

Background Brief

Performer's Rights

"Since the first actor took off his mask, ... the actors who have succeeded him have no longer been considered as mere instruments or puppets, fully entering into the temple of Thalia as creators." – Javier Bardem, actor (Spain), speaking at WIPO in July 2011 [Video](#) | [Statement](#)

The performances of actors, singers, musicians and dancers are an integral part of the creative process in presentations to the public. Since the very first performance recordings, in sound and images, it has been accepted that performers should have some rights over those recordings and a share in the proceeds from their commercial exploitation.

Nevertheless, the first international recognition of these so-called "neighbouring rights" (rights related to copyright) did not come until adoption of the 1961 [Rome Convention](#). This treaty gave performers in audiovisual works such as feature films, videos and television dramas rights against unauthorized broadcasts or recordings of their performances. However, and in contrast to performers in sound-only recordings (CDs, MP3 files and so on), once performers in audiovisual works had consented to the initial recording of their performance they were given no rights over its use.

With the advent of the internet and sophisticated digital technologies, the scope for both authorized and unauthorized copying and digital manipulation of performances has vastly increased, while the industry has become global. Half of Hollywood's revenues, and a fifth of Bollywood's, now come from abroad. In 1996 WIPO adopted a new [copyright treaty](#) updated for the internet age (WIPO Copyright Treaty, WCT), as well as one for [musical performances and sound recordings](#) (WIPO Performances and Phonograms Treaty, WPPT). But WIPO members failed to agree a similar treaty for performers in audiovisual works, and a second attempt to do so in 2000 was also unsuccessful.

While a number of countries have domestic legislation that grants certain rights to performers in audiovisual works, including the right to be paid when these works are copied, distributed or broadcast, there is no international treaty giving performers control over how and when their work is used abroad, or any legal right to payment.

As a result:

- A musician who records a sound-only CD may be paid whenever that CD is sold or broadcast in a country that is party to the WIPO phonograms treaty, but the same performance on a music video does not carry the same entitlement to payment.
- An actor in a film or TV series sold abroad has no legal right to payment for foreign broadcasts or DVD sales. Any payment for use of the film or TV series that may be made under national laws often goes in its entirety to the producer.
- Once authorization has been given for filming a performance, actors in most countries have no control over how that performance is used. In particular, they may not be able to assert "moral

rights” that ensure attribution and respect for the integrity of their performance. Digital technologies make it easy to manipulate video images and may do so in ways that can harm an actor’s reputation. Actors who provide “movements” for computer-generated characters using motion-capture technology (as used, for example, in *The Adventures of Tintin* movie (2011) directed by Stephen Spielberg) also often have no legal say in use of their work.

The stumbling block to agreement in both 1996 and 2000 was a stand-off between the USA and the European Union over the transfer of rights. In audiovisual productions the transfer of rights from performers to producers is essential so that producers can negotiate commercial deals with cinema chains, broadcasters, DVD retailers and so on without having to seek authorization from each individual performer. A feature film, for example, may use dozens of actors, in addition to others such as screenwriters and photographers who also have rights over their contribution. Although the need to transfer rights is not disputed, different countries have different systems for doing this. In the USA performers’ rights are automatically transferred to producers, while actors’ pay is negotiated by a strong trade union, the Screen Actors Guild. In Europe, practice varies. In some European countries, transfer is automatic while in others it is presumed by law but an agreement to the contrary is possible. Other countries such as the UK have no statutory rules, leaving transfer arrangements to a contract between the performer and the producer. In addition, even after transferring authorization rights, performers in some countries retain moral rights to object to lack of attribution and distortion or derogatory treatment of their performances.

Although 19 of the 20 articles in the proposed audiovisual treaty were agreed provisionally in 2000, Article 12 on transfer of rights remained in dispute because the USA wished to preserve the operation of its automatic system in international law, while the European Union opposed mandatory automaticity. However, in June 2011 negotiations in WIPO’s [Standing Committee on Copyright and Related Rights](#) produced a compromise text that allows countries to keep their own transfer systems. The new draft article permits countries to require transfer of authorization rights to the producer unless there is a contract to the contrary; it also allows for other agreements providing performers with the right to remuneration for their work. This provision would open the way for producers receiving payment for exploitation of audiovisual works abroad to share the proceeds with performers under whatever arrangements prevail in national law.

In September 2011, WIPO’s General Assembly decided to convene a diplomatic conference in 2012 to agree the proposed treaty on protection of audiovisual performances. If adopted, the treaty will extend performers’ rights against unauthorized use of audiovisual performances to films and videos available on the internet, along the lines of the 1996 WPPT. It will raise the minimum term of protection to 50 years from the Rome Convention’s 20 years, as provided by the World Trade Organization’s [Agreement on Trade Related Aspects of Intellectual Property](#) (TRIPs). And when a DVD is reproduced, sold, rented or broadcast in a different country, the treaty will ensure that some money will go to the country of origin, which can then be shared with performers. It will also grant performers moral rights to prevent lack of attribution or distortion of their performance.

For many actors and other performers, including those in developing countries, the treaty will strengthen their economic rights and provide valuable extra income. How much extra will depend on how the treaty is put into national legislation and implemented in practice. But there will for the first time be a legal requirement on countries party to the new treaty to pay for use of foreign audiovisual performances and a presumption that some or all of that revenue will go to performers, the vast majority of whom earn very little.

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