

Main Provisions and Benefits of the Beijing Treaty on Audiovisual Performances (2012)



2016

Background

The Beijing Treaty on Audiovisual Performances (Beijing Treaty or BTAP) was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances, which took place in Beijing from June 20 to 26, 2012. The Beijing Treaty modernizes and updates for the digital era the protection for singers, musicians, dancers and actors in audiovisual performances contained in the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1961). These updates for the digital era complement the provisions in the WIPO Performances and Phonograms Treaty (WPPT), which updated protections for performers and producers of phonograms.

The Beijing Treaty encompasses the performances of actors in different media, such as film and television, and also includes musicians when their musical performances are recorded in a DVD or any other audiovisual platform. The Beijing Treaty grants performers economic rights in fixed and unfixed performances, as well as certain moral rights.

This document describes some of the main provisions of the Beijing Treaty and then explains some of the benefits for WIPO Member States that join the Treaty.

Main Provisions of the Beijing Treaty

The Beijing Treaty grants performers four kinds of **economic rights** for their performances **fixed in audiovisual fixations**: **(i)** the right of reproduction; **(ii)** the right of distribution; **(iii)** the right of rental; and **(iv)** the right of making available.

- The **right of reproduction** is the right to authorize direct or indirect reproduction of the performance fixed in an audiovisual fixation in any manner or form.
- The **right of distribution** is the right to authorize the making available to the public of the original and copies of the performance fixed in an audiovisual fixation through sale or other transfer of ownership.
- The **right of rental** is the right to authorize the commercial rental to the public of the original and copies of the performance fixed in an audiovisual fixation.
- The **right of making available** is the right to authorize the making available to the public, by wire or wireless means, of any performance fixed in an audiovisual fixation, in such a way that members of the public may access the fixed performance from a place and at a time individually chosen by them. This right covers, in particular, on-demand, interactive making available through the Internet.

As to **unfixed (live) performances**, the Treaty grants performers three kinds of economic rights: **(i)** the right of broadcasting (except in the case of rebroadcasting); **(ii)** the right of communication to the public (except where the performance is a broadcast performance); and **(iii)** the right of fixation.

The Treaty also grants performers **moral rights**, that is, the right to claim to be identified as the performer (except where such an omission would be dictated by the manner of the use of the performance); and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation, taking into account the nature of the audiovisual fixations.

The Treaty provides that performers shall enjoy the right to authorize the broadcasting and communication to the public of their performances fixed in audiovisual fixations. However, Contracting Parties may notify that instead of the right of authorization, they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or communication to the public. Any Contracting Party may restrict or – provided that it makes a reservation to the Treaty – deny this right. In the case and to the extent of a reservation by a Contracting Party, the other Contracting Parties are permitted to deny national treatment *vis-à-vis* the reserving Contracting Party (“reciprocity”).

As to the **transfer of rights**, the Treaty provides that Contracting Parties may stipulate in their national laws that once a performer has consented to the audiovisual fixation of a performance, the exclusive rights mentioned above are transferred to the producer of the audiovisual fixation (unless a contract between the performer and producer states otherwise). Independent of such a transfer of rights, 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 the Treaty.

With respect to **limitations and exceptions**, Article 13 of the Beijing Treaty incorporates the so-called “three-step” test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights. The accompanying Agreed Statement provides that the Agreed Statement of Article 10 of the WCT applies similarly to the Beijing Treaty, that is, that limitations and exceptions that are established in national law in compliance with the Berne Convention may be extended to the digital environment. Contracting States may devise new exceptions and limitations appropriate to the digital environment. The extension of existing limitations and exceptions or the creation of new ones is allowed if the conditions of the “three-step” test are met.

The **term of protection** must be at least 50 years.

The enjoyment and exercise of the rights provided for in the Treaty cannot be subject to any formality.

The Treaty obliges Contracting Parties to provide for legal remedies against the circumvention of technological measures (e.g., encryption) used by performers in connection with the exercise of their rights, and against the removal or altering of information – such as the indication of certain data that identify the performer, performance and the audiovisual fixation itself – necessary for the management (e.g., licensing, collecting and distribution of royalties) of the said rights (“rights management information”).

An Agreed Statement related to the interplay between technological measures and limitations and exceptions clarifies that nothing prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance. The above effective and necessary measures may be needed only where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations

and exceptions under that Contracting Party’s national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, the obligations concerning technological measures of protection are not applicable to performances unprotected or no longer protected under the national law giving effect to the Treaty.

