WIPO REGIONAL WORKSHOP ON THE OPPORTUNITIES AND CHALLENGES IN THE IMPLEMENTATION OF THE BEIJING AND MARRAKESH TREATIES

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NATIONAL IMPLEMENTATION OF THE BTAP: PERSPECTIVE OF PERFORMERS

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Before talking about the "*implementation*" of the Beijing Treaty on Audiovisual Performances, please allow me to briefly introduce the question of its ratification [or accession], as it has a direct link with its entry into force.

Indeed, and in accordance with its Article 26, the Beijing Treaty will only enter into force once 30 eligible parties, including countries and certain intergovernmental organizations, have **ratified** [or acceded to] it.

So far, 75 countries have already **signed** it, including China, Indonesia and the Democratic People's Republic of Korea (as the only countries in this meeting having done so), while only 6 countries have **ratified** [or acceded to] it, among them China – but with a reservation to Article 11 potentially detrimental to performers.

So, the Beijing Treaty needs at least another 24 ratifications or accessions in order to enter into force, allowing a real and practical debate about its implementation at national level. And that is why, from here, and speaking on behalf of several thousands of performers worldwide, I would like to encourage all Governments in this region to promptly ratify the Beijing Treaty, or to accede to it; noting that SCAPR and its members societies are ready to cooperate in the implementation of the Treaty in the different national legislations, and in the establishment of performers' organizations capable of making effective their rights.

That said, what is in the Treaty that makes it so important for all performers? What do we expect from it? What do we expect from its implementation at national level?

Well, to start with, it is the first multilateral convention granting performers certain level of protection on their audiovisual performances, and it does so more than five decades after recording artists (singers and musicians) had their rights granted at international level – in the Rome Convention of 1961. So, the first highlight of the Beijing Treaty is that it puts an end to more than 50 years of discrimination between performers.

But more importantly, the Beijing Treaty grants performers the possibility of claiming protection [i.e. to claim their rights] abroad, in other countries. In other words: the Beijing Treaty will enable performers, under certain conditions, to receive a fair economic return on their audiovisual performances when exploited in other countries. And, in a globalized sector, such as the audiovisual, in a globalized market, this possibility will surely make a difference in terms of the income received by performers for their job – a job from which, by the way, we all benefit, not just as consumers, but also as part of our respective economies and cultural heritage. A well-developed audiovisual industry not only enhances economic growth and employment, but also serves as a tool for securing our cultural diversity. But the audiovisual industry can only be "*well-developed*" it the interests of all players are rightfully balanced – and by "*balanced*" I mean "*protected*".

Does it mean that when ratifying the Beijing Treaty any given country will be automatically obliged to grant foreign performers the same level of protection it grants to its own nationals? No. That would only happen with respect to the rights expressly provided in the Treaty, and as long as the other country makes no reservation to Article 11 (broadcasting and communication to the public). That is to say, according to 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*"; an obligation which, according to Article 4(3) "*does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3)* [broadcasting and communication to the public rights]".

But is be the point of discussing the level of protection that each country must grant to foreign performers, before even focusing our attention in the protection performers may be entitled to claim **in their own country**? In fact, **in many countries, the most important effect of the Beijing Treaty will come from its implementation at national**

level, i.e. from the adaptation of its national legislation to the standard of protection provided by the Treaty.

The Beijing Treaty, as any other convention of the same nature, grants a minimum level of protection to which all Contracting Parties are obliged (after ratifying it). This means that their national legislations must grant performers at least such level of protection, that is to say, Contracting Parties are obliged to grant performers at least the rights expressly provided under the Treaty. This also means, of course, that Contracting Parties are free to grant performers a higher level of protection – which would then not benefit foreign performers, unless their national legislation provides for such higher level of protection.

What are those rights conforming the minimum level of protection?

These are the rights granted in Articles 5 to 11: moral rights (paternity and integrity rights) and the economic rights (exclusive right to authorize the fixation of the performers' performance, and the reproduction, distribution, rental, making available, broadcasting and communication to the public of such fixation), as well as the remuneration right for the broadcasting and communication to the public of performances fixed in audiovisual fixations.

