

## **WIPO Regional Workshop on the Beijing and Marrakesh Treaties**

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### **BTAP: TRANSFER OF RIGHTS AND REMUNERATION SCHEMES**

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# Denial in 1961

## **Article 19 of the Rome Convention:**

**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.**

At the diplomatic conference, there were some attempts to reduce the scope of this restriction. Austria and Czechoslovakia proposed that performers only lose completely the applicability of Article 7 if their performances are incorporated into audiovisual works, and that their treatment be more favorable in the case of audiovisual fixations intended for television. The majority of the delegations, however, were of the view that such a distinction would be impractical, and the proposals were rejected.

(Records of the Rome conference, p. 232)

It was made clear during the debate that Article 19 has **no effect upon performers' freedom of contract in connection with the making of visual and audiovisual fixations.** (ibid, p. 53.)

# Denial in 1994 and in 1996

- The provisions of both the **TRIPS Agreement** and the **WIPO Performances and Phonograms Treaty (WPPT)** **only cover** live performances and **fixations of performances on phonograms**.
- **At the 1996 WIPO Diplomatic Conference, the Basic Proposal** for a treaty which became the WPPT **included an alternative** in accordance with which **it would have also covered audiovisual performances; however it was not adopted**. The Diplomatic Conference adopted only a **Resolution** inviting WIPO to continue preparatory work on a „protocol” to the WPPT on the rights of audiovisual performances with a view of its adoption „not later than in 1998.”

## Nearly a success, but still failure in 2000

- The preparatory work continued in accordance with the Resolution first in a special committee and then in the Standing Committee on Copyright and Related Rights, but **the 1998 deadline to adopt the „protocol” was impossible to meet, and when it was decided finally to convene a Diplomatic Conference** in December 2000, it took place **without the key problem** – absence of agreement on the question of **transfer of rights** – still unresolved.
- The 2000 WIPO Diplomatic Conference adopted the idea that the new instrument should be **a stand-alone treaty rather than a protocol to the WPPT.**
- The Conference **adopted provisionally 19 articles** and several agreed statements – in general quite similar to the corresponding provisions of the WPPT; however, **it failed to adopt the key „20th article” on the transfer of rights.**

# The 19 articles provisionally adopted (1)

- **Art. 2(b) definition of „audiovisual fixation:”**
  - (b) “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;
    - Agreed statement concerning Article 2(b): It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT.
  
- **Art. 5 moral rights:** paragraph (1)(ii) (similar to those under the WPPT, however, to the phrase „to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation” it is added: **„taking due account of the nature of audiovisual fixations.”** (see agreed statement on next slide)

## The 19 articles provisionally adopted (2)

- **Agreed statement concerning Article 5:** “For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, **considering the nature of audiovisual fixations** and their production and distribution, **modifications of a performance that are made in the normal course of exploitation of the performance**, such as editing, compression, dubbing, or formatting, in existing or new media or formats, **and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer’s reputation in a substantial way.** It is also understood that the **mere use of new or changed technology or media, as such, does not amount to modification** within the meaning of Article 5(1)(ii).” (Emphasis added.)

# The 19 articles provisionally adopted (3)

In general, **the same exclusive rights of authorization (or prohibition) as under the WPPT:**

- **broadcasting and communication to the public of unfixed performances** (except where the performance is already a broadcast performance) (WPPT Art. 6(i) – WAPT/BTAP Art. 6(i));
- **fixation of unfixed performances** (WPPT Art. 6(ii) – WAPT/BTAP Art. 6(ii));
- **reproduction** (WPPT Art. 7 – WAPT/BTAP Art. 7);
- **distribution** (WPPT Art. 8 – WAPT/BTAP Art. 8);
- (interactive) **making available to the public** (WPPT 10 – WAPT/BTAP 10)

# The 19 articles provisionally adopted (4)

**The provisions on the exclusive right of rental defer.** Although paragraph (1) of both WPPT Art. 9 and WAPT/BTAP Art. 9 provide in the same way for an exclusive right, their paragraph (2) contains different provisions

- **paragraph (2) of WPPT Art. 9** – in a “*mutatis mutandis*” manner – corresponds to the second sentence of TRIPS Art. 14: if on 15 April, 1994 a Contracting Party has in force a system of equitable remuneration of performers for the rental of the copies of their right performances fixed in phonograms, it may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of performers;
- **paragraph (2) of WAPT/BTAP Art. 9** is a derived version of TRIPS Art. 11: Contracting Parties are exempt from the obligation under paragraph (1) if the commercial rental has not led to widespread copying of audiovisual fixations materially impairing the exclusive right of reproduction of performances.



