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THE FUTURE PROTOCOL SHOULD NOT LEAD TO A MODIFICATION OF THE WPPT OF 1996 TO THE DETRIMENT OF PERFORMERS

According to article 3 of the Rome Convention a phonogram means **“any exclusively aural fixation of sounds of a performance or of other sounds”**

According to the same article, broadcasting means **“the transmission by wireless means for public reception of sounds or of images and sounds...”**

Article 1 of the WIPO Performances and Phonograms Treaty of 1996 (WPPT) states that **nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Rome Convention and that the protection granted “shall leave intact and shall in no way affect the protection of copyright in literary and artistic works” and that consequently, “no provision of this Treaty may be interpreted as prejudicing such protection.”**

The comments attached to the basic proposal, also reflected in a statement of the Australian Delegation, on the disappearance of a phonogram published for commercial purposes used in an audiovisual work, can lead to an **expropriation for performers of a substantial part of the equitable remuneration** ensuring their protection in application of article 12 of the Rome Convention and article 15 of the WPPT.

The example of music videos, used by the phonographic industry, is particularly relevant.

A music video is a commercial phonogram illustrated by images.

A phonogram published for commercial purposes is a phonogram made available to the public through **copies (reproductions)** or, in application of the WPPT, through on demand systems.

This commercial phonogram is reproduced on an audiovisual medium.

The sound recording thus reproduced does not disappear. It remains unchanged, whether or not associated with images, still or moving. The sounds that are broadcast are the same.

The broadcasting of this music video is a broadcasting of this commercial phonogram within the meaning of article 12 of the Rome Convention or of article 15 of the WPPT.

The WPPT does and can not say something else.

Article 2 b) of the WPPT, which defines the phonogram as a "fixation of the sounds of a performance or of other sounds", excludes from its scope "a fixation incorporated in a cinematographic or other audiovisual work".

The incorporation of a fixation into an audiovisual work is not a reproduction of a pre-existing fixation, but the fixation of a live performance into an audiovisual work. It does not concern a reproduction of a commercial phonogram on an audiovisual medium.

Fixation of a live performance and reproduction should be clearly distinguished, contrary to the confusion created in the note 2.11 of the proposal.

On this point, as it has been said, **this notion of fixation, referring to the sole fixation of a live performance, which can only be done once, is clearly adopted in article 14 of the basic proposal. The fixation of the live performance is the point of departure for the term of protection to be granted to performers. Nobody will think of mixing this fixation with following reproductions...**

The agreed statement concerning article 2 b) WPPT clearly indicates that:

"It is understood 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 statement does not have the intention to indicate that a phonogram on a sound medium remains a phonogram even if this phonogram is reproduced in parallel on an audiovisual medium... In this case, it would be totally useless.

The meaning of this statement is that a commercial phonogram, even reproduced on another medium, generates rights that can not disappear through the reproduction.

Supporting the view that that a commercial phonogram reproduced on an audiovisual work would not generate the right to equitable remuneration in the sense of article 12 of the Rome Convention and article 15 of the WPPT, would moreover lead to absurd situations detrimental to performers, such as:

- There would only be equitable remuneration in the case of audio broadcasting and not in the case of audiovisual broadcasting including commercial phonograms, even if article 12 of the Rome Convention and article 15 of the WPPT cover audio broadcasting as well as audiovisual broadcasting. Indeed, the (many) commercial phonograms broadcast on television are most of the time reproduced on an audiovisual medium and accompanied by images... The **same commercial phonogram**, at one hand broadcast live from an audio medium simultaneously with images, or, at the other hand, reproduced on an audiovisual medium with the same images, would lead to the application of two different legal systems: equitable remuneration in the first case, no equitable remuneration in the second.
- Likewise, audio broadcasting on a radio of a sound part of a music video realised on the basis of a commercial phonogram would not lead to the payment of equitable remuneration, but the broadcasting of the same commercial phonogram on a sound medium, would.

The application of the legal system of equitable remuneration for the broadcasting of commercial phonograms does not depend on the nature of the medium in which the commercial phonogram is incorporated.

The AEPO does not ask the Diplomatic Conference to adopt its own reading of the WPPT nor of the Rome Convention, **but merely asks not to adopt provisions that would interpret the scope of these treaties.**

The participants of the Diplomatic Conference should know that there is a conflict in a certain number of countries between the phonographic industry which produces music videos and the performers in the field of application of equitable remuneration. The phonographic industry would like to have the benefit of all rights notably on music videos made on the basis of commercial phonograms, dealing directly with broadcasters, without payment of equitable remuneration.

The performers who have participated to the making of the commercial phonogram thus **lose the equitable remuneration** that should be guaranteed in application of article 12 of the Rome Convention and article 15 of the WPPT.

In order to avoid intervening and interfering in this conflict and adopting an instrument that would be contradictory to other international legal instruments, the Diplomatic Conference should adopt a neutral definition of an audiovisual fixation, without comments or agreed statements.

The AEPO therefore proposes the following definition in article 2 c):

“Audiovisual fixation means the embodiment of moving images or of moving images and sounds, or of the representation thereof, from which they can be perceived, reproduced or communicated through a device.”