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Comments of AEPO on the « basic proposal » drafted by the Chairman of the Standing Committee of WIPO

These comments are the first observations from AEPO on the document communicated by WIPO entitled "Basic proposal for the substantive provisions of an instrument on the protection of audiovisual performances to be considered by the diplomatic conference", drafted by the Chairman of the Standing Committee on Copyright and Related Rights, to be discussed during the diplomatic conference that will take place from 7 to 20 of December 2000 in Geneva.

More detailed remarks, concerning certain elements of this proposal, will be communicated at a later stage.

1. Nature of the instrument (article 1):

AEPO considers that the future instrument **shall be a protocol to the WPPT of 1996.**

This is the will of the Diplomatic Conference that, in its resolution concerning audiovisual performances of 1996, called for "*the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of the preparatory work on a protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances, with a view to the adoption of such a protocol not later than in 1998*".

Moreover, a coherent protection for performers implies a simultaneous ratification by contracting parties of both instruments.

2. Definitions (article 2)

2.1. Performer

The proposed definition reproduces the already adopted definition of 1996, referring essentially to the performance of “literary or artistic works or expressions of folklore”.

This reference is satisfactory to distinguish in the audiovisual, if necessary, performers who would be “extras” and who might not be protected on the ground of intellectual property.

It will be up to national courts to solve the possible problems of interpretation, on the basis of the specific cases submitted to them.

2.2. Audiovisual performances

The proposal is to consider as such “*performances that can be embodied in audiovisual fixations*”.

This definition is by far too wide. Any performance, whatever is its nature, can be embodied in an audiovisual fixation, leading to conflictual consequences and situations in contradiction with the Rome Convention of 1996 and the WPPT of 1996 (and also European Directives).

The adoption of such a definition would for instance exempt from the payment of the equitable remuneration as granted in article 15 of the WPPT the broadcasting of commercial phonograms included in any audiovisual productions (that is to say all the commercial phonograms used by televisions...).

This definition would also be **in contradiction with** the definition of the Rome Convention of 1961 in its article 3 b), and with article 2 of the WPPT of 1996. The agreed statement concerning article 2 b) of the WPPT is clear enough in indicating that “*the definition of phonogram provided in Article 2 b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work*”.

This proposal of a definition of “audiovisual performances” would result in an opposite unjustifiable situation.

Moreover, this definition is useless in the future instrument (protocol). Only the audiovisual fixations must be defined, audiovisual performances as such being not the subject of rights.

The nature of a performance does not depend on the media in which it is embodied.

This definition should be suppressed.

2.3. Audiovisual fixation

The proposal to define an audiovisual fixation as “*the embodiment of moving images, whether or not accompanied by sound or representations thereof, from which they can be perceived, reproduced or communicated through a device*” can only generate confusion, and will be in contradiction with the Rome Convention and the WPPT.

The concept of "embodiment" does not correspond to the concept of fixation, but is referring to the act of reproduction.

A fixation must be understood as a first fixation made from an unfixed performance.

Taking into account the already existing definitions of the WPPT of 1996, an audiovisual fixation must be defined as a "fixation that is not a fixation of sound according to the WPPT of 1996".

3. Beneficiaries of the protection (article 3) :

AEPO is not in favour of the second paragraph of this article granting the benefit of the protection to rightholders that are not nationals of one of the Contracting Parties but who have their habitual residence in one of them.

First of all, the concept of habitual residence is not defined.

Moreover, taking into account the habitual residence (during which period ?) makes collective management of rights extremely difficult, performers travelling a lot during their career.

4. Moral right (article 5) :

The proposal reproduces the wording of article 5 of the WPPT of 1996.

But, concerning the right for the performer to oppose any modification of his performances that would be prejudicial to his reputation, a paragraph has been added stating that "*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*".

Consequently, are not considered as prejudicial to the moral rights of performers modifications :

- consistent with the normal exploitation of a performance
- and in the course of a use authorized by the performer.

The concept of normal exploitation may directly create a dependence between the content of the contract between the performer and the producer and the possibility of exercising the moral right.

Rather than to create such a handicap in the future protocol – that is not justified with regard to already adopted principles in the WPPT of 1996 – it would be more reasonable to maintain the definition of 1996 and to let to national legislation and courts the task to deal with specific situations.

