

2002

## The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and Its Domestic and International Implications

Adler Bernard

Follow this and additional works at: <https://ir.lawnet.fordham.edu/iplj>



Part of the [Entertainment, Arts, and Sports Law Commons](#), and the [Intellectual Property Law Commons](#)

### Recommended Citation

Adler Bernard, *The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and Its Domestic and International Implications*, 12 Fordham Intell. Prop. Media & Ent. L.J. 1089 (2002).

Available at: <https://ir.lawnet.fordham.edu/iplj/vol12/iss4/4>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Intellectual Property, Media and Entertainment Law Journal by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact [tmelnick@law.fordham.edu](mailto:tmelnick@law.fordham.edu).

---

# The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and Its Domestic and International Implications

## **Cover Page Footnote**

Ralph Oman; Martino & Julie Bernard; Stan Bernard; Ralph Bernard; Tara Scott

# The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and Its Domestic and International Implications

**Adler Bernard\***

## INTRODUCTION

Creative control over one's artistic endeavor is an important right that an artist strives to retain. In addition to creative control, artists seek to prevent the unlawful distribution of the creative product, insist on being acknowledged as the creator of the work, and aim to achieve adequate compensation for the creation. Through union organization, treaties and national legislation, countries have tried to ensure that these rights, and others, are protected for those men and women whose talents have enlightened, challenged, and entertained us for centuries.

Utilitarian principles adopted in the U.S., and other common law countries, serve as a basis for affording copyright protection to writers, musicians and thespians under these legal regimes. These individuals are granted financial remuneration in return for access to their products. Through financial encouragement and statutory protection, artists and society as a whole benefit. In the U.S., copyrighted material including books, phonographs and audiovisual works, and the administrative processes associated with the creative arts are great sources of wealth both domestically and internationally. Due to this union of creativity, economics and legislation, the U.S. remains the premier exporter of entertainment content throughout the world.<sup>1</sup>

---

\* The author is a former employee of Sony Music Publishing; J.D. expected 2002, George Washington University Law School; B.A., New York University, 1997. The author would like to thank Professor Ralph Oman of George Washington University, Martino & Julie Bernard, Stan Bernard, Ralph Bernard, and Tara Scott.

<sup>1</sup>See S. REP. NO. 104-315, at 9 (1998) (noting that the U.S. "exports more copyrighted

Conversely, in countries such as France, Japan, and in regions such as Latin America and francophone Africa, an artist's work product is viewed as an extension of his or her personality. Ralph Oman, George Washington University Law School Professor and former U.S. Register of Copyrights, noted that "[t]he author's right in his work is one of the basic Rights of Man the French embraced in their Revolution of 1789."<sup>2</sup> Preservation of an artist's "Natural Rights," as opposed to his or her rights to economic compensation, is the primary reason why nations such as France seek to establish adequate means of protection for the moral or "spiritual" aspects of an artist's work product.

Technological developments have given rise to increased modes of distributing creative content, thus allowing purveyors of art to access creative works from almost anywhere in the world. For example, one could view the latest installment at the Whitney Museum in New York City from the comfort of one's home in Accra, Ghana. This increased exposure has expanded the artist's potential audience and has created additional sources of revenue. However, with technological innovation and increased exposure have come numerous logistical and legal problems for artists, utilitarian proponents and the natural rights regime legislators who scramble to keep the law in step with our rapidly changing society.

Via the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter "ROME"),<sup>3</sup> the 1976 U.S. Copyright Act,<sup>4</sup> the Agreement on Trade-Related Aspects of Intellectual Property (hereinafter "TRIPS"),<sup>5</sup> various E.U. Directives<sup>6</sup> and most recently

---

intellectual property than any other country in the world").

<sup>2</sup> See Professor Ralph Oman, The Impact of the Berne Convention on U.S. Copyright 1, 6, Address at the International Intellectual Property Association (Oct. 24, 1996).

<sup>3</sup> See International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Oct. 26, 1961, 496 U.N.T.S. 43 [hereinafter ROME].

<sup>4</sup> See 17 U.S.C. § 101 (1995).

<sup>5</sup> See Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, art. 9, 1869 U.N.T.S. 299, 33 I.L.M. 81, 87 [hereinafter TRIPS].

<sup>6</sup> See MARJUT SALOKANNEL, OWNERSHIP OF RIGHTS IN AUDIOVISUAL PRODUCTIONS: A COMPARATIVE STUDY Art. 5(1) (1997).

the World Intellectual Property Organization's (hereinafter "WIPO") Performances and Phonograms Treaty (hereinafter "WPPT") adopted in 1996,<sup>7</sup> domestic and international copyright negotiators have attempted to do just that.

With the adoption of the WPPT, musicians, songwriters and audio performers witnessed the enactment of legislation that granted them enhanced protection and control over their contributions to sound recordings, plays, motion pictures and other works that use music.<sup>8</sup> Uniform standards concerning the definition of authorship, length of ownership and control over the distribution, licensing and duplication of copyrightable content were set forth in this treaty and adopted by the contracting nations.<sup>9</sup>

However, one group of artists was conspicuously excluded from the scope of the WPPT's protection. The WPPT failed to outline a method for harmonizing legislation that would ensure protection of the rights of audiovisual performers in their contributions to audiovisual fixations.<sup>10</sup> Consensus could not be reached on the manner and scope of protection to be granted to actors.<sup>11</sup> These differences led WIPO members to abandon their hopes of including audiovisual performers within the WPPT.<sup>12</sup>

At the close of the 1996 diplomatic conference in Geneva, WIPO members passed a resolution that called for member states to reconvene at a later date to negotiate a treaty that would address audiovisual performers' rights.<sup>13</sup> In the months leading up to the review of a proposed treaty, U.S. and E.U. representatives were at odds over how the following issues should be addressed within the international accord: (1) national treatment; (2) the scope of

---

<sup>7</sup> See World Intellectual Property Organization Performances and Phonograms Treaty, Dec. 20, 1996, S. Exec. Doc. 105-17, 18, 36 I.L.M. 76 [hereinafter WPPT].

<sup>8</sup> See *id.*

<sup>9</sup> See *id.*

<sup>10</sup> See ROME, *supra* note 3; see also *Diplomatic Conference Set for December on Global Pact to Protect Audiovisual Rights*, 59 PAT. TRADEMARK & COPYRIGHT J. (BNA) 868 (2000).

<sup>11</sup> See *id.*

<sup>12</sup> See *id.* at 869.

<sup>13</sup> See *id.*

protection that should be afforded to performers for the public broadcast of their works; (3) transfer of rights; and (4) moral rights.<sup>14</sup>

After much debate, negotiators from over 120 nations met in December of 2000 at the Diplomatic Conference on the Protection of Audiovisual Performances. Agreement was reached on nineteen of the twenty proposed Articles that comprise the treaty. Consensus could not be reached on an appropriate manner with which audiovisual performers would transfer their rights to producers so as to allow producers greater ease in administering and licensing rights to the audiovisual production.<sup>15</sup>

This article will examine sixteen of the twenty articles within the proposed treaty and what impact the treaty would have had on the manner in which the rights of audiovisual performers are currently addressed domestically and internationally. First, the article will examine how audiovisual and phonogram performers are protected under the WPPT and TRIPS. Next, brief attention shall be paid to the domestic copyright systems of France, Germany and the United States. Finally, there will be an analysis of the treaty and a proposal put forward as to how the nations may want to resolve their differences concerning transfer of rights from audiovisual performers to producers.

