the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

EXPLANATORY MEMORANDUM OF ACCESSION TO THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES, 2012 ('THE BEIJING TREATY')

The Beijing Treaty on Audiovisual Performances is a multilateral Treaty, which regulates copyright for audiovisual performances and expands the performers' rights. The Beijing Treaty was adopted on 24 June 2012. South Africa as member state to WIPO is in terms of Article 23 eligible to be a party to the Treaty. The Treaty is not yet in force and will only come into force on ratification or accession by at least 30 member states (Article 26). Currently 20 member states have ratified the Treaty. The fact that the 30 member states have not ratified the Treaty and it is not yet in force does not preclude South Africa from exercising the rights that are provided by the Treaty.

Contracting Parties have the obligation to ensure that appropriate provisions exist in their national laws for the effective enforcement of the rights in the Treaty (Article 20). The Treaty is a non-self-executing Treaty and will not automatically become judicially enforceable once Parliament has approved it in terms of section 231(2) of the Constitution. It will hence only become judicially enforceable through the implementation of domestic legislation.

Legislation is also required to ensure that other parties to the Treaty are granted, under South African copyright law, the rights to which they are entitled under the Treaties. Acceding to the Treaty will not require amendments to the Constitution but will introduce new rights for performers which enhances intellectual property rights.

The Treaty requires Contracting Parties to accord protection to audiovisual performers on a national treatment basis only and not in respect of any additional rights granted in national law or where other Contracting Parties might have made reservations in relation to the rights covered by the Treaty (Articles 4 and 11). South Africa will need to ensure that the rights provided for in the Performers' Protection Act, 1967 (Act No. 11 of 1967)

are also extended to nationals of other Contracting Parties to the Treaty who perform in South Africa.

The Treaty grants performers four kinds of economic rights (i.e: the right of reproduction; the right of distribution; the right of rental; and the right of making available) for their performances fixed in audiovisual fixations, such as motion pictures. In terms of unfixed (live) performances, the Treaty grants performers three kinds of economic rights being the right of broadcasting; the right of communication to the public; and the right of fixation. Article 6 to 11)

The Treaty also grants performers moral rights on live performances and performances fixed in audiovisual fixations. That is the right to claim to be identified as the performer and the right to object to any distortion, mutilation and modification that would be prejudicial to the performer's reputation (Article 5). The intention of granting moral rights is to protect the personality of the performer over and above his or her economic interests.

The Treaty requires Contracting Parties to ensure that appropriate remedies are put in place against the circumvention of technological protection measures used by performers in connection to the exercise of their rights (Article 15). Adequate protection and remedies should exist against the alteration or removal of electronic rights management information attached to a performance fixed in an audiovisual fixation (Article 16).

Besides the expenses provided for in Article 21 of the delegates attending the Assembly to be constituted to deal with matters concerning the operation, application, development and maintenance of the Treaty and the annual WIPO member's fees which South Africa by virtue of being a WIPO member pays, no further expenses will be incurred with respect to this Treaty. Any financial implications that may be incurred by government or industry in the application of this Treaty will be offset by the greater benefits the Treaty introduces for audiovisual performers who have been excluded for a long time from benefiting from audiovisual works.

ANNEXURE A

the doj & cd

Department:
Justice and Constitutional Development
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER
Private Bag X81, PRETORIA, 0001, Tel (012) 315 1130, Fax (012) 315 1743, Momentum Centre East Tower 12th Floor Pretorius Street, Office Email: OCSLA@justice.gov.za

Ref: 11/2018/19A+B
Enq: Adv J N McLachlan
Tel: 012 – 315 1127
E-mail: JMcLachlan@justice.gov.za
Website: http://www.doj.gov.za

Date: 16 May 2018

Mr L October
Director-General
Department of Trade and Industry
Private Bag X 84
PRETORIA
0001

