**Comments on *Atresmedia* – what rights of performers are, or are not, applicable in case of embodiment of phonograms in audiovisual works**

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**Abstract**

In its *Atresmedia* judgment[[2]](#footnote-2), the Court of Justice of the E.U. (CJEU) has found that, when a phonogram is incorporated into an audiovisual work, it loses its quality of phonogram. Consequently, the rights in the phonogram cease to be applicable (although the phonogram regains its quality when published later separately). The Court has deduced from this finding that, as long as a phonogram is incorporated in an audiovisual work, the right of performers and producers of phonograms to a single equitable remuneration provided in Article 8(2) of the E.U.’s Rental, Lending and Related Rights Directive (Directive 2006/115/EC)[[3]](#footnote-3) is not applicable.

The CJEU has based this finding on a specific interpretation of the agreed statement adopted by the 1996 Diplomatic Conference concerning the definition of “phonogram” under Article 2(b) of the WIPO Performances and Phonograms Treaty (WPPT) – *inter alia*, with reference to a comment made by the author of this paper in the Guide to the Copyright and Related Rights Treaties Administered by WIPO.[[4]](#footnote-4)

In this paper, the view is expressed that it is not justified to interpret the agreed statement in a way that the right of performers and producers of phonograms to a single equitable remuneration is not applicable as long as a phonogram is embodied in an audiovisual work. It is pointed out such interpretation cannot be deduced from the above-mentioned comment quoted by the Court from the WIPO Guide.

Reference is made to the overlap between the definitions of “phonogram” under Article 2(b) of the WPPT and “audiovisual fixation” under Article 2(b) of the Beijing Treaty on Audiovisual Performances (BTAP), which has been eliminated in favor of the definition of “phonogram”. On the basis of analysing the relevant provisions of the WPPT and the BTAP, a possible alternative option is outlined for the protection of the rights of performers in case of embodiment of phonograms in audiovisual fixations (= audiovisual works) – in their “performances fixed in audiovisual fixations”.

The author acknowledges and thanks Pál Tomori, Director of the Hungarian Bureau for the Protection of Performers Rights (EJI), as well as José Luis Sevillano, Managing Director, Álvaro Hernandez-Pinzón García, Director of Legal Department and Paloma López Paláez, International Area Director of the Spanish Society of Performers (AIE) for their comments and suggestions.

**I. The judgment**

The case concerned a dispute between, on the one hand, Atresmedia,[[5]](#footnote-5) the owner of a number of television channels, and, on the other, AGEDI[[6]](#footnote-6) and AIE[[7]](#footnote-7) – entities that manage, respectively, the intellectual property rights of phonogram producers and such rights of performers – concerning the payment by Atresmedia of a single equitable remuneration for the broadcasting, on television channels operated by it, of audiovisual works incorporating phonograms.

AGEDI and AIE brought an action before the Commercial Court of Madrid[[8]](#footnote-8) against Atresmedia. The Court declared AGEDI’s and AIE’s claim unfounded. They appealed to the Provincial Court of Madrid,[[9]](#footnote-9) which set aside the judgment and upheld their application. To this decision, Atresmedia appealed to the Supreme Court (Tribunal Supremo) of Spain.[[10]](#footnote-10)

The Supreme Court stayed the proceeding and turned to the CJEU with the following questions for preliminary ruling:

(1)      Does the concept of the “reproduction of a phonogram published for commercial purposes” referred to in Article 8(2) of Directives 92/100 and 2006/115 include the reproduction of a phonogram published for commercial purposes in an audiovisual recording containing the fixation of an audiovisual work?

(2)      In the event that the answer to the previous question is in the affirmative, is a television broadcasting organisation which, for any type of communication to the public, uses an audiovisual recording containing the fixation of a cinematographic or audiovisual work in which a phonogram published for commercial purposes has been reproduced, under an obligation to pay the single equitable remuneration provided for in Article 8(2) of the aforementioned directives?[[11]](#footnote-11)

The CJEU has adopted the following preliminary ruling:

Article 8(2) of Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property and Article 8(2) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property must be interpreted as meaning that the single equitable remuneration referred to in those provisions must not be paid by the user where he or she makes a communication to the public of an audiovisual recording containing the fixation of an audiovisual work in which a phonogram or a reproduction of that phonogram has been incorporated.

The Court has quoted the definitions of “phonogram” under Article 3(2) of the Rome Convention (“exclusively aural fixation of sounds of a performance or of other sounds”) and Article 2(b) of the WPPT (“the fixation of the sounds of a performance or of other sounds […] other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”), and has found that they “preclude a fixation of sounds incorporated in a cinematographic or other audiovisual work from being covered by the concept of ‘phonogram’” [despite of the incorporation into it the sounds fixed in a phonogram][[12]](#footnote-12).

The CJEU has also quoted the agreed statement concerning Article 2(b) of the WPPT according to which “[i]t is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work”[[13]](#footnote-13). But it stated that it “cannot call into question” the findings of the Court, because “[i]t may be inferred from that agreed statement that a phonogram incorporated in a cinematographic or other audiovisual work loses its status as a ‘phonogram’ in so far as it forms part of such a work, without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue.”[[14]](#footnote-14). Furthermore, the CJEU has rejected the idea that the incorporation of a phonogram in an audiovisual work might be regarded as a reproduction of the phonogram.[[15]](#footnote-15)

**II. Analysis of the issues raised in *Atresmedia***

***Misinterpretation of a comment made in the WIPO Guide***

Both authors and performers have exclusive rights to authorize the incorporation of their unfixed musical works and performances, respectively, in an audiovisual fixation. For musical works, Article 14(1)(i) of the Berne Convention applies on the exclusive right of authorizing “cinematographic adaptations and reproduction”, or using a legal-technical term: “synchronization”[[16]](#footnote-16), while for unfixed performances, the exclusive right of fixation provided in Article 6(ii) of the WPPT and Article 6(ii) of the BTAP.