Concerning the exclusive rights of authorization, the only problematic issue would be the position of the producer, who needs to consolidate all such rights – he needs to be in the position of negotiating and granting licenses for the use of the audiovisual fixations, as it would be extremely complex for the commercial use to rely in the authorizations or grants by each and every one initially holding an exclusive right (such as the performers).

This issue was in fact the one which prevented the 2000 Diplomatic Conference to successfully adopt the Treaty, as the Member States were not capable for designing a solution fitting the two main systems at stake: the continental Authors' Rights and the Anglo-Saxon Copyright.

After more than 10 years of work at the WIPO Standing Committee con Copyright and Related Rights, including several regional seminars Worldwide, the solution was agreed in June 2011, as reflected in Article 12 of the Treaty. The secret of the success was the enormous flexibility of the wording finally adopted, as all three paragraphs

have "*may*", instead of "*shall*", meaning that the national legislation of a Contracting Party is in accordance with the Treaty even if it does not include such provisions.

So, according to first paragraph, Contracting Parties are free to provide in their national legislations that, otherwise agreed between the performer and the producer, once the performer has consented to the fixation of this performance the exclusive rights of authorization related to fixed performances (articles 7 to 11) are either:

- ***Owned*** by the producer, or
- ***Exercised*** by the producer, or
- ***Transferred*** to the producer.

As I have said, any of these three options is equally valid, as it also would be valid not to include any of them in the national legislation. The key for the success of this formula was precisely, that it is absolutely respectful with the different systems already in force in the different national legislations – it does not impose a particular mechanism. In this sense article 12 is so flexible, that some voices have even compared it with the Alternative H presented to the Diplomatic Conference in 2000 (proposing not to include any provision in the Treaty on the issue of transfer of rights, leaving it completely to national laws).

It is also important to point out that, in any case, and regardless the option chosen by each Contracting Party, second paragraph allows to subject the validity of the "*consent*" [which would activate the presumptions provided under first paragraph] to be in writing – in the form of a contract signed by the performer and the producer.

And finally, but most importantly for performers, the third paragraph allows national legislations or individual, collective or other agreements to provide the performer with the right to receive royalties or equitable remuneration for any use of the performance (mentioning articles 10 and 11: making available and broadcasting), and that such right is independent from the presumptions in paragraph 1. That is to say, the right of performers to receive royalties (based on an agreement – most commonly a collective bargaining agreement) or to an equitable remuneration (based on the law) cannot be transferred, owned or exercised by the producers. And the same can be said with respect of the moral rights, which are not included in the scope of the presumption in paragraph 1.

In sum, the implementation of the Beijing Treaty will secure the protection of audiovisual performances, no matter the formula chosen by the concerned country on the issue of transfer of rights:

1. There will be no longer any discrimination between performers, based on the nature of the fixation of their performances – i.e. performers will be similarly protected, no matter where their performances are fixated (in a sound recording or in an audiovisual fixation).

2. Performers will have granted moral rights on their audiovisual performances, and these rights are independent of the transfer of rights to the producer.

3. Performers [and producers] will enjoy an increased legal certainty as to the scope and effects of the transfer [or initial ownership] of the exclusive rights.

4. Performers will be in a better position for negotiating a fair payment, in the form of royalties [from the producer] or remuneration [from the user], for the use of their performances.

5. Performers will be able to claim protection abroad, even though limited to the rights expressly provided in the Treaty, and as long as the other country makes no reservation to Article 11.

This is, in sum, the perspective of the performers, but what about their expectative?

They expect most WIPO Member States to promptly ratify [or accede to] the Beijing Treaty, as most of them supported the adoption of this Treaty back in 2012. They also expect such ratification or accession without unnecessary reservations, notably to Article 11, as it refers to the broadcasting and communication to the public, the main source of income for both producers and users [as it should be, therefore, for performers].

Reservations to Article 11, such as the one introduced by China when ratifying the Treaty, not only will prevent performers from obtaining the most out of such instrument [as they may end up deprived, at national level, from any right connected to the broadcasting an communication to the public] but, furthermore, will allow other Contracting Parties, under Article 4 of the Treaty, to deny such rights to performers nationals of the country making such reservation.