

**INTERNATIONAL COPYRIGHT LAW – PART II:
THE ROME CONVENTION, 1961 (INTERNATIONAL
CONVENTION FOR THE PROTECTION OF
PERFORMERS, PRODUCERS OF PHONOGRAMS
AND BROADCASTING ORGANIZATIONS)**

**By Alhaji Tejan-Cole
Deputy Registrar, BELIPO**

INTRODUCTION

This Article focuses on the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to as the Convention), and the implementation of the provisions of the Convention by certain Member States of the World Trade Organization (hereinafter referred to as WTO). The article shows that the Convention has been “indirectly” adhered to by several Member States of the WTO who may not necessarily be Contracting States of the Convention.

While the Berne Convention for the Protection of Literary and Artistic Works protects the rights of authors, the Convention protects the rights of performers, producers of phonograms and broadcasting organizations. These rights are described as rights related to copyright because they protect the intermediaries in the production, recording or broadcasting of the works of copyright owners.¹ It has been observed that the object of related rights is “....to protect those people or organizations that add substantial creative, technical or organizational skill in the process of bringing a work to the public”.² Related rights do not cover actual works but things involved in the bringing of the work to the public.³ Related rights are also referred to as neighbouring rights because they are viewed as “neighbours” to the protection of works of authorship under copyright.⁴ Section 20 of the Copyright Act of Trinidad and Tobago⁵ defines related or neighbouring

¹ Collective Management of Copyright and Related Rights, World Intellectual Property Organization, 2.

² Introduction to Intellectual Property (DL-101), World Intellectual Property Organization/WIPO Worldwide Academy, Module 3: Related Rights, 2.

³ Ibid.,3.

⁴ Essential Elements of Intellectual Property, Overview of the Basic Notions of Copyright and Related Rights and Treaties Administered by WIPO, CD-ROM published by the WIPO Academy, World Intellectual Property Organization, paragraph 54.

⁵ Act No. 8 of 1997.

rights as the property rights subsisting in performances, sound recordings and broadcasts.

Related rights emerged from the technological revolution.⁶ Specifically, the emergence of the phonogram industry led to the emergence of a movement that clamoured for the protection of the rights of performers whose performances were incorporated in phonograms.⁷ The first protection for related rights was done in countries sharing the common law tradition.⁸ This protection came in the form of copyright protection against the unauthorized copying of phonograms.⁹ The United Kingdom Copyright Act 1911, and the copyright laws of the United States and Australia, granted copyright protection to producers of sound recordings.¹⁰

The first international attempt to protect related rights occurred at the Diplomatic Conference held in Rome in 1928 to revise the provisions of the Berne Convention for the Protection of Literary and Artistic Works.¹¹ This Diplomatic Conference coincided with the involvement of the International Labour Office in the fight to protect performers as employed workers.¹² At the Brussels “Berne Convention” Revision Conference held in 1948, it became crystal clear that authors’ groups were opposed to the idea of offering copyright protection to performers and producers of phonograms.¹³

However, there was a great deal of support for the development of an international agreement that will provide separate protection for related rights.¹⁴ A draft Convention was finally prepared by a Committee of Experts convened at The Hague (The Netherlands) in 1960 by BIRPI (the predecessor organization to WIPO), the United Nations Educational, Scientific and Cultural Organization (hereinafter referred to as UNESCO) and the International Labour Office.¹⁵ This draft Convention was adopted as the final text of the Convention by a Diplomatic Conference held in Rome on October 26, 1961 (hence the name—the Rome Convention).¹⁶ The

⁶ Essential Elements of Intellectual Property, *supra*, paragraph 57.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*, paragraph 58.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

Convention is jointly administered by UNESCO, the International Labour Office and by WIPO.¹⁷

MEMBERSHIP AND SAFEGUARD CLAUSE

According to Article 24 (2) of the Convention, only countries that are both Member States of the United Nations and members of the Berne Union or parties of the Universal Copyright Convention are allowed to become parties to the Convention. A country that ceases to be a party to either the Berne Convention or the Universal Copyright Convention automatically ceases to be a party to the Convention.¹⁸ This requirement that Member States of the Convention had to also be parties to the copyright conventions led to the Convention being described as a “closed” convention.¹⁹ The Convention can also be described as a revolutionary convention because it established new international norms in an area that was still virgin territory for most national legislation that existed at the time the Convention was signed.

The Convention commences by declaring that it shall not affect or prejudice the protection of copyright in literary and artistic works.²⁰ This provision is referred to as the “safeguard clause” and is aimed at preventing any provision of the Convention from being interpreted as prejudicing the protection of copyright in literary and artistic works.²¹ Thus, the acquiring of the authorization of a musician (related rights owner) for the use of a song does not absolve the user of the requirement to also seek the authorization of the composer (copyright owner). According to section 107 (2) (a) of the Copyright Act of Belize,²² the rights conferred on performers for a performance, and persons having recording rights in a performance, by the Act, are separate from any copyright and moral rights in the work used or performed in the performance.

¹⁷ Collective Management of Copyright and Related Rights, *supra*, 3.

