

# Kluwer Copyright Blog

## The Beijing Treaty: A step forward in the protection of related rights in audiovisual performances

Sara Tortosa (Elzaburu) · Friday, June 18th, 2021

In the midst of the economic and social paralysis arising from the COVID 19 pandemic, the tireless discipline of law has prevailed as always, if anything with increased activity. *The Beijing Treaty on Audiovisual Performances*

(BTAP, hereinafter the “Treaty”) came into force on 28 April 2020 in the first thirty contracting parties (the minimum number required). It was a historic milestone in the area of rights related to copyright.

Switzerland was the first State to join the list and, at present, 42 states are contracting parties to this Treaty.

For the first time, an international instrument confers express protection to performing artists for fixations of their work on an audiovisual medium, acknowledging their right to decide the time and manner in which their audiovisual works are used abroad, while also receiving a share of the profits obtained from their exploitation, even in the digital environment. Up to now, only sound



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fixations enjoyed this protection (see the *WIPO Performances and Phonograms Treaty* – WPPT – approved in 1996 and in force since 2002).

With the Beijing Treaty, any performance of literary or artistic works or expression of folklore is covered by intellectual property, independently from its nature or medium, including both fixed and unfixed works (live performances), acknowledging the creative activity of these performers in the same way as with regard to musicians and authors.

### **A look to the past before planning for the future**

In 1961, the protection of the rights related to copyright started playing an economic role, thanks to the *International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations* (“Rome Convention”). However, while this acknowledged the rights of all artists against unauthorised broadcasting or recording of their performances, it deprived them of control over their works only when fixed on an audiovisual medium, as opposed to a sound recording. Thus, a discrimination that still persists today came into being, the correction of this being the cornerstone of the Beijing Treaty.

The need to eliminate this asymmetry was addressed at the 2000 WIPO Conference, without any agreement being reached. The point of contention was, and continues to be, the transfer of the rights by the artists in favour of audiovisual producers. Should the transfer be automatic or agreed? Should there be a presumption of transfer unless there is an agreement otherwise or, perhaps, a presumption of no transfer?

These issues have stalled negotiations for many years since the Diplomatic Conference on the Protection of Audiovisual Performance held in Beijing in June 2012. The BTAP offers a solution in its controversial Article 12, which enables, but does not require, participating States to introduce a presumption of assignment in favour of the producer, unless otherwise agreed, from the moment the artist agrees to the fixation of his performance in an audiovisual recording.

This presumption of assignment is without prejudice to the power of participating States to grant the artist the payment of royalties or a fair remuneration for any use of the performance. Each State will decide on the basis of its own laws whether or not the payment of said economic rights is subject to collective management.

At present, it is usual for artists to receive economic consideration for the transfer of their rights, as an essential element of the business negotiation for producers to broadcast the work, but without the artists having any capacity for control over or economic participation in its subsequent exploitation.

### **A minimum but asymmetric protection**

Despite the fact that the Treaty has not yet been ratified by a number of countries with an important role in the world economy, by the European Union as a whole or by any of its Member States, neither its future prospects nor the scope of its effects should be underestimated. Its content is now on the table of international negotiation, favouring and encouraging communication between the States.

If we consider the technical definition of “beneficiaries” (any performer, national or habitual resident of a contracting party, whose performance is broadcast in another contracting state), the

impact of the Treaty across the world is clear. For the same audiovisual production, the BTAP will benefit some artists but not others, depending on whether their performances are broadcasted, represented or distributed in contracting States.

This is not a harmonizing instrument, but it creates an international legal framework for a minimum level of protection, establishing the application criteria that each State must provide to foreign artists in relation to the exploitation of their work within the State's territory. This asymmetry results from the degree of autonomy granted by these criteria, which allows the contracting countries to maintain their different levels of internal protection regarding certain aspects. Thus, although the Treaty is governed by the principle of national treatment, this is only imposed with regard to exclusive rights expressly included in the Treaty and to the right to a fair remuneration. In relation to everything else, any State is free to voluntarily exceed the minimum protection, without having, as a result, the obligation to apply this voluntary protection "excess" to foreigners, who would be subject to the principle of reciprocity.

It is important to highlight that non-accession to or non-ratification of the Treaty does not necessarily imply that no protection is offered, as states are free to offer protection equivalent to that provided for in the BTAP. An example of this would be the work carried out by AISGE – a Spanish organisation that manages dubbing actors' intellectual property rights in Spain and abroad.

