

13: Related Rights

Article 14 Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.
2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.
3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).
4. The provisions of Article 11 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.
5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.
6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent

1. Introduction: terminology, definition and scope

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permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

1. Introduction: terminology, definition and scope

“Related rights” refers to the category of rights granted to performers, phonogram producers and broadcasters. In some countries such as the United States and the United Kingdom, these rights are simply incorporated under the general rubric of copyright. Other countries, such as Germany and France, protect these rights under the separate category called “neighbouring rights.” The reason for this differentiation is the perception in those countries that works protected under related rights do not meet the same requirement of personal intellectual creativity as literary and artistic works.²⁰⁰ For instance, the production of a broadcast or a compact disk is considered to be an activity of technical and organizational character, rather than the expression of personal intellectual creativity.²⁰¹ Protection of such works is nevertheless required, considering their economic value and the fact that they are easy to imitate.

TRIPS leaves Members free to protect these works under copyright proper or as a separate category of related rights. In the following, the rights of performers, phonogram producers and broadcasting organizations as covered by Article 14 will be referred to as “related rights”.²⁰²

Article 14 does not define what “performers” are. Aid in interpretation might be found in the definition of that term under Article 3 (a) of the Rome Convention, and in the later WIPO Performances and Phonograms Treaty (WPPT), according to which “performers” are:

“actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works [or expressions of folklore]”. [bracketed portion from Article 2, WPPT]

“Phonograms” and “sound recordings” are used coextensively in Article 14, in an effort to ensure that this Article clearly encompasses countries that use related rights systems to provide protection for phonograms, and those, most notably the United States, that protect sound recordings as copyright works. In general, the definition of a phonogram has been extended in related rights countries so that the term may reasonably encompass sound recordings. This trend is reinforced by Article 2(b) of the WPPT, which defines a phonogram as the “fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than

²⁰⁰ On the creativity and originality requirement under copyright law, see Chapter 7, Section 3. As opposed to originality, copyright law does not require the work to meet certain quality standards (*ibid.*).

²⁰¹ This is the approach taken under German copyright law. See J. Ensthaler, *Gewerblicher Rechtsschutz und Urheberrecht*, 2. edition 2003, Berlin, Heidelberg, New York.

²⁰² It is not in the purpose of this Book to decide whether these rights are to be protected under copyright proper (as in e.g. the USA and the UK) or as a separate category of “neighbouring rights” (as in e.g. France and Germany).

in the form of a fixation incorporated in a cinematographic or other audiovisual work.” In any event, to the extent that definitions differ across jurisdictions, the provisions of Article 14 cover both these categories of works.

2. History of the provision

2.1 Situation pre-TRIPS

The protection of related rights has been a much slower and uneven development in national laws (see below), notwithstanding negotiation of an international convention in 1961. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations (Rome Convention) entered into force in 1964.²⁰³ The scope of protection afforded to related rights under the Rome Convention is generally lower than the protection offered under the Berne Convention. For example, the term of protection under the Rome Convention is twenty years,²⁰⁴ compared to life of the author plus fifty years under the Berne Convention. Prior to TRIPS, the different forms of protecting related rights had the practical effect of relaxing a country’s Berne Convention obligations with regard to certain works (such as broadcasts) that, due to the separate related rights system, were not considered literary works. In respect of broadcasts, TRIPS will have little impact on this, considering that the level of harmonization reflected in Article 14 is very low. Indeed, Article 14 contemplates a very high degree of flexibility in what a country is obligated to protect and the conditions under which such protection must take place.²⁰⁵

In the United States, there is a recognised unitary public performance right that includes live performance as well as performance by transmission. The right is granted to copyright owners of “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.”²⁰⁶ Owners of sound recordings (i.e., phonograms) are not granted this public performance right, but instead have a separate public performance right limited to digital audio transmissions.²⁰⁷ In addition performers are granted the right to prevent the unauthorized fixation of live performances.²⁰⁸ The U.S. approach is one model of how a country might assimilate related rights within the copyright system, as distinct from the two-system approach utilized by many European countries.

