

**WIPO Regional Workshop
on the Opportunities and Challenges
in the Implementation of
the Beijing and Marrakesh Treaties
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**“TRANSFER OF RIGHTS (ARTICLE 12)
in the Beijing Treaty on Audiovisual Performances,
2012”**

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Transfer of Rights

Phase 1:

**WIPO Diplomatic Conference on the
Protection of Audiovisual
Performances December 7 to 20, 2000**

International Conventions – Performer rights

- **Rome Convention 1961** : for the first time recognized performers rights as “neighbouring to authors’ rights.
- **Article 7**: right to prohibit - broadcasting, communication to public, fixation and reproduction.
- **Article 19**: 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.
- **TRIPS Agreement 1994**: has not improved the protection of audiovisual performers; it has further decreased the minimum level of protection for audiovisual performances.
- **WIPO Performances and Phonograms Treaty (WPPT) 1996**: applies only to performances exploited in sound recordings.
- **Exclusive rights**: economic rights in unfixed performances, moral rights, to authorize reproduction, rental, to authorize the making available of performances in an interactive, on-demand system, equitable remuneration for secondary uses such as broadcasting.
- **No transfer of rights**, but exceptions and limitations and 50 years term.

WIPO Diplomatic Conference on the Protection of Audiovisual Performances December 7 to 20, 2000

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- **Article 6** : Economic Rights of Performers in their Unfixed Performances
 - (i) **broadcasting and communication to the public** of their unfixed performances except where the performance is already a broadcast performance; and
 - (ii) the fixation of their unfixed performances.

- Article 7 : Right of Reproduction
- Article 8 : Right of Distribution
- Article 9: Right of Rental
- Article 10: Right of Making Available of Fixed Performances
- Article 11: Right of Broadcasting and Communication to the Public

Transfer of Rights- 3 alternatives

- *Alternative E*

- **Transfer:** Once a performer has consented to the incorporation of his performance in an audiovisual fixation, he shall be deemed to have transferred all exclusive rights of authorization provided for in this Treaty with respect to that particular fixation to its producer, subject to written contractual clauses to the contrary.

- *Alternative F*

- **Entitlement to Exercise Rights:** In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this Treaty with respect to that particular fixation.

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Transfer of Rights- 3 alternatives

- **Alternative G - Law Applicable to Transfers**

(1) **In the absence of any contractual clauses to the contrary**, a transfer to the producer of an audiovisual fixation of a performance, by agreement or operation of law, of any of the exclusive rights of authorization granted under this Treaty, **shall be governed by the law of the country** most closely connected with the particular audiovisual fixation.

(2) The country most closely connected with a particular audiovisual fixation shall be

(i) the Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or

(ii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of performers are nationals; or

(iii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, and where there is no single Contracting Party of which a majority of the performers are nationals, the principal Contracting Party in which the photography takes place.

Article 12: Transfer of rights

Two diverging views on the international protection of audiovisual performances –

- neighbouring rights (contract/equitable remuneration) and
 - collective bargaining (automatic transfer)
- no agreement** was found on the issue of the transfer of rights from the audiovisual performer to the producer in 2000.

3 Kinds of Transfer of rights of Performers

- i. work made for hire doctrine
 - ii. presumption of transfer
 - iii. contractual transfer
- **Treaty collapsed**

Transfer of rights

Phase 2:

WIPO Fact finding and Analysis And Member States Contribution in SCCR

WIPO Fact finding and Analysis

- **Worldwide Survey** on national legislation protecting fixed audiovisual performances,
- **Two Studies** on the treatment accorded to performers in current audiovisual
- **Questionnaire** addressed to local experts
- **National and Regional Seminars**

Member States Contribution in SCCR

- **20th SCCR** that the member countries to give their comments on the controversial Article 12 on Transfer of rights
- **India held a Meeting of Stakeholders** including performers, producers of film industry, classical musicians and copyright experts at IIT, Bombay on 13th September 2010.
- **Indian Proposal:** suggestions were within the framework of provisions of the existing Copyright Act and proposed amendments, this Ministry conveyed the same to the WIPO Secretariat. This was included as one of the **agenda items (document SCCR/21/5) in the 22nd SCCR.**
- **Similar Textual Suggestions** were submitted by **Mexico** (in 22nd SCCR) and the **USA** (in 23rd SCCR) on Article 12 i.e Transfer of rights.
- During the **Informal Consultations of WIPO** members and observers held at Geneva from 13-14th April 2011, it was decided that **India, USA and Mexico** would try to bring out a consolidated legal text on Article 12 i.e Transfer of rights based on their proposals submitted to WIPO.
- **22nd Session of SCCR** of WIPO held at Geneva from 15th to 24th June 2011 **India** played a key role in drafting Article 12 on **'Transfer of rights'** along with **Mexico and USA** which culminated in reopening of the Diplomatic Conference for finalizing the treaty
- **Approval of General Assembly in Sept, 2011.**

Transfer of rights

Phase 3:

**WIPO Diplomatic Conference on the
Protection of
Audiovisual Performances,
at Beijing, China
from June 20 to 26, 2012**

Article 12 : Transfer of rights

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 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.

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 to the contract or by their duly authorized representatives.

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.

Article 12 (1): Transfer of rights

- an *e contrario* (on the contrary) conclusion, - allows contracting parties only to **provide a rebuttable presumption (true unless it is proven otherwise)**, and this only in form of a presumption either of ownership of the producer or of his entitlement to exercise the performers' rights, or of transfer of these rights to the producer.
- **“as determined by the national law”**, also non-rebuttable presumptions or other solutions are permitted.
- Enabling Clause of Article 12(1) (**“may”**) also means that contracting parties do not need to provide any such clause in their laws but may leave this issue unregulated, in particular by not providing for any presumption of transfer and leaving the transfer to contractual agreement.
- performer must have **consented** to the fixation of the performance in an audiovisual fixation before, due to a determination by the law, the exclusive rights are owned or exercised by or transferred to the producer.

Article 12 (2): Transfer of rights

- an enabling clause, allowing contracting parties to require written form and signature for the consent to fixation given by the performer or the contract between the performer and producer.
- Written form has usually the function of warning the person who gives his consent or concludes a contract about the content of his agreement and its possible consequences.
- It is usually regarded as protection for the weaker party of a contract.
- Even without that clause in Article 12(2) of the Beijing Treaty, the written form could be required by national law of Contracting Parties;
- Article 12(2) of the Beijing Treaty simply draws the attention of legislatures to this possibility and sends the signal that the counterbalancing of the disadvantages of a presumption under paragraph (1) by written form is considered by the Contracting Parties as an important and noteworthy option.

Article 12 (3): Transfer of rights

- is also an **enabling clause**
- It addresses the typical imbalance of bargaining positions of performers on the one hand and film producers on the other hand and the frequent agreement on lump sums instead of royalties.
- draws the attention of the legislatures and parties to agreements to the possibility of providing a right to equitable remuneration or royalties for any uses of the performance.
- aims at recreating a proper balance between the parties of the contract, in particular by providing a **non-waivable right to equitable remuneration even after the transfer of the exclusive right, ideally administered by collective management organizations.**
- It reflects **the matter of legislation of member states** if one seriously wishes to grant a meaningful protection to audiovisual performers.

THANKS