## II. PROTECTION OF AUDIO AND AUDIOVISUAL PERFORMERS: HISTORICAL AND COMPARATIVE PERSPECTIVE

ROME provides minimum standards of protection to musicians, writers, actors and other creative individuals.<sup>16</sup> ROME prohibits the fixation of a performer's work without prior consent, and forbids the reproduction of works that diverge from that to which the performer had previously consented.<sup>17</sup> ROME also prohibits the broadcasting

---

<sup>14</sup> See *id.*

<sup>15</sup> See *Basic Proposal for the Substantive Provisions of an Instrument on the Protection of Audiovisual Performances to be Considered by the Diplomatic Conference*, World Intellectual Prop. Org. Diplomatic Conference on the Prot. of Audiovisual Performances, at 22, U.N. Doc. IAVP/DC/3 (Aug. 1, 2000) [hereinafter *Proposal*].

<sup>16</sup> See ROME, *supra* note 3.

<sup>17</sup> See *id.*

and communication of a performer's work without prior consent.<sup>18</sup> Furthermore, Article 4 of ROME calls for each contracting nation to grant national treatment to audio and audiovisual performers, and Article 14 calls for a minimum duration of twenty years of protection that shall be calculated from the end date of when fixation is first made.<sup>19</sup> Lastly, similar to subsequent treaties and statutes covering copyrightable material, ROME grants individuals a fair use exception that is found in Article 15(1).<sup>20</sup>

ROME's basic protection covers fixations made by the recording of audio performances and the filming of audiovisual works. ROME fails to address issues concerning moral rights, transfer of rights and the protection of a performer's contributions to a sound recording. The importance of each of these unresolved issues grew in the decades following the enactment of ROME in 1961 due in part to technological advancement, increased lobbying power of performers in their respective countries, and shifts in opinions on how the contracting nations viewed their cultural products. The WPPT and the Proposed Audiovisual Performances Treaty both set out to go beyond the basic protocols outlined in ROME.

Under the WPPT, 127 member nations sought to broaden performers' rights by: (1) including performers of folklore within the scope of the treaty; (2) granting audio performers rights with respect to the communication of their work via the broadcasting of their recordings; (3) establishing moral rights for performers; and (4) calling for a fifty-year minimum term of protection.<sup>21</sup> The WPPT proved to be a boon to audio performers because in addition to the rights above, audio performers were also granted inalienable moral rights that provided them with the right of attribution in their aural performances fixed in phonograms.<sup>22</sup>

The WPPT also addressed emerging formats of distribution of phonograms, particularly those performances transmitted via the

---

<sup>18</sup> *See id.*

<sup>19</sup> *See id.*

<sup>20</sup> *See id.*

<sup>21</sup> *See* WPPT, *supra* note 7, at 34.

<sup>22</sup> *See id.* at 26.

Internet. Included in the audio performer's exclusive right to authorize any communication to the public that incorporates fixed elements of their work, audio performers were afforded the right to control the distribution of their works through any form including on-line/on-demand services.<sup>23</sup> Furthermore, the treaty called for the ratifying nations to adopt a "general right of distribution and a rental right limited to computer programs, movies and works embodied in phonograms."<sup>24</sup> Provisions on rights management information and enforcement procedures that guard against tampering with technological measures designed to impede any attempted infringing reproduction, also found their way into the WPPT.<sup>25</sup>

The WPPT could have easily been seen as a great step towards harmonizing protection for audio performers and granting these artists increased economic rights in their performances. However, many of the 762 representatives of the 127 nations who attended the Geneva Conference would object to such a conclusion. Similar to ROME, the WPPT failed to explicitly address the rights of audiovisual performers in their audiovisual fixations. Many were disappointed by this omission.<sup>26</sup> Richard Arnold, author of *Performer's Rights*, a comparative study of European and U.S. audio performers' copyright protection, wrote that "[t]his [omission] was at the insistence of the U.S."<sup>27</sup> One could only assume that U.S. trade representatives were somewhat influenced by the political clout possessed by Hollywood producers who have long opposed setting universal standards for the protection of audiovisual performers other than those provided via labor law, the Screen Actors' Guild (hereinafter "SAG") representation, and individual personal service contracts.<sup>28</sup>

While performance rights under TRIPS are not as exhaustive as those mandated by the WPPT, they do require some discussion. Like the WPPT, TRIPS fails to address the rights of audiovisual

---

<sup>23</sup> *See id.*

<sup>24</sup> *See id.*

<sup>25</sup> *See id.* at 35.

<sup>26</sup> *See* RICHARD ARNOLD, *PERFORMER'S RIGHTS* § 1.94, at 35 (2d ed. 1997).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

performers within its scope of protection. TRIPS does grant phonogram performers certain rights including national treatment, most favored nations status, and detailed rules concerning minimum standards of protection for phonogram performances. The agreement incorporates minimum standards outlined in Articles 1 through 21 of the Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter "Berne"), but excludes Article 6<sup>bis</sup>'s requirement of moral rights.<sup>29</sup> Marshall Leaffer, author of *Understanding Copyright Law*, wrote that this omission was due in large part to the U.S. insistence that it be left out of TRIPS.<sup>30</sup> The U.S. argued persuasively that the General Agreement on Tariffs and Trade (hereinafter "GATT")/TRIPS intended to regulate *economic* rights, and since moral rights are not economic rights, they had no place in the negotiation.

Similar to the WPPT, TRIPS grants audio performers the right to prevent any fixation of their unfixed performances, and reproductions of their performances without prior consent.<sup>31</sup> Also, audio performers may block broadcasts made by wireless means and other communications to the public that occur without their prior consent.<sup>32</sup> One other important aspect of TRIPS with respect to copyright law is that it requires participating nations to provide both civil and administrative procedures and remedies that copyright owners can use to enforce their rights.<sup>33</sup>

Unlike the WPPT, the omission of audiovisual performers protection in TRIPS was not solely the United States' doing. Thomas Murray, author of *The U.S. – French Dispute over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution was "Rent-Seeking"*, writes that, "France and the other European Community nations wanted the audiovisual sector to be excluded from the services section (General Agreement on Trade in Services) of the General

---

<sup>29</sup> See TRIPS, *supra* note 5.

<sup>30</sup> See MARSHALL LEAFFER, *UNDERSTANDING COPYRIGHT LAW* § 12.11, at 398 (3d ed. 1999).

<sup>31</sup> See TRIPS, *supra* note 5.

