

Max Planck Institute  
for Innovation and Competition

Copyright and Related Rights: Beijing and Marrakesh Treaties

Possible reservations and options for  
implementation of the Beijing Treaty on  
Audiovisual Performances (BTAP) (2012)

WIPO in cooperation with the Copyright Directorate of the  
Ministry of Culture of Albania

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**Prof. Dr. Silke von Lewinski**



# Overview

- The BTAP allows for one reservation (Art. 11(3), 18 BTAP), and
- Several options (Art. 11(2), 19(2), 12 BTAP)
- “Reservation” is a unilateral statement by a State, when adopting or ratifying a treaty, that purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State
- Optional provisions offer different choices for national legislation
  - Those under Art. 12 BTAP are only of a declaratory nature
  - In the cases of Art. 11(2), 19(2) BTAP a notification with the Director General of WIPO is required (see also Art. 18(2) BTAP)



# Art. 11

## Right of Broadcasting and Communication to the Public

(I) Initial proposition: **Exclusive Right (Art 11(1))**

*Performers enjoy the exclusive right to authorize the broadcasting and communication to the public of their performances fixed in audiovisual fixations*



(II) *Option 1*: Instead of exclusive right: **Right to equitable remuneration (Art. 11(2))**

and option to set conditions for the exercise thereof

Required for both: Notification deposited with the Director General of WIPO

Reciprocity is possible (Art 4(2))



# Art. 18(2) on Notifications

Notification deposited with the Director General of WIPO

Art. 18(2) Form and Effective Date of Notifications:

Sentence 1:

- Either in instruments of ratification or accession - - -
- Effective date: entry into force of the BTAP for the Contracting Party

Sentence 2:

- Or may be made later;
- Effective date then: three months after receipt by the Director General of WIPO or a later date indicated in notification



# Art. 11

## Right of Broadcasting and Communication to the Public

(I) Initial proposition: **Exclusive Right**

(II) *Option 1: Remuneration Right*



(III) *Option 2: Restrictive Application of (I) or (II), Art. 11(3)*

- Option 2a: Provisions of (I) or (II) only

in respect of certain uses, or

- Option 2b: Other restriction of (I) or (II), or

- Option 2c: **No application of (I) and (II)**

*Declaration  
of reservation  
required*



# Art. 11

## Right of Broadcasting and Communication to the Public

Examples for option 2:

Option 2a (Provisions of (I) or (II) only in respect of certain uses):

Exclusive right or remuneration right only for:

- broadcasting
- or communication to the public
- or specific kinds thereof (e.g., only direct or indirect use, or only broadcasting by satellite, etc.)

Option 2b: Other restriction of (I) or (II), e.g.:

Exclusive right or remuneration right only for:

- certain kinds of AV performers
- for a shorter duration of protection, etc.

Option 2c: No application of (I) and (II)



# Art. 18(1) Reservations

- The BTAP does not allow for any reservations, except for those under provisions of Art. 11(3) BTAP
- “Reservation” is a unilateral statement by a State, when adopting or ratifying a treaty, that purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State
- Unlike a mere notification under Art. 11(2), a reservation can only be declared at the time of ratification/accession, not at a later time
- Reciprocity is possible, Art. 4(3)



# Art. 19(2)

## Notifications on Application in Time

### Art. 19(1): Principle

- The BTAP applies to all fixed performances existing at entry into force for a CP and occurring later

### Art. 19(2): Options to deviate therefrom

- Option 1: Not apply Arts. 7 – 11 BTAP
- Option 2: Not apply any of the Arts. 7 – 11 BTAP to performances existing at entry into force for a CP
  
- Notification required
- Reciprocity by other CPs possible





# Art. 12 Overview

## Art. 12:

- (I) “May”-clause leaves Member States freedom to regulate transfer
- (II) Explicitly mentions written form as possible condition for contract
- (III) Explicitly mentions possibility to provide for equitable remuneration

### (I) **Transfer of rights to the producer**

Usually: treaties leave contract law questions to national law.

Usually: transfer is regulated by individual contract, not by law

BUT for AV: Many countries provide a legal mechanism to assure that rights end up with producer, e.g., legal presumption



# Art. 12

## Transfer of Rights

### (I) **Transfer of rights to the producer**

Art. 12 (1): Law may provide that:

“once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.”

- *Option 1* for legislator: Not provide for anything, leave it to parties of contracts
- *Option 2*: Legislator may provide for legal presumption that performers' rights are “owned” by producer after their consent to AV fixation (but performers must be granted the rights initially (Art. 3, 7 – 11, at least for a logical second in order to allow for subsequent ownership by the producer)



# Art. 12

## Transfer of Rights

### (I) Transfer of rights to the producer

- *Option 3*: Legislator may provide for legal presumption that performers' rights are "exercised" by producer after their consent to AV fixation; "**Exercise**" may relate to such (derived) rights that the producer owns, or that he exercises on behalf of the performer
- *Option 4*: Legislator may provide for legal presumption that performers' rights are "transferred" to producer after their consent to AV fixation;
- *Options 5 ff.*: These variants are a non-exhaustive enumeration; Art. 12 BTAP leaves full discretion to Contracting Parties for divergent regulation of transfer



# Art. 12

## Transfer of Rights

### (I) Transfer of rights to the producer

- “subject to any contract to the contrary between the performer and the producer of the audiovisual fixation *as determined by the national law*”:
  - Understood as one option for any presumption, not as a condition for legislator
  - Therefore: possible to provide rebuttable or non-rebuttable presumption

BUT: in any case: Consent of performer to AV fixation needed



# Art. 12(2)

## Transfer of Rights – Written Contract

### (II) Formal Requirements for a Consent allowed/Option for legislator

*Law may require written consent/contract signed by both parties or duly authorized representatives*

- **Political signal** to outline the value of written form and signature for the performer as an equation for transfer-provisions under (I)
- **Contracting parties are free** to determine the extent of formal requirements in national legislation implementing Art 12 (1)



# Art. 12

## Remuneration for Transfer of Rights

(III) **Article 12(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.”

- **Background of remuneration:** re-balancing position of performers

- **Inspiration by Article 4 EC Rental Directive 1992/Art 5** of consolidated version 2006 (though more open):

Residue of the exclusive right, only for authors and performers (distinguish from statutory remuneration right to compensate for limitations)



# Art. 12

## Remuneration for Transfer of Rights

- **Options for national legislation:**
  - No regulation/leaving it to contractual parties
  - Binding legal rules on performers' contract law in national copyright acts
  - Statutory rules granting the performer an unwaivable right outside the contract, after transfer of exclusive right (as under above EU model)
  - Other models
  - Art. 12(3) BTAP is also only of **declaratory nature**
  - **Political signal**





***Thank you for your attention!***

**Contact: [svl@ip.mpg.de](mailto:svl@ip.mpg.de)**