Dear Mr October

Attention: Ms T Mabirimisa

ACCESSION TO BEIJING TREATY ON AUDIOVISUAL PERFORMANCES: YOUR E-MAIL DATED 9 APRIL 2018

Introduction

1. The Department of Trade and Industry (hereinafter referred to as "the Department") informs us that South Africa intends to accede to the Beijing Treaty on Audiovisual Performances (hereinafter referred to as "the Treaty") concluded by members of the World Intellectual Property Organization (hereinafter referred to as "WIPO"). We have scrutinised the Treaty in terms of *paragraph 5.20(a)* of the *Manual on Executive Acts of the President of the Republic of South Africa* and with reference to *Chapter 5* of the *Constitutional Handbook for Members of the Executive*.

Accession to the Treaty

2. South Africa is a member state of WIPO and can therefore, in terms of Article 23(1) of the Treaty, become a contracting party to the Treaty. South Africa was not one of the original signatories of the Treaty contemplated in Article 25 of the Treaty. In terms of Article 27(ii) of the Treaty it will become binding on South Africa three months after the instrument of accession has been deposited with the Director-General of WIPO.

Overview of the contents of the Treaty

3. Article 3 of the Treaty identifies the persons who are the beneficiaries of the protection granted under the Treaty as performers as defined in Article 2 of the Treaty. The performers that receive protection are citizens and permanent residents of the Contracting Party.

4. Article 4 provides that performers who are citizens of another Contracting Party must enjoy the same treatment as that enjoyed by the performers who are citizens of the Contracting Party.

5. Article 5 provides for the nature of the rights of a performer, apart from his or her economic rights, namely that—

(a) the performer may claim to be identified as the performer of his or her performance;

(b) the performer may object to distortion or modification of his or her performances which are prejudicial to his or her reputation.

6. Article 6 provides that a performer has the exclusive right to authorise the broadcasting of his or her performances before the said performance has been recorded and to authorise the recording of his or her performances.

7. Articles 7 to 10 of the Treaty provides that performers have the exclusive right to authorise —

(a) the reproduction of their recorded performances;

(b) the distribution by sale of their recorded performances;

(c) the commercial rental of their recorded performances; and

(d) the distribution of their recorded performances by wire or wireless means.

8. Article 11 of the Treaty deals with the rights of performers with regard to the broadcasting of their recorded performances. Paragraph (1) of Article 11 provides that performers have the exclusive right to authorise the broadcasting of their performances. Paragraph (2) provides that the Contracting Parties may, by depositing a notification with the Director-General of WIPO, establish the right that performers will be equitably remunerated for the broadcasting of their recorded performances instead of the performers having the exclusive right to authorise the broadcasting of such performances.

9. In terms of Article 12 of the Treaty a Contracting Party may by legislation provide that when a performer has authorised the recording of his or her performances, the rights provided for in Articles 7 to 11 of the Treaty will be owned by the producer of the recording subject to the provisions of the contract between such producer and the performer.

10. Article 13 of the Treaty provides that Contracting Parties may by legislation impose the same type of limitations on the rights of performers conferred in terms Articles 7 to 11 of the Treaty as the limitations imposed by legislation on the protection of copyright in literary and artistic work.

11. Article 14 of the Treaty provides that a performer's rights in the recording of his or her performance will be protected for a period of 50 years.

12. Articles 15 and 16 of the Treaty provide that Contracting Parties shall provide adequate legal protection and effective legal remedies against—

(a) the circumvention of measures taken by performers to protect their rights under the Treaty; and

(b) persons who infringe the rights of performers by—

  (i) removing their particulars from recordings of their performances;

  (ii) distributing or broadcasting recordings of performances from which the particulars of the performer have been removed.