The EC Rental Right Directive requires that performers be granted the exclusive right to authorize or prohibit the rental or lending of fixations of their performances.²⁰⁹ Under the Directive, a performer may transfer the rental right

²⁰³ However, the Rome Convention has not been ratified by the United States.

²⁰⁴ See Rome Convention, Article 14.

²⁰⁵ For example, Article 14.5, TRIPS Agreement requires a minimum term of protection of 50 years for performers and phonogram producers and 20 years for broadcasting organizations (counted from the end of the respective calendar year, see Section 3 of this chapter). This leaves Members distinguishing between copyright and related rights free to afford longer protection to literary and artistic works (life of the author plus at least 50 years).

²⁰⁶ 17 U.S.C. §106(4).

²⁰⁷ Id. at §106(6).

²⁰⁸ Id. at §1101(a).

²⁰⁹ EC Rental Right Directive, Article 2(1).

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but the right to an equitable remuneration for the rental is inalienable.²¹⁰ The Directive also requires that broadcasting organizations have the exclusive right to fix their broadcasts, as well as to reproduce the fixations, directly or indirectly.²¹¹ Public rebroadcast and communication rights²¹² as well as public distribution rights for broadcasters²¹³ are also recognized by the Directive.

2.2 Negotiating history

Article 14.1 provides that performers shall have “the possibility of preventing” the unauthorized fixation of their unfixed performances and the reproduction of such fixation. In addition, performers shall have the right to prevent the “unauthorized broadcasting by wireless means and the communication to the public of their live performance.” Protection for the rights of performers has historically been the province of the Rome Convention. The fact that Article 14.1 simply requires that countries grant “the possibility” of the rights in question flows from the negotiating conditions that characterized the Rome Convention, where the United Kingdom dealt with unauthorized fixation under the penal code. Phrasing the right in this way facilitated ratification of the Rome Convention by the United Kingdom.²¹⁴ In general, the Rome Convention provides a significant amount of the context for the provisions of Article 14. Consequently, the interpretation of the full scope of Article 14 is directly related to the Rome Convention and its own negotiating history.

2.2.1 The Anell Draft

“10. Relation to Rome Convention

10A PARTIES shall, as minimum substantive standards for the protection of performers, broadcasting organisations and producers of phonograms, provide protection consistent with the substantive provisions of the Rome Convention. [Articles 1 to 20 of the Rome Convention could be considered to constitute the substantive provisions.]

11. Rights of Producers of Phonograms (Sound Recordings)

11A.1 PARTIES shall extend to producers of phonograms the right to authorise or prohibit the direct or indirect reproduction of their phonograms [by any means or process, in whole or in part].

11A.2a [In regard to the rental of phonograms,] the provisions of point 3 in respect of computer programs shall apply mutatis mutandis in respect of producers of phonograms [or performers or both].

11A.2b The protection provided to producers of phonograms shall include the right to prevent all third parties not having their consent from putting on the market, from selling, or from otherwise distributing copies of such phonograms.

11A.3 The provisions of point 4A shall apply mutatis mutandis to the producers of phonograms.

12. Rights of Performers

²¹⁰ Id. at Article 4(1), (2).

²¹¹ Id. at Article 7(1).

²¹² Id. at Article 8(3).

²¹³ Id. at Article 9(1).

²¹⁴ Gervais, p. 96/97.

12A The protection provided for performers shall include the possibility of preventing:

12A.1 the broadcasting [by any technical means or process such as by radio wave, by cable or by other devices] [by wireless means and the communication to the public of their live performance];

12A.2 the fixation of their unfixed performance [on phonograms or data carriers and from reproducing such fixations];

12A.3 the reproduction of a fixation of their performance;

12A.4 the production of their performance in any place other than that of the performance;

12A.5 the offering to the public, selling, or otherwise distributing copies of the fixation containing the performance.

