great obstruction to normal exploitation of the product. The suggestions to pacify this fear (on the lines of the Geneva draft of the performer retaining the right to negotiate did not succeed)\textsuperscript{91}. But this was opposed on the ground that this would amount to restriction of the freedom of contract and that it need not find expression in the international realm\textsuperscript{92}. The grant of rights may turn the onus of proof on the producers and broadcasters as against customary practices in which the presumption is traditionally in their favor. The manner of administering group performances has been left to the domestic legislations of the respective countries in the Rome Convention\textsuperscript{93}. The only addition has been the introduction of the plausibility of compulsory licensing to the countries to be exercised with respect to group performances\textsuperscript{94}.

\textit{Equitable Remuneration \textendash\ Article 12 of the Rome Convention}

The right to equitable remuneration had been considered as a safe substitute to the grant of a complete positive right to authorize the use of the performances. The use of the equitable remuneration for the traditional entities had already been seen to be present either by way of statute or through collective bargaining processes. The extension of this concept to the Rome Convention and the processes including the draft preparation over a ten year period culminating in the Hague draft was a strong pointer to the need to accommodate the rights along with the need to have less cumbersome administration of rights\textsuperscript{95}. The

\textsuperscript{91} The Austrian delegation referred to the Geneva draft and mooted that notwithstanding any assignment, performers may exercise their rights to the extent necessary for the fulfillment of contracts in which they undertake to perform for the purposes of a recording or a broadcast. The ministerial draft of the new German copyright law was also supportive of this. Eugene Ulmer, \textit{op.cit.}, p.224.

\textsuperscript{92} The United States delegation. Eugene Ulmer, \textit{op.cit.}, p.224.

\textsuperscript{93} This follows the desire on the same lines in the Hague draft. Eugene Ulmer, \textit{op.cit.}, p.224.

\textsuperscript{94} This was upon an American proposition. As the word condition carried according to the revised Berne Convention the meaning of imposition of conditions in the form of compulsory licensing for the exercise of rights.

\textsuperscript{95} Article 12 (secondary uses of Phonograms) says that if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.
provision triggered a lot of opposition from the authors' associations and the European Broadcasting Union. They were opposed to an obligation to pay or share remuneration and were not satisfied despite the possibilities of reservations and limitations in the Rome Convention. They were of the opinion that it would be much better to leave the issue to the choice of the domestic legislations and enable the countries who initiate such a legislation to deny national treatment where there is no reciprocity. However majority of the delegations were in favor of the article. The dissenting notes are also considerable. However the delegations which where favorably inclined to authors' associations and broadcasting organizations were instructed by their government's guided by social considerations to vote in favor of article 12 or in the alternative to abstain from voting.\textsuperscript{96} It is noteworthy that India was among those countries that voted for the motion. It is also significant that most phonogram producing and performer centric countries were in favor of the concept of the single equitable remuneration being applied.\textsuperscript{97} It's noteworthy that under article 12 of the Rome Convention only the use of phonograms for commercial purposes is to give rise to an obligation to the remuneration. In other words only those commercial phonograms are taken into reckoning not intended for free trade but those of broadcasting organizations are outside the scope of article 12. Under the terms of the Convention there is no obligation to pay remuneration for the use of these in broadcasting\textsuperscript{98}. Secondly, the obligation to the remuneration has provided for in Rome is confined to the direct use of records for broadcasting or communication to the public. If for example the broadcast of a record by broadcasting organization is rebroadcast by another of broadcasting organization or communicated to the public in a

\textsuperscript{96} Eugene Ulmer, \textit{op.cit.}, p.226. It is noteworthy that the delegations at 20 countries-Argentina Australia, Austria, Brazil, Cambodian, Chile, Congo, Cuba, Czechoslovakia, cuddle federal republic of Germany, Great Britain, Iceland, India, Ireland, Israel, Italy, Mauritius, Mexico, Peru and Poland voted in favor of acceptance of article 12. The delegations of eight countries France Japan, Luxembourg, Monaco, Netherlands, South Africa, Tunisia and the Yugoslavia voted against. Nine delegations Belgium Denmark, Finland and Norway, Portugal, Spain, Sweden, Switzerland and the United States abstained from voting.

\textsuperscript{97} However interestingly, the necessary two-thirds majority had been achieved. It was met with a vigorous applause.

\textsuperscript{98} It is important to note that, during this relevant period, certain legislations in countries such as in Germany have gone for the further and even those records the sharp that are not meant for commercial usage are also subject to take the trouble remuneration. Further there is no exception regarding employees of broadcasting organizations who are performers. Their remuneration is to be governed by the terms of their employment contract.
restaurant or other public place, no obligation to pay remuneration arises in the second broadcasting organization of or restaurants. Here the protection under the Convention for the benefit of performers lags behind the protection enjoyed by authors in other provisions of the world Convention. Thirdly, the remuneration payable to the performers and to the producers of phonograms was to be a single equitable remuneration. A two-fold burden was decided against in view of the burden on the organizers and the authors. However doubts and criticisms have been raised whether the single equitable remuneration that has been mandated would be a maximum limit or a minimum guarantee. In other words the question that emerges is whether the countries do enjoy the freedom to have a scheme that envisages something more than a single remuneration. Fourthly it is important to note that it is not a specific entity who has been entitled to the remuneration rather it is either the performer or the producer or both. This is left to the national legislations to choose from. Though the legal bases from which different countries proceeded differed, it was felt that it was not time to forge an international finality on the issue. Particularly since a balance had been arrived at through various means in different countries among the conflicting interests. However it was felt that fairness demands that payments for secondary users should not pass in a one-way flow from one contracting country to another.

Agreement that in respect of the obligation to pay remuneration, national treatment maybe withheld in the absence of reciprocity. In this connection, it was advisable to choose a uniform criterion, irrespective of whether the rights of performers, of producers of phonograms, or of both, is involved. The criteria chosen was the nationality of the producers of phonograms which is in keeping with the fact that the rationale of the use the most important criteria in connection with the protection of producers of phonograms. The following further reservations

99 Though this was considered to be a disadvantage, it was agreed to move ahead with caution.
100 Eugene Ulmer, op. cit., p. 228. The Berne consensus in this regard may not have the same influence considering the compromise in this regard that was evolved and arrived at in Rome neighboring rights.
101 id., p. 229. The Belgian delegation wanted the right to remuneration to be granted to the producers, but that obligation to allow the performers share in the remuneration has to be imposed upon them. The performers interests opposed this. For there were countries such as Germany who were envisaging legislation where in the remuneration was to go to the performers who in turn were to distribute a share to the producers. In Britain for instance despite the absence of a statutory obligation through collective contracts the performers were entitled to a share in the proceeds from the phonograph industry.
also admissible a. In the case of phonograms the producer of which is not a national of another contracting country, any contacting country may exclude the application of art12. Thus with respect to national treatment and art 12 benefits a different yardstick based on reciprocity and the point of attachment pegged on that of the nationality of the producer was intended. Though this pertains only to international situations nevertheless this showed the lack of sternness in making the equitable remuneration provision a part of the national legal system in a uniform manner. However there was an endorsement in principle to the concept from all nation states particularly the major entertainment producers that included India.

Right of the Performer in the Audiovisual and the Rome Convention and the Conflict of Interests

A Convention that protects performers and broadcasting organizations should have logically extended to the field of motion pictures as well. Particularly considering the fact that the motion picture industry engages the most number of performers and broadcasting of audiovisuals had become a huge commercial prospect by the middle of the century. However this logic seemed to run into bottlenecks and opposition came from the diverse interests particularly from the film industry. The issue was whether the film industry owing to the special circumstances prevalent in it required any special treatment. The Hague draft encompassed the film industry to bring the performers and broadcasting organizations within its ambit. The protection to performers was commonly confused with the protection accorded to authors of films. Another significant proposition that was advanced was that there ought to be a distinction between the cinematograph films and other audiovisuals. However no heed was given to this proposed demarcation at the Rome Convention. There was vehement opposition to the grant of neighboring rights to the performers on the ground that it might create new problems for the film industry. Rather than make do with any compromise of interests the film industry preferred

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103 Article 19 (performers' rights in films)- says that notwithstanding any thing in this Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 will have no further application.
a complete immunity from any legislative grant of rights. The eligibility of the film industry to the grant of rights to the performers had its first imprint in the Monaco draft. The draft provided that no provision was to be interpreted as applicable to the reproduction, or any other use, of motion pictures or other visual and audio visual fixations. This would have included the broadcasting organizations that would have enjoyed protection only for their live television broadcasts and not for their televised broadcasts from fixations. However the Hague draft excluded broadcasting organizations from the ambit of exclusion from the application of the draft. In the case of performers the Convention was not to apply to the reproduction of performances fixed on films where the purpose of the reproduction is different from the purpose understood by the performers when they consented to the original fixation. The exclusion was not total and that enhanced the protective status of the performer in comparison to the total exclusion that is reflected in Art 19 of the Rome Convention\(^{104}\).

The Rome provision for exclusion has raised some sharp criticisms that cannot be termed unfounded. For one, the exclusion seems to take away the right on the performer to disallow any derived exploitation from the film or the soundtrack of the film that he might not have explicitly consented to. Thus both the audio performers and those who appear for instance the actors do not have any right to fall back upon in case the exploitation was one that was distinct from that for which they gave consent\(^{105}\). The distinction between the treatments meted out to the performers in films and those in audio fixations has been ostensibly because of the distinction between the commercial distribution of records and those of films. In particular the question of secondary uses only arises from records in comparison to films\(^{106}\).

The grant of rights to the broadcasting organizations in the absence of similar rights to the performers has raised a storm of criticism. The broadcasters enjoy rights both with respect to radio as well as film exploitation. They are protected from rebroadcast, fixation of broadcast or reproduction of such a fixation regardless of whether a broadcast is a live broadcast or based on an audio,

\(^{104}\) Eugene Ulmer, op.cit., p.242. Eugene Ulmer it appears the provision was influenced by the film industry interests in the United States and comes nearer to the provision advanced by the American delegation.

\(^{105}\) Id.,p. 243. The German delegation did give a proposition to include the reproduction with respect to films within the Convention but this was not successful.

\(^{106}\) Ibid. This criterion is outdated today.
visual or an audiovisual fixation. This protection extends to the communication to the public too from films televised as well as recordings exclusively for television\(^\text{107}\).

**Reservations and Exceptions**

The Rome Convention provides for reservations and exceptions in the application of the Convention provisions by the member states\(^\text{106}\). This had found expression in the preceding Hague draft of the Convention too. There was conflict of interests with respect to these specific enumerations and there were suggestions for addition of further circumstances into the exception lists\(^\text{105}\). While Art 15(1) lays out a few instances of exceptions that include educational purposes, Art 15(2) provides that countries may limit the exercise of rights to those exceptions that is mandated for the copyright entities under the copyright laws. It has been stringently implied by means of article 15(2) of the Rome Convention that the exceptions to the entities covered by the neighboring rights should not be more liberal than the exceptions that the copyright entities have to comply with\(^\text{110}\).

**Anathema to compulsory licenses**—it is specifically provided in Section 15(2) that the compulsory licenses must be resorted to only in case of compatibility with the terms of the Convention. There is no endorsement of the compulsory or statutory licenses but they have been held to apply to certain circumstance that does not conflict with the exercise of rights. An indiscriminate application of the compulsory license for instance to the performers would negate the very basic enjoyment of their preventive rights by way of grant of consent. Therefore it appears that compulsory and statutory licensing in contradiction to the minimum exercise of

\(^{107}\) *Id.*, p.243. An exclusion from the purview of the protected entities has been the film producer. Films are commonly protected under the aegis of the Berne Convention. So any attribution of a neighboring rights status to the film producer will naturally lead to the danger of the continued protection to the film under a film copyright. However this only exposes the lopsided logic of the distinction between the producer of phonograms and the producer of films.

\(^{106}\) Article 16 of the Convention deals with reservations.

\(^{109}\) Eugene Ulmer, *op.cit.*, pp. 239-240. Interesting propositions can be seen to have come from the Scandinavian and the German ministerial drafts. This included exception to quotations being used and performances that were not rendered for a business motive such as during the testing of equipment.

\(^{110}\) Claude Masouye, *op.cit.*, pp.58 to 59. The general report on the Rome Convention has advised them to follow the rights and exceptions granted to traditional entities under the copyright fold.
rights is disallowed by the Rome Convention. However given the degree of 
allowance to impose, it does not present a profound difference with the leeway 
provided in the case of traditional entities under the copyright legislations. The 
statutory licensing as envisaged under the Art 12 for secondary uses does not 
affect the preliminary grant of consent. While the Rome Convention does limit 
the area with respect to possibilities of compulsory licensing, it has been pointed 
with regard to the leeway to be provided to the neighboring rights in being 
accorded a lesser quantum of exceptions than the copyright entities.

Reservations

The Rome Convention has been criticized as being too lenient in the observance 
of most critical provisions pertaining to performers and producers of phonograms. 
The provision for reservations overwhelms the effectiveness of the treaty.

Inferences from the Rome Convention, 1961

It has not stood the test of time and has become out dated under current 
technological developments and circumvention possibilities. The Rome 
Convention does not fulfill the desires of the performers by begetting them 
positive civil proprietary rights or authorization rights. It provides them only a 
possibility of prevention measures that the states are bound to undertake. It does 
not speak about enforcement machinery that the states must put in place in order 
to supervise the implementation of measures. The durational period is too 
meager compared to that enjoyed by the authors in literary and artistic works. 
The moral rights for the performer is not granted -not even an optional choice is 
provided to the states in this regard. The Rome Convention does not grant rights 
to performers in audiovisual fixations and is confined to aural and live 
performances. It leaves a lot of discretion to the states with regard to 
rebroadcasts and communications to the public of fixations. The Rome 
Convention provides a presumptive favor towards the affixer of the performance. 
The performers definition remains anchored to literary and artistic works. It has

\(^{111}\) Claude Masouye, op.cit.,p.59.  
\(^{112}\) Ibid.
left out the definitions of key terms thereby creating confusion. The Rome Convention has not mandated the use of a viable mechanism of single equitable remuneration that would have adequately taken care of the transactional intricacies. The Rome Convention has not explored nor exhorted the need for state supervised collecting societies.

But on the other hand, to sum up the Rome Convention has been a major gain for the following reasons. It introduced Conventional minima with a choice of obligations for the nation states to choose from. It is a landmark and a pioneering attempt of regulation with respect to performers rights. It allowed a lot of latitude to the nation states as an incentive. Even though technology would have grown beyond the dress tailored by the Rome Convention reference to it would be eternal and inevitable truism. It provided a reason for the nations to try for improvements. It created a permanent forum and office in the form of intergovernmental committee to follow up the administration of the treaty and suggest changes. The fact that by 1978, 84 states had legislated to protect the producers of phonograms, 66 to protect broadcasting organizations and 35 to protect performers show that the intent of the Rome Convention has to a large extent been realized.

The Phonograms Convention and the Performer

The concern for the performer was firmly in place even in the formulation of the phonograms Convention, 1971 that was ostensibly for the protection of the producer of the phonogram for exclusively aural fixations. This is evident from the sentiments reflected in the preamble to the Convention. The intent was to protect the interests of the producers, authors and the performers from the arms of the pirates and bootleggers taking into account the unauthorized duplication of phonograms and the damage caused to the interests of authors, producers and performers in phonograms. It was intended that the protection to producers would inadvertently help the performers as well and the need to secure the work

113 Masouye, op.cit., p.12.
115 Claude Masouye, op.cit., p.94.
tendered by the UNESCO and The WIPO and not to impair the gains of the Rome Convention. It expressly seeks to safeguard the protection otherwise secured to authors, performers and to producers or to broadcasting organizations under any domestic law or international agreement. The benefits secured by the Rome and the phonograms Convention needs to be cumulatively shared. Thus the phonograms Convention only fills areas like distribution and the importation of copies that were left unspecified by the Rome Convention. It is to be noted that the Convention does not say anything about the locus of the performer in raising a dispute in these circumstances against illegal duplication and distribution or importation. Secondly the membership of the Convention does not mandate that the state should have been a member of either the Berne or the Rome Convention in order to be eligible to be a member of the Convention.