¹⁸ Article 28(4).

¹⁹ Essential Elements of Intellectual Property, *supra*, paragraph 59.

²⁰ Article 1.

²¹ Essential Elements of Intellectual Property, *supra*, paragraph 59.

²² Chapter 252 of the Laws of Belize, Revised Edition 2000.

DEFINITIONS

Article 2(1) of the Convention defines national treatment as the treatment given by the laws of a Contracting State to performers, producers of phonograms and broadcasting organizations claiming protection in such state. The principle of national treatment requires a Contracting State to grant performers, producers of phonograms and broadcasting organizations of another Contracting State, the same protection that the former Contracting State grants to its own nationals.²³

The performer must be a national of the Contracting State and the performance must take place, be broadcasted, or be first fixed, on the territory of such state.²⁴ The producer of the phonogram must also be a national of the Contracting State and the phonogram must be first fixed or first published on the territory of such state.²⁵ Finally, a broadcasting organization must have its headquarters in the Contracting State and the broadcasts must be transmitted from transmitters situated in such a state, in order to enjoy the benefits of national treatment.²⁶ Further, the Convention states that the doctrine of national treatment shall not affect the protection and limitations specified in the Convention.²⁷

Article 3 of the Convention provides the following crucial definitions-

- “(a) “performers” means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works;
- (b) “phonogram” means any exclusively aural fixation of sounds of a performance or of other sounds;
- (c) “producer of phonograms” means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds;

²³ Essential Elements of Intellectual Property, supra, paragraph 60.

²⁴ Article 2(1)(a).

²⁵ Article 2(1)(b).

²⁶ Article 2(1)(c).

²⁷ Article 2(2).

- (d) “publication” means the offering of copies of a phonogram to the public in reasonable quantity;
- (e) “reproduction” means the making of a copy or copies of a fixation;
- (f) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds;
- (g) “rebroadcasting” means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization.”.

The definitions contained in Article 3 of the Convention have been largely replicated in the laws of most Member States of the WTO. Section 3 of the Copyright Act of Trinidad and Tobago virtually reproduces the above definition of a performer. The Trinidadian legislation substitutes the words “sound recording” for the word “phonogram” occurring in the Convention. The Trinidadian legislation defines a sound recording as-

“any exclusively aural fixation of the sounds of a performance or of other sounds, regardless of the method by which the sounds are fixed or the medium in which the sounds are embodied but does not include a fixation of sounds and images, such as the sound track of an audiovisual work.”.

Although the Trinidadian definition is more extensive than the definition of a “phonogram” in the Convention, both definitions basically focus on exclusively aural recordings. The Trinidadian legislation defines a producer of a sound recording as the natural or legal person who makes the arrangements necessary for the sound recording to be made.²⁸ According to section 5 (1) of the Copyright Act of Belize-

“In this Act “publication”, in relation to a work-

- (a) means the issue of copies to the public; and

²⁸ Section 3.

- (b) includes, in the case of a literary, dramatic, musical or artistic work, making it available to the public by means of an electronic retrieval system.”.

The Belizean legislation later states that a work that is not offered to the public in reasonable quantities shall not be regarded as falling within the ambit of the definition of the word “publication” in the Act.²⁹ The definition of the word “publication” in the Belizean legislation can be described as more technologically sensitive than the definition of the word “publication” in the Convention. This is because of the fact that the Belizean provision includes publication by means of electronic retrieval systems within the ambit of the definition.

This technological sensitivity is also seen in the definition of the word “reproduction” in the Trinidadian legislation. Section 3 of the Trinidadian legislation defines a reproduction as the making of copies of a work in any material form, including the making of electronic copies of the work. The Trinidadian legislation defines the word “broadcasting” as the public communication of a work, a performance or a sound recording by wireless transmission.³⁰ The influence of new technological developments on this definition can be seen in the inclusion of transmission by satellite.³¹ The definition of broadcasting also states that the word “rebroadcasting” shall have a corresponding meaning.³²

NATIONAL TREATMENT

Contracting States are required to accord national treatment to performers for performances that take place in other Contracting States.³³ National treatment shall also be granted to a performer whose performance is incorporated in a phonogram protected under Article 5 of the Convention (national treatment for producers of phonograms), or is not incorporated in a phonogram but is included in a broadcast protected under Article 6 of the Convention (national treatment for broadcasting organizations).³⁴

²⁹ Section 5(4).

³⁰ Section 3.

³¹ Ibid.

³² Ibid.

³³ Article 4(a).

³⁴ Article 4(b) and (c).

