

Approved for tabling.

BAT SNA  
26/6/19

REPUBLIC OF KENYA




THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT - THIRD SESSION

THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION  
AND INNOVATION

REPORT ON THE CONSIDERATION FOR RATIFICATION OF THE BEIJING  
TREATY ON AUDIO-VISUAL PERFORMANCES

	
THE NATIONAL ASSEMBLY PAPERS LAID	
DATE: 26 JUN 2019	DAY: Wed
TABLED BY:	Hon. William Kisingi Chair Person
THE-TABLE:	M. Moko

DIRECTORATE OF COMMITTEE SERVICES  
CLERK'S CHAMBERS  
PARLIAMENT BUILDINGS  
NAIROBI

JUNE, 2019



## TABLE OF CONTENTS

ANNEXES.....	3
1.0 PREFACE.....	5
1.1 Committee Mandate.....	5
1.2 Committee Membership.....	6
2.0 INTRODUCTION .....	8
3.0 CONSIDERATION OF THE SUBMISSIONS BY THE STAKEHOLDERS.....	14
3.1 SUBMISSIONS BY THE KENYA COPYRIGHT BOARD .....	14
3.2 SUBMISSION BY CONTENT DEVELOPMENT & INTELLECTUAL PROPOERTY TRUST ORGANIZATION .....	15
3.3 SUBMISSION BY THE CREATIVE ECONOMY WORKING GROUP.....	17
3.4 SUBMISSION BY THE KENYA ACTORS' GUILD.....	18
3.5 SUBMISSION BY MS.ANGELA NDAMBUKI.....	19
3.6 SUBMISSION BY PERFORMERS RIGHTS SOCIETY OF KENYA .....	21
4.0 COMMITTEE OBSERVATIONS .....	24
5.0 RECOMMENDATION .....	24



## **ANNEXES**

**I**—Minutes of the meetings of the Committee.

**II**—Adoption List

**III**—Advertisement inviting submission of Memoranda.

**IV**—Written Submissions received by the Committee.



## **CHAIRPERSON'S FOREWORD**

The Beijing Treaty on Audio-Visual performances was tabled in the House by Hon. Aden Duale, MP, the Leader of the Majority Party in the National Assembly on 8<sup>th</sup> November, 2018.

The Treaty seeks to maintain the protection of the rights of performers in their audiovisual performances; and maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information.

In considering the Treaty, the Committee mapped out the key stakeholders and invited them to make submissions on the treaty. The Committee also placed an advertisement in the local dailies on 4<sup>th</sup> March, 2019 pursuant to Article 118 of the Constitution inviting the public to submit their views on the Treaty.

Thereafter, the Committee held a one-day retreat meeting where it met with four stakeholders to consider their submissions as incorporated in this report. A total of five memoranda were received from members of the public and stakeholders through the Office of the Clerk of the National Assembly.

The Committee appreciates the assistance provided by the Office of the Speaker and of the Clerk of the National Assembly that enabled it to consider the Treaty. I take this opportunity to thank all Members of the Committee for their input and valuable contributions

Pursuant to provisions of National Assembly Standing Order 199 (6), and section 8 of the Treaty Making and Ratification Act, 2012 it is my pleasant privilege and honor to present to this House the Report of the Committee for adoption.

**HON. WILLIAM KISANG, MP - CHAIRPERSON**





## 1.0 PREFACE

### 1.1 Committee Mandate

1. The Departmental Committee on Communications, Information and Innovation is established under **Standing Order 216** whose mandate pursuant to the Standing Order 216(5) is as follows—
  - (a) Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned Ministries and departments;
  - (b) Study the programme and policy objectives of Ministries and departments and the effectiveness of the implementation;
  - (c) Study and review all legislation referred to it;
  - (d) Study, assess and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
  - (e) Investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
  - (f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under National Assembly Standing Order 204 (*Committee on Appointments*);
  - (fa) examine treaties, agreements and conventions;
  - (g) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - (h) make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
  - (i) consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
  - (j) Examine any questions raised by Members on a matter within its mandate.
  
2. In accordance with the Second Schedule of the National Assembly Standing Orders, the Committee is mandated to oversee Communication, Information, media and broadcasting (except for broadcast of parliamentary proceedings), Information Communications Technology (ICT) development and advancement of technology and modernization of production strategies.