The TRIPS and the Performer

The protection to performers under TRIPS is enshrined in Article 14 of the agreement. The possibility of prevention is specifically provided with respect to fixation of their performance on a phonogram. Acts such as fixation of unfixed performances and the reproduction of such fixations, broadcasting by wireless means and the communication to the public of their live performance without the authorization of the performer, require to be prevented by the contracting states. It is noteworthy that while the need for authorization to affix is provided only with respect to the performer in a phonogram as regards the need for authorization for broadcasting and communication to the public, the right is available for both the Phonogram as well as the audiovisual performer.

In contrast to the provisions of copyright where in the TRIPS has incorporated the provisions of the Berne Convention, with respect to the rights of the performers & producers of phonograms or broadcasters, the Rome Convention does not find

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116 Article 7 of the Phonograms Convention. Id., p.107.
117 Article 9 of the Convention.
ditto incorporation into the TRIPS agreement. The TRIPS agreement limits itself to reproducing in a simplified form, the substantive rights recognized by the Rome Convention. The rigor of the Rome Convention with respect to the ambit of the rights is absent in the TRIPS and a narrower string of rights is asserted. Art 14(1) only refers to right of affixation on a phonogram where as the Rome Convention is with regard to fixations on any material support. The Rome Convention does not provide for the retroactive application of its provisions but the TRIPS agreement establishes such retroactivity when applied mutatis mutandis Article 18 of the Berne Convention. In other words it can be noticed that TRIPS uses existing Conventions as starting points and do not reduce the obligation to these Conventions. National treatment is provided only for those rights recognized under the TRIPS agreement. Even though there is a strong shadow of the Rome Convention, it is the rights explicitly provided by the TRIPS that are consequential. The TRIPS do not endorse all the rights desired under Rome Convention. The reason for the non-application of the right to single equitable remuneration was owing to the opposition from North American broadcasters who did not want to pay. Provisions of the Rome Convention that were not found acceptable by all the members do not find itself in the TRIPS. The right of rental is narrower than the right in the corresponding European directive. The condition of the normal exploitation of the performance being impaired by the rental right has been placed. There is no right to lend mentioned in the TRIPS. The TRIPS also speaks of non-natural entities as authors and uses the term rights holder. The TRIPS therefore is narrower and conspicuously silent as distinct from the Rome Convention. For instance TRIPS does not speak about the audiovisual performer or exclude them expressly from the purview of rights. The silence leaves it to the nation states to decide. This is a major change from the stance of the Rome Convention. The TRIPS through its silence have spoken much more for the shape of things in the future. The TRIPS has also extended the duration of the rights of the performer from the Rome twenty years to fifty years.

121 ld.,p.157.
122 ld., p.149.
123 ld.,p.154.
124 ld.,p.155.
The TRIPS does not carry any definitional clauses and therefore inadvertently it would be the definitional clauses of the Rome Convention that would have to be resorted to. Another highlight of TRIPS is that it placed the performers for the first time in the company of copyright entities. That is in the same section. By including within the same agreement and the same section and also by using the term 'related rights' to characterize the performers rights, it has caused a perceptual change in the status of performers rights the world over.125 From the audiovisual perspective there was a tremendous imbalance and discrimination among the countries as regards the protectionism to domestic industries.126 From restrictive market access to foreigners to controls on marketing the audiovisual sector was straddled with mechanisms for preempting open competition. This was complemented by a conservative mindset, as it was also a cultural goods sector; any consensus was hard to evolve.127 Though a major hint at strategic overall change was made in the TRIPS Convention in 1994, by integrating trade with intellectual property, it was not a holistic re-appraisal of the Rome Convention taking into account the effects of profound change in the technological front and the consequent impact on the performers. Similar to the Rome endeavor, the producers of phonograms have been provided with positive authorization rights. While the broadcasters have been provided with right to prohibit the aforementioned acts.128 The extent of exceptions, conditions, limitations and reservations also follow the trajectory of the Rome Convention.129

Gains from the TRIPS

Though the TRIPS might have emulated the Rome Convention without much change nevertheless there is a significant gain. Owing to its synchronization with

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129 Article 14-6 of the TRIPS.
more onerous trade issues and the inextricable pattern in which both had been woven together there has been an inevitable obligation on the part of the contracting states of the TRIPS to undertake measures to protect the rights of performers in sound recordings. This is a major gain as the Rome Convention as well as the phonograms Convention found few takers.

The WPPT

The Need for the New Attempt

One of the major landmarks in the protection for performances and performers rights was the WIPO Performances and Phonograms Treaty (WPPT) adopted by the Diplomatic Conference held on Dec. 20, 1996\(^{130}\). The reason for its significance is obvious particularly considering that much water had flowed on the technological front since the first such international endeavor in 1961 that is the Rome Convention\(^{131}\). It was the answer to the need for solutions to the issues raised by economic, social, cultural and technological developments.\(^ {132}\) Based on these impelling concerns the treaty was the result of a work carried out over a number of years by WIPO committee of experts.\(^ {133}\) Long and detailed negotiations took place in the development of the draft instruments.\(^ {134}\) The result were two treaties- The World Copyright Treaty (WCT) and the WPPT. While the former was a reiteration of the literary and artistic rights in the new world order of digital communications, the latter was an initiation and expansion of certain concepts that were grounded rather nervously only a bare 34 years before but in a digitally wired world.\(^ {135}\)

\(^{130}\) The treaty was adopted by the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva, on December 20, 1996.

\(^{131}\) Jorge Reinbothe and Silke Von Lewinski, “The WIPO Treaties 1996: Ready to Come into Force” [2002] EIPR 199., p.200. The need was also felt to go beyond the minimum standards laid down by TRIPS.


\(^{134}\) In the year 1996, the Chairman of the Committees, Jikka Liedes of Finland was charged with producing the drafts to be considered at a Diplomatic Conference. The diplomatic conference was held from December 20, 1996, all member states, a large number of non-govt. organizations – a special delegation of European Communities, 7 inter-governmental organizations made it their single biggest diplomatic conference held to date.

The Intent Sought to be Accomplished

The intent of the WPPT has been to achieve the task of developing new protective mechanisms and maintain the protection already granted. While adapting to new social, economic, and technological demands of the age together with the need to provide a balance between private intellectual property rights and the larger public interest. The intent has been to recognize the need to adapt to the new developments in communication and convergence, in other words the digital revolution.\textsuperscript{136} In contrast to the intent as enshrined in the WPPT, the Rome Convention does not carry a profound guidance in its preamble. It merely expresses its objective to protect the entities spelt out. The intent of the WPPT is broader. Thus if Rome provisions were to meet with situations beyond the pale of the times when it was drafted, it would not be able to craft a solution out of the four corners of the instrument.

The TRIPS preamble on the other hand is at variance with the WPPT and the Rome Convention, as it does not explicitly refer to any subject matter that it has to treat. Neither performers nor any allied entities have been referred to in the preamble. The underlying rationale of TRIPS has been to have an accommodation between trade and IPR related issues where in intellectual property rights protection would be sufferable to the extent that it does not turn out to be an obstruction to trade. While it does say that intellectual property rights are private rights the TRIPS does not speak about public interest or balance between private rights and public rights.\textsuperscript{137} While the preamble in TRIPS is not as vocal as is the preamble of the WPPT, the only hint of public interest as a concern is in Article 8. Thus it could be said that the WPPT in contrast to its predecessors has been more pronounced and projects the underlying intent of balance and accommodation much more than the heavily trade inclined attitude of the TRIPS Convention.


\textsuperscript{137} This too is only directory giving the members the choice to adopt measures necessary to protect public health and nutrition and to promote the public interest in sectors of vital importance to their socio economic and technological development consistent with the provisions of this agreement. This is the nearest that TRIPS comes to with regard to the vital balance that intellectual property rights is supposed to hold with public interest.
The Dichotomy with Regard to the Subject Matter- Audio & Audiovisual

There were two standpoints the first being that the rights of performers should only be discussed as far as the fixation of the performances in the phonograms were concerned and that the new instrument would not extend to the audio visual fixations and that despite objection, it would not be possible to discuss the rights of the performers separately from that that of the phonogram producers. It was felt inappropriate not to discuss the question of phonogram producers without concomitantly discussing the question of performers rights.

It is significant to note that even though the majority took the view that nothing precluded the conference from discussing the audio-visual rights nevertheless there was reluctance and finally the idea was aborted for the time being to be taken up separately. A number of delegations did put forward arguments for and against the inclusion but upon the Director General’s assurance that the International Bureau would prepare a document on audiovisual fixations in due time. It was also decided that for the preparation of a separate document there would have to be a comparative study of the national laws, contractual practices and administration of rights of which it was collecting information. The reasons appear innocently to be of administrative convenience alone rather than other complexities together with a poise of unpreparedness from the WIPO-the coordinating body. Interestingly, the polarization does appear quiet evident at that stage also because the European communities en bloc did not conceal their enthusiasm for such an instrument nor do they display any indecision in this regard. With respect to the performers and the phonogram producers though


140 Ibid. INR/CE/II/3 Paras. 63-65. The Chairman noted this in the summary of discussions.


142 See, “Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms”, INR/CE/III/2, Annex III, International Bureau WIPO (1994), p.10. The rather elaborate letter written from the European commission to the international bureau seeking urgent action on this front would amply prove their resolve in this regard particularly when other participants were ambivalent. The letter (F.N.contd.next page)
they were brought under the same canopy in the instrument, it has to be borne in mind that there was insistence that both should be dealt with distinctly.\textsuperscript{143}

\textit{The Definitional Challenge}

The identification of the performer remains the most important issue, as the subject matter that ought to benefit from the protection should not suffer from ambiguity and uncertainty. In the absence of clear-cut definitions, this would make way for a lot of uncertainty and could be used unfavorably against the genuine performer.\textsuperscript{144}

\textit{The WPPT and the Definition of Performer}

The WPPT made two changes to the definition that holds tremendous ramifications. According to the definition performers are actors, singers, musicians, dancers and other persons who act, sing, deliver, declaim, play in, interpret or otherwise perform literary or artistic works or expressions of folklore. The word 'interpret' is an addition to the string of features appended to the words preceding the performance of literary and artistic works. This widens the ambit of those who come within the range of performers while at the same time narrowing the possibilities of qualitative distinctions among those who partake in a performance. The inception of the word interpret could also bring in off-view contributors into reckoning. Folklore has been included without providing any clue of what amounts to a folklore (not even a definition has been attempted). Nevertheless it is a major step away from the conservative fixation to accord protection only to performances rooted in literary and artistic works. Variety and circus artists have been dropped from consideration. It is a wonder why they did not find expression despite the inclusion of the more inscrutable folklore. It only


\textsuperscript{144} \textit{Id.}, p.6.
accentuates the contradictions in logic with regard to the extension of the protection.\textsuperscript{145} The stylistic reproduction of sounds as well as the reading aloud was also considered.

Different countries had varied propositions with regard to the definition of the term ‘performer’.\textsuperscript{146} There were propositions that said that the elaborate enunciation need not be there and that the definition should be comprehensive and thus the words actors singers, musicians should be deleted rather and that the definition should define performers as persons who act, sing, play music and should include folklore and circus and variety artists.\textsuperscript{147} In fact some of the African countries stressed that performers of folklore ought to be protected, as they should be considered as literary and artistic works from the moment they are documented\textsuperscript{148}. However, there was opposition to this move as while the inclusion of folklore was welcome, the notion that such expressions were an afterthought to creative expression in the form of literary and artistic works was opposed.\textsuperscript{149} The eligibility of folklore also involved degrees of recognition and the vital question could be as to- firstly, what is folklore and secondly as to who are folklore artists. Though there were suggestions for a sui-generis protection of folklore it was not carried out placing it within the category of performances otherwise protected.\textsuperscript{150} Thus both these change while bringing in newer categories is indicated the resolve of the international community to do justice to the genuine performers deserving of attention.\textsuperscript{151}

It is significant to note that the International Federation of Actors had not rendered any opinion at this session with regard to the extent of the term

\textsuperscript{145} See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms," INR/CE/V/11,International Bureau WIPO (1996), p.4. Proposal by Argentina. Performer means any actor, singer, musician, dancer or other person who plays a part in, sings, recites, declaims, interprets or in any way performs a literary or artistic work or an expression of folklore, including variety artists and circus performers.

\textsuperscript{146} A comparative table of proposals and comments received by the International Bureau-discussed in the fifth session Feb. 1 to 9, 1996. INR/CE/V/11,dated Jan 10, 1996.


\textsuperscript{149} Id.,p.15. The Caribbean Broadcasting Union.

\textsuperscript{150} The addition with regard to the folklore was based on the recommendations of the WIPO/UNESCO committee of experts on the intellectual property aspects of the protection of expressions of folklore-Geneva, June –July 1982.

performer.\textsuperscript{152} There had only been limited opposition to the inclusion of performances of folklore and to the protection of performers under the instrument. Some delegations and observers were of the opinion that the performers should not be linked\textsuperscript{153}. Another significant assessment was that the definition of fixation was not linked to works and thus corresponded with the definition of phonogram and producer of phonograms however the definition of the performer did not correspond to that of the fixation. The performer was linked to the artistic and literary works. He urged broadening the definition of the performer to include the use of previously fixed performances for the creation and production of literary and artistic works\textsuperscript{154}. An adaptation right for the performer was also mooted. One sole striking voice that stood against the enlargement of the definition as attempted at the Rome Convention was the European Broadcasting Union\textsuperscript{155}. The Asia Pacific Broadcasting Union also voiced the same restrictive approach but it was with particular impetus on the audiovisual fixation\textsuperscript{156}. There was an interesting submission to confine the definition of the performer to that of the musical performers alone\textsuperscript{157}.

While an open ended definition would have satisfied several of the performing organizations it was felt that the a provision in a national law that would merely state that the who do not perform literary or artistic works are also performers would create legal uncertainty since on the basis of this users would not know clearly whether a production is a protected performance or not.\textsuperscript{158} In this regard


the relationship between Article 3 and Article 9 of the Rome Convention was sought to be explained in that the delegations felt that even in the absence of Art 9 it was obvious that the contracting states had the power to deviate and extend more protection than was envisaged by the Article 3 of the Rome Convention. The plausibility of this interpretation appears debatable, as there were sufficient reasons for a closed-door approach to the definition of performers in the Rome Convention. The link with literary and artistic rights has been maintained ostensibly for identifiability, two, that literary and artistic are not overwhelmed by performers preeminence, and three, certainty as otherwise courts and executives would have to interpret according to circumstances, which would prove to be cumbersome in the long run.

Phonogram

Phonogram has been defined as meaning the fixations of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work. It takes into account the great incursions made by technology. It tends to be more descriptive than the one attempted in the Rome Convention. This has been prompted by the new technologies as also the fear of audio-visuals encroaching on the space. Thus, there is a total specific exclusion of the sounds incorporated in cinematographic works or other audio-visual works. This not only secures the position of phonogram producers but also of the audio-visual producers. The mechanism of phonogram has included within it the representation of sounds not just sounds alone. This is to accommodate the digital technology in which the technological representation of sounds (through numbers). The change over from the analogue era is reflected in this. Besides the fixation of sounds of performance other sounds are also brought within the purview. Thus any sound affixed to the instrument would beget rights protection for the phonogram. It need not fulfill any subjective nor objective criteria of originality or link to literary and artistic works. Thus even though the

159 Article 2 (b) of the WPPT. Fixation has been defined in Article 2(c) as the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

160 Performance has not been defined in the treaty.
phonogram may qualify for protection without being derived from a literary or artistic work, the performer need not if it is not based upon the definition of a performer. An incongruity is evidently created therein.

