



The Beijing Treaty on Audiovisual Performances

**Creativity and Access to Knowledge: A Social and
Economic Impetus for Africa**
Kampala, Uganda, March 27, 2015

Africa and the audiovisual sector

- Continuous growth of the audiovisual sector in Africa
- Digital switchover from terrestrial to digital tv in June 2015 will support new channels and growth of new services
- Digital technology sets a new economic trajectory for the african audiovisual sector
- 1600 Number of tv channels in Africa
- Pay tv subscribers will grow from 9.26 million at the end of 2012 to 21 million in 2018
- Huge opportunities for creating and distributing for local content through structuration of their audiovisual industries
- Nigeria 1.7billion USD
- Film is the largest employer of labour after the agricultural industry



Film Elements

Ip forms a considerable part of an Audi visual work A film is made up of a number of elements:

- The underlying works e.g. book, format, synopsis, etc;
- The screenplay;
- The music – musical compositions and sound recordings;
- The performances;
- The film is a work protected by copyright;
- copyright tool which can turn creativity into an economic asset and expand opportunities for the sector
- Need for a coherent legal system where all elements of the value chain properly protected

Conventions Treaties

The Berne Convention	(1886)
The Rome Convention	(1961)
WIPO Copyright Treaty	(1996)
WIPO Performances and Phonograms Treaty	(1996)
Beijing Treaty on Audiovisual Performances	(2012)
Marrakesh Treaty	(2013)



BTAP

- New international treaty adopted in 2012 June 26
- Acknowledges for the first time the IP rights of performers in their audiovisual performances
- Ends a discrimination dating back to the 60's resulting in the sole protection of audio performers
- Eg : an audio recording of a live performance could be protected whereas the audiovisual recording of the same performance would not be protected
- As content is increasingly audiovisual and its exploitation truly global, there was a need for a secure legal framework protecting all kind of performances

Rome Convention 1961 (Article 7)

First international treaty to protect the ip rights of performers. Limited protection and no moral rights. No economic rights to audiovisual fixations

“(..) the possibility of preventing:

- the broadcasting and the communication to the public, without their consent, of their “live” performance;*
- the fixation, without their consent, of their unfixed performance;*
- the reproduction, without their consent, of a fixation of their performance:*
 - (i) if the original fixation itself was made without their consent;*
 - (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;*

Rome Convention (Article 19)

cut-off provision

“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.”

Diplomatic Conference 1996

- Beijing treaty is the outcome of a lengthy process
- WIPO Performances and Phonograms Treaty failed to protect audiovisual fixations
- Recommendation

Diplomatic Conference on the Protection of Audiovisual Performances 2000

- Provisional agreement on 19 articles;
- Outstanding issue was the “transfer of right” (Article 12)
4 options;
- Rights of performers are managed differently in various legal systems some producers insisted on a mandatory presumption of transfer of the economic rights
- Many other debated issues (e.g. definition of audiovisual fixation, moral rights, national treatment (no collection without distribution), application in time).

Diplomatic Conference on the Protection of Audiovisual Performances 2012

- Until June 2011 maintained in the Agenda of the WIPO General Assembly: 12 years of discussion on the transfer of rights
- In September 2011 the GA gave the mandate to “reconvene” the Diplomatic Conference (Beijing, June 20-26, 2012)
- “reconvened” after 12 years;
- the results of the 2000 Dip. Conf. were the starting point;

China



- One of the most powerful economies
- Audiovisual industry has grown dramatically
- This has spurred China to rise among countries to contribute to the IP ecosystem
- Strong signal

Peculiar Diplomatic Conference

Narrow mandate

Adopt:

- the 19 articles provisionally adopted at the 2000 Dip. Conf.
- the new Article 12 agreed to by consensus at session SCCR/22

Negotiate:

- Three (*actually four*) additional Agreed Statements to be drafted in relation to Articles 1, 2, and 15, respectively, to address specific concerns raised by Member States;
- one additional clause in the Preamble recognizing the importance of the Development Agenda;
- the administrative and final provisions;

The Beijing Treaty on Audiovisual Performances (BTAP)

Follows the WPPT model:

- slate of economic rights:
- enable performers to seek an economic benefit from licensed uses.
- Exclusive rights/statutory licenses to deal with mass usage
- most of the BTAP rights are exclusive rights which provide leverage
- however performers are often in a weak bargaining position and accept to transfer their rights against a symbolic remuneration which means that the exclusive right will not be fully exercised.

Economic rights

- Right of Reproduction (7)
- Right of Distribution (8)
- Right of Rental (9)
- Right of Making Available (10)
- Limitations and Exceptions (13)
- Term of Protection (14)

Definitions (Article 2)

Who benefits from the Treaty ? All performers

(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 expression of folklore.

“It is understood that the definition of “performers” includes those who perform a literary or artistic work that is created or first fixed in the course of a performance.”

-Improvisations included

Definitions (Article 2)

(b) Fixation = process by which a live performance is captured for the first time on a medium from which it can be further enjoyed or reproduced.

“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;

A photograph of a live show is a fixation

National Treatment (Article 4)

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.

(= TRIPS, WPPT)

Means that countries commit to treating beneficiaries & performers who are nationals or habitual residents of Contracting parties) the same way they treat their own.

Material reciprocity allowed in certain cases (Articles 11(2), 11(3), 19(2)).

National Treatment (Article 4)

- Principle of “No Collection Without Distribution” according to the Chair of Main Committee I (from the minutes)
- .. *“that there is no legal basis for collection of remuneration in a Contracting Party in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they received the remuneration collected on their behalf.” ..*
- December 20 Declaration from EC and its Member States (IAVP/DC/39) that such statement was of unilateral nature.