# The 19 articles provisionally adopted (5)

## Right of broadcasting and communication to the public

- Here there is a **big difference** in the way this right is basically provided:
  - WPPT Art. 15(1) : **single equitable remuneration** for performers and producers of phonograms;
  - WAPT/BTAP Art. 11(1): **exclusive right** of authorization.
- **However**, paragraph (2) of WAPT/BTAP Art. 11 allows notification that the Contracting Party **rather provides for an equitable remuneration for performers.**
- Furthermore, paragraph (3) of WAPT/BTAP Art. 11 provides for the possibility of **the same kinds of reservations** (“declarations”) for Contracting Parties as under WPPT Art 15(3): they (i) may not apply this right for certain uses, (ii) may limit its application in some other way; or (iii) may not apply paragraphs (1) and (2) at all.

# The 19 articles provisionally adopted (6)

The following provisions – in a mutatis mutandis manner – are **the same in the WPPT and in the draft new Treaty**:

- **Limitations and exceptions:** WPPT Art. 16 – WAPT/BTAP Art. 13.
- **Term of protection:** WPPT Art. 17(1) – WAPT /BTAP Art. 13.
- **Obligations concerning technological protection measures (TPMs):** WPPT Art. 18 – WAPT/BTAP Art. 15.
- **Obligations concerning rights management information (RMI):** WPPT Art. 19 – WAPT/BTAP Art. 16
- **Prohibition of formalities:** WPPT Art. 20 – WAPT/BTAP Art. 14
- **Enforcement of rights:** WPPT Art. 23 – WAPT/BTAP Art. 20.

# The 19 articles provisionally adopted (7)

## Reservations and declarations

- The provision of **WPPT Art. 21** is simple: “Subject to the provisions of Article 15(3)[concerning the right of broadcasting and communication to the public], no reservation to this Treaty is made.”
- **The effect of WAPT/BTAP Art. 18(1) referring to Art. 11(3) – which corresponds to WPPT Art. 15(3) – is the same. However**, paragraph (2) of the article also refers to the **“declarations” allowed under WAPT/BTAP Arts 11(2)** [limitation of the exclusive right of broadcasting and communication to the public to a right to equitable remuneration] **and 19(2)** [limiting application to performances fixed after the entry into force of the Treaty for the Contracting Parties concerned].
  - In fact, the effect of these a “declarations” is also a reservation to the treaty provision concerned (from this viewpoint it is quite irrelevant whether notification may be deposited (WPPT/BTAP Art. 15(3) and WAPT /BTAP Art. 11(2)), declaration may be made (WAPT/BTAP Art. 11(3)), or declaration may be made by depositing a notification (WAPT/BTAP Art. 19(2)). Otherwise, the same may be said even about WPPT 22(2): see next slide.

# The 19 articles provisionally adopted (8)

## Application in time

- In this respect **there are differences** between the WPPT and the WAPT/BTAP.
- **WPPT 22(1)** contains an obligation to apply *mutatis mutandis* Berne Art. 18 under which the basic rule is that the Convention is applicable also for those works which were created before its entry into force. However paragraph (2) of the article allows Contracting Parties to only protect moral rights under Art. 5 in the case of performances occurring after the entry into force of the Convention.
- **WAPT/BTAP Art. 19** does not refer to Berne Art. 18, although its paragraph (1) basically corresponds to it. However, its paragraph (2) allows to Contracting Parties to declare that they do not apply Arts 7 to 11 (economic rights in audiovisual fixations of performances) for fixations made before the entry into force of the Treaty. Paragraphs (3) and (4) provide for transitional measures also for the case where no reservation is made under paragraph (2).

**AND NOW, LADIES AND GENTLEMEN,**

# ***WIPO PRESENTS***

**THE LONG-AWAITED FINAL PART OF ITS POPULAR SERIES**

***THE  
TWENTIETH  
ARTICLE***

***From Failure to Success***

# BEIJING TREATY ON AUDIOVISUAL PERFORMANCES JUNE, 26 2012



# The deal

- **Let us forget** Rome Article 19, the **failure** in 1996, **the near success but still a failure** in 2000, **the fruitless efforts** at the WIPO Standing Committee on Copyright and Related Rights for many years.
- **Finally, thanks to the spirit of compromise and mutual understanding of the producers' and performers' organizations and the negotiating parties in WIPO, a draft of the famous 20<sup>th</sup> article – Article 12 – was prepared in a way suitable to break the deadlock.** It offered a chance for the adoption of – now not the WIPO Audiovisual Performers Treaty but – the Beijing Audiovisual Performers Treaty following the decisions adopted by the General Assembly of WIPO in October 2011.