**Producer**

The WPPT has defined the producer of a phonogram to be the person or the legal entity who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds or the representation of sounds. On a comparison with the Rome Convention it is discernible that the definition has undergone an elaboration. In the Rome Convention the language and the intent was much more narrow and a technical one. The deficiency being that the impetus was on the person who first fixes the performance. However it was always pointed that the person who first fixes the same need not be the one who has either invested or facilitated the enterprise. Though the present change leads logically to the employer or the investor there is a danger of making identification susceptible to different interpretations. On the other hand the first affixer need not necessarily be the producer of the program.

Another noteworthy feature of this definition is that the producer of a phonogram is not linked to the need for his product to be ‘work’ based as in the case of the definition of a performer. It is pertinent to note that there is no attempt to define performance for if that is done then both the performer and the producer of the phonogram will beget the same protection but the intent appears to keep both the performer and the producer of a phonogram on two strata’s with respect to the term performances. The performers dependence on works or performance of folklore to beget protection is narrower than the right provided to the producer of phonograms.

Under the Rome Convention, the meaning of the term ‘publication’ meant offering of copies to the public in reasonable quantity. Under the WPPT, It is not only a phonogram whose publication that is signified but also any other fixed performance. It is intriguing how after an elaboration of definition of the term

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161 Article 2(d). The Indian delegation supported the assimilation of the definition of a producer of phonograms to the person who takes the initiative and responsibility for making the phonogram

162 Article 2(e).
phonogram, space has been found to encompass any other form of fixed performance? Doubts arise whether this is sought to rein in audiovisual means of dissemination. But in the context of the WPPT with audiovisuals outside the purview of its beneficial provisions then this appears to be only as a check against use of audiovisuals to circumvent the Provisions.

Another significant change has been in the provision that the rights-holders permission must be there for publication\textsuperscript{163}. This is a significant addition to the Rome Convention. This secures the position of the rights holder when the intellectual product that is published illegally ticks of the time machine. The agreed statement clarifies that publication could only be through the means of tangible objects. Thus dispersal through any other means does not come within the term publication.

The definition of broadcasting\textsuperscript{164} marks a discernible change from the Rome Convention by taking into account besides the wireless means for public reception of sounds or images and sounds- the representation there of transmission by satellite, transmission of encrypted signals where the means for decrypting are provided to the public by the broadcasting organization or with its consent.

\textit{Moral Rights}

The pioneering nature of this treaty has been the fact that it boldly introduced for the first time the concept of moral rights for the performer. This was a colossal change from the hesitancy that was conspicuous in the Rome Convention and the total silence in the TRIPS over this issue. It had been the subject of severe discord during the negotiations in the Rome Convention. The moral right of the performer is found enshrined in Article 5 of the treaty.\textsuperscript{165} It provides that independently of a performers economic right, and even after the transfer of rights as regards his live aural performances and performances fixed on phonograms moral rights shall subsist in it. An analysis of Article 5 brings to the fore the following components within it- it pertains to live aural performances or

\textsuperscript{163} Ibid.
\textsuperscript{164} Article 2(f).
performances fixed in phonograms. They exist independently of the economic rights, which means that even after the transfer of the product, the performer will have the right to be identified as the performer of his performances. Besides identification as the performer of his performances, the performer can object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. These rights are avoided only in circumstances where the manner of the use of the performance demands non-attribution. The above-mentioned rights are to continue till the normal expiry of economic rights even if the beneficiary expires in the meanwhile. Though the moral rights are mandated without any option or choice for the contracting states, the treaty provides a small reprieve to those countries that do not wish to extend the right beyond the death of the party. It is not that they have the complete choice rather it is that they can only take away some of the rights and not all after the death of the beneficiary.\textsuperscript{166} The question as to who are the legatees of these rights has to be identified by the legislatures of the respective nation states. Similarly the means of redress has also to be governed by the legislation of the place where protection is claimed.\textsuperscript{167} There is no hard and fast rule that moral rights ought not to extend beyond the term of 50 years laid down by the treaty, it can be made to go further and also can be made perpetual. This is left to the discretion of the nations contracting in the treaty.

It is pertinent to note that there is no speck of any moral rights for the audio-visual artists not even for the live performance nor for broad casts of the same or the fixation of unfixed performances, only live aural performances and fixations in phonograms carry the imprint of moral rights. The debate as to the grant of moral rights to the audio-visual performer was always agitating those concerned since the Rome Convention. One of the arguments advanced against it by the film community was that the grant could lead to the unexpected hurdles in the commercial exploitation of the product. It is interesting to note that even countries like the UK that has already incorporated sufficient economic rights for the performer though not in parity with copyright vehemently opposed the grant of any of the moral rights. After having stood for a complete denial of the same, it

\textsuperscript{166} This is expressed in Article 5(2).
\textsuperscript{167} Article 5(3).
was a compromise that they came to which paved the way for the aural performers to be granted some moral rights.\(^{168}\)

In comparison with Berne Article 6 bis, the following differences exist for the performer\(^{169}\). The exception from grant of rights with regard to ‘manner of performance’ is not present in the Berne Convention\(^{170}\). While the Berne Convention granted the authors the right to honor, the performers have only a guard against the prejudice to reputation. Further the open-ended clause of ‘other derogatory action’ is absent in WPPT. These quiet substantiate the fact that there was only a restricted focus for the grant of these rights. It is to be noted that in TRIPS there is no mention of performers moral rights or of the phonogram producers’ moral rights. The Phonogram Convention too is silent in this regard.

It was pointed out that the manipulation of recorded performances made possible by digital technology might amount to distortion, mutilation and other modification of performance in such a way that it would prejudice the honor, reputation of the performer and that certain other techniques such as dubbing could also be manipulated.\(^{171}\) Opinions were divided with regard to the exceptions for the right to paternity as well as the right to integrity. It was pointed out that only the most egregious alterations should matter. The moral rights were to be justified by the observations that the quest for moral rights could be found in the common-law roots as well. The need for moral rights was also a political rights necessity. There was a demand for modifying exclusions from the performers organizations. It was pointed out that parody could be made an exception to the right of integrity since it served the interest of free expression.\(^{172}\)

That could be left to the discretion of the national jurisdictions.\(^{173}\) It was also

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\(^{168}\) Sterling, *op.cit.*, p.587. The German delegation, for instance, was vehemently in support of the same and even wanted it to be enjoyed universally. It is not clear whether this preference for universality is merely geographical or caters to all performers is a matter to be explored.

\(^{169}\) Though several countries did want the same rights as were granted under the Berne umbrella the final draft fell short with arguments for commercial expediency prevailing.


With regard to the term of protection of moral rights the opinions (F.N.contd.next page) ranged
voiced that the term of protection should be equal to that of the term for economic rights or they could even be considered perpetual.\textsuperscript{174} With regard to moral rights of performers there were several countries that were unconvinced about their necessity and what could be conjured up was a reference model to the Art 6bis of the Berne Convention. It was pointed out that the interests to be protected by the moral rights were personal to the performer and therefore exercise of the rights after the death of the performer should be limited.\textsuperscript{175} Inclusion of vague and wide phrases such as 'as far as practicable' raised questions\textsuperscript{176}. However those in favor of commercial flexibility were in favor of the wide words. It was also pointed out that there was a difficulty to administer moral rights in situations that involved more than one performer.

The Economic Rights

The WPPT will be known in the history of performers' rights movement as the harbinger of substantive proprietary rights that they were clamoring for well three quarters of a century. It was a transition from the qualified contractual capability granted to the aural performer and the minimum guarantee of 'possibility of prevention' provided in the Rome Convention.

Unfixed Performances

The right enshrined in Art 6 caters to all performers that include both the aural and audiovisual performer. Art. 6 of the WPPT grants rights to the performer generally not merely confined to the aural performer alone. The right of


\textsuperscript{175}Ibid.

\textsuperscript{176}Ibid., p.22.
authorization is granted as regards their unfixed performances. They shall have the exclusive right of authorizing the broadcasting and communication to the public of their unfixed performances. This is however subject to an exception that if the performance has been once broadcast they shall no longer have any right of authorization with regard to that performance. This raises interesting questions. The phrasing of Article 6(1) suggests that the exception applies to both broadcasts as well as communication to the public. However there can be doubts in this regard with respect to communication to the public, as it does not find mention in the exception. Only rebroadcast is an exception. The communication to the public being of a very wide ambit, the reuse not being amenable to the authorization right could deprive the performers. It could also mean that where a performance has been communicated to the public then the exception could not be said to arise, as only program that was a prior broadcast is an exception.

While there appears to have been a broad consensus with regard to the economic rights for performers the fact that sufficient attention needs to be focused on the issues and proposals was pointed out by those countries, which had a well oiled contractual system regulating the relations between the performer and the industry. The issues with regard to enforcement of rights also posed problems particularly in the new digital environment.

Rights of Authorization of Fixations in Phonograms

177 Art 6 of the WPPT says: economic rights of performers in their unfixed performances. Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the fixation of their unfixed performances.

178 In this regard one would have to recollect the interpretation of Claude Massouye to the Rome Convention that the rebroadcast would encompass the communication to the public as well.

179 See, “Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms”, INR/CE/III/3, International Bureau WIPO (1994), p.7. There was a proposed legislation with regard to recognizing the public performances in digital communications pending in the U.S.A green paper on intellectual property aspects of the national information infrastructure (NII) and from the Middle East 1981 Arab Convention on the copyright. Many of the countries were in the process of seeking to streamline this new area by enacting new legislation by extending the traditional notions of rights either begotten through legislation or through the process of collective or individual bargaining to new area to the digital domain and distribution in that environment.
The WPPT provides the performer four other rights but these are confined to performers in phonograms. The right to reproduction (Article 7) covers both the direct and indirect reproduction of performances fixed on a phonogram.\(^{180}\) It is a right that has to be mandatorily provided to the performer as the word ‘shall’ has been used by the drafters.\(^{181}\) The right to authorize reproduction extends to reproduction in any manner or form. Thus the technological constraint is removed and the digital or any future technological possibility is taken care of. The right to authorize also covers the right to prohibit the reproduction implicitly.

In comparison, the Rome Convention made fixed performances and reproductions thereon totally within the control of the producer provided there was a contract to the contrary. Thus under the Rome Convention the presumption in favor of the producer would be lost only if the original fixation was without consent, if the reproduction was made for purposes different from those for which they were intended for and if the reproduction is made for reasons other than for reasons for which the performance was fixed under Art. 7. Thus with the WPPT providing them with the right of reproduction the performer can stop the reproduction if it is done even for the purposes for which the initial permission was given for fixation. Thus fixation and reproduction become two mutually exclusive legal entities where in the motive for the fixation would not have any bearing on the enterprise for reproduction. In other words an agreement to affix under certain conditions would not be sufficient to constitute an implied consent or agreement to reproduce the said performance for the said purpose for all times to come. Under the Rome Convention the lack of any contract explicitly appeared to provide an unrestrained right to the affixer to reproduce at will, unless and until limited by implied or express contract.\(^{182}\) The WPPT provision on reproduction with regard to performers provides them an exclusive right thereby passing on

\(^{180}\) Article 7—Right of Reproduction says that performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

\(^{181}\) WIPO performances and phonograms treaty with the agreed statements of the diplomatic conference that adopted the treaty and the provisions of the Berne Convention (1971) and of the Rome Convention (1961) referred to in the treaty, WIPO, Geneva (1\(^{st}\) edn. - 1997), p.15.

the presumption of right enjoyment to the performer rather than what was understood under the terms of the Rome Convention.\textsuperscript{183}

The meaning of the term 'reproduction' is also further clarified in the agreed statement accompanying the treaty instrument or the provisions of the treaty. The reproduction right fully applies in the digital environment. Even the storage of the protected performance or phonogram in the electronic medium would constitute a reproduction within the meaning of Art 7. However the crucial question whether temporary storage would also amount to reproduction has not been directly answered.\textsuperscript{184} The authorization extending to both direct and indirect infringements extends the locus-standi of the performer to cover and check indirect reproduction also. This saves the oft-encountered disadvantage of depending on the producer or the broadcaster for fighting indirect infringements.

It was felt that the words 'in whole or in part' should not provide performers the exclusive right of authorizing the reproduction of insubstantial parts of the phonograms. Rather the rule of substantiality should apply.\textsuperscript{185} The application of the criterion of substantiality and similarity in determining whether a phonogram is a copy of the other under national law and jurisprudence and was of the opinion that the words 'whole or in part' should be deleted.\textsuperscript{186} Some delegations accepted the phrase 'in part' but found difficulty in the inclusion of temporary and transitory storage in electronic format, which would in its view amount to the recognition of a right to use which was alien to copyright and neighboring rights. It was mooted that such a broad definition inevitably necessitates the inclusion of limitations on the right of reproduction along the lines of the European union directive on

\textsuperscript{183} See, "Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms", INR/CE/III/3,International Bureau WIPO (1994), p.13. Reservations were expressed by different parties with regard to the grant of a right of reproduction for performers in authorized fixations of their performances since they went beyond the Rome Convention.

\textsuperscript{184} WPPT (1996)- Agreed statement concerning articles 7, 11 and 16: the reproduction right, as set out in articles 7 and 11, and the exceptions permitted there under through article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram, in digital form in an electronic medium constitutes a reproduction within the meaning of these articles.


computer programs and that the interests of the owners could be secured by the grant of rights to such acts as permanent reproduction, transmission to the public, and public performance, thus it was suggested that the definition of the reproduction should be left to the national legislation following the example of the Berne Convention.\textsuperscript{187} It is proposed that that it should considered as such regardless of the duration of storage. Subject to the criterion of substantiality.\textsuperscript{188} Some delegations favored the inclusion of all forms of reproduction.\textsuperscript{189} Doubts were expressed regarding extending the right of reproduction to parts of phonograms at least without further qualification.\textsuperscript{190} It was proposed that the words ‘in part’ of the reproduction were significant and that it should be included.\textsuperscript{191} However there were delegations that considered the use of the words ‘in whole in part’ as inappropriate.\textsuperscript{192} It was pointed out that the words ‘in whole or in part’ must be replaced with one of substantiality that varied from case to case pointed it out.\textsuperscript{193} It was proposed that the words ‘in the whole or in part’ should be replaced with ‘in the whole or substantial part’ to reflect the principle of substantiality.\textsuperscript{194} In contrast some delegations favored the retention of the words ‘in whole or in part’ with respect to the definition of the word reproduction.\textsuperscript{195}

\textbf{The Right to Distribution}

Art. 8(1) of the WPPT grants the right of distribution to the performer in phonograms.\textsuperscript{196} The exclusive right extends to making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership. However this right is subject to a qualification or exception. The right can be the subject of exhaustion accordingly to be decided by the parties concerned. The exhaustion is to take place only in the aftermath of the first sale or transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. By copies is meant the fixed

\begin{footnotes}
\textsuperscript{187} Ibid.
\textsuperscript{188} Id., p.5. Delegation of the United Kingdom.
\textsuperscript{189} Ibid. Delegation of France.
\textsuperscript{190} Ibid. Delegation of Finland.
\textsuperscript{191} Id., p.6. Delegation of Sweden.
\textsuperscript{192} Id., p.6. Delegation of Spain.
\textsuperscript{193} Id., p.7. Delegation of Belgium.
\textsuperscript{194} Ibid. Delegation of Ireland.
\textsuperscript{195} Id., p.8. Delegation of Iberia –Latin –American Federation of Performers (FILAIE).
\end{footnotes}
copies that can be put into circulation as tangible objects.\textsuperscript{197} It would be interesting to see how this idea of original and copies as tangible objects will work in the digital realm where distribution through the wire or wireless means need not be through the means of tangible objects.\textsuperscript{198} The Rome Convention is silent as to the right of distribution.