Contracting States are required to grant national treatment to producers of phonograms who are nationals of other Contracting States.³⁵ This requirement is known as the criterion of nationality.³⁶ National treatment shall also be accorded if the first fixation on the phonogram was made in another Contracting State or if the first publication of the phonogram took place in another Contracting State.³⁷ These two requirements are referred to as the criterion of fixation and the criterion of publication respectively.³⁸ A phonogram shall still be regarded as first published in a Contracting State if it is published in the Contracting State within thirty days of its first publication in a non-Contracting State.³⁹ Such publication is referred to in the Convention as simultaneous publication.⁴⁰

Article 5 (3) of the Convention allows a Contracting State to opt out of the obligation of applying either the criterion of fixation or the criterion of publication. This opting out is done by means of a notification deposited with the Secretary-General of the United Nations (hereinafter referred to as the Secretary-General) at the time the Contracting State ratifies, accepts or accedes to the Convention.⁴¹ The notification can also be deposited at any time after such ratification, acceptance or accession.⁴² In the latter case, the notification becomes effective six months after its date of deposit.⁴³

Contracting States are also required to grant national treatment to a broadcasting organization that has its headquarters in another Contracting State.⁴⁴ National treatment shall also be granted to a broadcasting organization that utilizes a transmitter situated in another Contracting State for its broadcasts.⁴⁵ A Contracting State is also permitted to notify the Secretary-General that it will only accord national treatment to broadcasts if the headquarters and transmitter of the broadcasting organization are situated in the same Contracting State.⁴⁶ Such notification shall be deposited with the Secretary-General at the time the Contracting State ratifies, accepts or

³⁵ Article 5 (1)(a).

³⁶ Ibid.

³⁷ Article 5(1)(b) and (c).

³⁸ Ibid.

³⁹ Article 5(2).

⁴⁰ Ibid.

⁴¹ Article 5(3).

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Article 6(1)(a).

⁴⁵ Article 6(1)(b).

⁴⁶ Article 6(2).

accedes to the Convention, or at any time thereafter.⁴⁷ A notification deposited after the Contracting State ratifies, accepts or accedes to the Convention shall become effective six months after the date of deposit of the notification.⁴⁸

MINIMUM RIGHTS FOR RELATED RIGHTS HOLDERS

The Convention then goes on to list a series of minimum rights for performers, producers of phonograms and broadcasting organizations. The importance of each of these rights is concisely stated in the following quotation-

“The rights of performers are recognized because their creative intervention is necessary to give life, for example, to musical works, dramatic and choreographic works, and motion pictures, and because they have a justifiable interest in the legal protection of their individual interpretations.

The rights of producers of recordings are recognized because their creative, financial and organizational resources are necessary to make recorded sound available to the public in the form of commercial phonograms (tapes, cassettes, CDs, Mini Discs, etc.). They also have a legitimate interest in having the legal resources necessary to take action against unauthorized uses, whether it be through the making and distribution of unauthorized copies (piracy) or in the form of unauthorized broadcasting or communication to the public of their phonograms.

Likewise, the rights of broadcasting organizations are recognized because of their role in making works available to the public, and in light of their justified interest in controlling the transmission and retransmission of their broadcasts.”⁴⁹

⁴⁷ Ibid.

⁴⁸ Ibid.

⁴⁹ Introduction to Intellectual Property (DL-101), supra, 7.

Minimum Rights for Performers

The first set of minimum rights listed in the Convention is the set of rights granted to performers. Article 7 (1) of the Convention states that protection given to the performer shall include the possibility of preventing-

- “(a) the broadcasting and communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;
- (b) the fixation, without their consent, of their unfixed performance;
- (c) the reproduction, without their consent, of a fixation of their performance:
 - (i) if the original fixation was itself made without their consent;
 - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
 - (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.”.

The use of the expression “include the possibility of preventing” was aimed at allowing Member States the freedom of utilizing other means of protecting the minimum rights of performers.⁵⁰ For example, the United Kingdom also relies on penal statutes to protect the rights of performers.⁵¹ Also, the use of the word “performance” in this context refers to a live

⁵⁰ Essential Elements of Intellectual Property, supra, paragraph 65.

⁵¹ Ibid.

performance by one person or a group of persons.⁵² According to section 21 (1) of the Copyright Act of Trinidad and Tobago-

“Subject to the provisions of section 25 (limitations on protection), a performer shall have the exclusive right to do, authorize or prohibit any of the following acts:

- (a) the broadcasting or other communication to the public of his performance other than a communication through an electronic retrieval system, except where the broadcasting or the other communication-
 - (i) is made from a fixation of the performance, other than a fixation made under the terms of section 25; or
 - (ii) is a rebroadcasting made or authorized by the organization initially broadcasting the performance;
- (b) the fixation of his unfixed performance;
- (c) the reproduction of a fixation of his performance in any manner or form.”.

As can be seen in the above Trinidadian provision, the rights given to performers by the Trinidadian provision are basically the same those listed in Article 7 (1) of the Convention. The main difference is the exclusion by the Trinidadian provision of the public communication of performances through electronic retrieval systems from the list of acts requiring the authorization of performers.

The laws of a Contracting State where protection is claimed by a performer, who has authorized the broadcasting of his performance, shall determine the protection to be given against the rebroadcasting, fixation for broadcasting and the reproduction of such fixation for broadcasting, of the broadcast authorized by the performer.⁵³ The framers of the Convention

⁵² Paul Torremans and Jon Holyoak, Intellectual Property Law, Second Edition, Butterworths, 254.