13. Rights of Broadcasting Organisations

13.1 Broadcasting organisations shall have the possibility of preventing:

13A.1 the fixation of their broadcasts [on phonograms or data carriers, and from reproducing such fixations];

13A.2 the reproduction of fixations;

13A.3 the communication to the public of their [television] broadcasts;

13A.4 the rebroadcasting by wireless means of their broadcasts;

13A.5 the retransmitting of their broadcast;

13A.6 the putting on the market, sale, or other distribution of copies of the broadcast.

14. Public Communication of Phonograms

14A If a phonogram published for commercial purposes, or a reproduction of such a phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonogram, or to both.

15. Term of Protection

15A.1a The term of protection granted to producers of phonograms, performers and broadcasting organisations shall last at least until the end of a period of [20] [50] years computed from the end of the year in which the fixation was made or the performance or broadcast took place.

15A.2a PARTIES may, however, provide for a period of protection of less than 50 years provided that the period of protection lasts at least for 25 years and that they otherwise assume a substantially equivalent protection against piracy for an equivalent period.

15Ab Point 7 shall apply mutatis mutandis to the producers of phonograms.

16. Exceptions

16Aa PARTIES may, in relation to the rights conferred by points 11, 12, 13 and 14, provide for limitations, exceptions and reservations to the extent permitted by the Rome Convention.

16Ab Points 8A.2-4 of this Part shall apply mutatis mutandis to phonograms.

16B (See Section 8 of this Part.)

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17A.1 The provisions of points 6 and 9 of this Part shall apply *mutatis mutandis* to the producers of phonograms.

17A.2 PARTIES shall protect phonograms first fixed or published in the territory of another PARTY, including phonograms published in the territory of a PARTY within thirty days of their publication elsewhere; and phonograms the producer of which is a national of a PARTY, or is a company headquartered in the territory of a PARTY.

17A.3 The acquisition and validity of intellectual property rights in phonograms shall not be subject to any formalities, and protection shall arise automatically upon their creation.”

With respect to substantive protection, performers’ rights under the current Article 14 correspond more or less to the performers’ rights as listed under paragraph 12 of the Anell Draft. The same is true with respect to producers’ rights under Article 14.2 and paragraph 11 of the Anell Draft, and to the rights of broadcasting organizations under Article 14.3 and paragraph 13 of the Anell Draft. The difference between the scope of protection between the draft and the final version is that the final version does not refer to any distribution rights as does paragraph 12A.5 (for performers) and paragraph 13A.6 (for broadcasting organizations). The reason for this is that at the time of the Anell Draft, some delegations were still attempting to introduce a general right of distribution of copyrighted material.²¹⁵ This idea was then abandoned, and so was the reference to any distribution rights under the subsequent (Brussels) draft, as quoted below.

TRIPS does not refer either to paragraphs 12A.4 or 13A.5 of the Anell Draft.²¹⁶ Paragraph 17A.2 above refers to a national treatment obligation. In view of the general national treatment provision under Article 3 TRIPS, such specification was no longer required in the final version of the Agreement.

Finally, paragraph 17A.3 of the Anell Draft was not taken over into Article 14, but is now included in Article 62.1 of TRIPS, which authorizes Members to condition the acquisition and maintenance of the rights under Sections 2 through 6 (of Part II) on reasonable procedures and formalities. Thus, such authorization is not given with respect to copyrights under Section 1 (of Part II of the Agreement). This corresponds to the general rule that a copyright automatically comes into existence with the creation of the work.

2.2.2 The Brussels Draft

[“1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing: the fixation of their unfixed performance; and the reproduction of such fixation. Performers shall also have the possibility of preventing the broadcasting by wireless means and the communication to the public of their live performance.]

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

²¹⁵ See Chapter 10, Section 2.2.

²¹⁶ Regarding paragraph 13A.5, the retransmission right was framed without reference to public communication, and this may have been viewed as potentially imposing excessive liability on common carriers. Paragraph 12A.4 was, at the least, inelegantly drafted.

[3. Broadcasting organizations shall have the right to authorise or prohibit the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where PARTIES do not grant such rights to broadcasting organizations, they shall provide right holders in the subject matter of broadcasts with the possibility of preventing the above acts.]