Aligned to the right of distribution was the issue of importation. The concern was whether the right of distribution and the right of importation vested with the performers and the producers result in no access to works that would impede human civilization whether it would have any benefits to the consumer was also an engaging issue to consider.\textsuperscript{199} It was pointed out that the grant of a right of importation would upset contractual agreements. A possibility of collective administration might certainly enable the working of those rights so there were suggestions for provisions in that regard as well.

The issues raised were with regard to the exact ambit of the right.\textsuperscript{200} The reference was to the rights enjoyed by the authors in this regard and conferred by international Conventions in this regard. This was attempted with regard to the right of distribution and also with regard to the exceptions particularly in the realm of public lending. The first sale in the European union did not exhaust the right of rental. The right of distribution would include the right of public lending, sale and

\textsuperscript{196}Article 8- The right of distribution (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership. (2) Nothing in the treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of rights in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

\textsuperscript{197} The agreed statement concerning Articles 2(e), 8,9,12 and 13: as used in these Articles, the expressions “copies” and “original and copies” being subject to the right of distribution and the right of rental under the said articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

\textsuperscript{198} N.S. Gopalakrishnan, “WIPO Copyright and Performers and Phonogram Treaties- Implications for India”, 21 Ac.L.R., 7-8(1997). An agreed statement regarding the nature of copies (tangible fixed) was also included. This was to make it clear that the right of distribution applies only to permanent copies like printed materials, CD'S Etc. and not to materials in the electronic media which are intangible in nature, example material in the memory of the computer.


\textsuperscript{200} Id., p.14. This included is whether only tangible copies had to be covered or whether other forms of communication should also be brought within the four corners of distribution rights., how long the right should subsist with the performer or the producer is also crucial and the survival of the same after the first sale of the original or the copy, what should be the limit of the rental right and the right of importation and also whether the exhaustion should be upon national, regional or global basis.
right of rental. Each definition had its own ramifications and the issue was to delimit the extent by the use of the words that would not allow for any further interpretation and leeway than was essential. There was a call to redefine the right of rental to that of transfer of possession. (But this would have come to be similar to the right of lending that would have covered non-commercial activity as well. The idea of regional exhaustion was mooted in this regard. A broad right of importation was also proposed including a right of importation of both pirate and legitimate copies and recordings. But there was an objection to the grant of the right of distribution to pirate copies.

Some of the major factors that were influencing the discussions and the ambit of the protection were the characteristics of the new technological era that had arrived through the digital medium. It had blurred the distinction between the traditional media rights of reproduction and distribution, broadcasting and communication to the public and public performance. The question was whether any area should be exempted, as using wide terminology would have the tendency to over legislate. The digital means of exploitation and the consequent receptive clarity has blurred the distinction between primary use and secondary use. The perfect copies of the original communicated to the public through the diverse means of dissemination has led to similar expectations of compensation with regard to the manner of exploitation. The question was whether it should be mere exclusive rights to remuneration even if exclusive rights could not be provided to all manner of digital communications. There were demands that exclusive rights must be granted at least to the on demand interactive digital delivery of phonograms and performances included therein. 201

The Right to Rental

Art 9 (1) of the WPPT grants the right to commercial rental of the original and the copies to the performer. 202 It is specifically stated via an agreed statement that

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202 Art 9 says that the performers shall enjoy the exclusive rights of authorizing the commercial rental to the public of the original and the copies of their performances fixed in the phonograms as determined in the national law of the contracting parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Not withstanding the provisions of paragraph (1), a contracting party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may, maintain that system provided...
the terms 'copies' and 'original and copies' refer exclusively to fixed copies that can be put into circulation as tangible objects. The right is to be enjoyed even after distribution by them or pursuant to an authorization by the performer. Art (9)(2) points out that if there is a system of equitable distribution in place then that may suffice to the point that commercial rental is not giving rise to impairment of the exclusive right of reproduction of performers. It is important to note that it is only commercial rental that is covered and not lending. The manner of application of the right for the performer shall be left to the concerned national law. It is noteworthy that this delegation is absent in Art 7 and Art 8. Significantly the right is to subsist even after distribution by the performer or even when it is done under his authorization. A wide power is vested in the contracting state to draw the extent of the right of commercial rental that is as long as the exclusive right of reproduction is not impaired. This is a matter of wide subjectivity based on the practice of the system and the benefit to the performer in the long run. The WPPT has been careful that the commercial rental through equitable remuneration or otherwise does not swallow the right to reproduction.

The Rome Convention was silent on the issue of rentals thereby providing a huge leeway for the states. The TRIPS granted a right confined to the producers. It can be seen that the obligations mandated above are limited to the similar obligations expressed in the TRIPS agreement. Some of the propositions said that the definition of rental should include transfer of possession only and not to a transfer of ownership. It was also proposed to cover all forms of use that are of limited duration for commercial purposes.

that the commercial rental of phonograms is not giving rise to material impairment of the exclusive right of reproduction of performers.

The agreed statement concerning articles 2(e), 8,9,12 and 13: as used in these Articles, the expressions "copies" and "original and copies " being subject to the right of distribution and the right of rental under the said articles ,refer exclusively to fixed copies that can be put into circulation as tangible objects.

N.S.Gopalakrishnan, op.cit.,p.11. There was tremendous opposition from India against any extension of the protective ambit.


Ibid. Delegation of France.
The Right of Making Available of Fixed Performances

The performers were granted the right of making available fixed performances\textsuperscript{207} in such a way that the members of the public might access them from a place and at a time individually chosen by them.\textsuperscript{206} This is compensation for the right of distribution and rental being confined to physical tangible copies or originals. This would bring within the fold the digital mode of delivery of performances.

Right to Remuneration for Broadcasting and Communication to the Public

A common right shared between the performer and the phonogram producer has been the right to remuneration for broadcasting and communication to the public.\textsuperscript{209} The performer is entitled to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting and communication to the public. The single equitable remuneration can be claimed from the user either by the performer, producer or by both. The state can set the terms of how the remuneration is to be shared only in the absence of an agreement between the performer and the producer of the phonogram.\textsuperscript{210} Thus the concept of single equitable remuneration is to be practiced in the contracting state unless it takes recourse to these formalities. It can turn off this mechanism if it notifies to the Director General either that it will confine the application of single equitable remuneration to certain uses or that it will limit its uses to certain applications or that it will not apply these provisions at all. Phonograms made available by means of wire or wireless to the public who may access them from a place and at a time individually chosen by them shall be considered as having been published for commercial purposes. Thus the presumption is that the publication is for commercial purposes.\textsuperscript{211}

A parallel provision can be found in the Rome Convention in Art 12 where in if a phonogram is published for commercial purposes or a reproduction of the same

\textsuperscript{207} WIPO Performances and Phonograms Treaty (WPPT) (1996), WIPO, Geneva (1997), p.16, Art.10 of the WPPT says that - performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

\textsuperscript{206} N.S.Gopalakrishnan, op.cit., p.16.

\textsuperscript{209} Article 15 (1)(2)(3)(4) of WPPT


is used for broadcasting or communication to the public then a single equitable remuneration would have to be paid to the performers or to the producers of the phonograms or to both. In the absence of agreement between these parties domestic law may lay down conditions as to the sharing of the remuneration. The difference between the two treaties with regard to this is palpable. There is no ordination of a right of equitable remuneration under the Rome Convention. Thus, it appears to be an entirely optional provision though much stronger compared to the Rome Convention and the TRIPS sentiments in this regard. The agreed statement is an expression of the inability to come to a consensus regarding the extent of the rights and also the limits of the reservation.²¹²

The Debate Between Exclusive Rights and the Right to Remuneration

The impact of digital broadcasting was to change the conspectus with regard to the way the treatment of works either with regard to communication to the public was to be rendered. Previously prior to the impact of the digital revolution with its attendant technical qualifications and enhancing effects it was the common refrain to treat the issue of communication to the public either encompassing the broadcasting medium as being susceptible to control only via the right of equitable remuneration in the absence of any other exclusive grant. But even this was subject to the states discretion particularly after the first fixation and the first broadcast. The issue was whether the traditional broadcasting standards and the novel digital arrivals ought to be treated with the same regulatory attitudes and norms or there is sufficient difference between the two to have separate leg of regulatory framework for the new technological possibility.

A crucial difference in the manner of availability of programs had arisen in the manner of the making available programs in the sense that the recipient could now decide on the time and place of receipt of programs—either a phonogram or

²¹² Article 15(4). Agreed statement concerning Article 15.- It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by the performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have left the issue to future resolution. It is understood that Article 15 does not prevent the granting of the right conferred by this article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain. Ibid.
other material. The proposition was that both the performers and the producers should be endowed with a right of communication to the public, applying to the cable, satellite or any other system when such right was equivalent of distribution when the user could choose the works he received.

The on-demand delivery system demanded the recognition of exclusive rights and suggested that the committees focus on the possibility of those systems substituting the sale of copies of phonograms. This could not be considered the same as broadcasting. Without a mandatory collective administration system, electronic copyright management system, identifiers, the economics of the industry the world over would be affected.

The issue from another plane was that whether the grant of exclusive rights would clash with established practices in the country. While on one hand it was argued that a right to equitable remuneration would suffice as laid down in Rome and 14 of TRIPS. If exclusive rights were guaranteed then collective administration would not be a guarantee for appropriate access to fixed performances and phonograms. The major grouse was that if collective administration was resorted to and they were granted the exclusive right they could refuse licenses and impose unreasonable terms.

It was pointed out that digital broadcasting would facilitate purchase of copies. It would result in reduction of programming if payments were to be made. National culture and folklore never brought forth rewards for the producer rather it was only so for the broadcasters particularly in smaller developing countries. The recording industry already made sufficient substantial profits and it did not require any further remunerative potential. The American contractual system did not contain any reference to the payments for broadcasting that is through the NAFTA broached deals. There was no evidence that digital copying would bring about an increase in private copying or impinge on the sale of phonograms.

Studies in the states had revealed little copying of broadcasts. It was opined that a clear distinction had to be made between the traditional broadcasting and on

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214 Ibid.
215 Id., p.18.
demand delivery. The lumping together of both would make them too broad and difficult. A range of possibilities including the right to equitable remuneration would pose difficulties. There should not be different yardsticks for different media within the general realm of broadcasting and communication to the public. These terms have been used interchangeably but with the endeavor to create a different layer within the communication realm it would be important that each word had its own meanings. And if a different treatment was essential only then need a new word be added to the existing array of jargon.

The differences were based on different factors. Broadcasters used phonograms to increase their audiences. What uses justified exclusive rights and what other uses a simple right to remuneration should cover. For instance the multi channel broadcasting would have to be assimilated into on demand delivery systems. Economically comparable situations needed to be placed on the same footing. It was pointed out that the availability of multi channel and access to copying facility would naturally lead the user away from the purchasing a copy or tangible copy. This would deleteriously effect financial flows and reduce investments.

In other words without the grant of exclusive rights to the providers, it would not be helpful. The present technological possibilities do not find the optional use of the art 12 of the Rome Convention to be a feasible proposition. The authors lobby was quick to latch on to the issue to protect their interests. They objected to the equitable treatment of the authors of performances and phonograms that were derivative works. The hierarchy between the author’s rights and the neighboring rights had to be maintained. It was feared that the commercial interests of the owners of rights in derivative productions would directly interfere with the rights of the author and thus derogate from the bedrock principle of the international protection of copyright and neighboring rights protection. The musician lobby countered this that there would never be life for music without the performer. Rights owners were not in the habit of denying access to works rather the instinct was to the contrary-exclusive rights would help them to face new market practices and technical solutions that related to them. It was in order to

216 ibid.
217 ibid., p. 19.
218 ibid.
encourage dissemination that there was the need for exclusive rights. Thus there was no need for any exceptions with regard to the execution of these rights. The reasons that warranted an exclusive right for on demand delivery applied equally to all forms of delivery or broadcasting having a similar effect. There is no question of unmanageability particularly with the collective administrative mechanisms in place.

The term narrow casting was suggested as a likely replacement to broadcasting right in respect of on demand delivery- a right to equitable remuneration would be ineffective with regard to the multi channel broadcasting. The producers agreed that the performers could enjoy exclusive rights where it was so justified. It was stressed that it was the market practices that would have to be assessed and not any technical differences. The on demand delivery systems were more akin to distribution of copies in fact CD's could be made at a marginal cost at home. In this regard there is no difference between the benefits to be enjoyed by the producer, the performer, authors- a mere right to remuneration alone would not be optimal.

The Duration of Rights Under WPPT

The duration of performers rights under the WPPT for the performer begins from the end of the year when the performance is incorporated in the phonogram or fixed or published whichever is earlier. The producers' rights also begin at the same time. The term of protection is uniform for all the protected categories. That is for a period of fifty years. The TRIPS that preceded the WPPT by two years does not prescribe a minimum term less than fifty years. The duration granted under the Rome of the minimum of 20 years was found to be insufficient particularly owing to the technically superior quality, value and longer commercial

219 Id., p.20.  
220 Ibid.  
221 Art 17 of the WPPT-. (1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram. (2) The term of protection to be granted to producers of phonograms under this treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.
life of the phonograms. A 50-year protective term on the lines of the TRIPS seemed appropriate. Several national systems had also begun to provide the 50-year term. There were endorsements from different countries with regard to the 50-year term of protection. There were also calls for an equal treatment of the term of protection as that enjoyed by the copyrighted works. This would include both the term for the performers as well as the producers as well. Another interesting omission from the WPPT in contradiction to the Rome Convention has been the lack of an incorporation of a time limit of protection for unfixed performances. As for the producers the time duration has been fixed either from the end of the year the fixation of the performance was done or from the end of year when publication was rendered. The duration of protection for broadcasters under TRIPS is however significantly only 20 years. That is the only repetition from the Rome sentiment. But this could create a problem in the sense that while the broadcast could lose its protection after 20 years the performers permission would still have to be taken as the period of their protection is still 50 years under TRIPS and WPPT.

In other words, the inference from the durational limits placed would be that there has been an increase of the period for performers' protection. The period has been placed at par with that of the producer. One striking feature is that the performer despite his profound intellectual creative contribution has been placed alongside the producer. There is no further discrimination shown among various performers. There is no mention of the duration for live performances, which in its absence would mean to have been still surviving within the provisions of the Rome Convention with duration of twenty years, as there is no mention of it in TRIPS either. Another critical point is that while the authors or the intellectual creators under the Berne Convention have been granted a protection of a lifetime and a period of 60-70 years, such a rationale has not been found in here. The

224 id.,p.9. United States of America.
225 WPPT, WIPO, Geneva (1996), p.22. The TRIPS has provided other rights to the broadcaster-Art14 (3).
226 The international Bureau provides explanation that the value to the performance is imparted only with the affixation and not before.
WPPT has only laid down the minimum term and the nation states are free to decide the term above the minimum or increase it in accordance with their mandate.

**Technological Measures and Obligations Concerning Electronic Rights Management Information**

The WPPT introduces two new provisions that are significant particularly in the aftermath of around 30 years since the Rome Convention in a world confounded with technological breakthroughs in communications. The introduction of the obligations with regard to technological measures in safeguarding the rights marks an important step in adaptation to the altered environment where in both the rights holder and the rights violator are both endowed with the technology to secure and to circumvent. The WPPT under Article 18 mandates that there shall be provided adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights. The need for legal remedies extends to the restriction of acts in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law. The Rome Convention does not carry such a mandatory requirement of effective legal remedies. Thus even if there is no actual violation of the rights bestowed nevertheless if there is tampering with the technological apparatus placed to protect the performance then the contracting states are expected to place the legal provisions against this in place. This is a highly useful deterrent.