13. Whilst Articles 5 to 16 of the Treaty deal with the substantive rights and obligations of performers and Contracting Parties in terms of the Treaty, Articles 17 to 20 deal with the following procedural matters:

(a) The exercise of rights under the Treaty is not subject to any formality;

(b) the Contracting Parties are not allowed to make reservations to the Treaty;

(c) the Contracting Parties may deposit notifications in terms Articles 11 and 19 with the Director-General of WIPO;

(d) the time from when the protection offered in terms of the Treaty will be applicable to recordings of performers;

(e) obligations of the Contracting Parties to ensure the application of the Treaty within their countries.

14. Article 21 of the Treaty provides for the establishment of an Assembly in which each Contracting Party is represented by one delegate. The function of the Assembly is to deal with matters concerning the maintenance and development of the Treaty and with matters relating to the application and operation of the Treaty. The meetings of the Assembly will take place during the same time and at the same place as the meetings of the General Assembly of WIPO.

15. Article 22 of the Treaty provides that the International Bureau of WIPO performs the administrative tasks concerning the Treaty.

16. Article 24 of the Treaty provides that each Contracting Party enjoys all the rights and assumes all the obligations in the Treaty subject to any specific provision of the Treaty.

17. In terms of Article 27 of the Treaty South Africa shall become a Contracting Party three months after it deposited its instrument of accession with the Director-General of WIPO.

18. In terms of Article 28 of the Treaty any Contracting Party may denounce the Treaty by notification addressed to the Director-General of WIPO.

Salient features of the Treaty and their implications

19. Accession to the Treaty means that the relevant authorities in South Africa will have to extend the same protection to the intellectual property rights of performers who are nationals of other countries as that which it extends to performers of South Africa.

20. Accession to the Treaty also means that the right to equitable remuneration provided for in Article 11 must be extended to performers who are nationals of other countries. However, if nationals of South Africa enjoy limited rights in the country of

another Party to the Treaty the rights of the performers of that country may also be limited.

21. Article 20(1) of the Treaty provides as follows:

"Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."

The relevant authorities in South Africa will in terms of Article 20(1) of the Treaty therefore be obliged to ensure that the rights provided for in the Performers' Protection Act, 1967 (Act No. 11 of 1967), (hereinafter referred to as "the Protection Act") are also extended to nationals of signatories of the Treaty who perform in South Africa.

22. If the Treaty is enacted into law in terms of section 231(4) of the Constitution of the Republic of South Africa, 1996 ("the Constitution") the authorities dealing with the implementation of the Protection Act will have to ensure that the following sections of the Protection Act are not in conflict with the provisions of the Treaty:

"Protection of performers' rights in respect of performances in the Republic

3. Performers shall be granted the protection provided for in section 5 of this Act in respect of their performances -

(a) taking place,

(b) broadcast without a fixation, or

(c) first fixed,

in the Republic.

Extension of protection of performers' rights to performances in certain countries

4. The protection granted to performers by this Act shall be extended automatically in respect of performances -

(a) taking place;

(b) broadcast without a fixation; or

(c) first fixed,

in a country which is a member of the World Trade Organization: Provided that the right conferred on performers in section 5(1)*(b)* shall, in the case of performances in the Republic but emanating from a country which is a member of the World Trade Organization, only be granted to them to the extent that performances emanating from the Republic enjoy corresponding

protection in that country, and such performances of foreign origin shall not enjoy any wider protection in the Republic than is enjoyed in that country by performances emanating from the Republic.

Restrictions on use of performances

5.(1) Subject to the provisions of this Act, no person shall -

(a) without the consent of the performer -

(i) broadcast or communicate to the public an unfixed performance of such performer, unless the performance used in the broadcast or the public communication is itself already a broadcast performance; or

(ii) make a fixation of the unfixed performance of such performer; or

(iii) make a reproduction of a fixation of a performance of such performer -

(aa) if the original fixation, other than a fixation excluded by section 8 from the necessity for obtaining the consent of the performer, was itself made without his or her consent; or

(bb) if the reproduction is made for purposes other than those in respect of which such performer gave his or her consent to the making of the original fixation or of a reproduction thereof; or

(cc) if the original fixation was made in accordance with the provisions of section 8, and the reproduction is made for purposes not covered by those provisions; or

(b) by means of a fixation of a performance published for commercial purposes, without payment of a royalty to the performer concerned -

(i) broadcast the performance;

(ii) cause the performance to be transmitted in a diffusion service defined in section 1 of the Copyright Act, 1978 (Act No. 98 of 1978), unless such service transmits a lawful broadcast, including the performance, and is operated by the original broadcaster; or

(iii) cause any communication of the performance to the public.