In such a case, the performance of a musical work becomes part of the soundtrack of the audiovisual work, and the rights of authorization are acquired normally by the producer through different legal techniques. The legal status of authors and performers whose works and performances are *first* recorded by the producer of the audiovisual fixation in this way was not an issue in *Atresmedia* and, thus, it is neither discussed in general in this paper. One issue is, however, still relevant for the analysis of the judgment; namely, the ownership of the rights in the soundtrack when it is published separately for commercial purposes. The soundtrack published in such a way corresponds to the definition of “phonogram”, the producer of which, under Article 2(d) of the WPPT, will be the producer of the audiovisual fixation (as “the person, or the legal entity, who or which [has taken] the initiative and [had] the responsibility for the first fixation of the sounds of a performance or other sounds …”).

This is relevant in order to understand the meaning of the comment made in the WIPO Guide to which the CJEU refers in *Atresmedia*. The Court quotes the agreed statement as mentioned above and then it analyses it as follows:

43      However, that agreed statement cannot call into question the foregoing considerations [according to which the right to single equitable remuneration does not apply while a phonogram is part of the soundtrack].

44 *It may be inferred from that agreed statement that a phonogram incorporated* in a cinematographic or other audiovisual work *loses its status as a ‘phonogram’* in so far as it forms part of such a work, *without that fact having any effect on the rights in that phonogram were it to be used independently from the work at issue.*

45      *That interpretation is*, moreover, *supported by the document referred to in paragraph 40* *above* [the WIPO Guide], from which it is apparent that that agreed statement is intended to specify that ‘*phonograms may only be used in [a cinematographic or other audiovisual work] on the basis of appropriate contractual arrangements, duly taking into account the rights of producers of phonograms provided for in [the WPPT]. If they are used again independently from the audiovisual work, they are to be regarded as phonograms’*.

46      *In the present case*, first, it has already been noted in paragraph 25 above that *the phonograms* at issue in the main proceedings *were incorporated into audiovisual works with the authorisation of the rightholders* concerned *and in return for remuneration* paid to them in accordance with the applicable contractual arrangements. Secondly, *it has not been argued that those phonograms are reused independently* from the audiovisual work in which they were incorporated. (Emphasis added.)

The comment quoted in paragraph 45 of the judgment truly appears in the WIPO Guide[[17]](#footnote-17). However, it relates *only to the rights of producers of phonograms* and *only to the authorization* *of* the incorporation of phonograms into audiovisual works – that is, to the act of *synchronization*. It does not address the question of what kind of impact such incorporation may have on the right of performers and producers of phonograms to a single equitable remuneration under Article 12 of the Rome Convention, Article 15 of the WPPT and Article 8(2) of Directive 2006/115/EC. Consequently, it does not follow from this comment what the CJEU has deduced from them.

The comment according to which, if a phonogram incorporated in an audiovisual work is used again independently, it qualifies as a phonogram, has been made *only from the viewpoint of the rights of producers of phonograms*. Where an existing phonogram is incorporated in an audiovisual work, the situation is *not* the same as where the first fixation of the sounds is made by the producer of the audiovisual work in parallel with the fixation of the images. It is not the same because, while the producers of audiovisual works become producers of phonograms when the sounds first fixed by them are published independently, this is not the case when a pre-existing phonogram is incorporated in the soundtrack; the producer is the producer of the originally recorded phonogram whenever it is published separately.

***Doubts about the validity of the thesis according to which the incorporation of a pre-existing phonogram in an audiovisual work is not reproduction of the phonogram***

The CJEU has deduced from the definitions of “phonogram” in Article 3(b) of the Rome Convention and Article 2(b) of the WPPT that, although a phonogram is incorporated in an audiovisual work, an audiovisual work is involved exclusively and no phonogram anymore. Therefore, according to the Court, it is the audiovisual work which is broadcast and communicated to the public; the phonogram incorporated in the audiovisual work is not broadcast and communicated to the public; thus, Article 8(2) of Directive 2006/115/EC on the right of the single equitable remuneration is not applicable.

This conclusion of the CJEU presumes the position that the phonogram is not reproduced in the soundtrack of an audiovisual work. With due respect to the Court’s position, this is not the case. The Court itself has recognized this because, in paragraph 25 of the judgment contains the following statements: “[T]he referring court’s questions do not concern *the reproduction of such phonograms when they are being incorporated* in those audiovisual recordings. That court makes clear that *such an incorporation* was carried out with the authorisation of the rightholders concerned.” (Emphasis added.) It is apparent from this remark that the act of “incorporation” is, in fact, and act of reproduction. Thus, when an audiovisual work is broadcast or communicated to the public with a pre-existing phonogram incorporated in it, also the reproduction of the phonogram (as reproduced in the soundtrack) is broadcast or communicated.

It would have followed from this recognition – according to which, where the incorporation (“synchronization”) of a phonogram in an audiovisual work is authorized, in fact its reproduction is authorized – that with this, unless there is an un-rebuttable presumption of transfer of other rights, no other rights are transferred. The transfer of other rights in the phonogram, and this is particularly true as regards the rights in performances embodied therein, is another matter. It is about those rights that the agreed statement concerning Article 2(b) of the WPPT clarifies that those rights – are in no way affected by the incorporation of a phonogram into an audiovisual work. The right to a single equitable remuneration of the performers and producers of phonograms is beyond any imaginable doubt is such a right, and since it is in no way affected, it is applicable.[[18]](#footnote-18)

The CJEU, however, got into conflict with this justified recognition that the “synchronization” of a phonogram means and act of reproduction, as a result of which a reproduction is made in the soundtrack by still trying to prove that this reproduction is not reproduction.

