



# The Beijing Treaty on Audiovisual Performances

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# Background of the BTAP



# Rome Convention (Article 7)

*“(..) 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;*
  - (iii) if the original fixation was made in accordance with the provisions of [Article 15](#) (Possible Exceptions), and the reproduction is made for purposes different from those referred to in those provisions. (..)*

# 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 on the Protection of Audiovisual Performances 2000

- Provisional agreement on 19 articles;
- Outstanding issue was the “transfer of right” (Article 12)  
4 options;
- 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;
- 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.

Diplomatic Conference  
on the Protection  
of Audiovisual Performances

June 20 to 26, 2012  
Beijing, China

保护音像表演外交会议  
2012年6月20日至26日  
中国北京

Organized by  
the World Intellectual Property Organization (WIPO)

Hosted by  
the National Copyright Administration of China  
and the People's Government of Beijing Municipality  
the People's Republic of China

主办方：世界知识产权组织

承办方：中华人民共和国国家版权局  
中华人民共和国北京市人民政府



# 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:

- Right of Reproduction (7)
- Right of Distribution (8)
- Right of Rental (9) (more similar to TRIPS model)
- Right of Making Available (10)
- Limitations and Exceptions (13)
- Term of Protection (14)
- Technological Protection Measures (15)
- Rights Management Information (16)
- Enforcement Provisions (20)

# Outstanding Issues

- The new Agreed Statements were intended to reaffirm the Member States' commitments to the principles, objectives, and competition policy of the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement); to clarify the relationship between the WIPO Performances and Phonograms Treaty (WPPT) and the Treaty; to describe better those performers protected under the Treaty; and to clarify the relationship between Articles 13 and 15.
- The Committee further agreed that the preamble to the Treaty had include one additional clause recognizing the importance of the Development Agenda.

# Proposals submitted

[http://www.wipo.int/meetings/en/details.jsp?meeting\\_id=25602](http://www.wipo.int/meetings/en/details.jsp?meeting_id=25602)

- **AVP/DC/6 ADDITIONAL CLAUSE IN THE PREAMBLE**
- proposal by the Delegation of Brazil
  
- **AVP/DC/7 ADDITIONAL PREAMBULAR CLAUSE RECOGNIZING THE IMPORTANCE OF THE DEVELOPMENT AGENDA**
- proposal by the European Union and its Member States, Kenya, Mexico, Nigeria, Turkey and the United States of America
  
- **AVP/DC/8 AGREED STATEMENT REAFFIRMING MEMBER STATES COMMITMENT TO THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERTY (TRIPS)**
- proposal by Brazil, the European Union and its Member States, Kenya, Mexico, Nigeria, Turkey and the United States of America
  
- **AVP/DC/9 AGREED STATEMENT TO ARTICLE 1 TO CLARIFY THE RELATIONSHIP BETWEEN THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) AND THE WIPO AUDIOVISUAL PERFORMANCES TREATY UNDER CONSIDERATION AT THE DIPLOMATIC CONFERENCE**
- proposal by Brazil, the European Union and its Member States, Kenya, Mexico, Nigeria, Turkey and the United States of America
  
- **AVP/DC/10 AGREED STATEMENT TO CLARIFY THE RELATIONSHIP BETWEEN ARTICLE 13 AND ARTICLE 15 OF THE TREATY**
- proposal by Brazil, Mexico and the United States of America
  
- **AVP/DC/11 AGREED STATEMENT ON ARTICLE 15 ON TECHNOLOGICAL PROTECTION MEASURES**
- proposal by the European Union and its Member States, Kenya and Nigeria
  
- **DRAFT ADDITIONAL CLAUSE TO BE ADDED IN THE PREAMBLE AND DRAFT AGREED STATEMENTS ON ARTICLES 1, 2 AND 15 ANNEX TO DOCUMENT AVP/DC/3**
- proposal by India

# BTAP-specific Provisions

# Preamble

## Clause II

*“Recalling the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly of the Convention Establishing the World Intellectual Property Organization (WIPO), which aim to ensure that development considerations form an integral part of the Organization’s work, (..)”*

# Relations with other Treaties (Article 1)

## Non derogation clause

*Art. 1(3) This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.*

# Relations with other Treaties (Article 1)

“Agreed statement concerning Article 1:

*It is understood that nothing in this Treaty affects any rights or obligations under the WIPO Performances and Phonograms Treaty (WPPT) or their interpretation and it is further understood that paragraph 3 does not create any obligations for a Contracting Party to this Treaty to ratify or accede to the WPPT or to comply with any of its provisions.*

# Relations with other Treaties (Article 1)

“Agreed statement concerning Article 1(3): *It is understood that Contracting Parties who are members of the World Trade Organization (WTO) acknowledge all the principles and objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and understand that nothing in this Treaty affects the provisions of the TRIPS Agreement, including, but not limited to, the provisions relating to anti-competitive practices.”*



## Definitions (Article 2)

(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.