(2) In the absence of an agreement to the contrary, a performer's consent to the broadcasting of his or her performance shall be deemed to include his

or her consent to the rebroadcasting of his or her performance, the fixation of his or her performance for broadcasting purposes, and the reproduction for broadcasting purposes of such fixation.

(3)*(a)* The amount of any royalty contemplated in subsection (1)*(b)* shall be determined by an agreement between the performer and the person who broadcasts or transmits, or causes communication of, the performance, as the case may be, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in paragraph *(a)*, any party may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(4)*(a)* A performer who has authorized the fixation of his or her performance shall, in the absence of any agreement to the contrary, be deemed to have granted to the person who arranges for such fixation to be made the exclusive right to receive the royalties contemplated in subsection (1)*(b)* in respect of any broadcast, transmission or communication of such fixed performance: Provided that the performer is entitled to share in any payment received by the person who arranges for the fixation, in the manner agreed upon between the performer and the person who arranges for such fixation, or between their representative collecting societies.

(b) In the absence of an agreement contemplated in the proviso to paragraph (a), any party contemplated in that proviso may refer the matter to the Copyright Tribunal established in terms of section 29(1) of the Copyright Act, 1978 (Act No. 98 of 1978), or the parties may agree to refer the matter for arbitration in terms of the Arbitration Act, 1965 (Act No. 42 of 1965).

(5) Any payment made in terms of subsection (4) shall be deemed to have discharged any obligation by the person who broadcasts or transmits or causes communication of the performance to pay a royalty to the owner of any copyright subsisting in that fixation in terms of section 9A of the Copyright Act, 1978 (Act No. 98 of 1978).

(6) In the event of any right to a royalty being assigned to any successor in title, either by contractual arrangement, operation of law, testamentary disposition or otherwise, any successor in title shall be entitled to enforce such right to a royalty against the person who in terms of this section is obliged to pay or against his or her successor in title.

Collective performances

6. (1) Where several performers as a group take part in the same performance, it shall suffice if the consent required under section 5 is given by the manager or other authority in charge of the group or, failing such authority, by the leader of the group.

(2) In the case referred to in subsection (1) a single payment for the use of the performance shall, unless otherwise stipulated, be made to the manager or other authority in charge of the group or, failing such manager or authority, to the leader of the group, and the manager or authority or leader, as the case may be, shall distribute the proceeds as agreed by the performers or, in default of agreement, the right to remuneration of the respective performers shall be determined in accordance with the provisions of the Arbitration Act, 1965 (Act No. 42 of 1965), or alternatively, at the option of the majority of the performers, by the Copyright Tribunal established by the Copyright Act, 1965 (Act No. 63 of 1965).

Term of protection

7. The prohibition against the use of a performance as provided for in section 5, shall commence upon the day when the performance first took place or, if incorporated in a phonogram, when it was first fixed on such phonogram, and shall continue for a period of 50 years calculated from the end of the calendar year in which the performance took place or was incorporated in a phonogram, as the case may be.

Exceptions from prohibition against use of performance without the consent of the performer

8. (1) .....

(2) A performance, a fixation of a performance or a reproduction of such a fixation may be used without the consent required by section 5 -

(a) if it is for the purposes of private study or personal and private use; or

(b) if it is for the purposes of criticism or review or for the purpose of reporting on current events, provided that not more than short excerpts from the performance are used and, whenever possible, the performer's name or the names of the leading performers are acknowledged; or

(c) if it is for the purposes of teaching or scientific research; or

(d) if it is for the purpose of legal proceedings; or

(e) if it is for the demonstration of recording, amplifying or similar apparatus, provided that the demonstration is made by a licensed dealer on his premises to a specific client.