⁵³ Article 7(2)(1).

recognized the fact that the authorization of the performer may also involve the use of collective agreements and arbitration boards.⁵⁴

Contracting States are given the discretion of determining the regulations governing the use by broadcasting organizations of fixations made for broadcasting purposes.⁵⁵ The Copyright Act of Belize allows a broadcaster who proposes to lawfully broadcast a recording of a performance, or include the performance in a cable programme service, to make a further recording of the performance for purposes of the broadcast or inclusion.⁵⁶ However, this permission is subject to the condition that the further recording is made only for purposes of the broadcast or inclusion in the cable programme service and that the further recording shall be destroyed within twenty-eight days of the first broadcast or inclusion.⁵⁷

The laws of Contracting States shall not deprive performers of their freedom of contracting with broadcasting organizations.⁵⁸ Section 21 (3) of the Copyright Act of Trinidad and Tobago grants performers the right to negotiate more favourable terms and conditions for themselves in respect of their performances.

Contracting States are free to determine the manner in which performers taking part in joint performances will be represented.⁵⁹ Contracting States are also allowed to extend the coverage of the Convention to artists who do not perform literary or artistic works.⁶⁰ Examples of such artists are variety and circus performers.⁶¹

Minimum Rights for Producers of Phonograms

Article 10 of the Convention gives the right of reproduction of phonograms to producers of phonograms. One notable feature about the Convention is the fact that it gives Contracting States a lot of discretion in the domestic implementation of the provisions of the Convention. States are free to grant more extensive rights to related rights holders, on condition that

⁵⁴ Essential Elements of Intellectual Property, supra, paragraph 69.

⁵⁵ Article 7(2)(2).

⁵⁶ Section 131(1).

⁵⁷ Section 131(2).

⁵⁸ Article 7(2)(3).

⁵⁹ Article 8.

⁶⁰ Article 9.

⁶¹ Ibid.

such additional rights do not contravene the provisions of the Convention. Certain Members States of the WTO grant more rights to producers of phonograms than those envisaged by Article 10 of the Convention. According to section 22 (1) of the Copyright Act of Trinidad and Tobago-

“Subject to the provisions of section 25 (limitations on protection), a producer of a sound recording shall have the exclusive right to do, authorize or prohibit any of the following acts:

- (a) direct or indirect reproduction of the sound recording in any manner or form;
- (b) importation of copies of the sound recording, even where the imported copies were made with the authorization of the producer;
- (c) the first distribution of the original or a copy of the sound recording by sale or otherwise;
- (d) adaptation or other transformation of the sound recording;
- (e) rental of the original or a copy of the sound recording, for the purposes of direct or indirect commercial advantage, irrespective of the ownership of the original or copy rented;
- (f) the making available to the public of the sound recording through an electronic retrieval system.”.

The Convention recognizes the right of Contracting States to impose formalities, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in a phonogram. However, the Convention states that these formalities shall be regarded as fulfilled if copies of the published phonogram, or containers bearing such copies, being used in the course of trade, carry a notice consisting of the letter (P) and the year date of the first publication.⁶² The notice should be placed in a manner that will give reasonable notice of the claim of protection.⁶³ A close

⁶² Article 11.

⁶³ Ibid.

examination of most of the CDs on sale in record shops these days will reveal the notice on both the CDs and the cases bearing such CDs.

If the copies of the published phonogram, or containers bearing such copies, do not identify the producer or the licensee of the producer, such copies or containers shall identify the owner of the rights of the producer.⁶⁴ The identification of the producer or the licensee of the producer is done by stating the name, trademark or other appropriate designation of such producer or licensee.⁶⁵ Also, if the notice does not identify the principal performers, such notice shall identify the owner of the rights of such performers.⁶⁶ The owner of the rights of the principal performers is the person who owns such rights in the country in which the fixation of the phonogram was effected.⁶⁷

A person who directly makes a broadcast or other public communication of a phonogram published for commercial purposes, or a reproduction of such phonogram, shall pay a single equitable remuneration to the performer or the producer of the phonogram.⁶⁸ This use of phonograms is known as the “secondary use” of phonograms.⁶⁹ The single equitable remuneration may also be paid to both the performer and the producer of the phonogram.⁷⁰

It is worth noting that the Convention does not grant an exclusive right to either performers or producers of phonograms with regard to authorizing or prohibiting the secondary use of phonograms.⁷¹ By requiring that only a single equitable remuneration should be paid to the performer and/or the producer of the phonogram, the Convention effectively establishes a form of non-voluntary licence.⁷² This provision of the Convention has proved to be very controversial and has been described as “the most notorious provision of the Convention”.⁷³ However, note must be taken of the fact that a Contracting State is allowed to notify the Secretary

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Article 12.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Essential Elements of Intellectual Property, supra, paragraph 70.

⁷² Ibid.

⁷³ Ibid.