With due respect, the CJEU seems to have erred in trying to interpret the concept of “reproduction” exclusively on the basis of the definition in Article 3(e) of the Rome Convention. The Court must have taken into account that, in the E.U., Article 2(1) of the Information Society Directive (Directive 2001/29/EC)[[19]](#footnote-19) applies, under which the exclusive right to authorize or prohibit the reproduction of works, performances, phonograms, etc., is applicable to any kind of reproduction: “*direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part*”.

One of the elements of the broad concept of reproduction under Article 2(1) of Directive is already present in the Rome Convention itself. It is clarified in Article 10 of the Convention that the right of reproduction in phonograms covers *both direct and indirect* reproduction. However, Article 2(1) of the Directive provides for a right of reproduction to an even broader – the broadest possible – extent:

 (i) the reference to “*temporary or permanent*” reproduction is included because the Directive serves the implementation of the WCT and the WPPT where an agreed statement (concerning Article 1(4) of the WCT and Articles 7 and 11 of the WPPT) clarifies that the right of reproduction fully applies to storage of works, performances and phonograms in electronic form – irrespective of whether it is temporary or more permanent;

 (ii) it is stated that the right of reproduction applies irrespective of whether it is *in whole or only in part*; and

 (iii) the phrase “*any means and in any form*” appearing in Article 9(1) of the Berne Convention on the exclusive reproduction right of authors has also been transposed which further confirms the broadest possible application of the concept and right of reproduction.

In view of such a complete coverage of the concept and right of reproduction, the CJEU’s finding according to which, with the incorporation of a pre-existing phonogram in the soundtrack of an audiovisual work, no reproduction of the phonogram appears does not seem to be well founded.

The presence of a reproduction of a pre-existing phonogram does justify the application of the right to a single equitable remuneration provided in Article 8(2) of Directive 2006/115/EC, in accordance with both Article 12 of the Rome Convention and Article 15 of the WPPT. This is so, because – under these provisions – the right is to be applied not only to a phonogram published for commercial purposes, but also to “a reproduction of such a phonogram”: reproduction directly or indirectly, temporarily or permanently, in full or only in part, and by any means and in any other form.

Thus, when an audiovisual work, with a reproduction of a pre-existing phonogram incorporated in it, is broadcast and communicated to the public, also the reproduction of the phonogram is broadcast and communicated. It is normal that, with the authorization of the synchronization of the phonogram, the exclusive rights of reproduction and the distribution are transferred, as the transfer of other exclusive rights – such as the right of rental and the right of (interactive) making available to the public – is also justified and usual. The complex nature of audiovisual works justify this; in order to make the normal exploitation of certain rights possible, it is necessary to concentrate the rights of authorization in the hands of the producer of the work. However, there is no legal or practical obstacle to the application of the rights to remuneration by the performers and producers of phonograms; nor is there any such obstacle where an exclusive right may only be exercised through (mandatory) collective management (see the case of cable retransmission rights).

The agreed statement concerning Article 2(b) of the WPPT should be understood and applied in the light of these considerations. The expression according to which the definition of “phonogram” “does not suggest that rights [not certain rights, but any rights] in the phonogram are in *any way* [emphasis added] affected their incorporation [= reproduction] into a cinematographic or other audiovisual work” fully justifies the application of the right to a single equitable remuneration under Article 8(2) of Directive 2006/115/EC.

If the CJEU had more thoroughly analyzed the issue of the question of applicability of this right in respect of the reproduction of phonograms incorporated in audiovisual works, it certainly would have found that there are also other situations where no doubts emerge about the parallel applicability of rights in a work or a performance incorporated in an audiovisual work. It is sufficient to refer to the unwaivable right to equitable remuneration maintained by authors and performers under Article 5 of Directive 2006/115/EC – that is, the same Directive where the right to a single equitable remuneration is prescribed in Article 8(2) – when they transfer their exclusive right of rental to the producers of phonograms or to the producers of films.

For another reason, it is also a close parallel that, although the authors – through their collective management organizations (CMOs) or directly – authorize the synchronization of their musical works in audiovisual works, they normally maintain their “performing rights” (the rights of public performance and broadcasting) by means of contractual arrangements, or even by virtue of statutory provisions, which are exercised usually through CMOs.

It seems that the CJEU has not duly taken into account the rules of interpretation of international treaties laid down in Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). Under the next title, it is discussed how the Court, on the basis of these rules, would have had to interpret Article 2(b) of the WPPT and the agreed statement.

***Interpretation of Article 2(b) of the WPPT and the agreed statement concerning it on the rights in phonograms embodied in audiovisual works on the basis of the VCLT***

The CJEU, in paragraph 3 of its *Atresmedia* judgement, quotes Article 31.2(a) of the VCLT:

The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

1. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

However, it is necessary to quote these provisions together with paragraph 1 of the same article:

*Article 31. General rule of interpretation*

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
3. any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

The quotation Article 31.1 together with Article 31.2(a) is indispensable because it contains the basic rule of the interpretation of treaties. Without this it is not clear what the “context” is to which Article 31.2 refers.

The basic rule under Article 31.1 is that a treaty must be interpreted *in good faith* – in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. This requires the application of the principle of *effectiveness* of interpretation; which means that all elements of a treaty provision must be considered applicable; shrugging off any of them as irrelevant would not be in accordance with the requirement of interpretation in good faith.

In the previous section, a reasonable interpretation of the agreed statement concerning Article 2(b) of the WPPT is outlined. It follows from it that the right to a single equitable remuneration under Article 8(2) of Directive 2006/115/EC is applicable also where a reproduction of a phonogram is incorporated (reproduced) in the soundtrack of an audiovisual work.

By virtue of the agreed statement, the *rights* in a phonogram in general (and not only certain rights) are not affected through its incorporation into an audiovisual work. Contrary to what the CJEU has found, it is not seem to be decisive that a *reproduction* of a pre-existing phonogram is not used independently but it is included in the soundtrack of an audiovisual work, since the reproduction is used in that way too.