## **Last touches before the “final cut” – preamble paragraph and agrees statement (1)**

**The deal** on the basis of which the decision on the convocation of the diplomatic conference took place **included the agreement that**

- not a new diplomatic conference would be held but **the 2000 conference would be reconvened;**
- **the 19 articles provisionally adopted in 2000 would not be reopened for negotiation, but**
- in addition to the inclusion of Article 12, administrative and final provisions, **also a preamble paragraph and three additional agreed statements would be adopted.**

## **Last touches before the “final cut” – preamble paragraph and agrees statements (2)**

- **An additional clause in the Preamble was to recognize the importance of the Development Agenda, while the three additional agreed statements were to be drafted in relation to Articles 1, 2, and 15, respectively, to address specific concerns raised by Member States.**
- **The new preamble paragraph includes a general reference to the WIPO Development Agenda as adopted in 2007 and a statement that its recommendations aim to ensure that development considerations form an integral part of the Organization’s work. The paragraph is of a descriptive nature; it declares that for the preparation and adoption of the new Treaty, the principles of the Development Agenda – at least those which may have been considered as being relevant – have also been taken into account and, thus, the Treaty is in accordance with those principles too.**

## **Last touches before the “final cut” – preamble paragraph and agrees statements (3)**

- **The agreed statement concerning Article 1(1) on the relationship of the Treaty with the WPPT states what is obvious** (namely that nothing in the new Treaty affects any rights or obligations under the WPPT and that it does not obligate its Contracting Parties to ratify or accede to that Treaty), **but it also includes the useful clarification that the new Treaty does not affect the interpretation of the provisions of the WPPT. This further confirms the continued full validity of the principles and standards on which the 1996 WIPO Treaties are based; nothing in the new Treaty may be interpreted as suitable to question those principles or weaken those standards.**
- **The agreed statement in a way also shows one of the most positive results of the Beijing Diplomatic Conference: the BTAP has defended the WCT and the WPPT. It has confirmed that their principles and provisions are fully valid also in 2012.**

## **Last touches before the “final cut” – preamble paragraph and agrees statements (3)**

- **The agreed statement concerning Article 1(3) on the relationship of the Treaty with the TRIPS Agreement has no substantive influence on the interpretation of the new Treaty since it only consists of a “non-derogation” clarification from the viewpoint of the TRIPS Agreement rather than a possible indirect means of interpretation of the new Treaty (on the basis of certain aspects of the TRIPS Agreement).**
- **The reference to the provisions of the TRIPS Agreement is well balanced; although competition aspects are mentioned specifically, it covers all the objectives and principles of the Agreement identified in its Preamble and in its various provisions (in fact, in a general manner, all its provisions on obligations, rights, on the conditions of protection, on enforcement of rights, etc.)**

## **Last touches before the “final cut” – preamble paragraph and agrees statements (4)**

- **The agreed statement concerning Article 2(a) on the definition of “performers” only clarifies that not only those who perform existing literary or artistic works (or expressions of folklore) qualify as performers but also those who create (improvise) such works in the course of their performances.**
- **The statement does not have anything to do with the issue of “extras.” It follows unequivocally from the text of the definition and its negotiation history (“preparatory work”) as reflected in the records of the 2000 Diplomatic Conference that “extras” are not covered.**

## **Last touches before the “final cut” – preamble paragraph and agrees statements (5)**

- **The agreed statement concerning Article 15 on technological measures (TPMs) and its relationship with Article 13 on the three-step test offers an appropriate interpretation of the obligations concerning TPMs (which are **the same, *mutatis mutandis*, under the new Treaty as under the WCT and the WPPT**).**
- **It clarifies** not only that the limitations and exceptions concerned must be in accordance with the three-step test, but also **that the measures applied to ensure that beneficiaries may enjoy them are also only applicable where, and only in a way in which, the conditions of the test are fulfilled.**
- **The second sentence of the statement deals with possible “measures” in respect of performances in the public domain** (which, otherwise, are not covered by the Treaty and, thus, by its Article 15 and, therefore, it is irrelevant); **in order to prevent any possible misinterpretation, it includes a proviso according to which it is without prejudice to the legal protection of audiovisual works in which such performances in the public domain might be included.**

# The twentieth article: Article 12

## *Article 12. Transfer of rights*

(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.

(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.

(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.” (Emphasis added.)

# The twentieth article: Article 12 (1)

## *Article 12. Transfer of rights; paragraph (1)*

(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.