Contracting Parties are required to accord protection under this Treaty to fixed performances that exist at the time of entry into force of the Treaty and to all performances made after its entry into force for each Contracting Party. However, a Contracting Party may declare that it will not apply the provisions concerning some or all of the exclusive rights of reproduction, distribution, rental, making available of fixed performances, and broadcasting and communication to the public in respect of performances that existed at the time of the entry into force of this Treaty in each Contracting Party. Other Contracting Parties may then reciprocally limit the application of these rights in relation to that Contracting Party.

The Treaty obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights

covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

The Treaty establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty.

The Beijing Treaty will enter into force three months after 30 eligible parties have deposited their instruments of ratification or accession. The Treaty is open to States members of WIPO and to the European Union. The Assembly constituted by the Treaty may decide to admit other intergovernmental organizations to become party to the Treaty. Instruments of ratification or accession must be deposited with the Director General of WIPO.

Benefits of the Beijing Treaty

Ratification and entry into force of the Beijing Treaty shows that the multilateral norm-setting system as embodied by WIPO can function well to provide important new protections for creators and artists. In addition, the Beijing Treaty will have concrete positive effects on all WIPO Member States, including developing and developed countries. The benefits to countries and their performers will occur in a number of areas, including from the viewpoints of economic development, improved status of audiovisual performers and cultural diversity.

1. Economic development

The Beijing Treaty requires Contracting Parties to provide full protection within their territories to right holders who are nationals of other Contracting Parties, thereby ensuring that local producers and performers enjoy economic rewards when their films, TV series and other audiovisual products are screened or otherwise made available abroad.¹ The Treaty will contribute to safeguarding

¹ While protection of local performers and producers can be provided by national law, without a treaty this protection could risk putting local creators at a comparative disadvantage as the use of foreign audiovisual content would remain unprotected and could thus be less expensive. The Beijing Treaty ensures that this potential comparative disadvantage for local creators disappears.

the rights of performers against the unauthorized use of their performances in audiovisual media, such as television, film and video. In an era of the increasing prevalence of audiovisual productions as well as of audiovisual images in music, digital market consumption has extended beyond open TV broadcasts to pay-TV channels, DVDs and most recently the Internet, including the mobile environment. Protection of audiovisual performances will extend to all those expanding audiovisual markets.

The Beijing Treaty will strengthen and where necessary help to consolidate local audiovisual industries as they join an international system of protection. Moreover, the audiovisual industry is labor-intensive, employing scores of performers, technicians, musicians and other creators. Audiovisual content is also known for being a powerful vehicle for the promotion of locally generated goods and services, such as cars, food and beverages, clothing and tourism, and is therefore a perfect companion to export industries. As the local industries grow and have the resources to produce more content, local consumers will benefit from an increase in the range, diversity and quality of local audiovisual options.

The Beijing Treaty will encourage increased investment, by encouraging effective and well-enforced copyright and related rights legislation, which in turn will be conducive to the development of a balanced framework

for international exchange and access to foreign markets. By reinforcing these pillars of the audiovisual industry, the Beijing Treaty will stimulate multiple sources of investment in local production.

The Beijing Treaty, together with the WIPO Internet Treaties, puts in place the basic tools for a balanced, safe and effective distribution of audiovisual content over the Internet. Copyright industries are a basic element of the knowledge economy, which in turn is a key driver for growth and development in times of economic instability. The Beijing Treaty will enhance the role of the Internet as a leading channel for distributing audiovisual content, thereby furthering broadband development and ICT innovations in areas such as digital service platforms, content applications and transmission standards and technologies.

2. Improving the status of audiovisual performers

By providing incentives and compensation in regard to the international use of their performances, the Beijing Treaty will strengthen the standing of performers in the audiovisual industry. Performers are both artists and cultural workers. The Beijing Treaty will contribute to raising the professional status of actors and other performers and improving their working conditions. Moreover, the development of performers' rights could lead to the introduction

or consolidation of performers' organizations, as well as those of producers, which are their natural counterparts in the exercise of rights for the exploitation of films and other audiovisual content. The development of these representative organizations will facilitate an environment more conducive to social dialogue between artists and producers, which will have the overall effect of strengthening the cinematographic and audiovisual sectors.

3. Protection of culture, folklore and cultural diversity

Apart from being an art form on its own, film is an excellent vehicle for other expressions of creativity and cultural identity. Audiovisual performances can bring the literary works and music of a given culture close to the hearts and minds of the audience in an extremely effective way. This dimension of audiovisual performances as a carrier and multiplier of other creative expressions not only has a tremendous economic significance but is also extremely relevant to furthering cultural diversity. In this same context the Beijing Treaty contributes to the protection of traditional cultural expressions and national folklore, which has been the subject of examination in various WIPO fora, including the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). As clearly stated in

the Beijing Treaty, performers include those actors and singers who interpret an expression of folklore.

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