Article 19 of the WPPT imposes obligations concerning Electronic Rights Management Information (ERMI) on the contracting states. Though no parameters of a well-defined nature are provided in the Article 19 nevertheless

227 Art.18 - Contracting parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

the nation states have been asked to provide for effective legal remedies in respect of such acts that would reasonably induce, facilitate or conceal an infringement of any of the rights in this treaty.\textsuperscript{229} Thus it is to dissuade those who aid and abet rather than the actually infringe the rights guaranteed. The acts sought to be checked include the altering or removing of any electronic rights management information without authority, to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority. Once again it is those who aid and facilitate the infringement that is the object of deterrence \textsuperscript{230}. Thus no body is expected to feign or take advantage of the tampering with the rights management information if there is sufficient ground to believe that these are not genuinely authorized goods. Therefore doing any or all of the aforementioned acts would ordinarily invite punitive measures if it were done with the knowledge that the EMRI has been tampered with. Though this demands formalities to be indirectly imposed nevertheless it is not to be construed that without these EMRI formalities there would not be any protection.\textsuperscript{231}

Art. 20 that follow the security clauses against EMRI violation is a statement that the enjoyment and exercise of the rights provided for in this treaty shall not be subject to any formality. This follows the Rome sentiment though it was not made as explicit in the Rome Convention. It also seeks to pursue the norms of protection followed in literary and artistic works. From an assessment of the provision it must be stated that there is no other provision bringing the need for aiding and abetting or indirect infringements within the net other than those in relation to EMRI. It is an issue whether this would mean that there is no international mandate to go after the indirect infringements other than against those who tamper with EMRI. The striking deficiency of the entire scheme of Article 19 is that there appears to be no direction to have an EMRI compulsorily

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\textsuperscript{229} Agreed statement says that this includes both the exclusive rights as well as rights of remuneration.
\textsuperscript{231} Agreed Statement. \textit{Ibid}. 
imposed upon the nation states as only legal remedies have been called forth to be put in place and to subscribe to norms as desired by the WPPT.\textsuperscript{232}

\textit{Limitations and Exceptions with Regard to Rights Granted in the WPPT}

The clause with regard to limitations and exceptions is very widely worded in the treaty.\textsuperscript{233} The contracting parties are given the option to provide for the same kind of limitations and exceptions as they provide in their national legislation in connection with the protection of literary and artistic works. It is optional on the part of the contracting nation states to provide any thing less or more for the performers rights as exceptions. It is a mandatory clause that the parties should confine their exceptions or limitations to the certain special cases that does not conflict with the normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or the producer of the phonogram\textsuperscript{234}.

Thus unlike the Berne and the Rome Conventions the parties do not have a precise criteria to follow. Questions could abound as to what constitutes conflict with the normal exploitation of the performance and what unreasonably prejudices the legitimate interests of the performer and the exercise of his rights.\textsuperscript{235} The agreed statement clarifies that the exceptions shall apply to the performances stored in the digital form as well. It in effect brings even the computer storage within the ambit of reproduction thereby extending limitations and exceptions to that sphere also. But yet again lack of sufficient clarity mars this provision particularly in a digital era where in the mode of exploitation has changed and is in a state of flux.

\textsuperscript{232} It is noteworthy that both Art 18 and 19 don't find a place in the Rome Convention. The nearest that any thing comes close to the need for formalities in the Rome Convention is Article 11. Though it is not a provision that calls for measures to protect the EMRI, it is only a caution to restrict the need for formalities that might be adopted by the contracting states. It is another way of saying what has been stated in the agreed statement of the WPPT to Article 19 and the subsequent Article 20. There is no other provision corresponding to Article 20 of the WPPT in the Rome Convention.

\textsuperscript{233} Article 16(1) of the WPPT.

\textsuperscript{234} Article 16(2) of the WPPT.

Reservations & Limitations

Save one Provision none of the contracting parties can exercise any right of reservation other than in those circumstances where in discretion has been explicitly granted to them to do so. The reservation power is granted to only the right under Art 15(3) where in the contracting states have been granted the power to notify if they are not planning to fulfill the mandate of Art 15 that provides for a single equitable remuneration. This is in sharp contrast to Art 16 of the Rome Convention wherein Art 12 (with regard to single equitable remuneration) as Art 15(3) of the WPPT can be reservedly applied as also Art 13(d) with regard to communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee.

The right of reservation can be invoked in this regard under Art 16 only when the state notifies the Secretary General that 13-(d) would not be applied and that the other contracting parties shall not be obliged to grant the right in 13-(d) to broadcasting organizations whose head-quarters are in that country. It is noteworthy that this provision of reservation has been taken away in the WPPT. As is the right of reservation with regard to entrance fee to television broadcasts. Further no procedure is formulated with regard to any reservation attempted after the accession to the treaty while under the Rome Convention the notification for reservation could be attempted six months after accession or ratification. The TRIPS agreement does not make any specific contribution with regard to conditions, limitations, exceptions and reservations other than state that it intends to follow the same to the extent provided by the Rome Convention.

Retroactivity

The TRIPS through Art 18 of Berne Convention speaks about application of the provisions from the time the treaty is applied. Those works that were protected continue to be protected under the shadow of the new treaty. It shall be subject to any provisions contained in special existing Conventions or those to be
concluded between the parties. In relation to the Rome Convention, the WPPT carries a softer approach.\textsuperscript{236}

The WPPT has also borrowed from Art.14 (6) of the TRIPS provision on the application of Art 18 of the Berne Convention. Thus the treaty would be applicable to works still not in the public domain. No mention is made about not disturbing acquired rights as is mentioned in the Rome Convention. Nevertheless, Art 22(2) provides a further leeway to the contracting states in that Art 5 of the treaty concerning the moral rights may be applied only to performances that have happened after the coming into force of the treaty. This essentially excludes even those performances whose period of moral rights protection survives the impact of the new treaty. Thus existing performances would not be able to enjoy the protection of moral rights.\textsuperscript{237} The protection of the economic rights of the existing performances survives the advent of the new treaty. The underlying tenor both of the TRIPS as well as the WPPT provides the contracting states much more discretion to evaluate the application of retroactivity and non-retroactivity. While this is substantial with regard to the economic rights it is even more so with regard to the moral rights.

\textit{Membership}

A significant change can be seen with regard to the eligibility norms to become the member of the treaty.\textsuperscript{238} Any member of WIPO is eligible to be a member. Intergovernmental organizations may also become parties to this treaty upon a declaration being made that it is competent in this respect and has its own legislation binding on all its members on matters covered by the treaty. This

\begin{itemize}
\item The Rome Convention it was specifically stated in Article 20 that the rights acquired before the date of coming into force of this Convention were not to be prejudiced. Further article 20(2) also stated that state shall not be bound to apply the provisions to performances or broadcasts that took place or to phonograms that were fixed before the date of coming into force of this Convention for that state. Thus it was a kind of total non-retroactivity that was proposed.
\item Both the TRIPS as well as the Rome Convention do not grant moral rights to the performer.
\item Article 26 of the WPPT says that ' (1) Any member State of WIPO May become party to this treaty. (2) The assembly may decide to admit any intergovernmental organization to become party to this treaty which declares that it is competent in respect of, and has its own legislation binding on all its member states on, matters covered by this treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this treaty. (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this treaty, may become party to this treaty.
\end{itemize}
treaty also recognizes the European community. The aforementioned criterion reflects a sea change in the attitude of the treaty makers from that fostered by the Rome Convention. The Rome Convention carried an eternal conservatism and anxiety to safeguard the literary and artistic works in an age recognizing the property rights of the performers.

Under the Rome Convention, the instrument could be open for accession only if any member state of the United Nations is a party to the UCC (Universal Copyright Convention) or a member of The International Union for the Protection of Literary and Artistic Works. Thus this firmly provided authors and artists a secure environment, as they would not be denied protection in preference to performers and producers of phonograms and broadcasters. Thus those nations that did not provide protection to the works of literary and artistic works as mandated in the international instruments would not come within the purview of eligibility to qualify for the membership of the Rome Convention. But the WPPT marks a significant change from the same and does not demand this prior qualification and provides an open opportunity for all WIPO members, intergovernmental organizations and European community members.

INTERNATIONAL INSTRUMENTS AND THE PERFORMER IN THE AUDIOVISUAL

It can be seen that both during the Rome Convention as well as the WPPT the question of protection to the performers in the audio-visuals had been hotly debated. However the preparation of an international instrument could not be agreed upon owing to differences of opinion and the conflict of interest. It ought to be noted that the Berne Convention in Art. 14bis (3) was open to accommodating certain contributors who did not really have a separate copyright such as the principal director etc.239 It can be recollected that the drafts prior to the Rome Convention contained some definite designs with respect to the accommodation of the performer in the audiovisual. The term 'audiovisual' had not been used and the reference consistently had been to films. The performer in the films was

239 See the result of the Stockholm revision of the Berne Convention, 1967. Thus while a rigidity could be discerned, the option of accommodation had not been totally foreclosed. Though the performer was not considered as one among the authors of the film.
excluded in the Monaco draft (1957) and no provision was to be interpreted as applying to a reproduction or to any use made of a film. In The Hague draft, the need to protect the performer from clandestine filming either live or off the air and to protect television broadcasts even if it included films was stressed. But it was not with any obligation on the part of the states to affect any rights of filmmakers or any other rights in visual or audio and visual fixations. The draft gave protection to the performers against uses for purposes different from those for which their consent was given. However this was not extended to films. No protection can be said to be afforded to the performers or to the broadcasting organizations against reproduction or other uses of fixations of images or of images and sounds. Some of the reasons voiced were that film producer's feared damage to their interests if performers and broadcasting organizations were to enjoy rights in their films. The film producers themselves had not gained a copyright foothold internationally. Their sight was on Berne rather than in Rome. Another problem encountered was the confusion between films and television. Broadcasting organizations also separately made the their own television programs. There was a synchronization of use between the cinema specific products and the television products as the former was used in the latter as well. The Rome Convention via Article 19 denied total protection to the performer. This was unlike the protection that was extended up to the contractual extent by the Hague draft. There was much anguish at the treatment meted out to the performer in the films as new uses and the possibilities of exploitation had increased manifold times.

The United States of America had firmly stalled any attempt to remain silent about the audio-visual performers rights in any of those instruments and the resultant exclusion in the Rome as well as the WPPT was the result of the stubborn stand. The reason as could be understood from the records suggest

241 Id., p.66.
242 Id., p.66.
243 Id., p.66. Their intent was to steer clear of Rome. They finally managed to beget a foothold in the revision Stockholm in the year 1967.
244 Id., p.66.
245 Id., p.67.
that the standoff was between the American collective administration bloc that did not want the statutory streamlining of the rights on the one hand and the European and the Latin Americans bloc that wanted fundamental statutory minimum guarantees on the other. Accordingly the negotiations in 1996 offered different alternatives namely the coverage of only musical audio performances, the coverage of all kinds of performances or the principle coverage of all kinds of performances combined with the possibility for contracting parties to declare a reservation with a view to applying the treaty only in respect of audio performances. However the United States was not satisfied with the proposed idea of reservations being left to the respective states concerned. The United States was in favor of limiting the possible treaty to musical performances alone. However it was not amenable to the idea of limiting its own obligations to musical performances alone while allowing the other contracting parties most of which were in favor of a full coverage of all kinds of performances to protect audio visual performances at the international level. Even a proposal of the E.C. and its member states made during the Diplomatic Conference 1996 to allow reservations in respect of certain sectors instead of a comprehensive en bloc reservation as well as further options for a more flexible reservation possibility did not satisfy the United States.

The United States referred explicitly to the possibility of granting protection by collective agreements, under certain conditions that would have allowed them to maintain their domestic system while not being obliged to introduce exclusive rights for the performers. National treatment on the lines of the Berne Convention was to be allowed. Significantly, the U.S also wanted the exclusion of the background performers who do not speak words of scripted dialogue. These were concerns that were raised for the first time in the international parleys and as can be seen in the final WPPT instrument it was all rejected.

The most vehemently opposed component was the set of proposals regarding transferability. This was rejected not only by performers organizations but also several other delegations. Significantly most delegations consistent with the performers point of view preferred not to include audio-visual performers if their

247 Ibid.
248 Ibid.
protection had to be combined with a mandatory presumption of transfer of rights to the producer. The mandatory transfer was perceived to be potentially weakening the position of performers rather than strengthening it and therefore was mainly beneficial to the producers.\textsuperscript{250} That was seen as potentially weakening the position of performers rather than strengthening it and instead was beneficial mainly to film producers in particular to the dominating American film industry.

Significantly, prior to the WPPT, the TRIPS had confined to positive speak only on the issue of live performers and phonograms and did not either restrict nor promote nor desire any moves on the audio-visual sector. This could be easily explained away as it was not derogating from the Rome Convention in areas other than the areas on which it has expressly spoken. Thus the restriction on rights in the audiovisual sector would hold. But unlike WPPT where this option of silence was not taken, the TRIPS eased the mental block to explore further moves in this direction ostensibly because of the European block as against American obstruction. The initiative towards the Protocol reveals the conflict involved in realizing a protection for the audiovisual performer.

The WPPT closed with a resolution that the efforts to figure out a consensus with regard to audio-visual performers would continue as a sequel to the efforts to the 1996 efforts for the performers and the phonogram producers. Though the resolution made it a point to distance the WPPT 1996 from any extension to the audiovisual sector, it was with a pint of regret that the same was voiced.\textsuperscript{251} This is

\textsuperscript{250} Von lewinski, op.cit., p.334. Such an outcome was regretted particularly by the E.C. and its member states, African countries, Latin American and Caribbean countries. It is interesting to see the package that was proposed by the United States which if accepted would have made themselves accommodative to the protection of audio visual performances. The package contained an interesting mix. The proposed exclusive rights of fixation, reproduction, distribution, and making available were to be granted. What was not to be granted were the proposed moral rights and the exclusive right of modification and the audiovisual performers rental right. The free transferability of all exclusive rights including those of audio performers was to be preferred. The U.S had tried to introduce the same into the TRIPS agreement. In addition a mandatory rebut able presumption of transfer of all rights under the new treaty to the producer of the audiovisual fixation on the mere consent of the performer was to be provided. Still under the heading transferability of rights the United States proposed a choice of law rule under which in the absence of an agreement of the applicable rule, contracts concerning rights granted under the new treaty were to be governed by the law of the contracting party that was most closely connected to the contract. Another proposition was the implementation clause that would allow the respective parties to decide on the means by which the entire scheme was to be implemented.

\textsuperscript{251} See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", (F.N cont.next page)
indicative of the fact that there had been a sincere endeavor even at the WPPT to forge an understanding that failed. The contracting states did not want to take a chance even by keeping silent on the issue lest the ambivalence be taken to be susceptible to differing interpretations.

_The Protocol[^252]_

The latest in the array of international instruments that have attempted to streamline the protection of performer in the audiovisual is the Protocol to the WPPT that has been debated at the Diplomatic Conference held in the year 2000. One of the most conspicuous features of the endeavor towards an audiovisual performance treaty has been the fact that there was least disagreement with regard to the need for such an instrument. In fact almost all jurisdictions that mattered with regard to the entertainment industry agreed that performers should be compensated for their work and that a uniformity of treatment must be attempted the world over with respect to their rights. The difference of opinions was only in the means resorted to realize this end. As the WPPT and the WCT had provided a level playing field of protection for some groups of right holders in the new digital environment, it was felt all round that this

[^252]: From Dec 7 to 20, 2000, a Diplomatic Conference on the protection of audiovisual performances was convened by WIPO in Geneva. At the end of the conference its president read out a statement according to which a provisional agreement on 19 articles had been reached and however as outstanding issues remained it was decided to reconvene the conference at some later date. Von Lewinski, "The WIPO diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 335.
needed to be extended to the performers in the audiovisual as well. The non-governmental organizations that represented the various industry interests also echoed the same attitude. Besides this the non-performer organizations such as the broadcasters and producers associations too did not oppose the grant of the performers rights to the performer in the audiovisual. The proposed Protocol has intended to meet the demands posed by the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances.