Moral Rights (Article 5)

Paternity (= WPPT)

(i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance;

Bruce Wayne	CHRISTIAN BALE
Joker	HEATH LEDGER
Harvey Dent	AARON ECKHART
Alfred	MICHAEL CAINE
Rachel	MAGGIE GYLLENHAAL
Gordon	GARY OLDMAN
Lucius Fox	MORGAN FREEMAN
Ramirez	MONIQUE GABRIELA CURNEN
Wuertz	RON DEAN
Scarecrow	CILLIAN MURPHY
Lau	CHIN HAN
Mayor	NESTOR CARBONELL
Maroni	ERIC ROBERTS
Chechen	RITCHIE COSTER
Engel	ANTHONY MICHAEL HALL

Moral Rights (Article 5)

Integrity

- (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation (not honor), taking due account of the nature of audiovisual fixations.

Agreed statement: exempts modifications in the normal course of exploitation (e.g. editing, compression, dubbing, formatting); highlights the need for such changes to be objectively prejudicial to performers' reputation in a substantial way.

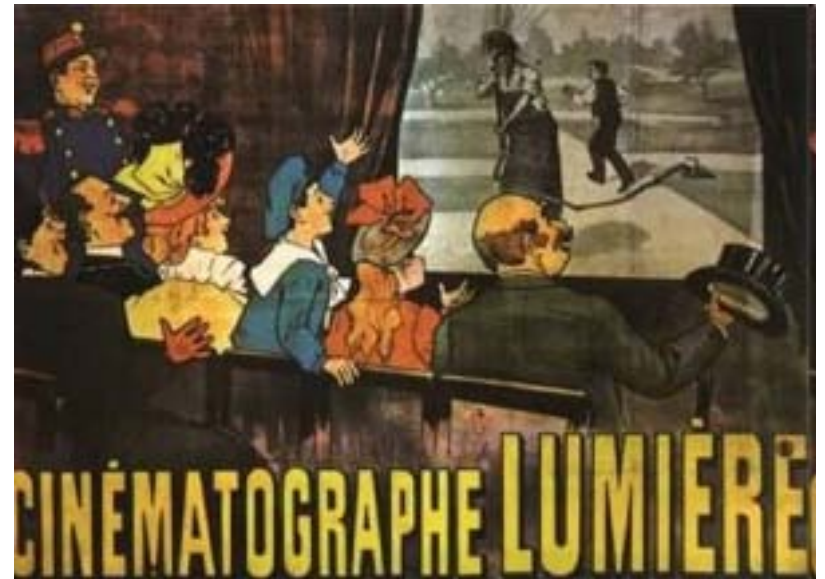
Broadcast and Communication to the Public of Fixed Performances (Article 11)

Exclusive right to authorize;

Reservations are allowed to establish a right to equitable remuneration + “Contracting Parties may also declare that they set conditions in their legislation for the exercise of the right to equitable remuneration”;

More limiting reservations are possible, but material reciprocity would apply.

Transfer of Rights



Transfer of Rights

Provision that prevented the successful conclusion of the treaty until 2012

Provision regulates the transfer of the economic rights of the performer to the producer

Art 12 is a recognition of the fact that different legal systems exist in that respect

4 options back in 2000:

New Article 12

(1) “A Contracting Party **may** provide in its national law 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 (a) owned or (b) exercised by or (c) 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”.

New Article 12

(2) “A Contracting Party **may** require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties (..)”

(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”.

Article 15 “Technological Protection Measures”

*“Agreed statement concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting **effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions** provided in that Contracting Party’s national law, **in accordance with Article 13**, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as **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, it is further understood that the obligations under Article 15 are **not applicable to performances unprotected or no longer protected** under the national law giving effect to this Treaty.”*

Application in time (Article 19)

- **General rule is the “retrospective protection”** applicable to all protected subject matter, not fallen in the public domain;
- A reservation is possible to grant protection (economic rights Articles from 7 to 11) only to performances not yet fixed at the time of the entry into force of the Treaty.



Administrative Provisions and final clauses

- Article 26: entry into force three months after 30 eligible parties have deposited their instruments of ratification or accession.

- Article 23: Eligibility for Becoming Party

- “(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.*
- (3) The European Union, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.”*

Signatories (72) of the Treaty

Austria, Belgium, Botswana, Bulgaria, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Djibouti, El Salvador, Estonia, European Union, France, Germany, Ghana, Grenada, Greece, Guatemala, Guinea, Haiti, Honduras, Hungary, Indonesia, Ireland, Italy, Jamaica, Jordan, Kenya, Luxembourg, Madagascar, Mali, Mauritania, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Namibia, Netherlands, Nicaragua, Peru, Poland, Qatar, Republic of Moldova, Romania, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Slovenia, Spain, Sudan, Switzerland, Syrian Arab Republic, Togo, Tunisia, Uganda, United Kingdom, United States of America, Zambia, Zimbabwe

Benefits of the BTAP

- Economic development
(International protection of national performers; consolidation of AV industry through minimum harmonized standards; increased foreign investment; effective and secure distribution of AV content online);



Benefits of the BTAP

- Improving the status of audiovisual performers (provide incentives and compensation in regard to international use of AV performances; consolidation of performers' organization);
- Protection of culture, folklore and cultural diversity (AV as vehicle for other expressions of creativity and cultural identity; protection of performances of folklore).