<sup>32</sup> See *id.*

<sup>33</sup> See *id.*

Agreement on Tariffs and Trade (GATT) talks; the U.S. wanted the sector included.<sup>34</sup> The American entertainment industry, which lobbied heavily for inclusion, was seen as the ‘big loser.’<sup>35</sup> The debate centered around a proposal put forward by France and other European nations that would have placed a quota on the number of audiovisual products that they would allow to be imported into their territories, particularly products emanating from the U.S.<sup>36</sup>

Jack Valenti, president of the Motion Pictures Association of America (hereinafter “MPAA”), lobbied on behalf of the U.S. film industry in opposing any such restriction.<sup>37</sup> Mr. Valenti did not have a difficult time convincing the Clinton Administration that such a quota would greatly impair not only the film industry, but also would adversely affect the U.S. economy. Murray noted the following:

The American Entertainment industry is the second largest export industry in the U.S. after the aerospace and aviation sector, generating foreign revenues of approximately \$18 billion annually and producing a trade surplus of \$4 billion in 1992 alone. Furthermore, 414,700 workers were directly employed in the film industry and, for every two direct jobs, three were created in support industries.<sup>38</sup>

French representatives strictly opposed free audiovisual trade and pushed for an audiovisual performances protection initiative to be handled separately from industrial service products. The justification asserted was their desire to foster and protect local European customs and moral values.<sup>39</sup> Quotas entitled “The Television Without Frontiers Directive” imposed restrictions on E.U. members that would require broadcasters to air certain minimum percentages of audiovisual productions of European origin.<sup>40</sup> The U.S. also took

---

<sup>34</sup> Thomas Murray, *The U.S. – French Dispute over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory: How an Efficient Market Solution was “Rent-Seeking”*, 21 MD. J. INT’L L. & TRADE 205 (1997).

<sup>35</sup> *Id.*

<sup>36</sup> *See generally id.* at 205, 207.

<sup>37</sup> *See generally id.*

<sup>38</sup> *Id.* at 207.

<sup>39</sup> Murray, *supra* note 34, at 207-08.

<sup>40</sup> *See* Council Directive 89/552 on the Coordination of Certain Provisions Laid Down

2002] *WIPO'S PROPOSED AUDIOVISUAL PROTECTIONS* 1097

exception to the Europeans' insistence on continuing subsidies to member states' film industries.<sup>41</sup>

Like the United States' position during the GATT and WPPT talks, French trade representatives were greatly influenced by their film industry lobbyists. Arguments for the preservation of a distinct European identity within European broadcast content may have been sincere, but this was only part of the story. German director Wim Wenders and a host of other European producers, writers, directors and audiovisual performers were greatly involved in ensuring that "cultural goods" were left out of the GATT/TRIPS agreement.<sup>42</sup>

Political pressures and selfish cultural and economic concerns all contributed to the exclusion of provisions that would have guaranteed audiovisual performers minimum standards of international protection that were already afforded to audio performers. However, E.U. members have taken affirmative steps towards harmonizing the laws governing audiovisual performers with those that already safeguard the rights of audio performers. The first step was to reach a consensus on who is deemed to be the 'author' of an audiovisual performance. Member states adopted E.U. Directive 92/100/EEC, which states that "the principal director of a cinematographic or audiovisual work shall be [considered] its author."<sup>43</sup>

This same E.U. Directive also endeavors to protect the rights of audio and audiovisual performers by calling any illegal fixation of a performer's live performances an act of piracy.<sup>44</sup> The directive enacts provisions outlining the exclusive licensing and economic rights of audiovisual performers similar to those adopted in the WPPT. Audiovisual performers have the exclusive right to distribute, authorize or prohibit the broadcasting of their performances made via wireless means, and other communications to

---

by Law, Regulation or Administration in Member States Concerning the Pursuit of Television Activities, 1989 O.J. (L 298) 23, *cited in* Murray, *supra* note 34, at 208.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.*

<sup>43</sup> SALOKANNEL, *supra* note 6, at Art. 5(1).

<sup>44</sup> *See id.* at Art. 5(2)(1).

the public.<sup>45</sup> Lastly, audiovisual performers have the right to authorize or prohibit “the rental and lending of the fixations of their performances.”<sup>46</sup>

In an effort to allow for an easier means of administering all of the various rights of the contributors to an audiovisual production, the French system, like most other domestic copyright systems, sets forth a method by which all rights are transferred from audiovisual performers and writers to the producer or director of the work. French law explicitly states: “Contracts binding the producer and the authors of an audiovisual work, other than the author of a musical composition with or without words, shall imply, unless otherwise stipulated . . . assignment to the producer of the exclusive exploitation rights in the audiovisual work.”<sup>47</sup>

With respect to audiovisual performers, French law clearly states that “the signing of a contract between the performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce, and communicate to the public the performance of the performer.”<sup>48</sup> Although the contract between an artist and the producer is viewed primarily as an employment contract, it has been given certain legal effect under the country’s artist rights law.<sup>49</sup> Marjut Salokannel wrote that “[a]s a counterpart to the automatic assignment of rights to the producer, the law provides that such contract shall specify a separate remuneration for each mode of exploitation of the work.”<sup>50</sup>

Similar to French law, the German system establishes that the producer of an audiovisual work holds the right to control the distribution and fixation of the audiovisual production.<sup>51</sup> With the adoption of the E.U. Directive 92/100/EEC, performers were at least in theory granted the exclusive right to prohibit the reproduction and distribution of their audiovisual fixations to the public under German

---

<sup>45</sup> *See id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at Art. 8(1)(2)(1).

<sup>48</sup> SALOKANNEL, *supra* note 6, at Art. (8)(1)(2)(2).

<sup>49</sup> *See id.*

<sup>50</sup> *Id.*

<sup>51</sup> *See id.* at Art. 8(1)(1)(1).

law.<sup>52</sup> However, to balance this new directive with the existing rights granted to producers, audiovisual performers are deemed to have assigned their rights once they finalize an agreement with the producer with regard to their participation in the audiovisual production.<sup>53</sup> Furthermore, unlike the French system, performers' rights in an audiovisual production are usually collectively assigned to the producer via collective labor agreements.<sup>54</sup> Employment law and artists' rights law governs the relationship between the two parties.

The granting of moral rights protection to audio and audiovisual performers has been hotly contested in France, Germany and throughout most of the European Union. Most European countries view protecting an artist's moral rights as a worthwhile endeavor. At the same time, these nations understand the importance of taking into account the nature and scale of an audiovisual production with respect to moral rights.<sup>55</sup> Just imagine a scenario in which a performer could dictate which scenes could be used in the final version of a film or the placement of their name in the end credits. Such authority granted to each major artist in an audiovisual production could greatly delay, if not derail, the completion of the project. Due to this concern, European countries have placed great restrictions on performers' ability to exercise their rights of integrity and attribution. In France, performers are prohibited from exercising their moral rights during the production of a work, and "it is only after the final version of the film has been approved by a common accord between the director and producer that moral rights protection may come into play."<sup>56</sup> At that point in the production, due to the transfer of rights from the performers to the producer or director via

---

<sup>52</sup> *See id.*

<sup>53</sup> *See* SALOKANNEL, *supra* note 6, at Art. 8(1)(1)(2).

<sup>54</sup> *See id.*

<sup>55</sup> *See id.* at Art. 2(2)(1).

<sup>56</sup> *See id.* at Art. 9(2)(1).

the signing of a contract, only the director or producer may exercise their moral rights, not the performer.<sup>57</sup>

Unlike European copyright systems, the American copyright regime views an audiovisual performer's contribution to an audiovisual production as a work made for hire.<sup>58</sup> According to § 101 of the 1976 Copyright Act, the employer, or the one who commissioned the work, is deemed to be the author.<sup>59</sup> The executive producer is more than likely the employer under the U.S. system. The relationship between audiovisual performers and producers is governed under labor and employment law.<sup>60</sup> Guilds such as SAG represent performers and negotiate performers' economic rights and general employment terms with respect to their participation in any audiovisual performance.<sup>61</sup> Thanks in part to this relationship, audiovisual performers have managed to reap excellent financial benefits, albeit sacrificing some protection under copyright law.