On this point, the proposed draft gives a large flexibility, insofar as the draft article 5, 3° refers to national legislation with regard to "*the means of redress for safeguarding*" the moral right.

AEPO suggests to delete the second part of paragraph 5, 1), ii).

5. Rental right (article 9) :

The proposal of exclusive rental right is totally annihilated by the proposal of 2) according to which “ *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*”.

In application of this paragraph, the rental right becomes optional, unless it is demonstrated (how and by whom ?) :

- that the rental of audiovisual fixations leads to the “*widespread*” making of copies (how can the widespread copying be defined ?)
- that this “*widespread copying*” materially impairs the exclusive right of reproduction of performers (from which moment the exclusive right can be considered as materially impaired ?).

It is not true to indicate, as it is done in the comments on this proposal (9.03) that such a wording corresponds to the content of article 7. 2) of WCT of 1996, which is only referring to specific provisions concerning contracting parties applying a system of **equitable remuneration for the rental of commercial phonograms**.

This 2) of article 9 should be suppressed. If not, article 9 will never be applied.

6. Right of broadcasting and communication to the public (article 11) :

The proposal is based on an alternative :

- an exclusive right
- or an equitable remuneration right for which national legislation can set conditions for the exercise.

On the other hand, these rights can be the subject of full reservations, or, with regard to the remuneration right, also limited reservations.

This proposal does not offer a satisfactory level of protection for performers in the audiovisual.

AEPO considers that the future protocol should grant performers an exclusive right and also guarantee a right to an equitable remuneration, without possibilities of reservations in par (3).

The wording of article 11 could be the following :

(1) unchanged

(2) Contracting parties shall establish, in addition to the exclusive right provided for in paragraph (1), a right to equitable remuneration collected from the users 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, such remuneration being untransferable except to the benefit of a performers collective management organisation”.

(3) Suppressed

7. National treatment (article 4) :

With regard to performers’ rights in international instruments, national treatment has always been a limited national treatment, for reasons linked to the weakness of the minimal protection granted by these instruments (this is the case for the Rome Convention, WPPT and Trips agreement of WTO).

Two alternatives are proposed in the draft of the Chairman of the Standing Committee.

7.1.

Alternative C provides for an obligation to contracting parties to grant national treatment to nationals of other contracting parties with regard to :

- the rights specifically granted in the instrument, and
- such additional rights as it accords to its own nationals., with a possibility on this point to limit the protection “to the extent to which, and to the term for which, the latter contracting party grants such rights to the nationals of the former contracting party”.

As a matter of fact, the proposed full national treatment would lead to unbalanced and unfair situations. With regard to the reference to the application of reciprocity, it will be confronted to the difficulty in comparing the content and the extent of performers’ rights in different legal systems, where compulsory legislation and contractual practices can be mixed, making such a possibility only theoretical, and even encouraging and creating highly conflict situations.

This alternative is not acceptable.

7.2.

Alternative D reproduces the structure of national treatment as adopted in 1996 in WPPT, with a national treatment :

- limited to the exclusive rights specifically granted in the instrument,
- also including the right to equitable remuneration provided for in article 11 of the instrument, with application of the principle of reciprocity if a contracting party has made use of the possible reservations of article 11 3).

This proposal, taking into account of the content of the proposal of article 11, is dangerous.

It would be possible, for a contracting party that would grant an exclusive right to performers in the field of broadcasting and communication to the public of audiovisual fixations, with a presumption of transfer of rights to the benefit of the producer, to benefit from national treatment from another contracting party that would grant a right to an equitable remuneration to performers to these exploitations.

This is certainly not the aim of a number of countries that are trying to grant performers a real protection in order to improve their economic situation.

AEPO considers that such a national treatment cannot be accepted except if article 11 includes a compulsory right to an equitable remuneration.

If not, alternative D) should be modified, for instance in including in 1) the indication that : *“This right to an equitable remuneration will be covered by the national treatment if it is granted by the other contracting party whose nationals are claiming for the benefit of national treatment”*.

7.3.

Alternative D can only be accepted if article 11 is modified as proposed by AEPO, including :

- an exclusive right for broadcasting and communication to the public of audiovisual fixations
- AND an equitable remuneration
- WITH no possibilities of reservations.

