

The importance of the Beijing Treaty for National Stakeholders



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STARTING POINT

On behalf of actors from all over the World

THANK YOU, SAMOA!!!!

- ✓ Up to date, **74 countries** have signed the Beijing Treaty, including **4 countries** in the Asia-Pacific region out of which **3** are in this room: **China, Democratic People's Republic of Korea and Indonesia.**
- ✓ **But only 2** of them, together with Samoa and Japan (and **17** countries in other regions), have ratified or acceded to it.
- ✓ **We need another 11** ratifications or accessions so that the Treaty may come into force for the benefit of actors worldwide.



STARTING POINT

The Beijing Treaty aims *to develop and maintain the PROTECTION of the rights of performers in their AUDIOVISUAL PERFORMANCES in a manner as EFFECTIVE and UNIFORM as possible*. (Preamble, first paragraph).

BUT...

- ✓ How do we ensure that performers will benefit from the protection granted by the Beijing Treaty?
- ✓ How do we ensure that performers will benefit from the exploitation of their audiovisual performances?



A REAL and EFFECTIVE protection of performers' rights requires at least four elements:

- ✓ **Substantive rights**
- ✓ **A well-defined system for the exercise or transfer of such rights.**
- ✓ **A remedy for counterbalancing the bargaining position of performers vis-à-vis producers (the “automatic” transfer or initial ownership of rights): such remedy are the REMUNERATION RIGHTS.**
- ✓ **An adequate mechanism for the exercise of these remuneration rights: their COLLECTIVE MANAGEMENT.**



1. Substantive rights

- ✓ **Both moral and economic**, granting the performer the power to control the exploitation of his or her performance.
- ✓ The economic rights should in principle adopt the form of **EXCLUSIVE** rights, granting the performer the right to authorize the exploitation of his or her performances, more specifically the **REPRODUCTION**, the **DISTRIBUTION**, the **RENTAL**, the **MAKING AVAILABLE**, and the **BROADCASTING AND COMMUNICATION TO THE PUBLIC** of such performances fixed in audiovisual fixations.
- ✓ These exclusive rights on fixed performances are provided under **Articles 7 through 11 of the Beijing Treaty**, as the **MINIMUM LEVEL OF PROTECTION** that Contracting Parties are obliged to grant performers.



2. A well-defined system for the exercise or transfer of such exclusive rights

- ✓ While Articles 7 through 11 of the Beijing Treaty grant performers the exclusive right of authorizing the commercial exploitation of their performances fixed in audiovisual fixations, **Article 12.1 grants Contracting Parties great FLEXIBILITY for providing in their national legislations the way such rights may be exercised.**
- ✓ Such exercise takes place when the performer **consents to the fixation** of his performance in an audiovisual recording: **when concluding a contract with the producer of the audiovisual fixation.**
- ✓ **This contract, or the consent to the fixation, triggers the CONSOLIDATION OF THE EXCLUSIVE RIGHTS IN THE PRODUCER, which may adopt any of the formulas provided under Article 12.1 of the Beijing Treaty, subject, in any case, to any provision to the contrary in the contract:**
 - ❖ Producer's **initial ownership** of the exclusive rights,
 - ❖ Producer's **entitlement to exercise** such rights, or
 - ❖ **Presumption of transfer** of such rights to the producer.

I shall refer to all these formulas as ***“TRANSFER OF RIGHTS”***.



WHY THE “AUTOMATIC” TRANSFER OF RIGHTS?

- ✓ The **bargaining position of performers vis-à-vis producers** determines in most cases, if **not all, THE TRANSFER OF ALL EXCLUSIVE RIGHTS TO THE PRODUCER**, who, in return, will pay a lump or “buy out” (and symbolic) sum to the performer which does not represent the value of the economic rights they are giving away.
- ✓ The transfer of rights from performer to producer always takes place, no matter under which formula, and even regardless of the bargaining position of any given performer, **also because of the licensee’s (TV station, cinema exhibitor, ...) need or request for LEGAL CERTAINTY, for which the producer needs to consolidate all exclusive rights.**

SO, IF ONE WAY OR ANOTHER ALL THE EXCLUSIVE RIGHTS ARE TRANSFERRED TO THE PRODUCER, HOW DO WE ENSURE THAT PERFORMERS ENJOY A REAL PROTECTION OR BENEFIT FROM THE EXPLOITATION OF THEIR PERFORMANCES?



3. REMUNERATION RIGHTS

IN THE ABSENCE OF A STRONG BARGAINING POSITION (either individually or through a collective representative – such as a CMO or a union):

- ✓ Performers need **remuneration rights** as a “legal remedy” for counterbalancing the “automatic” transfer of the exclusive rights and their bargaining position vis-à-vis the producer, as well as adequate mechanisms for the exercise of such remuneration rights: their **collective management**.
- ✓ Enacting the exclusive rights provided under the Beijing Treaty **is NOT enough**, it is also necessary to **ensure that such legislation works in practice, serving the interests for which it was adopted** – namely to stimulate creativity and thereby promote the cultural, social and economic development.
- ✓ **The remedy that has proven to best serve such interests is a system of unwaivable rights to an equitable remuneration subject to collective management when the exclusive rights have been transferred to the producer, because:**

WHAT IS THE USE OF EXCLUSIVE RIGHTS IF THE PERFORMER CANNOT BENEFIT FROM THEM?



4. COLLECTIVE MANAGEMENT [of remuneration rights]

WHY COLLECTIVE MANAGEMENT OF REMUNERATION RIGHTS?

- ✓ Copyright protection, which requires copyright legislation to be fully implemented, providing substantive rights, enforcement measures and **appropriate mechanisms for the management of rights in such situations where individual exercise by the right holder is not possible or feasible** – the case of mass uses, such as public performance or broadcasting of audiovisual works, or cable retransmission of TV programs.
- ✓ Safeguarding the performers' interests, by preventing the transfer of ALL his economic interests to the producer, which requires **THE REMUNERATION RIGHTS TO BE UNWAIVABLE FOR PERFORMERS AND SUBJECT TO MANDATORY COLLECTIVE MANAGEMENT** (so that the performer cannot individually exercise/transfer them).



MORE IMPORTANTLY....

- ✓ Both elements (**REMUNERATION RIGHTS** and **COLLECTIVE MANAGEMENT**) are provided under the **Beijing Treaty**:
- ❖ Concerning the right of broadcasting and communication to the public, **Article 11.2** provides the possibility for the Contracting Parties to declare, in a notification deposited with the Director General of WIPO, that “*instead of the right of authorization provided for in paragraph 1, they will establish a right to equitable remuneration*”, and that “*they will set conditions in their legislation for the exercise of the right to equitable remuneration*” – most likely through collective management organizations.
- ❖ Concerning the transfer of rights to the producer, **Article 12.3** provides that “*Independent of the transfer of exclusive rights (...) national laws (...) may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided under this Treaty including as regards Articles 10 [right of making available] and 11 [right of broadcasting and communication to the public]*”.
- ✓ It must be noted, in any case, that a **remuneration right does not interfere with the licensing activity by the producer**, because such rights don't encompass the power of **authorizing any exploitation act**, but just the right to receive equitable remuneration once the exploitation (previously authorized by the producer) takes place.





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THANK YOU VERY MUCH

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