(3)*(a)* A broadcaster may make by means of his or her own facilities a fixation of a performance and reproductions of such fixation without the consent required by section 5, provided that, unless otherwise stipulated, the fixation or any reproduction thereof -

(i) is intended exclusively for broadcasts to which the performer has consented;

(ii) if they are not of an exceptional documentary character, are destroyed before the end of the period of six months commencing on the day on which the fixation was first made or such longer period as may be agreed to by the performer

(b) The fixation and the reproductions thereof made under the provisions of this subsection may, on the grounds of their exceptional documentary character, be preserved in the archives of the broadcaster but shall, subject to the provisions of this Act, not be further used without the consent of the performer."

Entry into force of the Treaty in South Africa

23.1 The Department's attention is drawn to section 231 of the Constitution which deals with international agreements and provides as follows:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.

(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

23.2 International agreements that need ratification or accession can only become binding on South Africa in terms of section 231(2) of the Constitution. As South Africa has to accede to the Treaty the procedure provided for in section 231(2) of the Constitution will have to be followed, with the effect that it will bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. After this procedure has been followed the instrument of accession must be submitted to the Director-General of WIPO.

23.3 We have also considered the—

(a) Intellectual Property Rights from Publicly Financed Research and Development Act, 2008 (Act No. 51 of 2008);

(b) Protection Act,

with regard to the Treaty and are of the view that it is not in conflict therewith.

20. Subject to our remarks in paragraphs 19 to 22 above the Republic can accede to Treaty as there is, as far as we could ascertain, no provision of the Treaty that is in conflict with the domestic law of the Republic of South Africa.

Yours sincerely,

OFFICE OF THE CHIEF STATE LAW ADVISER
J N McLACHLAN/W J J NEL/M A OLWAGE/A JOHAAR

ANNEXURE B

international relations
& cooperation

Department:
International Relations and Cooperation
REPUBLIC OF SOUTH AFRICA

OFFICE OF THE CHIEF STATE LAW ADVISER (INTERNATIONAL LAW)
Private Bag x 152, PRETORIA, 0001 Tel: +27 12 351 0857 Fax: +27 12 329 1721

18mpongoshas062201
File: 10/16/3/4
RO: 199/2018

Ms M Herfurth
Route: herfurthm
Directorate: Multilateral Trade Relations

SOUTH AFRICA'S ACCESSION TO THE BEIJING TREATY AUDIOVISUAL PERFORMANCES, 2012

1. Reference is made to your request for legal advice under reference number 18herfurthm0614c received by this Office on 15 June 2018 in relation to the above-mentioned subject matter.

2. The State Law Advisers (IL) have been requested to advise whether the Beijing Treaty on Audiovisual Performances, 2012 (hereinafter referred to as the "Treaty") is consistent with international law in general and South Africa's international obligations specifically, and to provide an advice on the procedure for accession.

3. We note that the State Law Advisers at the Department of Justice and Constitutional Development (hereinafter referred to as "the DOJ&CD") have scrutinised the Treaty for consistency with the domestic law of the Republic of South Africa and have advised under paragraph 23 of their legal opinion that the Treaty falls within the scope of section 231(2) of the Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the "Constitution") and will therefore bind the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces. Under paragraph 20 of their opinion, they further advised that no provision of the Treaty is, as far as they could ascertain, in conflict with the domestic law of the Republic of South Africa.

4. In this respect, as requested, we have scrutinised the Treaty for consistency with international law and South Africa's international obligations, and have found it to be consistent with international law and South Africa's international obligations.