The agreed statement offers clarification exactly for this situation: such a status of the reproduction of the phonogram “does not suggest that the rights in the phonogram are *in any way* affected through their incorporation”. The right to a single equitable remuneration under Article 8(2) of Directive 2006/115/EC is beyond any doubt a right in the phonogram and there is no legal or practical obstacle that might make its application absurd or unreasonable in the given context. Thus, if follows from the ordinary meaning of the terms used in the agreed statement that this right is not affected either through the incorporation of the phonogram in an audiovisual work.

It is to be noted that Article 32 of the VCLT provides for the applicability of possible supplementary sources of interpretation:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

1. leaves the meaning ambiguous or obscure; or
2. leads to a result which is manifestly absurd or unreasonable.

The above-mentioned agreed statement concerning Article 2(b) is not ambiguous, obscure, absurd or unreasonable. The examples mentioned in the preceding section (the parallel application of the exclusive right of rental transferred by a performer to the producer of a film and the right to remuneration of the performer for the same acts vis-à-vis the users of the film as well as the parallel application of the performing rights of authors in their musical works incorporated in films) make it clear that there is no reason to characterize the agreed statement in such a way. The objective of the application of Article 32 may rather be only “to confirm the meaning resulting from the application of article 31.”

In general, the “preparatory work” of a treaty – as reflected in the documents and records of the preparatory meetings and in particular of the diplomatic conference – is the most relevant supplementary source of interpretation. However, in the case of the above-mentioned agreed statement concerning Article 2(b) of the WPPT, practically no such official source is available. The agreed statement was agreed upon during informal consultations of which no record has been prepared; it was submitted by Main Committee I to the Plenary on December 20, 1996, the last day the Diplomatic Conference, along with other agreed statements[[20]](#footnote-20), and then it is referred to just in the records of the Plenary according to which the Plenary has accepted the agreed statements included in the said document by consensus without any debate[[21]](#footnote-21). Thus, the “preparatory work” does not offer any real supplementary source of interpretation. Nevertheless, it is a fact, there is nothing in the “preparatory work” that would contradict the above-outlined meaning of the agreed statement “resulting from the application of article 31”.

It was at the 2000 Diplomatic Conference on a possible treaty on the rights of audiovisual performers (adopted finally as the BTAP in 2012) that a debate took place on the status of rights in phonograms incorporated in audiovisual fixations. The following statements were made:

* The U.S. Delegation did not specifically address the issue of the acts of incorporation of a phonogram in an audiovisual work, but stated that “[t]he soundtrack of a motion picture or television production which formed part of the work was not a separate phonogram subject to separate remuneration, unlike a commercially published phonogram of the soundtrack or a selection from the soundtrack.”[[22]](#footnote-22)
* The Australian Delegation made the following statement: “According to the definition in Article 2(b) of the WPPT, once a phonogram was incorporated in an audiovisual work, in that new context it ceased to be a phonogram, but the phonogram in the original format continued to enjoy its status and protection. Thus, if it was broadcast, Article 15 of the WPPT would continue to apply notwithstanding that it had been incorporated in the audiovisual fixation. However, if the audiovisual work incorporating the phonogram was used in a broadcast, the phonogram incorporated in it was not being broadcast for the purposes of Article 15.”[[23]](#footnote-23)

The problem with this Australian statement is that it is based on a badly founded premise. Article 2(b) of the WPPT reads as follows: “’phonogram’ means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work”. There is nothing in this definition or the agreed statement concerning it that might mean that “once a phonogram was incorporated in an audiovisual work, in that new context it ceased to be a phonogram”. The fact is that, a reproduction of the phonogram is made about which it cannot be alleged reasonably that it is not a reproduction of the phonogram just because it is made as part of the soundtrack. The agreed statement concerning the definition does not suggest that the rights in the phonogram would be affected throughout its incorporation into the soundtrack. Under the agreed statement just the contrary is the case: the rights are not affected in any way.

* The Japanese delegation offered the most thorough analysis: “[W]hen aural performances once fixed in a phonogram is incorporated in an audiovisual fixation, such aural performances do not fall under the new instrument but fall under the WPPT. On the other hand, aural performances fixed in an audiovisual fixation fall under the new instrument, however, when such aural performances are embodied in a phonogram, such aural performances embodied in a phonogram fall under the WPPT.”[[24]](#footnote-24) )

This analysis corresponds to the interpretation of Article 2(b) of the WPPT and the agreed statement outlined above in accordance with relevant provisions of the VCLT.

* Finally, the E.C. delegation stressed the flexibility available to the Contracting Parties: “There were sound recordings that were accompanied by visual elements. That fact made such sound recordings an audiovisual fixation or made them phonograms, depending on how Contracting Parties would deal with these phenomena. The same went for the treatment of music videos. An important objective was that the new instrument would not prejudice the freedom of Contracting Parties to choose the appropriate category as they saw fit for those various phenomena.”[[25]](#footnote-25) (Summary minute, paragraph 97.)

Of course, it is doubtful whether the comments made at the 2000 Diplomatic Conference on the rights of “audiovisual performers” might be regarded truly decisive for the interpretation of an agreed statement adopted in 1996 concerning the definition of “phonogram” in the WPPT. In the E.U. context, it further questions the relevance of these comments that the E.U. and its Members States (with the exception of Slovakia) are not party to the BTAP. Nevertheless, to the extent that the preparatory work of that other treaty may be considered at all, it certainly does not contradict the interpretation of Article 2(b) of the WPPT and the agreed statement based on Article 31 if the VCLT. Rather the comments made by the delegation of the E.C. – referring to phonograms accompanied by visual elements – and even more clearly those made by the Japanese delegation, seem to confirm the interpretation outlined in this memorandum above. In contrast, the position expressed by the Australian delegation does not seem to be in due accordance with the agreed statement and with the very text of Article 2(b) of the WPPT.