Alternative D could then be accepted without its proposed paragraph (2).

8. Transfer of rights – Entitlement to exercise rights – Law applicable to transfers... (article 12):

AEPO wants to stress, generally, the need for performers to have a written contracts when they are employed. In a number of countries, this is not the case yet.

The Chairman of the Standing Committee has proposed, under this wording, four alternatives, with a favour for the two first alternatives, which are a matter or concern for performers.

8.1. Transfer of rights :

According to the first alternative, a presumption of transfer of performers' rights to the benefit of the producer would be organised.

The obligation for contracting parties, in an international instrument, to lay down to performers a presumption of transfer to the benefit of the producers is obviously not acceptable.

AEPO underlines that this obligation is all the more unacceptable since performers are already, in their relation with the audiovisual industry, in an unbalanced situation that can hardly be compensated in contractual negotiation, even without the handicap of a presumption of transfer.

Moreover, in a great number of countries, performers are contracting without any written contract. They will find themselves in the situation to have transferred all their rights, since their engagement, without even being aware of these rights or being given a chance to try to negotiate for their transfer...

An international instrument including such a presumption would be built essentially to satisfy the audiovisual industry.

8.2. Entitlement to exercise the rights :

The remarks under 8.1. are fully applicable to this alternative concerning the “entitlement to exercise the rights” that leads, under a different wording, to the same result.

8.3. Law applicable to the transfers

The aim of this alternative is to make a choice of the applicable law with regard to the specific situation of the law applicable to the transfer of performers rights in the audiovisual.

In the absence of possible contractual choice, the transfer should be governed “*by the law of the country most closely connected with the particular audiovisual fixation*”.

A point of attachment is then proposed (the place in which the producer has his headquarters or habitual residence), with subsidiaries solutions (the country of nationality of the majority of performers, and then the country in which the photography takes place).

AEPO is not in favour of this method, that encourages the lack of written contracts between performers and producers in the audiovisual.

Such a system would generate an extreme complexity by the use of uncertain criterions and, for instance, would make the USA legislation applicable, if there are no written contracts, for a film shot in Russia with German and Italian actors if the producer has its headquarters in Los Angeles.

One should note that, in a number of legislations, such provisions would be in contradiction with imperative rules of public order applicable in the field of labour legislation.

Last but not least, it does not seem reasonable, in a context of a multiplicity of current works and studies in the field of international private law; to adopt a rule with the intention to limit its application – in the sphere of intellectual property - to the relations between performers and producers for the audiovisual fixations.

This is why AEPO considers that the best alternative is alternative H, that would not include any provision on this point in the future instrument.

9. Term of protection (article 14) :

The proposal reproduces the term of 50 years adopted in article 7 of the WPPT of 1996, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in an audiovisual fixation.

AEPO wishes to remind that such a duration is notoriously inadequate for the protection of performers.

This is already the case for the WPPT, providing for a protection of 50 years computed from the end of the year in which the performance was fixed in a phonogram (one must note that the producer of phonograms is better protected, with a protection of 50 years from the end of the year in which the phonogram was published...). It is hardly acceptable that sound recordings, of very high quality (as it is the case for recordings from the end of the forties and the beginning of the fifties) may not be protected anymore.

The situation is similar with audiovisual recordings, and their high level of quality since the forties (color, cinemascope... and other technical improvements...).

AEPO proposes that the term of protection shall not be **inferior to a period of 70 years** computed from the end of the year in which the audiovisual fixation took place.

10. Application in time (article 19) :

10.1.

The proposed 2) of article 19 would lead, for a number of years, to the lack of application of the future instrument.

Contracting parties would be able not to apply the economic rights granted in the protocol to *“fixed performances that existed at the moment of entry into force of this Treaty”*.

The protocol would only apply to performances fixed after its entering into force.

2) of article 19 should be suppressed.

10.2.

The 3) of article 19 in application of which *“the protection provided for in this Treaty shall be without prejudice of any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty...”*

The reference to *“acts committed”*, that would not give ground to the rights granted in the instrument because they took place before its entering into force, would make illegal pirate activities accomplished before this date, legal.

One will note also that the reference to *“rights acquired”*, without any reference to a contractual situation, is also obscure and ambiguous.

Only the reference to “agreements concluded” should be maintained in article 19 3).