4. The provisions of Article 11 shall apply *mutatis mutandis* to right holders in phonograms.

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of [50] years computed from the end of the calendar year in which the fixation was made or the performance or broadcast took place. The term of protection granted pursuant to paragraph 3 above shall last for at least [25] years from the end of the calendar year in which the broadcast took place.

6. Any PARTY to this Agreement may, in relation to the rights conferred under paragraphs 1-3 above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. [However, the provisions of Article [-²¹⁷] of this Section shall also apply *mutatis mutandis* to the rights of performers and producers of phonograms in phonograms.]”

The Brussels Draft was essentially similar to the current version of Article 14. As opposed to the Brussels Draft, the current version in its paragraphs 1 and 3 specifies that the enumerated rights of performers and broadcasting organizations apply only to situations where third persons make use of their protected materials without the right holders’ authorization.

Paragraph 3 was quite controversial during the negotiations:²¹⁸ A number of countries supported the inclusion of a copyright of broadcasting organizations with respect to their broadcasts. Other countries opposed such right, agreeing only to provide broadcasting organizations with copyrights concerning the audiovisual productions themselves (as opposed to the broadcasting of these productions). As a compromise, the Brussels Draft (like the current Article 14.3) left it up to Members to decide whether to grant the enumerated rights to broadcasting organizations. In case a Member refuses to do so, it remains obligated to grant the same rights more generally to owners of copyright (possibly including broadcasters) in the subject matter of broadcasts (see below, Section 3).

Paragraph 4 of the Brussels Draft version made the rental right (Article 11) applicable to performers, producers and broadcasting organizations. It did not, however, distinguish between computer programs and cinematographic works. This was so because under the Brussels Draft article on rental rights, there was no distinction between those categories of works, either.²¹⁹

Paragraph 4 of the Brussels Draft article on related rights did not refer to a remuneration right as does the current Article 14.4, second sentence. The reason for this was that under the Brussels Draft, there was a reference to remuneration rights in what is now Article 11.²²⁰ This right was construed as an alternative to

²¹⁷ This was the provision on protection of works existing at time of entry into force.

²¹⁸ For the following, see Gervais, p. 99, para. 2.80.

²¹⁹ See above, Chapter 10.

²²⁰ *Ibid.*, Section 2.2 (negotiating history).

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the exclusive rental right. Since paragraph 4 of Brussels Article 14 referred to Article 11 and thus to the remuneration right, any additional, express reference under draft Article 14 was not required. However, when the reference in Article 11 to a remuneration right was deleted under the final TRIPS version, such reference had to be inserted into the TRIPS version of Article 14, applying specifically to the rental of phonograms.

Finally, the proposed minimum term of protection provided to the rights of broadcasting organizations was 25 years (paragraph 5). Under TRIPS, this term was reduced to 20 years.

3. Possible interpretations

3.1 Article 14.1 TRIPS (Rights of performers)

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

The first sentence of this paragraph corresponds to Article 7.1 (b) and (c) of the Rome Convention. The right accorded to performers is not construed as a full right to *authorize* or to prohibit, but merely as a negative right, i.e. as the possibility of preventing unauthorized acts. This provision leaves Members some freedom as to the means by which they choose to grant such right to performers. Under the Rome Convention, Article 7.1 has traditionally been interpreted as giving parties to the Convention the freedom to exclude civil judicial proceedings from the scope of performers' rights, thus limiting right holders' possibilities to the invocation of criminal sanctions or administrative procedures.²²¹ Since the Rome Convention is referred to under Article 14.6 of TRIPS, the question has been raised whether the same flexibility is permitted under TRIPS.²²² This appears doubtful, considering that under Article 42 of TRIPS, Members "shall make available to right holders civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement". This obligation is expressly waived in the case of geographical indications, as made clear in footnote 4 to Article 23.1. Such explicit waiver does not exist, however, with respect to Article 14.1.²²³

As far as the scope of the first paragraph is concerned, it is limited to the fixation of the protected work on a phonogram. Thus, the first paragraph does not cover audiovisual fixations.

²²¹ Gervais, p. 98, para. 2.79.