General that it will not apply the provisions of the Convention dealing with the “secondary use” of phonograms.⁷⁴

In the absence of an agreement between the performer and the producer of the phonogram, Contracting States may regulate the sharing of the single equitable remuneration.⁷⁵ In Member States of the WTO such as Barbados, Brazil, Costa Rica, Paraguay, and Uruguay, both producers of phonograms and performers are entitled to such equitable remuneration.⁷⁶ Other members such as Colombia grant the right to one category on the condition that the equitable remuneration is shared with the other category.⁷⁷ This is also the situation that pertains in Trinidad and Tobago. The Copyright Act of Trinidad and Tobago requires the amount to be paid to the producer of the phonogram, who is then mandated to pay half of the amount to the performer.⁷⁸ In Chile, El Salvador and Peru, only performers are entitled to the amount, while in Fiji, Guatemala, Philippines and the United Kingdom, only producers of phonograms are entitled to the amount.⁷⁹ It is worth noting that in the United Kingdom, the producers of phonograms have voluntarily agreed to share the equitable remuneration with performers.⁸⁰

The United States can be cited as an interesting example because of the fact that performers and producers of phonograms recently reached an agreement involving the self-regulation of the sharing of the single equitable remuneration. Before the signing of the agreement, producers of phonograms were entitled to collect the single equitable remuneration for the broadcast of musical works on cable, satellite and the Internet and then share the amount with the performers.⁸¹ As a result of the agreement, performers are now entitled to direct payment for the digital broadcast of their works.⁸² The signatories to the agreement included the Recording Industry Association of America, a trade group for producers of phonograms, and artists' groups such as the American Federation of Television and Radio Artists, the American Federation of Musicians, the Recording Artists

⁷⁴ Article 16.

⁷⁵ Article 12.

⁷⁶ Introduction to Collective Management of Copyright and Related Rights, Document prepared by the International Bureau, World Intellectual Property Organization, 29.

⁷⁷ Ibid.

⁷⁸ Section 28(3).

⁷⁹ Introduction to Collective Management of Copyright and Related Rights, supra.

⁸⁰ Ibid.

⁸¹ Musicians win web royalties fight, http://news.bbc.co.uk/hi/english/entertainment/new-media/_Sunday, 11 November, 2001, 1.

⁸² Ibid.

Coalition, the Music Managers Forum and the National Academy of Recording Arts and Sciences also signed.⁸³ The two sides also agreed to share control of Sound Exchange, which is the collective management organization that collects and distributes royalties for digital broadcasts.⁸⁴ The first direct payment of the single equitable remuneration to performers was done on the October 15, 2001, and involved an amount of US\$5.2 million.⁸⁵

Minimum Rights for Broadcasting Organizations

Article 13 of the Convention gives broadcasting organizations the right to authorize or prohibit-

- “(a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.”.

The right mentioned in Article 13 (d) does not include the public communication of merely sound broadcasts.⁸⁶ Also, the rights given to

⁸³ Ibid., 1 and 2.

⁸⁴ Ibid., 2.

⁸⁵ Ibid.

⁸⁶ Essential Elements of Intellectual Property, supra, paragraph 67.

broadcasting organizations does not include the right to authorize or prohibit the cable distribution of broadcasts.⁸⁷ This deficiency with regard to the cable distribution of broadcasts can be traced to the definition of the word “broadcasting” in the Convention. According to Article 3 (f) of the Convention, ““broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds”.

The South African Copyright Act⁸⁸ replicates the substance rather than the exact wording of Article 13 of the Convention. Section 10 of the South African legislation states that-

“Copyright in a broadcast vests the exclusive right to do or to authorize the doing of any of the following acts in the Republic:

- (a) reproducing, directly or indirectly, the broadcast in any manner or form, including, in the case of a television broadcast, making a still photograph therefrom;
- (b) rebroadcasting the broadcast;
- (c) causing the broadcast to be transmitted in a diffusion service, unless such service is operated by the original broadcaster.”.

The first difference in wording can be seen in the use of the word “copyright” in the South African provision. The South African legislature did not draw the fine line between copyright and related rights. Secondly, the South African provision did not use the Article 13 expression “the fixation of their broadcasts”. However, it can be argued that the use of the expression “reproducing, directly or indirectly, the broadcast in any manner or form” in paragraph (a) of the South African provision, captures the substance of the Article 13 expression “the fixation of their broadcasts”. Thirdly, the South African provision refers generally to the right to authorize or prohibit the transmission of the broadcast in a diffusion service. It does not make any specific mention of the right to authorize or prohibit the public communication of a television broadcast against the payment of an entrance fee.

⁸⁷ Ibid.

⁸⁸ Act No. 98 of 1978.

Additional Rights for Related Rights Holders

Apart from the above-cited rights, many countries have granted additional rights to performers, producers of phonograms and broadcasting organizations. Member States of the European Union grant producers of phonograms and performers a right of rental in respect of phonograms.⁸⁹ Such states also grant performers a right of rental in respect of audiovisual works.⁹⁰ Although the Convention does not cover cable transmissions, some countries grant owners of related rights protection against unauthorized cable transmissions.⁹¹ The laws of many countries in the area of related rights has also been extended by the national implementation of Article 14 (4) of the Agreement on Trade Related Aspects of Intellectual Property Rights (hereinafter referred to as the TRIPS Agreement), which states as follows-

“The provisions of Article 11 (right to authorize or prohibit the commercial rental of a work) in respect of computer programs shall apply mutatis mutandis to producers of phonograms and any other right holders in phonograms as determined in a Member’s law. If on 15 April 1994 a member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.”.