Unlike European performers, U.S. audiovisual performers have not technically been afforded moral rights. Writers, directors and audio performers also lack a strict statutory regime of moral rights protection as outlined under Berne. Several states have passed statutes that recognize a visual artist's rights of integrity and paternity in limited circumstances.<sup>62</sup> Under the federal scheme, visual artists are granted the rights of integrity and attribution under the Visual Artists Rights Act (hereinafter "VARA").<sup>63</sup> But this limited protection does not cover the works of writers, directors or audiovisual and audio performers. Many in the U.S., including the Executive Director of the Writer's Guild East, view the lack of moral rights protection within the audiovisual context as being problematic.<sup>64</sup>

---

<sup>57</sup> *See id.*

<sup>58</sup> *See* 17 U.S.C. § 101 (1995).

<sup>59</sup> *See id.*

<sup>60</sup> *See* SALOKANNEL, *supra* note 6, at 334.

<sup>61</sup> *See id.*, § 10.2 at 305.

<sup>62</sup> *See* LEAFFER, *supra* note 30, § 8.28(B), at 362.

<sup>63</sup> *See* 17 U.S.C. § 106A (1996).

<sup>64</sup> *See* SALOKANNEL, *supra* note 6, § 10.2.2, at 307.

### III. WIPO TREATY FOR THE PROTECTION OF AUDIOVISUAL PERFORMANCES

Consensus was reached on all but one of the twenty Articles put forth in the proposed WIPO Treaty.<sup>65</sup> The 120 nations reached provisional agreement on legislation that would harmonize international treatment of audiovisual performers' rights with respect to distribution, reproduction, national treatment, the audiovisual performer's economic rights to unfixed performances and other entitlements granted to performers in their audiovisual fixations.<sup>66</sup>

Articles 1 and 2 cover the preamble and provide definitions of key terms used in the treaty.<sup>67</sup> One important provision in Article 2 deals with the definition of 'performer' that was agreed upon by the contracting nations.<sup>68</sup> Before the proposed treaty was presented to the respective nations, representatives on behalf of the U.S. film industries had opposed ratifying such a treaty due to the effect it would have on the administration of rights in audiovisual productions.<sup>69</sup> Donald Wear of Discovery Communications, who represented North American Broadcasters at the Convention, noted that as a result of the proposed treaty broadcasters would be subject to "significantly higher administrative burden[s]."<sup>70</sup>

In acknowledgment of such a fear, negotiators agreed that the definition of 'performers' would be limited to marquee audiovisual performers.<sup>71</sup> Extras or ancillary audiovisual performers would not be afforded protection under the proposed treaty. In the eyes of the contracting states, "ancillary participants' do not qualify for protection because they do not, in proper sense, perform literary or

---

<sup>65</sup> See USPTO TODAY, November-December 2001, at <http://www.uspto.gov/web/offices/ac/ahrpa/opa/ptoday/nov-dec2001.pdf> (last visited Feb. 8, 2002).

<sup>66</sup> See *Proposal*, *supra* note 15.

<sup>67</sup> See *id.*

<sup>68</sup> See *id.* at 22.

<sup>69</sup> *WIPO to Debate Rights*, TELEVISION DIGEST, Sept. 25, 2000, at [http://www.findArticles.com/cf\\_0/m3169/39\\_40/65465363/print.jhtml](http://www.findArticles.com/cf_0/m3169/39_40/65465363/print.jhtml) (last visited Jan. 6, 2002).

<sup>70</sup> See *id.*

<sup>71</sup> See *Proposal*, *supra* note 15, Art. 2., at 22.

artistic work.”<sup>72</sup> The treaty does grant each contracting nation the right to draft domestic legislation that would give the “extras” some protection under domestic audiovisual performances law.<sup>73</sup> The International Federation of Actors (hereinafter “FIA”), an international lobbying society for audiovisual performers, is in agreement with this resolution.<sup>74</sup> The definition of a performer in the proposed treaty is similar to that adopted in the WPPT with two minor additions: (1) “interpretive arts” is added to the list of protected performances, and (2) an audiovisual performer who engages in the expression of folklore is covered within the scope of the treaty.<sup>75</sup>

Article 3 provides a clear statement of who would be protected under the proposed treaty. An audiovisual performer must be a national of one of the contracting nations to be afforded protection.<sup>76</sup> If an audiovisual performer is a national of a contracting nation, the performer will be protected even if he or she is habitually residing in a non-contracting nation. This language mirrors that which is found in Article 3(2) of Berne.<sup>77</sup>

Article 5 deals with the hotly contested debate over the protection of moral rights.<sup>78</sup> The WPPT was the first international instrument to grant moral rights to performers. Not all contracting nations incorporated such protection into their domestic laws. In particular, as mentioned above, the U.S. became a party to both the Berne Convention in 1989 and the WPPT without explicitly adopting any federal law extending moral rights to all areas of creativity. The U.S. did pass VARA, which grants visual artists the rights of attribution

---

<sup>72</sup> *Id.*

<sup>73</sup> *See id.*

<sup>74</sup> *See* INTERNATIONAL FEDERATION OF ACTORS, *Comments on the WIPO Basic Proposal: Prepared for the Diplomatic Conference, December 2000*, at 4, at [http://www.fia-actors.com/new/wipo\\_2000\\_comments\\_eng.htm](http://www.fia-actors.com/new/wipo_2000_comments_eng.htm) (last visited Jan. 30, 2002).

<sup>75</sup> *See Proposal, supra* note 15, Art. 2., at 22 (Aug. 1, 2000).

<sup>76</sup> *See id.* at 28.

<sup>77</sup> *See* Paris Act relating to the Berne Convention for the Protection of Literary and Artistic Works, Jul. 24, 1971, 1161 U.N.T.S. 3 [hereinafter Berne].

<sup>78</sup> *See Proposal, supra* note 15, at 32.

and integrity in their works, but audio and audiovisual performers are not covered within its scope.<sup>79</sup>

Under Article 5 of the proposed instrument, audiovisual performers are granted the right to be identified as a performer in an audiovisual production.<sup>80</sup> This clause mirrors that which was adopted in Article 5 of the WPPT.<sup>81</sup> An exception was added to the treaty that would prohibit audiovisual performers from exercising their moral rights when, "omission is dictated by the manner of the use of the performance."<sup>82</sup> This exception is important for it allows producers to omit a performer's identity in an effort to preserve the integrity of a work, and it grants contracting nations some flexibility in incorporating Article 5 into their domestic law.

Article 5 also states that audiovisual performers would have the authority to oppose any material distortion of their performances fixed in an audiovisual medium that would be prejudicial to their reputation.<sup>83</sup> In an effort to decrease the number of possible causes of action available to a performer under moral rights legislation, alterations or modifications to a production including standard editing and abridgment, would not qualify as material distortion.<sup>84</sup> In order for the performer to establish a claim under this clause, an individual assessment of the way the distortion or change was made would be necessary.<sup>85</sup> Similar to moral rights regulations in France and Germany, such an assessment would be conducted using a subjective standard, with close attention paid to the rights of additional right holders in the production.<sup>86</sup> The notes to the proposed Article clarify this point in stating that any alteration would not be prejudicial unless it was meaningful or substantial.<sup>87</sup>

---

<sup>79</sup> See 17 U.S.C. § 106A (1996).

<sup>80</sup> See *Proposal*, *supra* note 15, at 32.