“Agreed statement: *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
- “extras” not included

## Definitions (Article 2)

(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: It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) (“fixation”) of the WPPT”*

*(Article 2 (b) WPPT “phonogram means the fixation of sounds of a performance or other sound, or representation of sounds, other than in the form of a fixation incorporated in a cinematographic or audiovisual work”)*

# 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)

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 (IAMP/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.”

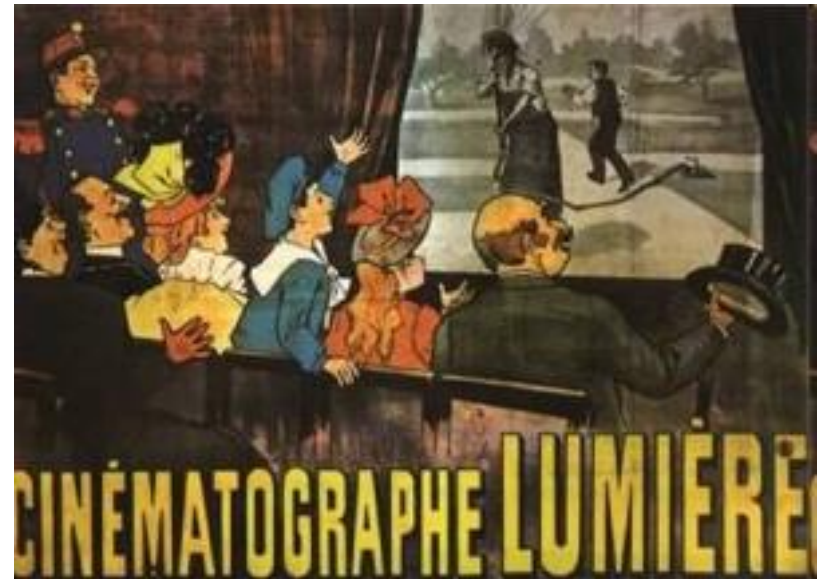
# Broadcast and Communication to the Public of Fixed Performances (Article 11)

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

4 options back in 2000:

- Rebuttable presumption of transfer;
- Entitlement to exercise (model of 14bis Berne Convention);
- Applicable law (most closely connected country);
- Absence of provision.

# 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.”*

# Notes on Agreed Statement

- “effective and necessary measures” (when necessary / necessary effective measures);
- Priority of voluntary measures;
- Legal access for the beneficiary is a requirement;
- “,in accordance with Article 13,” within commas may extend application of the three-step-test;
- Open exclusion of public domain;
- Importance of post-adoption statements (v. Switzerland “no obligation to provide for any procedure or to establish any organization in order to ensure that beneficiary may enjoy...”; Republic of Korea and reaction of the United States of America and European Union clarifying it cannot affect the interpretation of WCT and WPPT).

# 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 (123) of the Final Act

Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Barbados, Belgium, Belize, Benin, Botswana, Brazil, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Comoros, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Djibouti, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Ethiopia, Fiji, Finland, France, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Haiti, Honduras, Hungary, India, Iran (Islamic Republic of), Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kenya, Lao People's Democratic Republic, Latvia, Lithuania, Madagascar, Malawi, Malaysia, Maldives, Mali, Mauritania, Mauritius, Mexico, Mongolia, Morocco, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Nigeria, Norway, Pakistan, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Republic of Korea, Republic of Moldova, Russian Federation, Saint Kitts and Nevis, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Togo, Tonga, Trinidad and Tobago, Tunisia, Ukraine, Uganda, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Vanuatu, Zambia, Zimbabwe, European Union.



# Signatories (74) of the Treaty

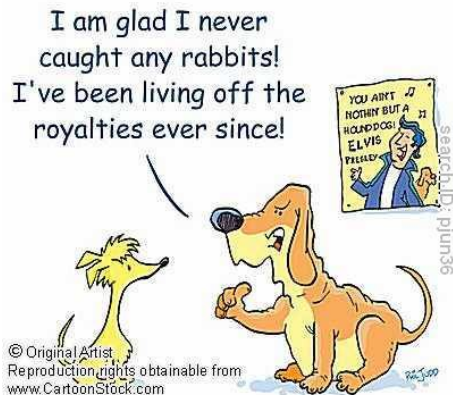
Austria, Belgium, Botswana, Bulgaria, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Djibouti, El Salvador, Estonia, European Union, Finland, France, Germany, Ghana, Greece, Grenada, 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, Sweden, Switzerland, Syrian Arab Republic, Togo, Tunisia, Uganda, United Kingdom, United States of America, Zambia, Zimbabwe

# Ratifications and Accession (6)

Botswana, China, Japan, Slovakia, Syrian Arab Republic,  
and United Arab Emirates

# Benefits of the BTAP

- Economic development  
(International protection of national performers; consolidation of AV industry; 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).





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