The above-quoted remarks by the E.C. delegation have also drawn attention to videoclips, in the case of which it is particularly clear that, when they are broadcast or communicated to the public along with the visual elements (which may or may not qualify as original audiovisual works) the broadcasting or communication to the public of the phonogram also takes place; thus the right to an equitable remuneration under Article 8(2) of Directive 2006/115/EC is applicable along with any parallel rights in the accompanying visual elements.

**III. A possible alternative way of protecting performers’ rights**

**in phonograms embodied in audiovisual works**

***If, under Atresmedia, performers lost their rights in their performances fixed in phonograms through their incorporation into audiovisual works, might they enjoy rights in the same as “performances fixed in audiovisual fixations”?***

The CJEU has not analyzed in *Atresmedia* the differences between the status of performances embodied in phonograms and in audiovisual fixations. This is understandable since the E.U. and its Member States (with the strange exception of Slovakia) are not party yet to the BTAP. In spite of this, it is worthwhile considering how the application of the provisions of that Treaty might influence the protection of the rights in performances fixed in phonograms incorporated in audiovisual fixations (which, as it is discussed below, in fact, are supposed to be fixations in audiovisual *works*). It should also be seen that, although the E.U. and the overwhelming majority of its Member States have not ratified the Treaty yet, there are provisions in the E.U. directives and in the national laws of the Member States on the protection of the rights in “audiovisual performances” (which may be suitable to implement the BTAP).

The extension of the analysis to the protection of the rights in performances embodied in audiovisual works seems to be particularly justified since the following question may be asked: if, under *Atresmedia*, the rights in performances embodied in phonograms are not applicable – because, through their incorporation into audiovisual works, they lose their status of performances fixed in phonograms – should not then they be regarded as performances embodied in audiovisual works and protected as such?

There is good reason to ask this question since the BTAP applies to all performances embodied in audiovisual fixations, including musical performances:

1. the protection of the rights of reproduction, distribution, rental, making available to the public, broadcasting and communication to the public under Articles 7 to 11 of the Treaty is applied to all “performances fixed in audiovisual fixations”, and
2. the definition of “performers” in Article 2(a) of the Treaty includes, among others, also “singers, musicians, […] and other persons who […] sing […] or otherwise perform literary and artistic works or expressions of folklore”[[26]](#footnote-26) – which means that their performances are also covered by the expression “performances fixed in audiovisual fixations”.

The question that may be asked more precisely is whether or not the provisions of the BTAP (and, in accordance with those, the corresponding provisions of the E.U Directives and national laws) apply only to performances *first* fixed in an audiovisual fixation[[27]](#footnote-27) or also to performances fixed before in phonograms and incorporated later. In order to answer this question, not only the provisions of the BTAP but also those of the WPPT should be taken into account, because the definition of “phonogram” in Article 2(b) of the latter Treaty is determined by distinguishing it from the fixation of sounds incorporated in audiovisual works.

***Double meanings of the word “fixation”***

Before analyzing the relevant provisions of the WPPT and the WPPT, it is necessary to clarify the double meaning of the word “fixation.”

First, “fixation” may mean *an act*. It is the case in Article 7.1(b) of the Rome Convention (“The protection provided for performers […] shall include the possibility of preventing […] the fixation, without their consent, of their unfixed performances”), in Article 6(ii) of the WPPT and also in Article 6(ii) of the BTAP (“Performers shall enjoy the exclusive right of authorizing, as regards their performances […] the fixation of their unfixed performances”).

“Fixation” means an act – and it is used even in various verb forms – also in Rome Articles 2.1(a) and (b) (“first fixed”) and 3(c) (“first fixes”), as well as in WPPT and BTAP articles (including all provisions on exclusive rights) where the expressions “performances fixed in phonograms” and “performances fixed in audiovisual fixations” are used, respectively. It is also an act in the key article of the BTAP, Article 12 on the Transfer of Rights: “once a performer has consented to fixation of his or her performance in an audiovisual fixation.”[[28]](#footnote-28)

Second, it may mean *a production* and, as such, a *subject matter* of protection; as in Rome Article 3(b) and (e) on the definitions of “phonogram” (“exclusively oral fixation”) and “reproduction” (“making of a copy or copies of a fixation”), in WPPP Article 2(b) on the definition of “phonogram” (“fixation of the sounds of a performance […] other than in the form of a fixation incorporated in”, etc.) and (c) on the definition of “fixation” (“the embodiment of sounds […] from which they can be perceived”, etc.)

“Fixation” is a subject matter also in the various provisions of the BTAP on the definition and the rights in “audiovisual fixations” and it has the same meaning in Article 12 where this term is used. (It shows the Janus-faced nature of the words “fixed” and “fixation” that, although in the expression “performances fixed in audiovisual fixations”, the word “fixed” appears as a passive form of the verb “to be fixed”, the entire expression refers to the subject matter of protection.)

***The relevant provisions of the WPPT and the BTAP***

After this clarification, all those provisions of the BTAP and the WPPT are to be reviewed together that may be relevant from the viewpoint of the question of whether or not performances embodied in pre-existing phonograms may enjoy protection under the BTAP when incorporated in audiovisual fixations (to certain terms, emphasis added):

WPPT, Article 2(a) *and* BTAP 2(a): “performers” are actors, *singers, musicians*, dancers, *and other persons who* act, *sing, deliver, declaim*, play in, interpret, *or otherwise perform* literary or artistic works or expressions of folklore;

WPPT, Article 2(b): “phonogram” means the *fixation of the sounds* of a performance or of other sounds, or of a representation of sounds, *other than in the form of a fixation incorporated in* a cinematographic or other *audiovisual work*;

WPPT, agreed statement concerning Article 2(b): It is understood that the definition of phonogram provided in Article 2(b) *does not suggest that rights in the phonogram are in any way affected through their incorporation* into a cinematographic or other audiovisual work.