<sup>81</sup> See WPPT, *supra* note 7, Art. 5, S. Exec. Doc. 105-17, 18, 36 I.L.M. at 82.

<sup>82</sup> *Proposal*, *supra* note 15, at 32.

<sup>83</sup> See *id.*

<sup>84</sup> See *id.* at 34.

<sup>85</sup> See *id.*

<sup>86</sup> See *id.*

<sup>87</sup> See *Proposal*, *supra* note 15, at 36.

Finally, Article 5 of the proposed treaty puts forth a means by which an audiovisual performer could waive the moral rights either by contract or collective labor agreement.<sup>88</sup> A performer could agree to waive the rights to be identified as the performer or to object to any substantial change to fixations of their audiovisual performances through an agreement between the parties explicitly waiving moral rights protection. Such a gesture on the part of the performer would more than likely be granted in return for financial remuneration.

Moral rights protection is a thorny issue for the FIA. The FIA wishes to include language from Article 6(1) of Berne that would cover any derogatory action, even that which is not explicitly listed in the treaty or currently documented in any national law, in relation to the performance.<sup>89</sup> The FIA views the granting of moral rights protection to audiovisual performers as important because “[i]t would seem a serious shortcoming if the proposed Instrument did not give a featured actor starring in a cinema film recourse against a producer who decided to insert a number of pornographic scenes in the released motion picture attempting to boost box office appeal.”<sup>90</sup>

Agreement on the scope of Article 5 was difficult for the negotiators to reach. United States and E.U. representatives unequivocally disagreed with each other. The U.S. pushed for a narrow reading of moral rights law that would permit the making of minor changes to an audiovisual work without requiring approval from the audiovisual performer.<sup>91</sup> Q. Todd Dickinson, the former Director of the U.S. Patent and Trademark Office, stated that “certain modifications are part of the normal exploitation of the work, including modifications necessary in reducing the cinema-sized work to the television-sized work or editing the work to exclude scenes considered inappropriate for certain audiences.”<sup>92</sup> Conversely, E.U.

---

<sup>88</sup> See *id.* at 36.

<sup>89</sup> See INTERNATIONAL FEDERATION OF ACTORS, *Comments on the WIPO Basic Proposal: Prepared for the Diplomatic Conference, December 2000*, at 4, at [http://www.fia-actors.com/new/wipo\\_2000\\_comments\\_eng.htm](http://www.fia-actors.com/new/wipo_2000_comments_eng.htm) (last visited Jan. 30, 2002); see also Berne, *supra* note 77.

<sup>90</sup> *Id.*

<sup>91</sup> *WIPO Members Fail to Agree on Performers' Rights for Audiovisual Treaty*, 61 PAT. TRADEMARK & COPYRIGHT J. (BNA) 231, 234 (2001).

<sup>92</sup> *Id.*

negotiators lobbied for strong protection of audiovisual performers' moral rights that would afford limited exceptions to producers taking action without audiovisual performers' prior approval.<sup>93</sup>

Article 4 addresses the manner with which national treatment would be granted to audiovisual performers. Under the proposed treaty, contracting nations are required to afford equivalent protection and entitlements to nationals of other countries to those they grant to their own citizens with respect to the exclusive rights outlined in the treaty.<sup>94</sup> But the treaty does allow each nation to limit the degree of uniform national protection with respect to each of the exclusive and economic rights set forth in the treaty.<sup>95</sup> The language dealing with 'rights' and 'exclusive rights' in Article 4 is intended to encompass moral rights protection as well. A similar interpretation was used in finding that moral rights protection is included under the umbrella of national treatment in Article 4 of the WPPT.<sup>96</sup>

The U.S. and the E.U. disagreed on the appropriate scope of this Article. The U.S. wanted an expanded definition of national treatment that would subsume all audiovisual-related rights.<sup>97</sup> On the other hand, the E.U. lobbied for a narrow definition of this Article.<sup>98</sup> European Union representatives felt that only rights explicitly outlined in the proposed treaty should be given national treatment. Nonetheless, the two sides managed to work out their differences by mutually endorsing the above-referenced language as part of Article 4 of the treaty.

The economic rights granted to performers under the proposed treaty would augment compensation schemes for audiovisual performers currently in place in various domestic laws. Article 6 grants performers limited economic rights in their unfixed performances. This right simply allows performers to possess the

---

<sup>93</sup> *See id.*

<sup>94</sup> *See id.*

<sup>95</sup> *See id.*

<sup>96</sup> *See Proposal, supra note 15; see also WPPT, supra note 7, Art. 4.*

<sup>97</sup> *See Proposal, supra note 15, Art. 2, at 22.*

<sup>98</sup> *See id.*

exclusive right to control communications to the public, and the right to regulate the fixation of their live performances.<sup>99</sup>

Audiovisual performers are given the right to control direct and indirect reproductions of their audiovisual fixations via the proposed treaty.<sup>100</sup> According to the notes to Article 7, language concerning ‘direct and indirect reproductions’ is used to highlight the fact that the location of the reproduction of an original fixation will have no significance on the performer’s right to control reproduction of the audiovisual fixation.<sup>101</sup> This provision is an exact replica of Article 7 of the WPPT.<sup>102</sup>

Surprisingly, Article 7 fails to carve out a fair use exception to the audiovisual performer’s exclusive distribution right. Article 9(2) of Berne does provide some language for the granting of exceptions to the reproduction right.<sup>103</sup> But Berne leaves the crafting of an appropriate standard up to each contracting nation. Under U.S. law, the “fair use doctrine” has been used to defend against claims of copyright infringement, as long as the one asserting fair use complies with the four factors set out in 17 U.S.C. § 107.<sup>104</sup> European countries such as the United Kingdom and France adopted fair dealing provisions into the E.C. Rental and Lending Directive.<sup>105</sup> Similar to the U.S. exception, an E.C. fair dealing defense to what would be an infringing reproduction applies to all copyrightable works.<sup>106</sup> Whether the contracting parties would include such an exception in implementing the audiovisual performers treaty remains to be seen.

Article 8 of the proposed instrument grants audiovisual performers the exclusive authority to control the distribution of performances

---

<sup>99</sup> See *id.* at 38.

<sup>100</sup> *Id.* at 40.

<sup>101</sup> *Id.* at 41.

<sup>102</sup> See *Proposal*, *supra* note 15, at 40; see also WPPT, *supra* note 7, Art. 7.

<sup>103</sup> See Berne, *supra* note 77, Art. 9(2).

<sup>104</sup> See 17 U.S.C. § 107 (1995).

<sup>105</sup> See Council Directive 92/100 on Rental and Lending Right and on Certain Rights Related to Copyrights in the Field of Intellectual Property, 1992 O.J. (L 346/61), cited in ARNOLD, *supra* note 26, § 5.04, at 122.