TERM OF PROTECTION

The Convention grants phonograms and performances incorporated in such phonograms, performances not incorporated in phonograms, and broadcasts, a minimum term of protection of twenty years, calculated from the end of the year in which the fixation was made, or the performance or broadcast took place, to the end of the twenty year period.⁹² This term of protection has been extended in the national legislation of many Member States of the WTO. The Copyright Act of Belize protects the rights of a

⁸⁹ Introduction to Intellectual Property (DL-101), supra, 10.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Article 14.

performer or a person having recording rights in relation to a performance for a period of fifty years from the end of the calendar year in which the performance takes place.⁹³ The Copyright Act of Trinidad and Tobago protects a performance, a published sound recording, a fixed but unpublished sound recording, and a broadcast, from the moment the performance, publication, fixation, and broadcasting takes place, until the end of the fiftieth year following the year in which the performance, publication, fixation, and broadcasting takes place.⁹⁴

These extended terms of protection can be traced to the provisions in the TRIPS Agreement requiring Member States to protect the rights of performers and producers of phonograms for a term of fifty years from the end of the year in which the fixation was made or the performance took place, and broadcasting organizations for a term of twenty years from the end of the year in which the broadcasting took place.⁹⁵ The most apparent difference between the terms of protection for related rights and the terms of protection for copyright is that while the latter usually refers to the life of the author, the former does not refer to the life of the performer.⁹⁶

EXCEPTIONS TO MINIMUM RIGHTS

Following the lead set by the Berne Convention, the Convention allows Contracting States to impose certain exceptions to the rights granted by the Convention. Contracting States may exclude the private use of a protected work from the protection granted by the Convention.⁹⁷ Other permitted exceptions are the use of short excerpts in relation to the reporting of current events and the ephemeral fixation of protected works by broadcasting organizations using their own facilities and for their own broadcasts.⁹⁸ Contracting States may also exclude the use of a protected work for purposes of teaching or scientific research from the protection granted by the Convention.⁹⁹ Further, Contracting States are allowed to extend the exceptions in their copyright laws to the protection of performers,

⁹³ Section 115.

⁹⁴ Sections 21(4), 22(2) and 24(2).

⁹⁵ Article 14(5) of the TRIPS Agreement.

⁹⁶ Paul Torremans and Jon Holyoak, *supra*, 255.

⁹⁷ Article 15(1)(a).

⁹⁸ Article 15(1)(b) and (c).

⁹⁹ Article 15(1)(d).

producers of phonograms and broadcasting organizations.¹⁰⁰ However, the Convention states that compulsory licences may only be granted in conformity with the provisions of the Convention.¹⁰¹

Section 25 of the Copyright Act of Trinidad and Tobago states that the rights granted to performers, producers of phonograms and broadcasting organizations shall not apply to acts related to-

- “(a) the use by a natural person exclusively for his own personal purposes;
- (b) using short excerpts for reporting current events to the extent justified by the purpose of providing current information;
- (c) use solely for the purpose of face-to-face teaching activities or for scientific research;
- (d) cases where, under Part II (limitations on the rights of owners of copyright), a work can be used without the authorization of the owner of copyright.”.

MISCELLANEOUS PROVISIONS

According to Article 16 (1) of the Convention, Contracting States shall be entitled to the benefits of the Convention and shall also be bound by the obligations of the Convention. Further, Contracting States may notify the Secretary-General that-

- “(a) as regards Article 12 (equitable remuneration for use of phonogram):
 - (i) it will not apply the provisions of that Article;
 - (ii) it will not apply the provisions of that Article in respect of certain uses;

¹⁰⁰ Article 15(2).

¹⁰¹ Ibid.

- (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;
- (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection.”.¹⁰²

Article 16 (1) (b) of the Convention states that Contracting States are also allowed to notify the Secretary-General that they will not grant broadcasting organizations the right to authorize or prohibit public communication of their broadcasts in places charging an entrance fee. This reservation is subject to the principle of reciprocity. Other Contracting States are permitted to withhold the right to authorize or prohibit public communication of their broadcasts in places charging an entrance fee from a broadcasting organization whose headquarters is in a Contracting State making the notification under Article 16 (1) (b) above.¹⁰³

An Article 16 notification deposited after the Contracting State ratifies, accepts or accedes to the Convention shall become effective six months after the date of deposit of the notification.¹⁰⁴ Contracting States which only granted protection to producers of phonograms based on the criterion of fixation at the time the Convention was signed (October 26, 1961), are allowed to notify the Secretary-General, upon ratifying, accepting or acceding to the Convention, that they will only apply the criterion of fixation when granting national treatment for producers of phonograms under Article 5.¹⁰⁵ Such states may also notify the Secretary-General that

¹⁰² Article 16(1)(a).

¹⁰³ Article 16(1)(b).

¹⁰⁴ Article 16(2).