**Whether a Protocol or a Treaty**

While it does proclaim the kindred link with the WPPT, the new instrument seeks to have an independent identity of its own. This is ostensibly to make it clear that there shall be no confusion between the interpretational techniques used and the inferences with respect to the two treaties. The preamble loudly says that the new instrument is in pursuance of the resolution passed at the WPPT. This delicate tight ropewalk could be because of a possibility that the width attributed in interpreting WPPT might be used to dissect the new instrument as well. The maintenance of the umbilical chord could only be for the reason of administrative and procedural simplicity of ratification. Several options as to the exact relationship with WPPT have been proposed and discussed. The indecision could turn on the fact, what would be more dangerous in the long run. This is particularly so since courts in the past and at all times when confounded by confusion has ventured forth to interpret in the light of international norms, practices and legislations. Though the proposed Protocol tries not to derogate from the existing treaty commitments, particularly the Rome and the WPPT, nevertheless the instrument intended the exclusiveness of this new instrument to be clearly preserved.

The consequences arising from the designation as a Protocol or a treaty may not be noticed from the first impression. However, the distinction would trigger off
different interpretations. Particularly when there is a conscious intent to accord a
different treatment to the audiovisual performer. This is significant in the context
of the stance taken by the European and the American delegations in the post
WPPT phase. While the European and other delegations insisted on a Protocol to
the WPPT and would not include any article on transfer, the United States on the
other hand including a few Asian countries preferred an entirely different
independent treaty with considerable deviations\(^{255}\). The important point being
relied upon was that the character of the instrument should emerge as being for
the protection of the performers. It was proposed by the International Federation
of Actors that the instrument should reflect the primary aim of the instrument and
consequently contain the words "for the protection of audio visual performers"\(^{257}\).

The Objective

The proposed Protocol was intended to meet the demands posed by the
profound impact of the development and convergence of information and
communication technologies on the production and use of audiovisual
technologies. A similarity in reasons on the technological front can be found in
the WPPT as well particularly being impelled by the influx of the digital medium
and imminent revolution of the convergence phenomenon. The envisaged
protection while it would encompass the new media —digital devices, does not
lose sight of the balance of interests that ought to pervade intellectual property
discourse. Thus the rights of the performer are to be realized subject to the
limitations in larger public interest. Interestingly, in contrast the Rome Convention
does not speak of any such balance in its preamble\(^ {258}\).

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\(^{255}\) The above mentioned run up to the Protocol and the developments prior to it indicate a
galactic divide between nations and blocs reflecting the history and the industry practices that
have gained ground in the cinematographic or audio-visual industry.

\(^{257}\) They were for a strong and comprehensive instrument without undermining the protection
already established by the WPPT. They mooted the need for an agreed statement on the lines of
the Agreed statement for Art (1) & 2) of the WPPT. It was felt that whatever term was to be used it
should substantially realize the protection for the performer. This would be in conformity with the
titles of Rome and the Berne Conventions. The federation was of the opinion that this question
did not warrant much importance and felt undecided to decide whether to call the instrument a
 treaty or a Protocol.

\(^{258}\) See the “Basic Proposal For the Substantive Provisions of an Instrument on the Protection of
Audiovisual Performances to be Considered by the Diplomatic Conferences”, Prepared by the
The Safeguard Clauses
The WPPT and the Rome safeguard clauses have been incorporated in the new Protocol. This has been modeled after the TRIPS agreement and the WPPT. There is also a continuation of efforts to secure the rights of the author's rights in the new instrument. 259

Rental Rights

The WPPT had granted the same right to performers in the phonograms that can only be displaced by the scheme of equitable remuneration, provided it does not cause material impairment to the exclusive right of reproduction of the performer.260 Significantly the basic proposal for the Protocol deviates a great deal from the guarantees that the WPPT carries with respect to rental rights.261 While Article 9 of the Protocol does provide the performer with the exclusive right to authorize rental of the original and copies of the performances fixed in audiovisual fixations. It is conditional in that it provides too wide an option to the contracting states to be compelled to implement the same. The parallel provision of equitable remuneration has been done away as an alternative. The rental right need not be applied unless the exploitation has led to widespread copying of such fixation materially impairing the exclusive right of reproduction of such performers. Thus the users are free to commercially rent the audiovisual fixation without the consent or exclusive authorization of the performers until it becomes quiet evident that the commercial rental is detrimental to the exclusive right of reproduction.


259 Both with respect to obligations under other treaties as well as the protection accorded to the literary and artistic works a non-prejudice clause has been intended to be inserted on the lines of Article 1 of the WPPT.


261 Ibid.
This is a relevant grant in as much as much of the exploitation in current times is through the method of rental.\textsuperscript{262} This flexible wording of the so-called impairment test has been a compromise between Art.11 of the TRIPS to accommodate the needs of those countries such as the United States. It was not in a position to introduce the rental right in respect of cinematographic works. The position of most countries had changed since then and the rental right has been applied also to audiovisual performances.\textsuperscript{263} There was a division between the European Community and the United States of America in this regard. This was compromised by Art 9(2) that has resorted to 11(4) from the TRIPS to leave the issue to be determined by the national law of the contracting parties.\textsuperscript{264}

\textit{Definition of the Term ‘Performer’}

An assessment of the definitions attempted in the proposed treaty brings to the fore the fact that there is broad correspondence between the definition of the term ‘performer’ in WPPT. Article 2 of the basic proposal deals with the definition of the term performer \textsuperscript{265}. It is understood that extras, ancillary performers or ancillary participants do not qualify for protection because they do not in the proper sense perform literary or artistic works.\textsuperscript{266} The borderline of determination is to be left to the respective national legislations. When making this determination the contracting parties are supposed to look into the

\textsuperscript{262} Id., p.45. Article 9 of the proposal suggests (1) performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original sand copies of their performances fixed in audio visual fixations even after distribution of them by or pursuant to, authorization by the performer.

(2) Contracting parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers.

\textsuperscript{263} Von Lewinski, op.cit., p.336.

\textsuperscript{264} Ibid.

\textsuperscript{265} Art 2(a) of the Protocol defines performers as actors, singers, musicians, dancers, and other persons who act, sing, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folk lore; Supra.n.14., p.23. It is surprising that Von -Lewinski says that there was least resistance to the adoption of this definition.


The notes accompanying the Basic Proposal are supposed to have the status of an interpretative aid.
established industry practice—whether a person has a speaking role or forms a background to performance.

According to the International Federation Of Musicians, it is difficult at the international level to divide performers into different categories distinguishing some as ancillary performers, extra performers or background performers. Such a distinction particularly at the international level and in the new digital context could prejudice musicians worldwide and diminish their protection. It is only at the national level that professionals or authorities could decide when a contributor does not interpret a work. The delegations that supported the exclusion of extra performers, background performer or ancillary performers did so in order to not upset industry practices. However, there was already an opinion that even the existing definitions in the prior Conventions readily excluded those groups of participants because of the requirement that a performer should perform a literary artistic work. However the artists do not seem to have uniform views with regard to this. The International Federation of Actors were of the view that there was no need for expressly excluding the extras and that it should be left to national legislation or national court practice to decide the question.

It is interesting to note that during the committee of experts meetings the delegations of China and France warned against introducing definitions that would imply qualitative distinction. The French notion of artistes de complement had been subject to court cases in France where the phonogram industry tried to clear the decisions that the background decisions musicians should be considered as artistes and therefore to be excluded from protection. The French court rejected this theory notably on the basis of the Rome Convention but such a

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268 The Rome Convention and the WPPT benefit performers defined in these instruments without any formal exclusion of certain categories of performers. A different approach at the Protocol was expected to create legal uncertainty.
The Definition of Audiovisual Fixation in the Protocol

The definition of the audiovisual fixation attempted in the basic proposal also came in for criticism as it was found to bring in a lot under its ambit. The issue was that audio visual performances which would not per se qualify as audio visual performances would qualify once they have been embodied in an audio visual fixation. Audiovisual fixation is defined as meaning the embodiment of moving images, whether or not accompanied by sound or by representations thereof, from which they can be perceived, reproduced or communicated through a device. The definition of audiovisual performances was deleted as being of no consequence in the Protocol. However the definition of audiovisual fixation was drafted so broadly that it was to surely overlap with the same in WPPT. It depended on a narrow or broad interpretation provided to the definition in the WPPT. The performers’ associations were alarmed that the envisaged instrument would potentially include provisions that would be less advantageous for the performers and more advantageous for the producers as compared to WPPT. Thus any overlap would be inimical to the intent behind the new instrument. For instance products such as the CD-PLUS where in the musical performances might be complemented by visual elements such as pictures of a landscape that the consumer might even turn off. In such instances, the producer could benefit. Since this definition was crucial for the delimitation of the scope of application of the new instrument from that of the WPPT and since the new instrument was

273 Art 2 (C) of the Basic Proposal.
274 <http://www.wipo.org/documents/en/meetings/1999/sccr_99/pdf/sccr2_4.pdf> for a comparative table of proposals on the protection of audiovisual performances. This definition had found endorsement from among almost all the delegations prior to the basic proposal being put forward for discussions.
expected potentially to include weaker protection for the performers than the WPPT, the solution to the problem was not as simple and required a comprehensive agreement from all sides. However, delimitation has been attempted by resort to a separate clause.

The blurring line between audio and audio-visual has been seen with anxiety by the performers organizations. As any overlap would result in a dilution of the gains under the WPPT by the audio performers, on the other hand any fusion of or merging of the identity could also result in the audio-visual fixations begetting the protection of the audio performer in fixations. It is an issue of considerable delicacy that demands a minute understanding of the phraseology, the technology and identification of what criteria should distinguish between the subject matter. It is a precarious zone particularly in an era of convergence. The performers organizations have been supportive of any definition that would not take away any of the gains that they might have had so far and to provide increased protection where it deserves the same. The definition of the term phonogram symbolizes an important division as to where the protection under the Protocol ought to begin. However the current definitional weakness points out a paradoxical situation where in the audiovisual actor would beget a lower level of protection than the dubbing performer.

The International Federation of Musicians has voiced concern over the adoption of such a wide definition. The definition follows the technical structure of fixation as defined in the WPPT; all the technical elements that are not dictated by a different subject matter are identical. The expression moving images must be understood in a broad way incorporating or recording of visual material using whatever means and whatever medium. The definition of the fixation proposed does not include the duration of the life of the embodiment necessary to result in fixation. The expression is also used to refer to any first fixation and any fixation in any subsequent copy. In addition to audiovisual performances the given carrier may incorporate several other types of protected subject matter not limited to cinematographic or audiovisual works.

The Rome Convention defines phonograms as any exclusively aural fixation of sounds of a performance or of other sounds. The WPPT formulates it differently though the effect is the same. The WPPT defines it as the fixation of sounds of a performance or of other sounds other than in the form of fixation incorporated in a
cinematographic work or other audiovisual work. The first part of the definition in the Protocol is near to that of the Rome Convention but is not limited to aural fixations, however this limitation is reintroduced by excluding fixation in cinematographic work and other audiovisual work. This gave rise to genuine fears that the notion of phonograms and the consequent protection might be lost with the reproduction of the phonogram in the audiovisual fixation.

As the word used is a fixation as against the word reproduction such a fear can be discounted also because a phonogram is itself a fixation and nothing else. There is nothing till now which may be called as re-fixation as a circumstance. Thus the re-incorporation of a fixation can only be called as reproduction. Incorporation in a new media can be called reproduction or is it just re-fixation or just fixation. Apparently the difference is that the fixation does not require prior fixation. Reproduction can only be attempted through the means of exploiting the fixation. If the fixation is exclusively aural it is a phonogram but if the fixation is not exclusively aural for instance if the images of the performance of a musician are fixed simultaneously with the musical part of it then it is an audiovisual fixation. It is a fact that in most audiovisual works including cinematographic works, the music sound track is fixed separately from images. It means that the protection provided by the WPPT for music performances fixed in a phonogram covers music performances used in such audio visual in case of reproduction, distribution, rental, broadcasting, communication to the public and making available of the audio visual work with which it has become associated.

In other words the aural fixation remains a phonogram despite its incorporation in an audiovisual medium. The audiovisual fixation would have no consequence on its definition and its protection. To say the contrary would drastically reduce the protection particularly in the digital context, as it is more and more easy to reproduce phonograms on the digital media with accompanying images. The WPPT conference of 1996 has been clear that it was only the audio-visual fixation that had been excluded from protection and not the reproduction of

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277 Id., p.11.
anything into the audiovisual. 278 It does not seem essential that the phonogram needs to be published or in any manner commercially exploited. What is most comforting to the aural performer is that the protection ought not to be taken away merely because the medium has been changed. 279

Economic Rights 280

The envisaged Protocol intends to grant the performing artist with economic rights in their unfixed performances. They are endowed with the exclusive right of authorizing 1. The broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance and the right of authorizing the audio visual fixation of their unfixed performances 281. The right of authorizing the broadcasting and communication to the public is qualified by the statement that it will not include rebroadcast. Even though only rebroadcast is mentioned, the notes in the basic proposal mentions retransmission as also being included within the exception 282. The right corresponds to art 7(1) (a) of the Rome Convention and 6(i) of the WPPT and 14.1 of the TRIPS agreement. The highlight of all these agreements was that both aural as well as audio visual agreements were covered by these agreements 283. The Indian proposition literally echoed the same sentiment as in the Protocol.

Japan desired the WPPT formulae 284. The United States speaks, wants to be vocal about it, specifically about the exclusion of repeat broadcasts but does not

278 Explore the new product identity when a new audiovisual product emerges from the use of prior audiovisual fixations.


280 Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and (ii) the audiovisual fixation of their unfixed performances.


282 Id., p.38.


284 Id., p.23, see the comparative table of proposals received as on January 30th, 2000, WIPO
extend the same rationale to communication to the public. In all there was a broad agreement with the pattern adopted and the Protocol does not deviate from the WPPT.

Economic Rights of Affixed Performances

The Protocol grants the right of authorizing the reproduction of the affixed performance either through direct or indirect means. In any manner or form. This again follows the WPPT route granted to the performers in sound records. The words direct or indirect reproduction indicates the distance from the place where the fixed performance is situated and where the copy is executed would not be a significant factor to decide the act of reproduction. The reproduction can be rendered in any manner or form.

Significantly the provision does not provide a hint whether the reproduction covers temporary or a permanent storage especially considering the relevance of this question in the light of the digital mode of delivery. This was objected to by the actors' organizations. It was found essential to include the words 'permanent or temporary. It was demanded that an agreed statement on the lines of paragraph 29 of the memorandum be incorporated in the absence of the same being made part of the article. The agreed statement that was formulated was found applicable to the audiovisual circumstance as well. The European commission wanted the endorsement of the WPPT stand. India went along with the provisions of the Protocol. Almost all the countries endorsed the Protocol extent on economic rights pertaining to reproduction.
The Right of Distribution

The right of distribution refers to the physical copies of audiovisual fixations of performances of both the original and copies of the fixations. It corresponds with art 8 of the WPPT. The European commission went with the WPPT. India proposed similar provisions as the Protocol. The United States proposition too goes with the Protocol. Not much of a difference can be discerned from the ideas expressed by other countries. It was suggested that the right of distribution should be granted with respect to copies distributed through the Internet as well.

The Right of Making Available

The right includes both wired and wireless means. It can be through short as well as long distances and does not cover fixed copies. The technology may be analogue or digital and use any vehicular means. That can carry information. The important distinctive feature of the right is that it must involve access from a place and time individually chosen by them. This would be based on interactivity and on demand access. These features bring out the distinction from the communication to the public. Further there is no exhaustion of rights in contrast to the situation visited upon the distribution of physical copies. The onus is

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291 Article 8 states that (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership (2) nothing in this treaty shall affect the freedom of contracting parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. Id.,p.42.