²²² Ibid, qualifying such flexibility as a possible "exception" permitted under the Rome Convention, as referred to in Article 14.6.

²²³ Ibid. However, it may be argued that by using the same language as the Rome Convention, Article 14.1 would arguably have "imported" the traditional interpretation of the Rome Convention, irrespective of Article 42 of TRIPS.

3.2 Article 14.2 TRIPS (Rights of producers of phonograms and sound recordings)

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

Article 14.2 parallels Article 10 of the Rome Convention. It grants producers of phonograms the right to authorize or prohibit the direct or indirect reproduction of their phonograms. While the direct reproduction refers to the copying of the music, etc. directly from the phonogram, “indirect” reproduction of a phonogram is done, e.g., by recording a radio or television programme containing the music that is fixed on the phonogram.

3.3 Article 14.3 TRIPS (Rights of broadcasting organizations)

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

This paragraph leaves it up to Members to grant special rights to broadcasting organizations, as long as they provide the above rights in the subject matter of broadcasts to owners of copyright in general. While there must be a right given to someone to prevent the enumerated acts, Members have flexibility as to who that person(s) should be. Members may want to avoid the situation in which two different parties are granted rights in respect to the same broadcast, that is, the creator/owner of the “content” (i.e., the traditional copyright holder), and the broadcast organization that merely makes the content available to the public in a broadcast form. If both the traditional copyright holder and the broadcast organization have rights in the same transmission, this can lead to conflicts, for example, regarding re-use of the content.

3.4 Article 14.4 TRIPS (Rental rights)

4. The provisions of Article 11 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.

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In addition to the exclusive reproduction right conferred by Article 14.2, Article 14.4 grants producers an exclusive rental right with regard to their phonograms. This was accomplished by extending the provisions of Article 11 “to producers of phonograms and any other right holders as determined in domestic law.” Thus, under the terms of a domestic law, the rental right shall apply both to producers and other right holders in the phonogram contemplated by domestic law. If the domestic law does not determine other right holders in the phonogram, Article 14 still mandates a rental right for producers of phonograms.

3.5 Article 14.5 TRIPS (Term of protection)

5. The term of the protection available under this Agreement to performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The term of protection granted pursuant to paragraph 3 shall last for at least 20 years from the end of the calendar year in which the broadcast took place.

This paragraph is largely self-explanatory. An important distinction is made between performers and producers on the one hand, and broadcasting organizations on the other.

If, under Article 14.3, a Member chooses to not grant special rights to broadcasting organizations, it has to grant rights to the creator of the subject-matter of the broadcast, which is eligible for protection under general copyright law as literary or artistic work. In that case, the general term of protection for copyright under the Berne Convention applies.

3.6 Article 14.6 TRIPS (Conditions, limitations, exceptions and reservations)

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandis*, to the rights of performers and producers of phonograms in phonograms.

The first sentence makes applicable compulsory licenses for broadcasts, as far as permitted under the Rome Convention, and as far as rights in the broadcast are granted. Under the Rome Convention, compulsory licenses are authorized under Article 13 (d), which provides that

“Broadcasting organisations shall enjoy the right to authorize or prohibit: [...] (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.”²²⁴

The second sentence refers to Article 18 of the Berne Convention. This provision provides that:

“(1) This Convention shall apply to all works which, at the moment of its coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.

(2) If, however, through the expiry of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew.

(3) The application of this principle shall be subject to any provisions contained in special conventions to that effect existing or to be concluded between countries of the Union. In the absence of such provisions, the respective countries shall determine, each in so far as it is concerned, the conditions of application of this principle.

(4) The preceding provisions shall also apply in the case of new accessions to the Union and to cases in which protection is extended by the application of Article 7 or by the abandonment of reservations.”

One of the “special conventions” under the first sentence of paragraph 3 is the TRIPS Agreement itself, which provides in Article 70(5):

“A Member is not obliged to apply the provisions of Article 11 and of paragraph 4 of Article 14 with respect to originals or copies purchased prior to the date of application of this Agreement for that Member.”

