

## Summary of the Beijing Treaty on Audiovisual Performances (2012)

The Beijing Treaty on Audiovisual Performances was adopted by the Diplomatic Conference on the Protection of Audiovisual Performances, which took place in Beijing from June 20 to 26, 2012. The Treaty deals with the intellectual property rights of performers in audiovisual performances.

It grants performers four kinds of **economic rights** for their performances fixed in audiovisual fixations, such as motion pictures: **(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 director 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, *vis-à-vis* the reserving Contracting Party, national treatment ("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.

As 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 such limitations and exceptions as 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 or the creation of new limitations and exceptions 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 shall 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 Community. 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.

cited in Garcia v. Google (ebop)  
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