WPPT, Article 2(c) “fixation” means the *embodiment of sounds*, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

BTAP, Article 1(1) and (3):

(1) *Nothing in this Treaty shall derogate from existing obligations* that Contracting Parties have to each other *under the WPPT* or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome on October 26, 1961. […]

(3) This Treaty shall not have any connection with treaties other than the WPPT, nor *shall it prejudice any rights and obligations under any other treaties*.

BTAP, agreed statement concerning Article 1: It is understood that *nothing in this Treaty affects any rights or obligations under* *the* WIPO Performances and Phonograms Treaty (*WPPT*) or their interpretation […]

BTAP, Article 2(b): “audiovisual fixation” means the *embodiment of moving images, whether or not accompanied by sounds* or by the representations thereof, from which they can be perceived, reproduced or communicated through a device[[29]](#footnote-29);

BTAP, agreed statement concerning Article 2(b): It is hereby confirmed that *the definition of “audiovisual fixation”* contained in Article 2(b) *is without prejudice to* Article 2(c) [but more correctly *Article 2(b*)[[30]](#footnote-30)] *of the WPPT*.

***Apparent overlap between the definition of “phonograms” and “audiovisual fixations” and its elimination in favor of “phonograms” – with the consequence that only audiovisual works qualify as “audiovisual fixation”***

If the above-quoted provisions are compared, it turns out that there is an apparent overlap – and therefore a potential contradiction – between the definition of “phonogram” in Article 2(b) of the WPPT and the definition of “audiovisual fixation” in Article 2(b) of the BTAP.

Under Article 2(b) of the WPPT, any fixation of the sounds of a performance other than in the form of a fixation incorporated in an audiovisual work is a “phonogram” – that is, where an *audiovisual* *fixation*, in absence of originality, does not quality as audiovisual *work*, it is also a phonogram. This is to be compared with Article 2(b) of the BTAP according to which any embodiment of moving images, whether or not accompanied by sounds is an “audiovisual fixation” – that is, also an audiovisual fixation that does not qualify as audiovisual work and, thus, under Article 2(b) of the WPPT, it is a phonograms.

Before analyzing this apparent overlap between the two treaties, it is worthwhile quoting Jörg Reinbothe and Silke von Lewinski – who played an active role in the negotiations leading to the adoption of the BTAP – how they characterize this overlap and what kind of solution they suggest to solve the potential contradictions it may create (with emphasis added to some parts of their comments):

Unlike the definition of 'fixation' in Article 2(c) WPPT, the definition of 'audiovisual fixation' in Article 2(b) BTAP refers to the embodiment of 'mov­ing images, whether or not accompanied by sounds or by the representations thereof rather than to the embodiment of 'sounds, or the representations thereof. […] The moving images may, but do not need to, represent a cinematographic or other audiovisual work; even moving images that do not incorporate a work, are covered by this term. […]

The definition includes the embodiment of moving images accompanied by sounds. Article 2(c) WPPT on the definition of 'fixation' covers the embodiment of sounds as does Article 2(b) WPPT on the definition of 'phonogram' (without generally excluding embodiments of sounds if combined with moving images); only fixations of sounds in the form of fixations incorporated in a cinematographic or other audiovisual work are excluded from the WPPT. These definitions of a fixation under the BTAP and the WPPT thus seem to overlap to a certain extent. If this is the case, the scope of application of the two Treaties would also overlap, since the BTAP applies to audiovisual fixations (which may include sounds), while the WPPT applies to fixations in the form of phonograms as defined in Article 2(b) WPPT. Although most provisions in both Treaties are drafted in parallel, so that an overlap would not seem to cause any harm, there are some differences in substance, in particular regarding the rights of communication to the public and broadcasting, Article 12 BTAP on the transfer or rights, moral rights, application in time, and points of attachment, apart from different agreed statements. Also, the countries that will be Contracting Parties to one or the other Treaty may differ.

The agreed statement concerning Article 2(b) BTAP attempts to clarify the demarcation between an audiovisual fixation and a fixation covered by the WPPT. However, its wording and history reflect the fact that negotiating parties had different views of which com­binations of sounds and images, if any, would be covered by the WPPT, so that a uniform and clear demarcation has not been achieved. Therefore, the agreed statement concerning Article 2(b) BTAP represents a Solomonian solution, because it simply confirms that the definition of audiovisual fixation in the BTAP is without prejudice to Article 2(c) of the WPPT which thus remains subject to different interpretations. It must be noted, however, that this agreed statement should be understood as leaving without prejudice Article 2(b) (rather than 2(c)) WPPT, since the scope of application of the WPPT extends to performances fixed in phonograms, which are defined in Article 2(b) WPPT. […] The replacement of the reference to Article 2(b) WPPT by a reference to Article 2(c) WPPT seems to have been made by error, or possibly in the belief that reference should be made to the parallel definition of the term 'fixation' in the WPPT. Nevertheless, the aim of this agreed statement was to delineate the scope of application of both Treaties, which refer to performances fixed in audiovisual fixations and those fixed in phonograms (rather than 'fixations'), respectively.

In any case, the agreed statement concerning Article 1 also ensures in general terms that nothing in the BTAP affects any rights or obligations under the WPPT or their interpretation. Accordingly, if Contracting Parties interpret the WPPT as covering the obligation to provide certain minimum rights for performances in phonograms, which they interpret as covering particular combinations of sounds and images, Article 2(b) BTAP does not affect such an interpretation of this obligation. Since there are multiple combinations of sounds and images, including music videos, sound recordings accompanied by moving images and the like, and since Contracting Parties expressed different views on the exact delimitation as well as their wish to maintain a certain discretion at national level, as reflected in the agreed statement […], one may have to acknowledge that this delimitation leaves a certain discretion to Contracting Parties.[[31]](#footnote-31)

These comments – although made by a key representative and a consultant of the delegation of the European Communities at the 2000 Diplomatic Conference – do not seem to offer an appropriate delimitation between the definitions of “phonogram” and “audiovisual fixations”. This is so because *the definitions would not only “seem to overlap*” as it is put in the comments quoted above; *there would be an obvious overlap*, *provided the agreed statements* concerning Article 1 and Article 2(b) of the BTAP *had not been adopted. But* – as already quoted above – *they have been adopted*:

Agreed statement concerning Article 1 of the BTAP: “It is understood that nothing in this Treaty affects any rights or obligations under the WIPO Performances and Phonograms Treaty (WPPT) or their interpretation […]”

Agreed statement concerning Article 2(b) of the BTAP: “It is hereby confirmed that the definition of "audiovisual fixation" contained in Article 2(b) is without prejudice to Article 2(c) [correctly 2(b)] of the WPPT.”