**Options:** 1) „May provide”: **no provision**;

2) **Original ownership of producers** (see Article 14*bis*(2)(a) of the Berne Convention in parallel: „Ownership of copyright in a cinematographic work shall be a matter for legislation in the country where protection is claimed”);

3) **Exercise of rights by the producer** (somewhat similar to the presumption of legitimacy under Article 14*bis*(3) of the Berne Convention);

4) **Transfer of rights to the producer** (subject to any contract to the contrary)



# The twentieth article: Article 12 (1)

## *Article 12. Transfer of rights; paragraph (1)*

- The **Basic Proposal to the 2000 Diplomatic Conference** contained four **alternatives** concerning the transfer of rights. **Article 12 of the new Treaty covers two of those alternatives: *Alternative E* on “Transfer”** about on a rebuttable presumption of transfer of rights; and ***Alternative F* on “Entitlement to Exercise Rights”**.
- Under ***Alternative G*** in the 2000 Basic Proposal on “**Law Applicable for Transfers**,” “in the absence of any contractual clauses to the contrary,” the transfer would have been governed “**by the law of the country most closely connected with the particular audiovisual fixation**” (and, the alternative included a detailed definition of such a country). In a way, ***Article 12, due to its flexibility, may have such an effect.***
- In 2000, ***Alternative H*** seemed to be the most simple; it consisted in **not including any provision in the Treaty** on the issue of transfer of rights and, thus, **leaving it completely to national laws. There is a provision, but there is flexibility too.**

# The twentieth article: Article 12 (1)

## *Article 12. Transfer of rights; paragraph (1)*

In Beijing, **certain opinions** were heard **according to which Article 12 corresponds to that Alternative H** since it also offers flexibility for national laws. It is submitted that, **although Article 12 is truly flexible, this not the case.**

- What was considered as permissible under Alternative H is hardly allowed under Article 12, in particular when it is read together with Article 3 on Beneficiaries of Protection and Article 4 on National Treatment. Namely, **a Contracting Party certainly cannot deny protection for the exclusive rights granted by the Treaty by citing alleged “public order” reasons** where, under the national law of another Contracting Party, (i) a producer is the original owner of those rights; (ii) a producer has the “entitlement to exercise” those rights; (iii) those rights are transferred to a producer.

# The twentieth article: Article 12 (2)

## *Article 12. Transfer of rights; paragraph (1)*

(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.

- See **Article 14bis(2)(c) of the Berne Convention as a parallel: „it shall be a matter for the legislation of the country of the Union where protection is claimed to provide that the said undertaking [as a basis for presumption of legitimation] shall be in a written agreement or a written act of the same effect.”**

# The twentieth article: Article 12 (3)

(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. [Articles 10 is on the right of (interactive) **making available to the public**; Article 11 is on the right of **broadcasting and communication to the public.**]

- Providing in **collective agreements: residuals** negotiated, e.g., by US guilds.
- Providing in **national laws**: recognition of the **acceptability and legitimacy of the model of the EU Rental, Lending and Related Rights Directive** including as regards the rights of making available, broadcasting and communication to the public.
  - See Article 5 of the Directive on the next slide.

# The twentieth article: Article 12 (3)

## *Article 5. Unwaivable right to equitable remuneration*

(1) **Where an author or performer has transferred or assigned his rental right** [an exclusive right too] concerning a phonogram or an original or copy of a film **to a phonogram or film producer**, that author or performer **shall retain the right to obtain an equitable remuneration** for the rental.

(2) The right to obtain an equitable remuneration for rental **cannot be waived** by authors or performers.

(3) The administration of this right to obtain an equitable remuneration **may be entrusted to collecting societies** representing authors or performers.

(4) **Member States may regulate whether and to what extent administration by collecting societies** of the right to obtain an equitable remuneration **may be imposed**, as well as the question from whom this remuneration may be claimed or collected.

# The twentieth article: Article 12 (3)

**Disputed questions of interpretation and practical issues of the application of Article 12 :**

- **Is the imposition of an unwaivable right to remuneration – in particular regarding the right of (interactive) making available – a limitation of the exclusive right concerned or just a „contractual issue“?**
- **If it were a limitation, how the three-step test might apply to it?**
- **How Article 5 on national treatment may apply, in particular in view of its paragraph (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.**” (Emphasis added.)
  - **Should the right to remuneration be considered as an element of the exclusive right – just dissected in such a way – or is it outside the scope of minimum obligations and national treatment?**
- **How, in general, the minimum obligations and the principle of national treatment apply in view of the highly different systems of transfer of rights?**



**Representatives of performers celebrating after the adoption of the BTAP**



# Success – but still a lot to do to make full use thereof

- The representatives of performers and the international community had **good reason to celebrate in Beijing.**
- With the adoption of the BTAP, **basic steps** have been taken to **appropriate recognition of the rights of audiovisual performers at the international level.**
- The Treaty, **irrespective of the different systems of transfer of rights, strengthens the position of audiovisual performers of all over the world.**
- **It deserves quick ratification and/or accession, of which 30 would be needed** for its entering in force. (At the finalization of this presentation, **we are at 17:** Algeria, Botswana, Burkina Faso, Chile, China, DPR Korea, El Salvador, Gabon, Japan, Qatar, R. of Moldova, Russian Federation, Saint Vincent and the Grenadines, Samoa, Slovakia, Syria and Tunisia ).
- **The interpretation problems and the practical application between the various legal systems should be duly solved.**



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