5. The Treaty deals with the intellectual property rights of performers in audiovisual performances. It grants performers four kinds of economic rights for their performances

CONFIDENTIALITY NOTE:
This legal opinion might contain information that is privileged and confidential. If the reader is not the intended recipient, or the employee or agent responsible for delivering the opinion to the intended recipient you are hereby notified that any dissemination, distribution, or copying the documentation is strictly prohibited. If you have received this communication in error, please notify the Office of the Chief State Law Adviser (IL) immediately by telephone, and return the original message to the Office of the Chief State Law Adviser (IL).

fixed in audiovisual fixations, such as motion pictures: (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available. It obliges each Contracting Party to adopt, in accordance with its legal system, the measures necessary to ensure the application of the Treaty. In particular, each Contracting Party must ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty. Such action must include expeditious remedies to prevent infringement as well as remedies that constitute a deterrent to further infringement.

6. Articles 26 of the Treaty deals with entry into force of the Treaty. It provides that the Treaty will enter into force three months after 30 eligible Parties have deposited their instruments of ratification or accession. Eligible Party according to article 23 are any Member State of WIPO. Those WIPO Member State may become party to this Treaty by depositing an instrument of ratification or accession. The effective date of becoming a Party to the Treaty for those Member State who have not deposited their instruments of ratification or accession, is according to article 27, from the expiration of three months from the date on which the Party has deposited its instrument of ratification or accession with the Director General of WIPO. South Africa is therefore required to deposit its instruments of accession with the Director General of WIPO to be bound by the Treaty.

7. In order for South Africa to accede to the Treaty, the following domestic procedures need to be followed:

7.1 Agreements that require ratification or accession falls within the ambit of section 231(2) of the Constitution. Parliament must approve that South Africa ratify or accede to the Treaty. All agreements that require parliamentary approval must be submitted to cabinet for consideration and approval.

7.2 A cabinet memorandum submitted through the relevant Ministry to the cabinet secretariat must be prepared. The legal opinions from the State Law Advisers at the DOJ&CD and the State Law Advisers at the Department of International Relations and Cooperation must be included. The text of the Treaty must be certified by the State Law Advisers at the Department of International Relations and Cooperation and attached to the cabinet memorandum.

7.3 Once cabinet recommended that the Treaty should be approved by parliament, the Treaty needs to be tabled in parliament. In this regard, please note that:

- Tabling is the authority of the Presiding Officers;
- Letters requesting tabling should be addressed to the Speaker of the National Assembly and Chairperson of the National Council of Provinces;
- The letter must clearly indicate that the tabling is done in terms of **section 231(2)** of the Constitution;
- The requesting letter must be signed and dated by the responsible Minister;
- An explanatory memorandum and a draft resolution must accompany the tabling of an international agreement that has to be approved by Parliament; and
- A certified copy of the Treaty must be tabled.

7.4 The explanatory memorandum referred to above must:

- Briefly set out the history, objective and implications of the agreement;
- Indicate the recommendation to cabinet;

- Include the legal opinions from the State Law Advisers at the DOJ&CD and the State Law Advisers at the Department of International Relations and Cooperation;

- State whether the agreement has self-executing provisions that will become law in the Republic upon the approval of the agreement in parliament; and

- Give account of the projected financial and other costs of the agreement for the state and contain all information needed by parliament to make an informed decision.

7.5 Once parliament has approved the accession of the Treaty, draft instruments of accession for signature by the Minister of International Relations and Cooperation must be submitted to the Department of International Relations and Cooperation.

7.6 Copies of the minutes of both Houses of Parliament reflecting the decision of the Houses must accompany the draft instruments of accession.

7.7 While the preparation of the instrument of accession is the responsibility of the line function department, this Office is available to assist.

7.8 Arrangements are made by the line function desk of the Department of International Relations and Cooperation for the binding of the Instrument before it is submitted for signature to the Minister of International Relations and Cooperation

8. Please note that copies of the signed instrument of accession must be deposited with the South African Treaty Section at the Department of International Relations and Cooperation.