292 Id.,p.27

293 Id.,p.28


295 See, "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences", Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August,2000), p.47,


. Art. 10 of the Protocol states that the Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that the members of the public may access them from a place and at a time individually chosen by them.

296 Id.,p.46. Protocol notes.
specifically on the on demand functionality of access. There was broad agreement with the terms of the Protocol in the propositions put forward. The proposals do not show much derogation. The European community wanted the same measures as in the WPPT.

The Right to Authorize Broadcasting and The Communication to the Public

One of the crucial sources of exploitation in the audiovisual industry has been through broadcasting and other means of communication to the public. Both the terms have been defined by the Protocol. The definitions take into account the width of technology and the manner of dissemination that accord with the characteristics of the digital media. It has been pointed out that the inclusion of transmission of sound in the definition of broadcasting and communication to the public if the sound track of the film is broadcast via the sound radio would not change the protective cover from the ambit of the WPPT to that of the new instrument. It is in the nature of and is used as a phonogram subject to rules of WPPT. The Rome and the WPPT initiatives provide a fairly large leeway or discretion with the contracting states to regulate broadcasting and its incidental consequences. It is noteworthy that both do not provide for an exclusive right to broadcasting and communication to the public. Thus the Protocol is a major shift in this regard. Art 11 of the basic proposal grants the performer the exclusive

298 Id., p.32. From the comparative table of proposals one can discern a broad consensus with respect to the definition for broadcasting as well as communication to the public among most of the countries. The proposal of the United States also tallies with that proposed.

Broadcasting is defined by Art 2(d) as meaning the transmission by wireless means for public reception of sounds or images or images and sounds or the representation of sounds, such transmission by satellite is also broadcasting, transmission of encrypted signals is broadcasting where the means of decrypting are provided to the public by the broadcasting organizations or with its consent.

Communication to the Public has been defined by Article 2(e) as meaning the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audio visual fixation for the purposes of article 11, "communication to the public" includes making a performance fixed in an audio visual fixation audible or visible or audible and visible to the public.

right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.\footnote{Article 11 (1) of the Protocol says that performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations. Article 11(2) says that contracting parties may establish, instead of the right of authorization provided for in paragraph (1), a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting parties may in their legislation set conditions for the exercise of the right to equitable remuneration. Article 11(3) says that any contracting party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraph (1) and (2) at all. See the "Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences ". Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p 49, \<http://www.wipo.int/documents/en/document/avp/doc/avp_dc3.doc > as on 1st January 2006.}

\textit{Alternative Right of Equitable Remuneration}

Instead of the right of authorization, a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public is proposed. Thus the contracting parties are provided with an option in the alternative to a right of authorization. However the good work in paragraphs 1 and 2 is rendered superfluous owing to the provision in 11-3, which grants the discretion to the concerned contracting party the discretion to notify the restricted use and application of paragraph 2, or that the two provisions would not be applied at all.\footnote{id.} Thus the article provides a wide range of options for the contracting states to choose from.\footnote{id., p.48.}

Significantly, it has to be noted that while the alternative to right to authorization that is the right to equitable remuneration is applicable to direct and indirect uses of the fixations, the right to authorization carries with it only the right to authorize direct uses as it does not mention indirect uses. While comparisons could be drawn with the WPPT- it is pertinent to note that the WPPT does not provide the right of authorization to the performer with regard to the use of their fixations in broadcasts and communication to the public. What it provides for in Art 15 is the right to remuneration. Further it must also have been published for commercial purposes. This is missing in Art.11 of the present instrument. Thus if 11-2 is
applied by the contracting state then it covers a wider range of activity than WPPT. Further the manner of sharing the proceeds under the Protocol is left to the nation states while in WPPT (15-2) it is first left to the performer and the producer and only in its absence the contracting states will enter the fray.

**Conflicting Perspectives Regarding the Right**

The formulation of Article 11 was preceded by several parleys with the producers lobby as well as the artists' NGO's and the government representatives providing significant alternatives to the discussions. It was an amalgam of statutory and collective bargaining principles that was mooted by the FIM representing the artists. It is also apparent that they were not averse to the proposition of compulsory licensing also being accommodated within the ambit of protection. While the United States of America, a strong pro union and anti-statutory proponent, was in favor of a broad exclusive right of broadcasting and communication to the public, the International Federation of Musicians representing the artists proposed that with the exception of Section 11bis of the Berne Convention, the performers shall enjoy the exclusive right of authorizing, as regards their performances fixed in audio-visual works, the broadcasting and communication to the public of such performances, except where such performance is already a broadcast performance. This means that all types of broadcasting and communication to the public would be covered by such a modified proposal from the USA, including rebroadcast and simultaneous retransmission.

However the provision has belied the expectations of the performers in that it provides for a notion of exclusive right without any opportunity for exercising

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305 The last exception is surprising coming from a performers union-why has repeat broadcast been excluded. It is once again surprising that the United States has hinted the possibility of dropping the last mentioned exception.
306 The relationship between the us lobby and the broadcasters would have to be explored as the Americans have always been clenched fisted when it came to moderation with regard to cinema and other audio-visuals.
such a right either wholly or in part through a compulsory licensing system.\textsuperscript{307} The right to equitable remuneration that is proposed excludes the notion of exclusive right.\textsuperscript{308} The proposition moves far beyond what had been envisaged by Rome and the WPPT. The reservation clause encourages the states to keep silent on any commitment. There is an underlying tone that there ought to be a different standard of protection for the audiovisual performer in comparison to the protection extended to the phonographic industry\textsuperscript{309}.

\textit{Article 12 of the Protocol- Formulating the Rights of the Performer in Audio-Visuals}

The most controversial of all the propositions placed before the several panels that discussed the issue of performers rights in the audio-visual industry has been the one regarding the relationship between the artist and the producers, the broadcasters and other communicators to the public in the post fixation stage.\textsuperscript{310} In order to trace the lineage of the present standpoint in this regard it would be pertinent to note that works in cinematographic works had always been treated differently from the rest of the works. It can be seen that right from the Berne Convention onwards the audiovisual realm has been treated distinctly.\textsuperscript{311}

\textit{The Rationale for the Incorporation of the Right}

The need for a provision guaranteeing a clause on transfer of rights was felt essential because of the need for business certainty for the distribution and exploitation of audiovisual fixations. This was to strengthen the international legal framework for protection of performers rights at the same time preserving the

\textsuperscript{308} ibid.
\textsuperscript{309} id.,p.11.
\textsuperscript{311} See Article 14 and Article 14bis of the Berne Convention. The Berne Convention has been most accommodating to the cinematographic producer through Art 14 and 14 bis of the Convention.
potential for bargaining. This resolve has to be seen in the light of WPPT where in there has been no mention of a transfer clause with regard to performers’ rights in phonograms. This was found indispensable with respect to audiovisual fixations because the fixation normally involves a multitude of performers. On the international stage, the performers were even from different nationalities. The apprehension was based on the novelty of the new right and the way to work it in the system. The states must be possessed of sufficient means to deal with the rights. The rights and the way it was being managed in different countries varied from country to country. Art 12 was found to be the compromise between these differences. The major fear was whether a single performer would obstruct the exploitation of a product that had demanded great investment and manpower. The idea received impetus from the attitude displayed by national legislations and the Berne Convention towards the relationship between contributing authors rights and the author of the cinematograph.

Article 12 of the Protocol that deals with the assignment of rights was peppered with different alternatives, as it was a most contentious issue. The alternatives ranged from outright transfer to the producer, entitlement to exercise rights on the part of the producer, according to the law applicable to the transfers of the respective countries. Owing to the strident conflict of interest the solution has

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313 ibid.

314 ibid. A grave error appears to have been made in the notes to art 12 in the basic proposal for audiovisual Protocol in that the reference to Art 14bis (2) (b) was unwarranted as the Provision dealt with only the entities that were provided the authorship in the film copyright. The performer is never considered as an author of the cinematograph rather a distinct right is to be vested in the performer.

315 ibid. In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this treaty with respect to that particular fixation (Alternative F).

317 ibid. In the absence of any contractual clauses to the contrary, a transfer to the producer of an audio visual fixation of a performance, by agreement or operation of law, of any of the exclusive rights of authorization granted under this treaty, shall be governed by the law of the country most closely connected with the particular audio visual fixation. (2) The country most closely connected with a particular audiovisual fixation shall be (i) the contracting party in which
been elusive and the issue has become the major bottleneck for the Protocol to cross the final ratifying point. The producers were vehemently for the inclusion of a transfer of rights while the performers looked upon any such measure with circumspection.

**The First Alternative of Rebuttable Presumption of Transfer – Possibilities and Criticism**

The proposition is characterized by a rebuttable presumption of transfer once the consent of the Performer is elicited. It is significant that it is only a mere consent that is required. There is no requirement of any mandatory formality in the like of a written instrument. These are left to the discretion of the particular nationalities jurisdictions. Another noteworthy feature is that it is not any of the rights but whole lot of the exclusive rights granted under the instrument that is made over to the producer. The extent of the transfer is limited to the particular audiovisual alone and the rights that accompany but not to the creation of another audiovisual. The effect of rebuttable presumption was to be confined to the economic rights alone and not to the moral rights. The alternative was to be mandatory on all parties. An optional basis was however not ruled out. An option however does not impart any security to the producers, as variations would create instability to the administration of the rights. A significant facet of the rebuttal is that it must be in a written form and circumstances would not be enough to indicate the rebuttal.

The need for the transfer clause was felt necessary because rules governing the contractual arrangements between the producers and performers were

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318 The producer of the fixation has his headquarters or habitual residence, or (ii) where the producer does not have his headquarters or habitual residence in a contracting party, or where there is more than one producer, the contracting party of which the majority of performers are nationals, or (iii) where the producer does not have his headquarters or habitual residence in a contracting party, or where the producer is more than one, and where there is more than one producer, and where there is no single contracting party of which a majority of the performers are nationals, the principal contracting party in which the photography takes place (Alternative G of Article 12).


320 *Ibid.* Though this would require a keener interpretation to find the difference or the discrimination between the exclusion of filtering the moral rights from the exclusive rights of authorization and the term economic rights do not qualify these rights.

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considered essential to provide legal security on an international basis. The point being stressed was that performers rights ought not to be pursued at the cost of producers' interest. The reference was made to the umpteen numbers of countries that had a system of transfer of rights in vogue. The producer was the repository of the rights who would decide on the commercial exploitation of the audiovisual works. This was considered essential in view of the plurality of rights and need of multiplicity of clearing shops. The emergence of new delivery platforms in an e-commerce and online driven world further complicates the scenario. The detriment would be on the investment in the film production if the system of transfer of rights were not in place. The alternative of choice of law option was not favored by the non-American producer coteries because the system would ultimately help American interests that held 80 percent of the share in English cinema market.

The performers led by International Federation Of Musicians (FIM) were very much against any presumption of transfer or of performers rights to the producers including the inclusion of a so-called rebuttable presumption. They viewed this as an unfair provision. According to them this goes against fair bargaining on a level playing field. Such a status of presumption is an obstacle to the development all over the world of collective management of performance rights by performance organizations. Particularly for those fixations on the blurred borderline between audio and audiovisual performances, it would certainly have a negative impact on the audio field. They are concerned that the inclusion of a presumptive class would establish an inequitable balance between performers and those who purchase their services. To counter this deficiency or correct this imbalance, it would be essential for a strong performers organization to be

324 Ibid.
325 Ibid.
functional however this is quiet a rare phenomenon particularly in developing countries.\textsuperscript{327}

The United States of America had been consistently maintaining that the performers organizations in their state had agreed to the inclusion of presumption of rights transfer. However this was misleading. The FIM also opposed the philosophy behind presumption of rights, as it is apparently to ensure producers of audiovisual works the business certainty that they could exploit these works globally. In the opposition to this International Federation of Musicians have agreed with the European union, in critically pointing out that the major purpose of the Protocol was to improve and modernize the protection of audiovisual performer rather than producers who are protected elsewhere.\textsuperscript{328}

This has been corroborated by the observations of the delegation of South Africa that felt that the performers in developing countries lacked collective bargaining mechanisms as well as lack of resources and of access to legal services. A mandatory provision of such a nature was not a feasible proposition practically according to the African group such a provision would sterilize the rights of the audiovisual performance since they would be enforceable by any one. Even the collective management of the performers rights would be difficult in such a scenario. A relationship was also attempted to be brought about between the Berne Convention provisions with regard to presumption and the current endeavor on audiovisual performance. The highlight of these proposals is that the performers can rebut the presumption through a written contractual clause. The International Federation of Musicians see that practical possibility of the performers invoking the their rights through contractual clauses to be conceptually unrealistic.\textsuperscript{329}

The presumption becomes compulsory when there is no written contract between the performer and the producer. Further according to the International Federation of Actors, the actors in several countries worked for little or no remuneration without a written contract. It is the same for musicians

\textsuperscript{327} Ibid.

\textsuperscript{328} Id., p.13.

\textsuperscript{329} Id., p.14. As stated by the ILO (International Labor Organization) the performer is a worker and there is an increasing precariousness in contractual arrangements for performers. It is natural that the performer would first try to get employment rather than haggle even if the terms are precarious.
Performers have to individually bargain with the possible employer in order to rebut the presumption. This circumstance that is envisaged is illusory.

Another important issue that is essential fallout of this provision is the problem posed by the increasing juxtaposition of performances in audio and audiovisuals. This is particularly so because audio performances of today are also transposed as audiovisual products. This would lead to an erosion of the protection accorded to audio performances through prior Conventions and national legislation. Very significantly, the International Federation Of Musicians were of the opinion and argue that any system of presumption is not a necessity in the world where transfer of rights can be quite achievable by a written contract. Where written contracts are compulsory there is no uncertainty as to the nature or the extent of the rights. The incidence of presumption merely strengthens one side of the contractual negotiations- that is of the producer.

Alternative F

The provision was inspired from the Berne Convention. It provides for a presumed entitlement to exercise the rights. In contrast to the transfer proposed by the Alternative e. The common factor being that the written clauses to the contrary would be necessary to rebut this presumption. Once again only the economic rights are presumably to be exercised by the producer and not the moral rights. In contrast to the provision in the Berne Convention authors may not object. In that authors continue to be owners of their rights but the rights are not exercisable against the user. However under alternative f, the producer would be expressly and properly entitled to exercise the exclusive rights of authorization provided in this treaty. However the performers would still own their rights and could assert the rights against the third parties to the extent of any unauthorized use or, subject to applicable contracts or national legislation, claim remuneration from the producer. In this arrangement the producers would have certainty in the marketing of their product while the performers would be able to have continued ownership over their rights while the exercisable right is imparted to the producer.

Alternative G was influenced by the requirements of private international law. This is the commonly resorted form to decide on questions of legal applicability in the absence of commonly agreed legal framework between the countries. The proposition leaves it to the countries to decide on the model of protection that it would require. It takes into account the international situation and provides a solution to the situations involving an international element. It does not propose a specific model that for the sake of the performer or the producer needs to be followed by all the countries. Thus the alternative serves a functional purpose and not a plan or model for the nation states. It merely advises on the formulae to be adopted in case of confusion with regard to applicability of the law.331

This is subject to the existence of a contract to the contrary. It does not advise whether the transfer to the producer must be through operation of law or through mutual contract. It merely maintains that the legal regime determining this shall be according to the law of the country with which the contract is most closely connected. It provides for three points of attachment to determine which is the law of the country most closely connected with the particular fixation. This is as good as Alternative h which is a no provision providing an advantageous environment to the producer with the saving grace being the guide to harmoniously solve the private international law question332. In this regard the Indian proposition while agreeing with a presumptive transfer provides for certain safeguards333. Article 11 transfer of Rights (1) In the absence of any contract to the contrary, once the performer has by written agreement consented to the audiovisual fixation of the performance, he shall not object to the enjoyment by the producer of the exclusive rights of authorization specifically granted to the performer under his Treaty in respect of such fixation, for the purpose for which such fixation was made. (2) It is for the legislation of the Contracting Parties to determine the manner of enforcement of this provision. It is significant that India had broached the idea of a written consent. Further there is no utterance for any presumption of transfer of rights. Rather this appears in broad agreement with the

331 id.,p.56.
332 id.,p.57.
alternative where in the producer is entitled to exercise the rights alone. There is no transfer or assignment of rights not does any presumption come into play. Further it is clearly stipulated that rights shall apply only for the fixation for which the consent was granted. There is nothing in this, which suggests that only the producer is entitled to exercise the rights. There is nothing to suggest that the producer shall exercise the rights on behalf of the performer. This means that a parallel enjoyment of the rights is retained with the performer with respect to the performance that is affixed.