It follows from these agreed statements that the overlap has been eliminated: in the relationship of the WPPT and the BTAP, Article 2(b) of the WPPT applies. Therefore, those fixations of sounds *along with images* that, in the absence of originality, do not qualify as audiovisual works are phonograms under the WPPT rather than audiovisual fixations under the BTAP.

It seems to worthwhile quoting also the following remarks made by Reinbothe and von Lewinski on the definition of “phonograms” in Article 2(b) of the WPPT:

 [T]he act of a fixation of sounds may by definition be an incorporation into an 'audiovisual work' only if it is done simultaneously with the fixation of images; a pre-existing fixation of sounds would not be incorporated in an audiovisual work, but in a visual work; without the sounds, an 'audiovisual' work does not yet exist. […] The time of fixation matters: When a pre-existing fixation of sounds or representations thereof is later used for an audiovisual work, it does not change its nature but remains a 'phonogram'. (Emphasis added.)[[32]](#footnote-32)

The following comments may be made about these remarks:

* First, the last sentence contradicts the findings in Atresmedia, and supports the interpretation of Article 2(b) of the WPPT – and the agreed statement adopted concerning it – as outlined above. Reinbothe and von Lewinski do not state less than that a pre-existing phonograms “used” for (that is, in) audiovisual works remain phonograms (obviously as reproduced in the soundtracks of the audiovisual works).
* Second, in the definition of “audiovisual fixation” in Article 2(b) of the BTAP, neither the word “fixation”, nor the word “incorporation”, nor the word “use” appears. The key part of the definition reads as follows: “’audiovisual fixation’ means the *embodiment* of moving images, whether or not accompanied by sounds …” (emphasis added.) “Embodiment” is a synonym of “incorporation”, but it refers slightly more to the status of things than to the act resulting in that status. This difference is indicated quite clearly in the dictionary definitions of the verbs “to incorporate” and “to embody”. While “to incorporate” is usually defined as “to include” (which seems to concentrate on the act of including something), in the definition of “to embody”, in addition of “to include”, it is, in general, added “or to contain” (referring to the status resulting through the act of inclusion). Therefore, there is good reason to interpret the definition of “audiovisual fixation” in a way that what is decisive is not how the sounds are included (an act) in and audiovisual work but that they are included, contained (a status) accompanying the images included, contained.
* Third, it does not seem to be the case either that the sounds embodied in a pre-existing phonogram “by definition” may only be included in a *visual* – rather than *audio*visual – fixation. It depends; it is possible that the sounds of the audiovisual performances of the performances are first fixed separately and they are merged later (“syncronized”) with the fixation of the images; the inclusion (“syncronization”) of the sounds embodied in a phonogram may take place at the same time but may also take place at different times.

***The provisions of the BTAP as a possible fallback basis to solve the problems raised by Atresmedia to the rights of performers***

As discussed above, there is a possible overlap between the definition of “phonograms” and “audiovisual fixations”, but the overlap has been eliminated in favor of the application of the provisions of “phonograms”. It is also discussed that, irrespective of whether it is recognized that the embodiment of a phonogram in the soundtrack of an audiovisual work is a form of reproduction of the phonogram or not recognized as in *Atresmedia*, it follows from the agreed statement concerning Article 2(b) of the WPPT that the rights in a phonogram “are [not] in any way affected through their incorporation into a cinematographic or other audiovisual work”.

Nevertheless, if *Atresmedia* were not corrected somehow (through a possible legislative clarification or by case law) and the rights in the phonograms embodied in audiovisual works – contrary to what follows from Article 2(b) of the WPPT and the agreed statement concerning it – were not applied, the apparent overlap between the provisions of the WPPT and the BTAP may also have a positive impact from the viewpoint of the rights of performers whose performances are embodied in an audiovisual work in that way. Although, the right to a single equitable remuneration provided in Article 12 of the Rome Convention, Article 15 of the WPPT and Article 8(2) of Directive 2006/115/EC would not be applicable, the rights of performers whose performances are embodied in audiovisual works might still be applied.

It is true that the real value of such a fallback protection would depend on the way the transfer of rights of performers is regulated in law or arranged contractually but, in Article 12 of the BTAP, a number of alternatives are offered, one of them being what is provided in paragraph (3) of the article:

(3) Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.

In those countries where such – usually unwaivable – right to an equitable remuneration (or “royalties”) – are applicable as stressed in the provision “including as regards Article 10 and 11” (that is, the rights of making available to the public, broadcasting and communication to the public), on the basis of the interpretation outlined above, it may fill in the gap left by the poorly found abolition in *Atresmedia* of the right to a single equitable remuneration provided in Article 8(2) of Directive 2006/115/EC. This may be so at least as far as the rights of performers are concerned (while the producers of phonograms may take care of the exercise of their rights when authorizing the synchronization of their phonograms as suggested in *Atresmedia*).

Such an interpretation would be supported, at least indirectly, also by the concept of “first fixation of film” applied in various E.U. directives[[33]](#footnote-33) as the subject matter of a specific related rights. The concept of “first fixation” of a film corresponds to the “final cut” in which the various previously fixed elements of the film are merged together – from the viewpoint of which it is not decisive whether the sounds were previous fixed together (or at least simultaneously) with the images or are incorporated from pre-existing phonograms.