¹⁰⁵ Article 17.

they will apply the criterion of fixation instead of the criterion of nationality for the purposes of Article 16 1 (a) (iii) and (iv) above.¹⁰⁶

A Contracting State may withdraw or reduce the scope of a notification deposited by it under Article 5 (3), Article 6 (2), Article 16 (1) or Article 17.¹⁰⁷ This withdrawal or reduction is done by means of a further notification deposited with the Secretary-General.¹⁰⁸ Article 19 of the Convention states that the protection given to a performer under Article 7 above is exhausted, once the performer has consented to the incorporation of his performance in a visual or audio-visual form. This provision was inserted to allay the fears of film producers who feared that their rights will be prejudiced if performers were granted rights in films.¹⁰⁹ However, Article 19 has proved to be almost as controversial as Article 12 (equitable remuneration for secondary use of phonograms).¹¹⁰ Many performers regard this provision as significantly limiting the rights given to them by the Convention.¹¹¹ Nevertheless, the controversial Article 19 has been replicated in the laws of many countries. A good example is section 21 (2) of the Copyright Act of Trinidad and Tobago, which states that-

“Once the performer has authorized the incorporation of his performance in an audiovisual fixation, the provisions of subsection (1) (acts requiring authorization of performers) shall have no further application.”.

The provisions of the Convention shall not be applied in a retroactive manner. Rights acquired, and performances or broadcasts which took place, or phonograms which were fixed, before the date of coming into force of the Convention for a Contracting State, shall not be subject to the provisions of the Convention.¹¹² Section 107 (3) of the Copyright Act of Belize extends the rights granted to performers and persons having recording rights to performances taking place before the commencement of the Act. However, this retroactive extension of such rights does not apply to acts or arrangements that are regarded as infringements of such rights.¹¹³ The

¹⁰⁶ Ibid.

¹⁰⁷ Article 18.

¹⁰⁸ Ibid.

¹⁰⁹ Essential Elements of Intellectual Property, *supra*, paragraph 73.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Article 20.

¹¹³ Section 107(3).

provisions of the Convention shall also not be prejudicial to any other protection secured by performers, producers of phonograms and broadcasting organizations.¹¹⁴

Contracting States are free to enter into special agreements among themselves in relation to the rights of performers, producers of phonograms and broadcasting organizations.¹¹⁵ Such special agreements should grant performers, producers of phonograms and broadcasting organizations more extensive rights than those granted by the Convention.¹¹⁶ Also, such special agreements should not contain provisions that are in contravention of the Convention.¹¹⁷

During the 1970s and 1980s, a lot of new technological devices were developed.¹¹⁸ These included video technology, compact cassette systems that enabled ‘home taping’, satellite broadcasting, cable television, and computer related devices.¹¹⁹ At the end of the 1980s, it became apparent that the provisions of the Convention were not ‘modern’ enough to face these new challenges.¹²⁰ WIPO convened a number of Committees of Experts and charged them with the task of preparing a new agreement that will adequately respond to the challenges posed by the new technologies.¹²¹ In the early preparatory work of the agreement (which became known as the WIPO Performances and Phonograms Treaty (WPPT)), it was felt that the new agreement should be adopted in the form of a special agreement under the Convention.¹²² This idea did not muster sufficient support within the WIPO Committees of Experts and was not included in the final draft of the WPPT.¹²³ The prevailing opinion was reflected in Article 1 (3) of the Treaty as follows-

“The Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.”.

¹¹⁴ Article 21.

¹¹⁵ Article 22.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Coenraad Visser, Tana Pistorius and Brian Rutherford, Internet Aspects of Copyright and Trademarks, University of South Africa, World Intellectual Property Organization, 3.2.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Ibid.

¹²² Ibid., 3.3.

¹²³ Ibid.

CONCLUSION

The Convention has been described as providing weak international protection for performers, producers of phonograms and broadcasting organizations, by virtue of the fact that it has been adhered to by only a fraction of the Contracting States of the Berne Convention.¹²⁴ Nevertheless, the Convention has probably remedied a lot of deficiencies that existed in the copyright protection regime. Some of these deficiencies are epitomized in the following quotation-

“Luciano Pavarotti adores live performances in front of mass audiences. Imagine him performing, live at Wembley, a series of songs taken from Gaetano Donizetti’s famous opera *Lucia di Lammermoor*. Someone in the audience makes a bootleg recording of Pavarotti’s performance and sells it to a record company other than Decca, with whom Pavarotti has a recording contract. There is very little that can be done on the basis of copyright rules....Donizetti died in 1848, the copyright in the music and the libretto have long expired. The Decca recording is not copied or dealt with, the bootleg recording is an entirely separate and independent recording. No copyright infringement can be found and both Pavarotti as the performer and Decca as the recording company are left unprotected.”¹²⁵

The above deficiency in copyright protection can be remedied by Article 7(1) (b) of the Convention which gives performers like Luciano Pavarotti the right to prevent the fixation or recording, without their consent, of their unfixed performance. Also, the adherence to the provisions of the Convention has been boosted by the adoption of the TRIPS Agreement. This World Trade Organization (WTO) administered agreement reproduces or makes reference to the minimum rights, conditions, limitations, exceptions and reservations contained in the Convention.¹²⁶ Members of the WTO are required to grant the minimum rights listed in the TRIPS Agreement to performers, producers of phonograms and broadcasting organizations.¹²⁷

¹²⁴ Paul Torremans and Jon Holyoak, *supra*, 256.