There is no doubt, however, that BTAP strengthens related rights of artists in audiovisual works and ensures their payment abroad.

### **Audiovisual globalisation**

The news was received very positively in the audiovisual sector, at a time when it had been hit hard by the effects of the pandemic. Since the Treaty has entered into force, TV and film actors in signatory states, including dubbing actors, musicians, singers and dancers – most of them in temporary or sporadic working relations – have seen their live or recorded performances duly covered as intellectual property and remunerated in a basic manner.

The growing online exploitation of audiovisual works, surpassing any geographical boundary and benefitting millions of users around the world, has made "streaming" and "on demand" platforms and digital channels the new content consumption model. The freedom regarding choice and broadcasting times offered by digital channels is in contrast to the time restrictions and audience criteria which govern linear content channels. These factors are, it seems, particularly valued and welcomed by consumers at a time when their freedom has been curtailed in order to manage the health crisis.

The exclusive right of performers to make their works available to the public becomes the cornerstone of BTAP as the first international text to establish this provision in the digital environment (encompassing films, videos, television programmes, etc.)

### **Key aspects of the Beijing treaty**

**1) Economic and moral rights:** In this respect, it is consistent with other regulatory instruments on the subject matter (such as, for example, the WPPT), granting performers both the moral rights and various economic rights relating to their audiovisual performances. The main change brought by the Beijing Treaty is the extension of protection to fixed or unfixed performances and the inclusion, for the first time, of online exploitation.

It is important to note the following in relation to **economic rights**:

- a) Performers of recorded works (fixations) are guaranteed to retain control over the following exploitation rights: reproduction, distribution, rental and making available via the Internet, together with broadcasting and communication to the public.
- b) Performers of live (unfixed) performances are granted the following rights: the right of broadcasting, the right of communication to the public (except where the performance is a broadcast performance) and the right of fixation.

With regard to **moral rights**, the BTAP introduces a measure of flexibility, by allowing certain “modifications” whenever necessary in order to carry out the exploitation of the audiovisual work, provided that they are not prejudicial to the artist.

**2) Term of protection:** The Treaty envisages a minimum term of 50 years for both the economic rights it regulates and the moral rights. However, the countries whose internal legislation does not envisage *post mortem* protection of moral rights, at the time the Treaty comes into force, will have no obligation to grant this protection.

**3) Temporal application:** There are several scenarios:

- a) The provisions of the Treaty will be *applied, on a mandatory basis*, to all future audiovisual performances, both fixed and live, taking place after it comes into force.
- b) In a dispositive capacity, the States *may or may not* grant exclusive economic rights (Articles 7 to 11) in the fixed performances that were already in existence at the time the Treaty comes into force, once again addressing the subject of reciprocity between the different contracting parties.
- c) The protection of the moral rights must apply equally to any past, present and future performance. In any case, a safeguard clause is added, according to which there must be no prejudice to any “*acts committed, agreements concluded or rights acquired before the entry into force of this Treaty [...]*”

In today’s Information Society, the Beijing Treaty finally addresses the issue of discrimination of artists and the protection conferred to them based on the format and nature of their work. It is clear that we still have a very long way to go but the harmonizing intent behind the Treaty opens a path to a uniform set of minimum protections in the audiovisual industry that is desirable both within and outside the Treaty.

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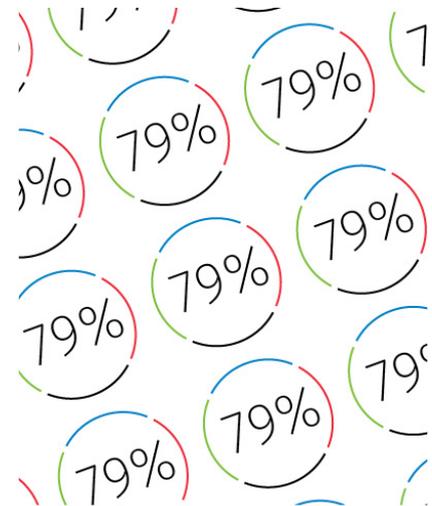
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This entry was posted on Friday, June 18th, 2021 at 9:26 am and is filed under [Legislative process](#), [Performers' Rights](#), [Remuneration \(equitable\)](#)

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