9. Kindly be reminded that this communication constitutes legal advice that is legally privileged and confidential. It is intended solely for the consumption of the addressee, and may not be freely disclosed to any third party, without the express consent of the client, after having obtained legal advice from this Office.

10. We trust that our comments will be of assistance to you.

SABONGA MPONGOSHA
STATE LAW ADVISER (IL)

PRETORIA
22 JUNE 2018

ANNEXURE C

S MPONSOSHE
STATE LAW ADVISER
(INTERNATIONAL LAW)
05/10/2018

Beijing Treaty on Audiovisual Performances

and

the agreed statements of the Diplomatic Conference that adopted the Treaty

(Beijing Treaty) (2012)

CONTENTS

Preamble
Article 1: Relation to Other Conventions and Treaties
Article 2: Definitions
Article 3: Beneficiaries of Protection
Article 4: National Treatment
Article 5: Moral Rights
Article 6: Economic Rights of Performers in their Unfixed Performances
Article 7: Right of Reproduction
Article 8: Right of Distribution
Article 9: Right of Rental
Article 10: Right of Making Available of Fixed Performances
Article 11: Right of Broadcasting and Communication to the Public
Article 12: Transfer of Rights
Article 13: Limitations and Exceptions
Article 14: Term of Protection
Article 15: Obligations concerning Technological Measures
Article 16: Obligations concerning Rights Management Information
Article 17: Formalities
Article 18: Reservations and Notifications
Article 19: Application in Time
Article 20: Provisions on Enforcement of Rights
Article 21: Assembly
Article 22: International Bureau
Article 23: Eligibility for Becoming Party to the Treaty
Article 24: Rights and Obligations under the Treaty
Article 25: Signature of the Treaty
Article 26: Entry into Force of the Treaty
Article 27: Effective Date of Becoming Party to the Treaty
Article 28: Denunciation of the Treaty
Article 29: Languages of the Treaty
Article 30: Depositary

Preamble

The Contracting Parties,
Desiring to develop and maintain the protection of the rights of performers in their audiovisual performances in a manner as effective and uniform as possible,

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,

SM

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances,

Recognizing the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information,

Recognizing that the WIPO Performances and Phonograms Treaty (WPPT) done in Geneva on December 20, 1996, does not extend protection to performers in respect of their performances fixed in audiovisual fixations,

Referring to the Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 20, 1996,

Have agreed as follows:

Article 1

Relation to Other Conventions and Treaties

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WPPT or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome on October 26, 1961.
(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
(3) This Treaty shall not have any connection with treaties other than the WPPT, nor shall it prejudice any rights and obligations under any other treaties [1], [2].

Article 2

Definitions

For the purposes of this Treaty:
(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 expressions of folklore [3];
(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 [4];

SM

(c) "broadcasting" means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;
(d) "communication to the public" of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation. For the purposes of Article 11, "communication to the public" includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.

Article 3

Beneficiaries of Protection

(1) Contracting Parties shall accord the protection granted under this Treaty to performers who are nationals of other Contracting Parties.
(2) Performers who are not nationals of one of the Contracting Parties but who have their habitual residence in one of them shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

Article 4

National Treatment

(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.
(2) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.
(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.

Article 5

Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right:

Sm

(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; and
(ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.
(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.
(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed [5].

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:
(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
(ii) the fixation of their unfixed performances.

Article 7

Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form [6].

Article 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.
(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer [7].

SM

Article 9

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in audiovisual fixations as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.
(2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers [7].

Article 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 11

Right of Broadcasting and Communication to the Public

(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.
(2) Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorization provided for in paragraph (1), they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.
(3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all.

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

SM

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.

Article 13

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.
(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer [8].

Article 14

Term of Protection

The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed.

Article 15

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law [9], [10].

Article 16

Obligations concerning Rights Management Information

SM

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty:
(i) to remove or alter any electronic rights management information without authority;
(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances or copies of performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.
(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation [11].