However, the truly healthy solution to the problems created by Atresmedia – not only to performers but also to producers of phonograms – would be the correction of the interpretation applied in it and giving effect to the agreed statement concerning Article 2(b) of the WPPT in accordance with its text and the context in which it has been adopted.

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1. \* Member of the Hungarian Copyright Experts Council, former Assistant Director General of WIPO. [↑](#footnote-ref-1)
2. Case C-147/19; ECLI:EU:C:2020:935. [↑](#footnote-ref-2)
3. #  Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

 [↑](#footnote-ref-3)
4. Mihály Ficsor*: Guide to the Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*, WIPO publication 891 (E), 2003 (hereinafter: WIPO Guide). [↑](#footnote-ref-4)
5. Atresmedia Corporación de Medios de Comunicación SA (‘Atresmedia’). [↑](#footnote-ref-5)
6. Asociación de Gestión de Derechos Intelectuales (AGEDI) managing the rights of producers of phonograms [↑](#footnote-ref-6)
7. Artistas Intérpretes o Ejecutantes, Sociedad de Gestión de España (AIE) managing the rights pf performers, in particular concerning their performamnces fixed on phonograms.   [↑](#footnote-ref-7)
8. Juzgado de lo Mercantil de Madrid No 4 Bis. [↑](#footnote-ref-8)
9. Audiencia Provincial de Madrid. [↑](#footnote-ref-9)
10. Case C-147/19; ECLI:EU:C:2020:935, paras 18 – 20. [↑](#footnote-ref-10)
11. *Ibid*., para 23. [↑](#footnote-ref-11)
12. *Ibid*., para 41. [↑](#footnote-ref-12)
13. *Ibid*., para. 42. [↑](#footnote-ref-13)
14. *Ibid*., paras 43- 44. [↑](#footnote-ref-14)
15. See, *ibid*., paras 48 – 51. [↑](#footnote-ref-15)
16. The term „syncronization” derived from the period of time when the era of silent movies ended due to the new technological solutions allowing the inclusion of sounds into the soundtracks of films. This required syncronisation of the sounds with the mouth and other movements of the performers. The expression „syncronization” has become used for the incorporation of any pre-existing creations, and also of phonograms, into audiovisual works. [↑](#footnote-ref-16)
17. *See* para. PPT-2.8 in p. 235 of the WIPO Guide. [↑](#footnote-ref-17)
18. It is in this context that the categories of “front-end fees” (just for the authorization of the synchronization; “sync fees”) and “back-end fees” (so-called “performance royalties”) exist. The “backend fees” may be an issue for separate regulation (in many European countries, they are due on the basis of statutory norms) or contractual agreements (mainly in countries following the common-law tradition). [↑](#footnote-ref-18)
19. Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. [↑](#footnote-ref-19)
20. *See* document CRNR/DC/93.Corr. [↑](#footnote-ref-20)
21. *See* Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions – Geneva 1996, WIPO publication No. 348 (E), 1999, p. 629, para 505. [↑](#footnote-ref-21)
22. Summary Minutes of Main Committee I, Document IAVP/DC/37, para. 95. [↑](#footnote-ref-22)
23. *Ibid*., para 319. [↑](#footnote-ref-23)
24. *Ibi*d., para 96. [↑](#footnote-ref-24)
25. *Ibi*d., para 97. [↑](#footnote-ref-25)
26. An agreed statement concerning Article 2(a) also clarifies that „[i]t is understood that the definition of ’audiovisual fixation’ includes those who perform a literary or artistic work that is created or first fixed in the course of a performance”. [↑](#footnote-ref-26)
27. The author, not much time of the adoption of the BTAP uploaded to this website a paper entitled: “Beijing Treaty on Audiovisual Performances: first assessment of the third WIPO ‘Internet Treaty’. In that paper, it was taken as granted that the agreed statement concerning Article 2(b) of the WPPT takes care of the rights of performers (and producers of phonograms) in case of embodiment of preexisting phonograms in audiovisual works. Therefore, that paper only analyzed the status of performances first fixed by a producer of audiovisual work. It is maintained that, in accordance with the analysis above, the applicability of right of performers and producers of phonograms to a single equitable remuneration in case of embodiment of phonograms in audiovisual works follows from the provisions of the WPPT (which have been not been modified by the BTAP). Therefore, the discussion in this section of the present paper is only relevant if the – with due respect, in view of the author, erroneous – interpretation adopted in *Atresmedia* were kept being applied. [↑](#footnote-ref-27)
28. It is to be noted that, in Article 19 of the Rome Convention, the expression „once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation” is used. [↑](#footnote-ref-28)
29. Agreed statement concerning Article 2(b): It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT. [↑](#footnote-ref-29)
30. See the analysis about this, *inter alia*, in the comments made by Jörg Reinbothe and Silke von Lewinski quoted below. [↑](#footnote-ref-30)
31. Jörg Reinbothe – Silke von Lewinski: *The WIPO Treaties on Copyright – A Commentary on the WCT, the WPPT, and the BTAP*, second edition, Oxford University Press, 2015, pp. 492 – 494., paras 9.2.17 to 9.2.20. [↑](#footnote-ref-31)
32. *Ibid*., p. 272, para. 8.2.42. [↑](#footnote-ref-32)
33. See various provisions of Directive 2006/115/EC – that is, the same directive which provides for the single equitable remuneration of performers and producers of phonograms in Article 8(2) – where this category of related rights was introduced, for the first time, in the original 1992 version of the directive (as Directive 92/100/EEC) but also, e.g. Articles 2 and 3 of the Information Society Directive (Directive 2001/29/EC) on the rights of reproduction, distribution and making available to the public. [↑](#footnote-ref-33)