An important source of conflict was the opposing stand taken by the European union and the United States of America with regard to the incorporation of the right. The European union was against any stringent transfer of rights norms and wanted the widest possible discretionary powers to be bested with the respective nation states. It wanted the performer to retain the rights and grant the producer only the entitlement to exercise the rights. They wanted any clauses on transfer to be in tune with the legal traditions and practices in their respective countries. Already in different degrees the transfer of rights was being practiced in different countries. Some of the countries like Japan also wanted a specific transfer of particularly mentioned rights rather than a transfer en-mass without restriction. The Japanese proposal also contained an option. The United States in contrast was emphatic about the total transfer of rights to the producer. With the exemptions being limited to the moral rights and the rights of remuneration.

Among the non-governmental organizations that gave its views the most vocal was the International Federation of Actors that represented several organizations actively engaged in the collective bargaining and administering process in leading film-producing counties like the United States of America. The organization was forthright about its suspicion of the alternatives presented with respect to the transfer of rights norms in the basic proposal. A mandatory transfer of rights was opposed by the IFA. Such a compromise would in all likelihood tip the balance in

334 See, Comparative Table of Proposals Invited for the Diplomatic Conference, WIPO (1999), p.29.
335 ibid.
336 Id., p.30. However the savings with regard to the rights of remuneration is not reflected in the alternative E Of the basic proposal.
favor of the stronger party. It would transform the objective of the instrument from being an instrument for protecting the interests of the performer to being that of the producer. The proponents of the transfer policy have not been able to point out a single example where in the performers have obstructed the course of exploitation of the film because of their rights. The transfer provisions would also have an impact by way of countries lowering the protection granted to the performers. In great many countries the performers have not even recovered the dignity of written contracts and that are invariably the weaker party. With respect to alternative f the organizations felt that it presented only a slight variation from the preceding alternative. Although it was modeled on the presumption of legitimation in Art 14 bis, it omits the exception granted under Art 14(bis) 3 in which only peripheral contributors are covered. The same drawbacks exist as has been inferred about the preceding option.

It is significant that the International Federation of Actors was more in agreement with the proposition G. It felt that it ought not be impossible for the instrument to recognize contracts made in other countries. It was significantly pointed out that as proposed by the alternative, the transfer must not be means of the operation of law but rather should be by means of written agreement. Otherwise it would amount to legal expropriation of the rights of the performer exclusive rights that cannot be condoned by an international treaty. This requirement cannot be said to negate the rule of law of the relevant country for the interpretation of the transfer agreement including such rules that determine the scope of the transfer. A written agreement of transfer would be absolutely essential to enable the performer to ascertain both the identity and the nationality of the producer to whom the rights have been transferred if it is based on oral agreements that would have definite disadvantages. Further in oral agreements the dependence would be on private international rules. Rights of remuneration should not be included in the transfer provisions. By assimilation exclusive rights, which are provided in the national laws, are subject to mandatory collective administration or to extended collective licensing, are in effect to carry the practical nature of the remuneration right. These should not be subject to transfer provisions. The International Federation Of Actors also advanced other conditions for the transfer

regime to be acceptable. The agreements should specify which are the rights being transferred. There ought to be no transfer of rights in respect of uses that do not as yet exist. There ought to be remuneration paid as consideration for the transfer of rights. There is no accommodation to the stand of irrefutable presumption of transfer. These are the minimum conditions that have to be made.

With respect to the point of attachment, the organization has a critical perspective. More better than the country most closely connected with the audiovisual fixation clause, it should have been the country most closely connected with the agreement clause that should have been applied. It is unfairly narrowed to audiovisual fixations while its actual ambit should have been the audiovisual fixation. The treaty does not define who is the producer. The habitual residence criteria could result in legal system shopping. In international co-productions the question as to who is the producer is unclear. This would also be subject to change.

If the criterion were based on the nationality of the majority of the performers it would result in arbitrariness and uncertainty. If it is to be the principle place of photography that too has its handicaps and is illogical. It would be the imposition of the majorities’ point of nationality on the minority in which the pivotal performers and others might not determine the equation. Instead of one or the other the courts should be allowed to take all these factors as well as other possible relevant points of attachment into consideration. If these cannot bridge and resolve the issue then the silent alternative would be a safe option.

The proposed Article 12 of the Convention says that the performer shall be deemed to have transferred all exclusive rights of authorization subject to written clauses to the contrary. It is significant to note that the word used is transferred and not assigned. Thus there appears to be no need of any formality even if the consent is retracted. Secondly, there does not appear to be the need for actual fixation but only consent for fixation. The pros and cons of this subtle difference would need to be addressed. It is noteworthy that it is the written contract to the contrary that would displace the presumption. Thus any equitable circumstance is not considered at all. Further it is to be pondered whether the written contractual clauses need to exist at the time of the consent to affix or whether it could be
brought in later. The difference from the earlier Convention is stark as in earlier ones the contractual preponderance is not provided for at all.

**Limitations and Exceptions in the Protocol**

The Protocol envisages the same limitations and exceptions with respect to the protection of performers in their audiovisual fixations as his provided to the literary and artistic works authors under the national legislation.\(^{338}\) It follows the same form as was adopted in the Article 16 of the WPPT. That is fair dealing provisions. It is to be noted that the word used is 'may' and not 'shall' and so even if the same pattern and standard is not followed it would be sufficient compliance. However it has been strictly laid down that this allowance should not conflict with the normal exploitation and should not unreasonably prejudice the legitimate interests of the performer. Under Article 13-2 in the Protocol wider words have been used to encompass more circumstances than compulsory licenses (that has been specified in the Rome Convention) that would obstruct the due realization of performers rights through the application of exceptions.

**The Moral Rights of Performers in Audiovisuals**

According to the propositions envisaged in the Protocol, moral rights are to subsist in the performer even after the transfer of the economic rights.\(^{339}\) The

\(^{338}\) Article 13 of the Protocol.

\(^{339}\) See the “Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences”, Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3,WIPO(1st August,2000), p.33.

< http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc > as on 1st January 2006. . Art 5 of the Protocol says that (1) independently of a performers economic rights, and even after the transfer of those rights, the performer shall have the right (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and (ii) to object too any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. Modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer shall not be considered prejudicial to the performers reputation. (2) The rights granted to a performer in accordance with paragraph (1) shall after death be maintained at least until the expiry of the economic rights, and shall be exercisable by the person’s or institutions authorized by the, legislation of the contracting party where protection is claimed. However, those contracting states whose legislation at the, moment of their ratification of or accession to this Treaty, remedies not provided for Protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained. (3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the contracting party where protection is claimed.
moral right shall grant the performer in the audiovisual the right to be identified as the performer of his performances except where the omission is dictated by the manner of use of the performance. The performer shall have the right of objecting to any distortion or mutilation or other modification of his performances that would be prejudicial to his reputation. However, there are exceptions to these Rights. Art. 5 of the Protocol provides that modifications consistent with the normal exploitation of the performance in the course of use authorized by the performance shall not be considered to be prejudicial to his reputation. It is pertinent to note in this regard that this condition is absent in the WPPT.\textsuperscript{340} It noteworthy that in the envisaged instrument the modification consistent with the normal exploitation of the performance is conceded as an allowance subject to the condition that it must be in the course of the use authorized by the performer. It is noteworthy that the exception is appended only to modification and not to objections against distortion or mutilation.

The ramifications of this provision and the exception to it are worth an analysis. The WPPT provides exceptions to the moral rights only in case of omission dictated by manner of the use of performance with respect to right of identity.\textsuperscript{341} In the Protocol both the manner of use of the performance with respect to identity and modifications consistent with the normal exploitation of the performance with respect to integrity are taken as exceptions. In other words, the modification of the performance can be done even if it is prejudicial to the reputation of the performer if it is consistent with the normal exploitation of the performance. This exception is not provided for in the WPPT.\textsuperscript{342} Thus mutilation and distortion cannot be saved by way of any exception. The crucial question as regards the second clause would be the point at which a modification can be termed as distortion and mutilation. The assessment of the sections would show that wide phraseology has been attempted as exceptions that could lead inevitably to a lot of confusion in interpretation. For instance the phrase 'manner of use' appears to be wider than the phrase 'normal exploitation'.

\textsuperscript{340} Article 5(1)& (2) of the WPPT.
\textsuperscript{341} Ibid.
\textsuperscript{342} Ibid.
A scan of Art 6bis of the Berne Convention reflects wide ranging differences between the moral rights guaranteed to authors and artists as distinguished from the protection guaranteed to the performers. This is particularly so with regard to the aspect of right to integrity. Even with regard to the right of identity an exception has been added that does not appear in the Berne Convention- the exception of 'manner of use of the performance'. This provides a highly flexible valve for the performer to be denied the attribution of paternity. The right to integrity is also clipped in several respects. The wordings 'other derogatory action' in relation to the said work is missing in the Protocol and also in the WPPT and secondly the word 'Honor' that appears with the word reputation is also taken away thereby narrowing the cause of complaint still further. The clause with regard to the normal exploitation further weakens the protection.

The right to integrity against distortion, mutilation or other modification would arise only if the same is prejudicial to the reputation of the performing artist. Thus any damage falling short of this standard would not be tantamount to the violation of the moral right. The Protocol moots an objective criterion to be assessed from the point of view of an objective viewer with experience in the pertinent category of audiovisual productions. The element of subjectivity appears to be fairly high in both adjudging the violation of right to paternity as well, as the right to integrity.

An aspect of significance is that the exception of manner of use with respect to the right to identity can be resorted to even with respect to uses not mandated by the author but the normal exploitation as an exception to the right to integrity can only be exercised if it is exercised in respect of uses authorized by the performer. As to the connotation of the words 'normal exploitation' a more specific elucidation appears to have met with difficulties considering the changing technological turf on which the media industry is placed. In the illustrative

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334 Von Lewinski, "The WIPO Diplomatic Conference on Audiovisual Performances" [2001] E.I.P.R. 337. A most controversial provision was the one about the moral rights. There was tremendous opposition to the incorporation of this exception particularly from the European community. The United States offered to replace the words with the phrase customary practice with agreed statement of specific inscription of what these
suggestions made in the notes to the Protocol normal exploitation has been defined as to include the use of new or changed technology, media, formats and/or methods of distribution, dissemination, making available or communication to the public. It is noteworthy that the definition takes into account only the mode of communicating the work. Thus unlike the popular understanding cannot be considered to include abridgement, condensation, editing and dubbing.

The question of attributing moral rights has been considered to be of fundamental importance by the representatives of the actors. This was particularly so in a digital environment. They were skeptical of the exceptions like those of the normal exploitation. According to them it should be limited to modifications necessitated by the particular use of the fixation. The exclusion of the words ‘derogatory action’ was found objectionable. There was the need to include this premise as well like in the Art. 6bis (1) of Berne Convention. The prospective application of moral rights was found disagreeable by the actors’ organization, as it was retrospective application that was most critical in a digital environment.

**Duration of Moral Rights**

Art 5(2) provides for the duration for which the performer or his representatives can exercise the moral rights. It is to last until the expiry of the economic rights. It does not cease upon the death of the performer, anything beyond this minimum can be statutorily granted by the contracting parties. With respect to designating the person or the institution that, after the death of the performing artist, are to exercise the rights, the Protocol provides full freedom to the contracting parties to do the needful. No minimum requirements have been made in the Protocol in this respect.

practices were composed of. The European community did not want the use of the phrase but only an agreed statement that mentioned the kind of activity like formatting or editing that would not be considered prejudicial to exploitation. Finally provisional agreement was modification taking due account of the nature of audiovisual fixation.  


The example of the possible situation of inserting pornographic bits into the film has been cited.  


347 See, “Basic Proposal For the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conferences”, (F.N.ntd next page)
**No Mention About Means of Redress**

Significantly the Protocol does not attempt to set forth or provide any hint with regard to the means of redress when the rights are violated.\(^{349}\)

**Waivability Not Stressed**

A most conspicuous omission is the absence of any objective stricture against waivability. This can be critically said to hurt the intent of moral rights jurisprudence as the performers are always placed in an unfair bargaining position. There is no mention of the possibility of alienability of the right or even inter-vivo transfer.\(^{350}\) Though this might appear to be remote with respect to the right of paternity, a transfer of the right to take a decision with respect to integrity cannot be ruled out. Further no guideline as to the manner of execution of the instrument has been proposed leaving the entire execution to the contracting states. In this regard it might be reminded that collecting societies and other administrators might not have as much interest in the moral rights regulation as in the economic rights. According to the International Federation of Musicians (FIM), the qualifications to the moral rights that have been granted would effect an unfair discrimination and enhance legal uncertainty\(^{351}\). The same quantum of protection as was carried in the WPPT has not been carried onto the Protocol and artists feel that the provisions of the WPPT need not be diluted in the application to the audiovisual performances.\(^{352}\) Another significant concern was raised as to how the sound part of an audiovisual communication was to be treated from the moral rights platform.\(^{353}\) The issue in question is whether the standards for the

\(^{349}\) Prepared by the Chairman of the Standing Committee on Copyright and Related Rights, IAVP/DC/3, WIPO (1st August, 2000), p.36.

\(^{350}\) Id., p.36.


\(^{352}\) Id., p.15. The establishment of a moral right in the WPPT represented a formal acknowledgement that the performance is a creative expression of the personality. It is surely illogical to suppose that this is less so in then audiovisual field than in the audio”. During the conclave the majority of members favored an extension of the WPPT clauses on moral rights to the audiovisual performances.

\(^{353}\) Id., p.14.
phonograms or the lesser rights in audiovisuals would be applicable to performers on the soundtrack.

One cannot discern any major deviation in sentiment among the countries that have contributed their propositions. A verbatim replica of the moral rights grant under the WPPT was desired by many of them. Among a slightly varied proposal the United States proposition was noteworthy for its intent on creating a narrower space for the right to integrity. This would have essentially granted much more freedom to the producers to exploit the performance. The condition essential to violate was to 'seriously prejudice' the reputation of the performer. The final draft of the basic proposal does not carry the term 'seriously' and therefore lightens the onus on the performing artist. Another aspect suggested by the United States was the incorporation of the additional clause requiring the performers moral rights interests to be accommodative to similar rights to be enjoyed by the other contributors.

The provisional agreement on moral rights replaced the controversial words 'modifications consistent with the normal exploitation of a performance' with the words 'talking due account of the nature of audio visual fixations,' complemented by an agreed statement. Despite the complexity of issues aggravated by opposing perspectives and practices a provisional agreement was achieved on 19 Articles of the convention and a call was given to convene another conference by September 2001. However the final formalization of an instrument has remained inconclusive. However this exercise at the international realm did bring to the fore the national, organizational standpoints on various issue and also impelled several studies both by the WIPO and other jurisdictions into the question of audiovisual performers and the realization that the audiovisual

355 Id., p.21. This was vehemently opposed by the European community a well as the performers organizations.
356 Id., p.22
358 Id., p.340.
performers rights at the national level would need to be a fine balance between safeguards and administrative flexibility both for the performer as well as the producers.