Article 17

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Article 18

Reservations and Notifications

(1) Subject to provisions of Article 11(3), no reservations to this Treaty shall be permitted.
(2) Any notification under Article 11(2) or 19(2) may be made in instruments of ratification or accession, and the effective date of the notification shall be the same as the date of entry into force of this Treaty with respect to the Contracting Party having made the notification. Any such notification may also be made later, in which case the notification shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the notification.

Article 19

Application in Time

(1) Contracting Parties shall accord the protection granted under this Treaty to fixed performances that exist at the moment of the entry into force of this Treaty and to all performances that occur after the entry into force of this Treaty for each Contracting Party.
(2) Notwithstanding the provisions of paragraph (1), a Contracting Party may declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 7 to 11 of this Treaty, or any one or more of those, to fixed performances that existed at

the moment of the entry into force of this Treaty for each Contracting Party. In respect of such Contracting Party, other Contracting Parties may limit the application of the said Articles to performances that occurred after the entry into force of this Treaty for that Contracting Party.
(3) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.
(4) Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of the rights provided for in Articles 5 and 7 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

Article 20

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 21

Assembly

(1) (a) The Contracting Parties shall have an Assembly.
(b) Each Contracting Party shall be represented in the Assembly by one delegate who may be assisted by alternate delegates, advisors and experts.
(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.
(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.
(b) The Assembly shall perform the function allocated to it under Article 23(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.
(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.
(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

SM

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.
(4) The Assembly shall meet upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of WIPO.
(5) The Assembly shall endeavor to take its decisions by consensus and shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 22

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 23

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.
(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.

Article 24

Rights and Obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 25

Signature of the Treaty

This Treaty shall be open for signature at the headquarters of WIPO by any eligible party for one year after its adoption.

Article 26

Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 eligible parties referred to in Article 23 have deposited their instruments of ratification or accession.

Article 27

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:
(i) the 30 eligible parties referred to in Article 26, from the date on which this Treaty has entered into force;
(ii) each other eligible party referred to in Article 23, from the expiration of three months from the date on which it has deposited its instrument of ratification or accession with the Director General of WIPO.

Article 28

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 29

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.
(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Union, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

SM

Article 30

Depositary

The Director General of WIPO is the depositary of this Treaty.

---

[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.

[2] **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.

[3] **Agreed statement concerning Article 2(a):** 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.

[4] **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.

[5] **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).

[6] **Agreed statement concerning Article 7:** The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.

[7] **Agreed statement concerning Articles 8 and 9:** As used in these Articles, the expression "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refers exclusively to fixed copies that can be put into circulation as tangible objects.

[8] **Agreed statement concerning Article 13:** The Agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable *mutatis mutandis* also to Article 13 (on Limitations and Exceptions) of the Treaty.

[9] **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

8m

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.

[10] **Agreed statement concerning Article 15:** The expression "technological measures used by performers" should, as this is the case regarding the WPPT, be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.

[11] **Agreed statement concerning Article 16:** The Agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WCT is applicable *mutatis mutandis* also to Article 16 (on Obligations concerning Rights Management Information) of the Treaty.

SM

ANNEXURE D

81/172488

(Z 19E)

PRESIDENT'S MINUTE NO. 292

In terms of section 231 of the Constitution of the Republic of South Africa, 1996, I hereby approve that the attached agreement on the Beijing Treaty on Audiovisual Performances and the agreed statements of the Diplomatic Conference that adopted the Treaty (2012) between the Republic of South Africa and the World Intellectual Property Organisation be entered into, and I hereby authorise the Minister of Trade and Industry to sign this agreement on behalf of the Republic of South Africa.

Given under my Hand at JOHANNESBURG on this 13 day of NOVEMBER, Two Thousand and Eighteen.

.....
PRESIDENT

.....
MINISTER OF THE CABINET