<sup>106</sup> See *id.*

that incorporate their audiovisual fixations.<sup>107</sup> This provision would only apply to the first sale of original copies of the fixed audiovisual performance. After the first sale, each country would be allowed to devise additional rules governing audiovisual performers' rights to equitable remuneration for subsequent transfers.<sup>108</sup>

Article 9 concerns the audiovisual performers' exclusive right to authorize the rental and lending of original copies of their fixations.<sup>109</sup> Although quite prevalent in the E.U., and adopted into the WPPT, a performer's right to control the rental and lending of his or her fixations has not made its way into U.S. law.<sup>110</sup> Understanding this dynamic, treaty negotiators designed an exception to this exclusive right that would allow each contracting nation the authority to waive compliance with this provision if it is deemed that, "commercial rental has [not] led to widespread copying of fixed performances that materially impairs the right of reproduction."<sup>111</sup> This exception was more than likely put forward by U.S. negotiators. Such an assumption is valid due to the fact that U.S. movie studios receive large amounts of annual income from the rental of audiovisual productions. Furthermore, a similar exception was drafted into Article 11 of TRIPS.<sup>112</sup> It is uncertain whether E.U. nations would be required to grant national treatment with respect to Article 9 as it applies to U.S. audiovisual works due to this conflict in protection.<sup>113</sup>

Similar to Article 6's recognition of the role digital communications play in the distribution of copyrightable material, Article 10 grants performers the exclusive right to make their fixed performances available by any means, including wire or wireless channels.<sup>114</sup> This Article expands the scope of protection available to an audiovisual performer under Articles 8 and 11, as it deals with making a work available through interactive or on-demand

---

<sup>107</sup> See *Proposal*, *supra* note 15, at 42.

<sup>108</sup> See *id.*

<sup>109</sup> *Id.* at 44.

<sup>110</sup> See WPPT, *supra* note 7, Art. 9.

<sup>111</sup> *Proposal*, *supra* note 15, at 44.

<sup>112</sup> See *id.*; see also TRIPS, *supra* note 5, art. 14.

<sup>113</sup> See LEAFFER, *supra* note 30, § 12.12, at 541.

<sup>114</sup> See *Proposal*, *supra* note 15, at 46.

technology.<sup>115</sup> Furthermore, viewers or customers who receive an audiovisual production via this mode of distribution are not allowed to make the work further available to the public or distribute it without the consent of the performer.<sup>116</sup> This proposed Article is just a baseline standard, as contracting parties are free to enact more stringent legislation under their domestic law.

Under Article 11, contracting parties agreed to provide audiovisual performers with the exclusive right to authorize and control any broadcasting and communications to the public that incorporate their audiovisual productions.<sup>117</sup> The treaty defines communication to the public to include fixed and unfixed performances transmitted by any medium.<sup>118</sup> This definition is important for two reasons. First, the treaty grants audiovisual performers rights over the dissemination of their performances whether or not they are first fixed. Additionally, by providing language that covers transmissions via any medium, the treaty allows performers to regulate on-line communications of their audiovisual performances. The only exception to the above right would be for re-broadcasting. A similar exception is carved out in Article 6 of the WPPT.<sup>119</sup>

The language concerning the treaty's treatment of the audiovisual performers' authority over broadcasts to the public was much tamer than what was initially proposed. Broadcasters lobbied for a "watered-down provisional text."<sup>120</sup> Broadcasters were able to secure an exception that allows each contracting nation to inform WIPO that a right of equitable compensation would be provided to audiovisual performers in lieu of an exclusive right.<sup>121</sup> Under paragraph 2 of Article 11, contracting nations have the ability to establish a right of remuneration system that would include the establishment of an agency designed to clear the aforementioned use of the audiovisual content, and collect revenue generated from this

---

<sup>115</sup> *See id.*

<sup>116</sup> *See id.*

<sup>117</sup> *See id.* at 48.

<sup>118</sup> *See id.* at 25.

<sup>119</sup> *See WPPT, supra note 7, at 27.*

<sup>120</sup> *WIPO Members Fail to Agree on Performers' Rights for Audiovisual Treaty, supra note 91, at 233.*

<sup>121</sup> *See Proposal, supra note 15, at 49.*

activity.<sup>122</sup> Such an exception greatly diminishes the administrative burdens placed on broadcasters, and manages to secure the audiovisual performers' claim to compensation for the transmittal of their performances.

This model for compliance with Article 11 mirrors the scheme now in place in the U.S. with regard to phonograms, musical works and the performance rights attached to these copyrightable creations. Musical works are performed extensively over the radio, and in clubs and restaurants. Because of this fact, individual copyright holders would have a difficult time enforcing their performance right. Performance rights societies such as the American Society of Composers, Authors and Publishers (hereinafter "ASCAP"), and Broadcast Music, Inc. (hereinafter "BMI") provide a means by which musical composers and publishers license and enforce their valuable performance right.<sup>123</sup> ASCAP and BMI also collect income earned from such licenses, and distribute royalties to the musical composers.<sup>124</sup>

An audiovisual rights society could similarly be established to administer the broadcast and communication rights of audiovisual performers. Many nations possess an audio-performances rights society that carries out duties similar to either ASCAP or BMI.<sup>125</sup> In the U.S., SAG represents audiovisual performers collectively. One of SAG's duties is securing the economic rights of audiovisual performers in an audiovisual production.<sup>126</sup> SAG, or another entity like it, would have little difficulty carrying out the collection of royalties stemming from an audiovisual performer's broadcast and communication rights.

---

<sup>122</sup> *See id.*

<sup>123</sup> *See* LEAFFER, *supra* note 30, § 8.22, at 348; *see also* ASCAP, *About ASCAP*, at [http://www.ascap.com/lp\\_about\\_ascap.html](http://www.ascap.com/lp_about_ascap.html) (last visited Jan. 30, 2002); BMI, *BMI Backgrounder*, at <http://www.bmi.com/about/backgrounder.asp> (last visited Jan. 30, 2002).

<sup>124</sup> *See id.*

<sup>125</sup> Bennett M. Lincoff, *Worldwide Music Performance Rights: The Devil in the Details*, at <http://musicomm.net/rerclinoffdevil.htm> (last visited Jan. 30, 2002).

<sup>126</sup> *See* SAG (Screen Actors Guild), *Membership Services Frequently Asked Questions*, at [http://www.sag.org/faq/membership\\_services\\_faq.html#1](http://www.sag.org/faq/membership_services_faq.html#1) (last visited Feb. 6, 2002).

Before engaging in a discussion of Article 12's treatment of transfer of rights, it is worth mentioning provisions in Articles 14, 15 and 16 concerning the term of protection, and each contracting nation's technological measurements and rights management information obligations. Article 14 sets out a fifty-year term of protection measured from the year fixation is first made.<sup>127</sup> This standard is in compliance with both WPPT and TRIPS.<sup>128</sup>

Article 15 deals with obligations concerning technological measures to which each contracting nation must adhere.<sup>129</sup> Under this Article, each contracting nation is obligated to establish baseline legal protection and effective legal remedies against unauthorized circumvention of technological measures. The notes corresponding to Article 15 define this standard as "national level provisions that provide genuine support for the rights provided for in the proposed Instrument."<sup>130</sup> While the Article does not outline what remedies are necessary to meet compliance, it does characterize those remedies that possess strong deterrent features, and sufficient sanctions against forbidden acts as being in full compliance with the treaty.<sup>131</sup> One could assume from the enactment of this provision that negotiators understood the importance of each nation establishing effective laws and preventative measures, and the positive effect global compliance would have on consumers and businesses that desire to engage in electronic commerce.

Article 16's Obligations concerning Rights Management Information requires each nation to provide legal remedies to any audiovisual performer who discovers a person knowingly engaging in any of the prohibited acts listed in paragraph 1(i).<sup>132</sup> Prohibited acts include the removal of any electronic rights management information without the consent of the audiovisual performer; distributing and broadcasting or communicating to the public, without the consent of the audiovisual performer, any audiovisual

---

<sup>127</sup> See *Proposal*, *supra* note 15, at 60.

