



Art. 12 of Beijing Treaty – transfer of the rights and remuneration

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I. Art. 12 (1) of Beijing Treaty – transfer of the rights

- art 12 (1) of BT transfer of the rights - **Effect of compromise:**

no **mandatory rebuttable presumption** of transfer of all exclusive rights of authorization of the performer to the producer of audiovisual fixation (alternative E – Basic Proposal I 2000) or similar mechanisms (as alternative F) **as new basic, binding international standard**

but

also no Alternative H – lack of provisions on this issue in the BT

Tension: **centralizing all exclusive rights of performs for worldwide exploitation in hands of film producers vs. confirmation of existing rules** (no disruption to national laws by international rules limited to one sector)



I. Art. 12 (1) of Beijing Treaty – transfer of the rights

Result: 1. flexible and facultative provision guaranteeing Parties of BT very wide **scope of freedom in implementation**: from no provisions option to different options mentioned in art. 12 (1) BT – sometimes no changes in national legislation needed (UE example) – all the provisions of art. 12 only empower Parties to regulate – do not oblige them to do so;

2. even more flexibility added - statutory provisions on the transfer of the rights maybe subject to any contract to the contrary;

3. list of possible legal instruments from art 12 (1) BT(ownership of film producer, excercises of exclusive rights, legal presumption of transfer) does not exclude other legal instruments (f.ex. irrebuttable presumption – France) that national laws may recognize in order to deal with transfer of performer’s rights (WIPO doc SCCR/22/18) – but art 12 (1) only covers situation when producer derives their rights from the performer;



I. Art. 12 (1) of Beijing Treaty – transfer of the rights

Result: 4. provision should apply to the exclusive, specifically listed in the treaty, economic rights of authorization (neither to moral nor – in Polish opinion - to the right of equitable remuneration under 12 (3) BT.

– only them are necessary to guarantee the producer - with full legal security - possibility to conclude licensing agreements in order to exploit the audiovisual fixation.



I. Art. 12 (2) of Beijing Treaty – transfer of the rights

➤ Art. 12 (2) and (3) BT added in favour of performers (at the end is „their” Treaty)

1. art 12 (2) – **consent or contract** in which performer consented to the fixation of his performance in audiovisual fixation must be in **writing** and **signed** by both parties/ their authorized representatives (important when want to analyse the legal consequences of the contract, rebutt the presumption from 12 (1) BT or set differently the scope of it) – similar solution to art. 6 UE rental rights directive;

in national legislation countries may add other prerequisites (for ex. necessary for validity of the contract) which transfers the exclusive rights to the producer.



II. Art. 12 (3) of Beijing Treaty – remuneration

- Art. 12 (3) – **possible** (next „may” provision) – **right of the performer** to get royalties of equitable remuneration for any use of the performance (form of compensation for the performer for the loss of exclusive rights);
- such a right is „independent of the transfer of exclusive rights” – no matter what are national provision on such a „transfer” (even where is legal presumption of the ownership of the rights by the producer – so no „transfer” in the sense of existence of agreement transferring the rights) still such royalties/ remuneration for performer may be regulated by national law or by contractual agreements.



II. Art. 12 (3) of Beijing Treaty – remuneration

- Result:
1. flexibility for the Parties of BT in art. 12 (3) BT- different legislative (not necessary direct statutory provision, also binding rules on the contract law imposed by law) or contractual measures allowed to guarantee performers ongoing payments;
 2. next flexibility – any kind of payment for the use of performance possible:
 - **royalties** (usually claimed from the producers and based on their gross revenue - so rather agreed on contractually basis)
 - **equitable remuneration** (which is generally paid by the users and can be made more effective when subject to mandatory collective management – similar solution to art. 4 of UE Rental Directive).
- „equitable” – so taking into account performers’s contribution to the final product and extent of use made thereof



II. Art. 12 (3) of Beijing Treaty – remuneration

Second option – also from Polish experience - may be extremely helpful as performers do not have a strong bargaining position, which will grant them comparable benefits to those that others may derive from collective agreements and/or individual negotiation.



III. General issues open for interpretation:

1. Legal nature of right of the performer under art. 12 (3) BT

Some arguments, why it is not a limitation of the exclusive right:

- * right to get equitable remuneration is outside the sphere of exclusive rights at all – it has additional character to exclusive rights (may exist but is not necessary) – compare with facultative character of art. 12 (3) BT;
- * it is based on the statute (argument valid, where such right is regulated by the statute – its scope can be different than the scope of exclusive rights – example Poland – exclusive rights for making available for performers and no equitable remuneration after transfer of rights for that field of exploitation).

III. General issues open for interpretation:

2. National treatment in the context of art. 12 (3) BT – crucial from political perspective – „pay or not to pay – this is a question”;

Some arguments, why no national treatment in this instance:

- * statutory rules of remuneration are not a „treatment” in the sense of art. 4 BT – it only covers minimum rights in the form of exclusive rights under BT (art. 7 – 11 BT) and remuneration rights namely provided in art. 4 of BT - so right of remuneration under art. 11 (2) BT;
- * such a „treatment” do not cover any rights that may and not need to be provided under BT.

In absence of „national treatment”: statutory rules of private international law regarding contracts should be applied (leaving that to contract rules dangerous due to weaker bargaining power of performers).





Thank you for your attention

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