¹²⁵ *Ibid.*, 253.

¹²⁶ Article 14(6) of the TRIPS Agreement.

¹²⁷ Article 14(1), (2) and (3) of the TRIPS Agreement.

Related rights have now become the focus of attention as a result of the emerging consensus that the unrecorded cultural expression of many developing countries should be protected.¹²⁸ Related rights are the most appropriate form of protection for folklore because of the fact that performers are the communicators of these unrecorded cultural expressions to the public.¹²⁹

The need to grant intellectual property protection to folklore was reflected in the Doha World Trade Organization Ministerial Declaration (hereinafter referred to as the Doha Declaration), adopted on November 14, 2001. According to paragraph 19 of the Doha Declaration –

“We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this Declaration, to examine, *inter alia*, the relationship between the TRIPS Agreement and the protection of folklore In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.”.

Also, the protection of producers and broadcasting organizations is a recipe for the development of national industries capable of promoting national cultural expression within a country and in markets outside the country.¹³⁰ The increased popularity of “world music” is a testament to this fact. World music is a brand of music from the developing world involving the fusion of traditional music and modern pop music.¹³¹ The increased popularity of this brand of music convinced world famous musicians such as David Byrne and Peter Gabriel to invest in the Real World and Luaka Bop world music record labels.¹³²

It was worth noting that though the Convention is supposed to be a union of the rights of performers and producers of phonograms, these two

¹²⁸ Introduction to Intellectual Property (DL-101), *supra*, 11.

¹²⁹ *Ibid.*

¹³⁰ *Ibid.*

¹³¹ The Concise Oxford Dictionary, Tenth Edition, Oxford University Press, 1648.

¹³² Garth Cartwright, Tower Guide to ... World Music 2000/2001, Published by Elspeth Thomson, 4.

categories of related rights holders have often been at loggerheads in recent times. The bone of contention is the issue of the financial exploitation or otherwise of performers (recording artists) by producers of phonograms (record companies). This controversy has led to the formation of the New York based National Action Network (NAN), which was charged with the task of investigating whether recording artists are being financially exploited by record companies.¹³³ On joining NAN, pop idol Michael Jackson stated that-

“Record companies have to start treating their artists with respect, honour and financial justice.”¹³⁴

NAN has pledged to work with the Recording Artists Coalition (RAC) in a bid to gain fairer contracts for recording artists and more oversight of the accounting practices of record companies.¹³⁵ RAC accuses record companies of tying recording artists to long contracts which amount to “indentured servitude”.¹³⁶ However, the Recording Industry Association of America (the trade group of the record companies) responds to this accusation by arguing that such long contracts offset the losses suffered by record companies on the majority of recording artists who fail in the music business.¹³⁷

It goes without saying that performers (recording artists) and producers of phonograms (record companies) have more to gain by working together rather than by squabbling. The positive effect of such collaboration was recently demonstrated by the success of rap superstar Eminem’s new album “The Eminem Show”.¹³⁸ The rapper and his record company, Interscope, brought forward the release of the album in a bid to thwart the efforts of Internet pirates.¹³⁹ Consequently, the album notched up sales of 3.3 million copies in the United States five weeks after it was released.¹⁴⁰

¹³³ Jackson backs ‘justice’ campaign, <http://news.bbc.co.uk/hi/english/entertainment/music/>, Thursday, 6 June, 2002, 1.

¹³⁴ Ibid.

¹³⁵ Ibid., 2.

¹³⁶ Music stars argue contract freedom, <http://news.bbc.co.uk/hi/english/entertainment/music/>, Thursday, 6 September, 2001, 1.

¹³⁷ Ibid.

¹³⁸ Eminem goes triple platinum in U.S., <http://news.bbc.co.uk/hi/english/entertainment/music/>, Friday, 28 June, 2002, 1.

¹³⁹ Ibid., 2.

¹⁴⁰ Ibid., 1.

Another example of such collaborative efforts can be seen in the recent decision by record companies and recording artists in the Untied States to jointly confront individuals who engage in large volumes of unauthorized online song-swapping and individual “supernodes” who provide centralized directories that enable unauthorized online music-sharing.¹⁴¹ This collaborative effort involves the Recording Industry Association of America (the trade group of the record companies) filing lawsuits against such song-swappers and supernodes and a public campaign by prominent artists urging music fans to respect copyright and related rights rules.¹⁴²

The provisions of the Convention can best be described as some of the best weapons for such collaborative assault against copyright and related rights piracy. One of the main objectives of the Convention is the creation of a union of the rights of performers, producers of phonograms and broadcasting organizations.

¹⁴¹ Music labels go after song-swappers, Anna Wilde Mathews and Bruce Orwall, The Wall Street Journal, www.msnbc.com/news/, July 3, 2002, 2.

¹⁴² Ibid.