<sup>128</sup> See WPPT, *supra* note 7; see also TRIPS, *supra* note 5, at 305.

<sup>129</sup> See *Proposal*, *supra* note 15, at 62.

<sup>130</sup> *Id.*

<sup>131</sup> See *id.*

<sup>132</sup> See *id.* at 64.

performance with knowledge that the rights management information has been deleted or tampered with.<sup>133</sup> Establishing electronic rights management information is completely voluntary. Only when such information has been attached to the audiovisual work would a contracting nation be required to comply with enforcement of this right.

#### IV. TRANSFER OF RIGHTS: NORTH ATLANTIC TUG-OF-WAR

All of the above proposed Articles gained consensus at the December 2000 Geneva Conference.<sup>134</sup> Despite all the hard work, the convening nations could not come to terms on how audiovisual performers would transfer their rights to producers who contracted the services of the audiovisual performer. Transfer of rights deals with the means by which audiovisual performers, and other owners of copyrightable content incorporated in a audiovisual production, transfer their rights to the producer of the work. Such a system allows audiovisual producers or directors to control the bundle of copyrightable works within their audiovisual production, thus allowing for an easier means of administering and licensing the production.

Battle lines over transfers of rights were drawn well before the 120 nations convened in Geneva. Both E.U. and U.S. negotiators knew that their individual approaches were quite different from one another, and that ultimately one side would have to acquiesce for ratification.<sup>135</sup> Such a concession never came to pass.

Four alternative Article 12 proposals were put forth at the meetings. The first, Alternative E, would have established a rebuttable presumption of the transfer of an audiovisual performer's exclusive rights under the proposed treaty to the producer of the production.<sup>136</sup> As soon as the audiovisual performer consented to the

---

<sup>133</sup> *See id.*

<sup>134</sup> *See Proposal, supra* note 15, at 17.

<sup>135</sup> *See WIPO Members Fail to Agree on Performers' Rights for Audiovisual Treaty, supra* note 91, at 234.

<sup>136</sup> *See id.* at 54.

incorporation of his or her performance in the production, the audiovisual performer would have triggered the transfer of the audiovisual performance rights. Alternative F would have provided a “presumed entitlement to exercise the rights.”<sup>137</sup> This presumption would apply so long as there was not a written agreement between the producer and the audiovisual performer to the contrary.<sup>138</sup> Both Alternatives E and F would have been mandatory upon the contracting nations.<sup>139</sup>

The FIA is unilaterally opposed to Alternative E. The Federation believes that if this version of Article 12 were adopted, the instrument would change from being one designed to protect performers, to a treaty granting increased protection to producers.<sup>140</sup> Furthermore, the FIA appropriately notes that adopting this Alternative would force many jurisdictions to reduce the level of protection currently afforded to audiovisual performers.<sup>141</sup>

The third proposed scheme for the transfer of rights was Alternative G, which served to bridge the two competing legal systems. This alternative would allow each country to establish its own standards for transfer of rights with the laws of the country that is most closely connected to the audiovisual production governing the legal arrangement between producer and performer.<sup>142</sup> The last suggested model was Alternative H, which would provide each nation the ability to decide whether or not they would enact legislation governing transfer of rights.<sup>143</sup> Furthermore, if enacted, each contracting party would be allowed to determine the nature and scope of rights transfer legislation with no intervention from WIPO.<sup>144</sup>

---

<sup>137</sup> *Id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See Proposal, supra* note 15, at 54.

<sup>140</sup> *See* INTERNATIONAL FEDERATION OF ACTORS, *Comments on the WIPO Basic Proposal: Prepared for the Diplomatic Conference, December 2000*, at 4, at [http://www.fia-actors.com/new/wipo\\_2000\\_comments\\_eng.htm](http://www.fia-actors.com/new/wipo_2000_comments_eng.htm) (last visited Jan. 30, 2002).

<sup>141</sup> *See id.*

<sup>142</sup> *See Proposal, supra* note 15, at 56.

<sup>143</sup> *See id.*

<sup>144</sup> *See id.*

On their face, both Alternatives G and H would seem to be ill-advised if the convening nations truly endeavored to strike an international treaty aimed at harmonization and certainty. Each of these two alternatives would preserve the status quo. The notes to the proposed Article best sum up this predicament: "Alternative G gives some certainty as to what national law will apply but does not harmonize national laws. Alternative H would perpetuate the current situation."<sup>145</sup>

Differences between E.U. and U.S. negotiators stemmed from each group's desire to incorporate language found in their respective legal systems. The E.U. set out to protect E.U. law in this area by making the transfer of rights from the audiovisual performer to producer contingent upon the performer's express consent.<sup>146</sup> The E.U. is unconditionally opposed to an automatic transfer of rights regime.<sup>147</sup> It is quite logical for one to be persuaded by the proposals put forth by the E.U. member states. E.U. countries have for years endeavored to harmonize the protection afforded to audiovisual performers with that already granted to audio performers.<sup>148</sup> E.U. community law has managed to grant protection to audiovisual performers while at the same time allowing producers to acquire rights in the audiovisual production via an administratively friendly contractual consent system.<sup>149</sup>

Conversely, the motion picture and television industries of the U.S. offer audiovisual performers unparalleled financial remuneration for their contributions to a work.<sup>150</sup> Under the current U.S. system, performers have extensive contracts with motion

---

<sup>145</sup> *Id.*

<sup>146</sup> See *WIPO Members Fail to Agree on Performers' Rights for Audiovisual Treaty*, *supra* note 91, at 232.

<sup>147</sup> See *WIPO Official Says Deal on Global Audiovisual Pact Likely Despite Differences*, 61 PAT. TRADEMARK & COPYRIGHT J. (BNA) 112 (2000).

<sup>148</sup> See Thierry Stoll, *Introductory Speech for the E.U. Delegation at the Diplomatic Conference on the Protection of Audiovisual Performances* (Dec. 12, 2000), at [http://europa.eu.int/comm/internal\\_market/en/intprop/news/diplomat.htm](http://europa.eu.int/comm/internal_market/en/intprop/news/diplomat.htm) (last visited Jan. 31, 2002).

<sup>149</sup> *See id.*

<sup>150</sup> Bennett M. Lincoff, *Worldwide Music Performance Rights: The Devil in the Details*, at <http://musicomm.net/rcrclincoffdevil.htm> (last visited Jan. 31, 2002).

picture studios through collective bargaining agreements with SAG.<sup>151</sup> Organizations such as SAG allow both producers and performers the opportunity to go about their jobs without the unnecessary grief of negotiating agreements covering each performer's exclusive rights, and whether or not they had been cleared before shooting the production. In an effort to bring such a model to the international level, the U.S. trade representatives fought for the recognition of their system, which ensures an automatic transfer of rights to the producer.<sup>152</sup> United States officials argued that this proposed system is "essential in order to allow producers to show their works abroad without running into a thicket of legal and bureaucratic hurdles."<sup>153</sup> One U.S. official characterized the U.S. approach as a more laissez-faire method of doing business, while the E.U. system endeavors to regulate economic relationships.<sup>154</sup>

The disagreement between the U.S. and E.U. negotiators centered on two words: 'entitlement' versus 'agreement.' The E.U. wanted the following language included in Article 12:

[A]n agreement to exercise such rights based on the consent of the performer to the fixation shall be governed by the law of the country chosen by the parties, or to the extent that the law applicable to the agreement between the performer and the producer has not been chosen, by the law of the country with which the agreement is most closely connected.<sup>155</sup>

The aforementioned language reads as if there was a merger of Alternative F with Alternative G. The U.S. was in agreement with the majority of the language cited above, except that U.S. negotiators wanted "an entitlement to exercise" to replace "an agreement to exercise." The reason for the United States' opposition to the phrasing of the E.U. proposal was that U.S. negotiators wanted the

---

<sup>151</sup> *See id.*

<sup>152</sup> *See WIPO Members Fail to Agree on Performers' Rights for Audiovisual Treaty, supra* note 91, at 232.