4. WTO jurisprudence

There has been no WTO panel decision on this subject.

5. Relationship with other international instruments

5.1 WTO Agreements

5.2 Other international instruments

The scope of the import of the level of protection for related rights in TRIPS can only be fully appreciated in light of the other international agreements that deal with the protection of related rights. Indeed TRIPS explicitly mentions that nothing in its provisions shall derogate from existing obligations under the Rome Convention.²²⁵ However, several treaties deal with protection of different related rights. In addition to TRIPS the major ones include the Rome Convention and

²²⁴ This last part of the provision may be interpreted as giving parties the right to authorize compulsory licenses.

²²⁵ See TRIPS Article 1.3.

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the WPPT. In many respects, these treaties incorporate substantially similar rules and principles. However, there are some areas of distinction as made evident in the summary table below.

A Comparative Overview of Related Rights Protection

	ROME CONVENTION(RC)	TRIPS AGREEMENT	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
Rights of Performers	Art. 7.1(b) (c) [“possibility of preventing” unauthorized broadcast and communication to the public of unfixed performance; reproduction of an unauthorized fixation of a performance.]	Art. 14.1 [in respect of unfixed works, “possibility of preventing” unauthorized fixation and reproduction of the unauthorized fixation; possibility of preventing unauthorized broadcasting by wireless means and communication to public of live performances.]	Art. 6 [grants exclusive rights in unfixed performances as to broadcasting communication to the public and fixation; Art. 7 grants an exclusive right to reproduce as to fixed performances; Art. 8 grants an exclusive right of distribution; Art. 9 grants an exclusive rental rights; Art. 10 grants an exclusive right to make the work available through an interactive system. The obvious example would be the Internet. Note, also that WPPT, Art. 5., requires moral rights for performers.]

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A Comparative Overview of Related Rights Protection (continued)

	ROME CONVENTION(RC)	TRIPS AGREEMENT	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
Rights of Producers of Phonograms and Sound Recordings	Art. 10 [right to authorize or prohibit direct or indirect reproduction of phonograms] The Rome Convention provides for a performance right. See Art. 12. The Geneva Phonograms Convention provides for a public distribution right.	Art 14.2 [right to authorize or prohibit direct or indirect reproduction of their phonograms] Note that, unlike the Rome Convention, TRIPS requires fixation on a phonogram alone. Other forms of fixation are not covered. Protection for such works will have to be covered by other provisions. Thus, for example, audiovisual works could be protected under Article 19 of the Rome Convention or Article 2 of the WPPT.	Art. 11 [exclusive right to authorize direct or indirect reproduction of their phonograms in any manner or form.] Art. 12 establishes a public distribution right; Art. 13 establishes a commercial rental right; Art. 14 establishes an exclusive right to make their phonograms available to the public by wire or wireless means.; Art. 15 establishes a right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or any communication to the public.

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	ROME CONVENTION(RC)	TRIPS AGREEMENT	WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)
Rights of Broadcasting Organizations	Art. 13 [right to authorize or prohibit (a) rebroadcasting of their broadcasts; (b) fixation of their broadcasts (c) reproductions of unauthorized fixations of their broadcasts; (d) communication to the public of their television broadcasts.]	Art. 14.3 [right to prohibit unauthorized fixations, reproduction of fixations, rebroadcasting of wireless means of broadcasts and communication to the public of television broadcasts of the same. TRIPS gives countries the option of giving these rights to broadcasting organizations or to owners of copyright in the subject matter of the broadcast, subject to the Berne Convention.]	

Article 14.5 requires that rights granted to performers and producers of phonograms “shall” last at least until the end of fifty years from the date of fixation or date of the performance. The rights of broadcasting organizations must last a minimum of twenty years from the end of the calendar year in which the broadcast took place.²²⁶ Conditions, limitations, exceptions and reservations are permitted under TRIPS with respect to the rights granted in paragraphs 1–3 of Article 14 on the same terms as provided in the Rome Convention.²²⁷ Article 18 of the Berne Convention is also invoked to apply to the rights of performers and producers of phonograms in the phonograms themselves.²²⁸ It is important to note that compulsory licensing is allowed under the Rome Convention to the extent that it is compatible with the Convention.