<sup>153</sup> *Id.*

<sup>154</sup> *See id.*

<sup>155</sup> *See id.* at 231.

treaty to reflect the current U.S. practice of creating work made for hire arrangements that allow for the automatic transfer of rights from performer to producer.<sup>156</sup> Furthermore, U.S. negotiators believed that parties who agree to such arrangements should be allowed to decide what national law governs their relationship.<sup>157</sup> One U.S. negotiator felt that entitlement was “absolutely needed . . . in the text in order to ensure a balanced agreement which establishes performers’ rights while also establishing certainty and clarity in the ability of producers to show their films internationally.”<sup>158</sup>

European Union negotiators took exception to the U.S. approach. In their opinion, the U.S. was attempting to protect the rights of producers, not audiovisual performers, and trying to “inject private law into an international treaty and in effect impose its legal practices on other countries.”<sup>159</sup> European Union officials felt that such a policy could lead to confusion for producers, legislators and courts who could be faced with the following hypothetical situation: Usually when a work is produced in Italy using Italian actors, Italian law would govern the relationships between the parties. However, under the U.S. transfer of rights policy, an Italian judge could be bound to apply U.S. law to settle any dispute if the parties had contractually agreed to such an arrangement.<sup>160</sup>

#### CONCLUSION

The potential benefits of an audiovisual performances treaty are numerous. Producers, audiovisual performers and broadcasters on both sides of the Atlantic would benefit from a uniform set of laws that would provide audiovisual performers increased financial rewards and creative control, while affording producers, consumers

---

<sup>156</sup> *See id.* at 232.

<sup>157</sup> *See WIPO Members Fail to Agree on Performers’ Rights for Audiovisual Treaty, supra* note 91, at 232.

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See id.*

and others a clearer understanding of what they can and cannot do with audiovisual fixations.<sup>161</sup>

Although the agreement would more than likely increase the price of movie tickets worldwide, it would grant rights to audiovisual performers in territories where such entitlements are nonexistent. Jorgen Blomqvist, WIPO Copyright Division Director, noted that “[i]f you are an actor, in many countries you have no rights whatsoever.”<sup>162</sup> Artists such as Hong Kong cinema star Maggie Cheung would be given the opportunity to take action against individuals who pirate her work in Venezuela.<sup>163</sup> Furthermore, an audiovisual performer would have the ability to control the accessibility of their audiovisual performances via digital means and the authority to bring an action against individuals who digitally distribute the audiovisual performer’s fixation without the performer’s consent.<sup>164</sup> Ms. Cheung commented on this dilemma by stating:

On a more personal level, I am very concerned about the Internet because when I look up ‘Maggie Cheung’ on the Internet I see about 25 sites on my work, or photos of me, even clips from my films which I didn’t even know about and nobody even asked me if I would allow this to be put onto a site.<sup>165</sup>

Audiovisual performers have lobbied in support of a treaty that would transform how legislators perceive their participation in the motion picture and television industries.<sup>166</sup> The FIA believes that it is important to have the economic rights of audiovisual performers governed under intellectual property rights law as opposed to labor

---

<sup>161</sup> See WIPO MAGAZINE, *Substantial Progress on Pact for Performers’ Rights* (Feb. 2001), available at <http://www.wipo.org/publications/general/121/2001/février.pdf> (last visited Feb. 2, 2001).

<sup>162</sup> See Alexander Higgins, *Action Call on Actors’ Rights: Actors are being Ripped Off by Broadcasts of Their Work Overseas and on the Internet, Says the UN, Which is Moving to Give Them Greater Protection*, TOWNSVILLE BULLETIN, Dec. 9, 2000, at 29.

<sup>163</sup> See *Actors Urge Anti-Piracy Protection in Internet Age* (Dec. 12, 2000), at <http://terra.com/movies/articulo/html/mov1808.htm> (last visited Feb. 26, 2002).

<sup>164</sup> See *id.*

<sup>165</sup> *Id.*

<sup>166</sup> See *WIPO Members Fail to Agree on Performers’ Rights for Audiovisual Treaty*, *supra* note 91, at 232.

law. Katherine Sand, General Secretary of the FIA, noted the difficulty performers have with their employers under a labor law regime. Ms. Sand stated that "U.S. performers had to strike for residual payments and are constantly under pressure from producers. . . . [T]hey have as precarious an existence as anyone else in the world."<sup>167</sup>

In an effort to strike an accord at the next conference on the proposed Audiovisual Performances Treaty, E.U. and U.S. legislators may want to reevaluate their respective positions on Article 12. Both parties agree on the overall language found in the proposed Article, and earnestly desire to ratify the treaty. Although some may view the E.U. approach as being pro-audiovisual performer, more so than the United States' proposal, much can be said for the financial rewards and critical acclaim U.S. audiovisual performers have earned over the years. The SAG strike of 2000 displayed the power of the audiovisual performer's labor force.<sup>168</sup> The cohesive strength of U.S. entertainment unions were put on display again during the summer of 2001 as the Writers Guild of America pushed for increased attribution rights for their contributions to audiovisual productions. Ms. Sand's assessment of the plight of audiovisual performers may have been technically accurate, but she failed to address the benefits that have and will continue to come to U.S. audiovisual performers due to the SAG strike, their negotiating power and their easy access to the public airwaves.

Probably the best approach to resolving the dispute concerning the language of Article 12 would be to allow each nation the opportunity to choose either of the two models for rights transfer. A similar resolution was made in allowing the U.S., and other nations, the opportunity to become part of the WPPT without requiring these nations to adopt domestic moral rights legislation. Although such an approach would not foster true international harmonization, it would pave the way for the ratification of a treaty that guarantees

---

<sup>167</sup> *Id.* at 233.

<sup>168</sup> For details on the strike of 2000, see Chris Neumer, *SAG: Strike One*, at <http://centerstage.net/stumped/articles/sag.shtml> (last visited Jan. 31, 2002); Screen Actors Guild, at <http://www.sag.org> (last visited Jan. 6, 2002).

1118

*FORDHAM INTELL. PROP., MEDIA & ENT. L.J.*

[Vol.12:

audiovisual performers baseline protection in regions of the world where they currently lack such entitlements.

Whether or not such an accord can be reached at the next WIPO conference on audiovisual performers' rights is uncertain. At the time of this writing, E.U. and U.S. negotiators had not conceded to such an approach, but remained optimistic that an agreement would be forthcoming. Due to rapid globalization and increased piracy of entertainment content, negotiators may be pressed by their respective audiovisual performers' rights societies and guilds, into quickly striking a resolution. Such a step would certainly be welcomed by negotiators and audiovisual performers alike.