²²⁶ See TRIPS, Article 14.5.

²²⁷ See Article 14.6.

²²⁸ Id.

6. New developments

6.1 National laws

6.2 International instruments

6.3 Regional contexts

7. Comments, including economic and social implications

The rights of performers, producers of phonograms and broadcasting organizations arguably are tangential to the incentive structure of the copyright system. In other words these categories relate more to the exploitation of underlying literary and artistic works, which means that strong proprietary rights may not be needed to encourage their development. The reality is that most of the works that are covered by a related rights regime do not need the full term of copyright protection as their economic value is likely to be exhausted long before such term expires. TRIPS provides a framework for the protection of these related rights that allows much room for Members to tailor the protection of such rights to suit domestic economic and political realities. It is important to note that because these categories of works are designed to exploit copyrighted works, the real issue for regulation is how rights administration (through collecting societies, as discussed below) will be designed to facilitate the ability of producers and broadcasting organizations to bring these works to the public. Thus, the economic and social concerns relating to related rights must be examined in the domestic context with a view to balancing the efficient mechanism of collecting societies with the need to ensure that the owners of underlying copyright works are not unduly taken advantage of. It is in respect of the regulation of collecting societies *vis-a-vis* rights owners that the protection of related rights may affect the incentive to authors.

From a development perspective,²²⁹ related rights may be of particular interest to countries endowed with oral traditions and culture, in the representation of which authors are usually performers as well. Expressions of folklore that often fail to qualify for copyright protection can thus indirectly obtain protection from rights in performances, fixations and broadcasts. Similarly, the protection of phonogram producers may contribute to developing countries' efforts to establish their own sound-recording industries which promote the dissemination of national culture, both within and outside the country, and also foster export opportunities.²³⁰ In the same vein, broadcasting organizations in developing countries can benefit from protecting costly programmes against unauthorized reproduction, and rebroadcasts of major culture and sports programmes abroad are potential sources of foreign exchange.

To these ends, developing countries need to establish an institutional framework, including national collecting societies, in order to ensure that public and private funds invested in the production of cultural goods bear fruit on both

²²⁹ As to the following, see UNCTAD, 1996, paras. 168, 169.

²³⁰ On the relevance of the music sector for developing countries, see UNCTAD-ICTSD, *Intellectual Property Rights: Implications for Development*, Policy Discussion Paper, Geneva, 2003, Chapter 3 (in particular pp. 70/71).

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domestic and foreign markets. These agencies may also assist local authors and artists in restoring copyrights or related rights protection to any works of national origin that foreign authorities must now remove from the public domain by virtue of the Berne Convention and relevant provisions of TRIPS.

On the other hand, developing countries should take appropriate measures to ensure that collecting societies, due to their market power, do not themselves prevent the competition required to keep prices of copyrighted materials at affordable levels. This means that a country should not promote collecting societies without at the same time ensuring a workable set of competition rules, including the establishment of the competent authorities to administer these rules.²³¹

²³¹ The IPR Commission has cautioned against an uncritical promotion of collecting societies (see the report, pp. 98, 99). The Commission advances two reasons for this view. First, it states that collecting societies operating in developing countries tend to collect “far more” royalties for foreign rights holders from industrialized countries than for domestic rights holders from developing countries. This tendency might, however, just reflect the economic reality in developing countries, i.e. that most holders of copyrights are nationals from developed countries. The second argument brought forward by the IPR Commission concerns the above-mentioned problem of collecting societies acquiring considerable market power and thus presenting a threat to competition and affordable prices. The IPR Commission concludes that collecting societies should not be established before the respective country has set up the institutions and the regulatory framework necessary for the protection of competition in the software market. The Commission also expresses the view that the benefit to the local population of collecting societies will be more direct in large markets, considering the modest absolute number of local copyright holders in small developing countries. According to the Commission, copyright holders as the immediate beneficiaries should bear the costs of setting up and running collecting societies.