## 1.2 Committee Membership

3. The Committee membership comprise –

No.	NAME	CONSTITUENCY/ County	POLITICAL PARTY
1.	The Hon. Kisang William Kipkemoi, M.P – <b>Chairperson</b>	Marakwet West	Jubilee
2.	The Hon. George Macharia Kariuki, M.P - <b>Vice Chairperson</b>	Ndia	Jubilee
3.	The Hon. Liza, Chelule Chepkorir, M.P.	Nakuru	Jubilee
4.	The Hon. Alfah, O. Miruka, M.P.	Bomachoge Chache	Kenya National Congress
5.	The Hon. Annie Wanjiku Kibeh, M.P.	Gatundu North	Jubilee
6.	The Hon. Joshua Kimilu, Kivinda, M.P.	Kaiti	Wiper Democratic
7.	The Hon. Marwa Kitayama Maisori, M.P.	Kuria East	Jubilee
8.	The Hon. Mwambu Mabongah, M.P.	Bumula	Independent
9.	The Hon. Maritim Sylvanus, M.P.	Ainamoi	Jubilee
10.	The Hon. Mwangaza Kawira, M.P.	Meru County	Independent
11.	The Hon. Jonah Mburu, M.P.	Lari	Jubilee
12.	The Hon. Gertrude Mbeyu Mwanyanje, M.P.	Kilifi County	Orange Democratic Party
13.	The Hon. Wamuchomba, Gathoni, M.P.	Kiambu County	Jubilee
14.	The Hon. (Eng.) Mark Nyamita Ogola, M.P	Uriri	Orange Democratic
15.	The Hon. John Kiarie Waweru, M.P.	Dagoretti South	Jubilee
16.	The Hon. Erastus Nzioka Kivasu, M.P.	Mbooni	New Democrats
17.	The Hon. Innocent Momanyi Obiri, M.P.	Bobasi	People's Democratic Party
18.	The Hon. Godfrey Osotsi Atieno, M.P.	Nominated	African National Congress
19.	The Hon. Anthony, Tom Oluoch, M.P.	Mathare	Orange Democratic



### **1.3 Committee Secretariat**

4. The following officers facilitate the activities of the committee -

- |                             |                                    |
|-----------------------------|------------------------------------|
| (1) Mr. Nicholas Emejen     | Deputy Director Committee Services |
| (2) Ms. Ella Kendi          | Clerk Assistant III                |
| (3) Ms. Marlene Ayiro       | Senior Legal Counsel               |
| (4) Ms. Lorna Okatch        | Research Officer III               |
| (5) Mr. Wilson Angatangoria | Sergeant at arms                   |



## 2.0 INTRODUCTION

5. The Beijing Treaty on audio-visual Performances hereinafter referred to as (BTAP) is a multilateral treaty which regulates copyright for audio-visual performances and expands the performer's rights. As content is increasingly audio-visual and its exploitation global, the absence of a specific WIPO treaty acknowledging the rights of performers in this field was felt to be an anachronistic and unfair anomaly. The BTAP carries the recognition that all performances of literary and artistic works or expressions of folklore deserve to be protected, regardless of their nature, thus setting the record straight at last and encouraging countries to amend their respective intellectual property provisions accordingly.
6. The Treaty was adopted on 26<sup>th</sup> June, 2012 by WIPO's Diplomatic Conference on the Protection of Audio-Visual performances after twenty years of negotiation. Kenya signed the Treaty and the process of ratification begun immediately.
7. The Beijing Treaty will become legally binding only once it is ratified by at least 30 eligible parties, including countries or certain inter-governmental bodies.
8. An outline of its contents is as follows -

Article	Title	Content
1	Relation to Other Conventions and Treaties	The Article provides that the Treaty is in addition to and does not derogate the provisions of other existing treaties on copyright matters (universal copyright convention, the WIPO copyright Treaty. The agreement on trade related aspects of Intellectual property rights etc)
2	Definitions	Contains definitions for the terms "performers", "audiovisual fixation", "broadcasting"; and "communication to the public".
3	Beneficiaries of Protection	The Article outlines the beneficiaries as performers who are either nationals of or have habitual residence in a contracting party.
4	National treatment	Provides that a contracting party has to accord nationals of other contracting parties the same treatment that it accords its nationals with regard to the exclusive rights of performers and the equitable remuneration rights provided for under the treaty; unless it had made a reservation to the treaty with regard to the grant and application of the rights.
5	Moral rights	Provides for a separate right for a performer with regard to live performances or performances fixed in audiovisual fixations— (a) to claim to be identified as the performer of a performance; and (b) to object to any distortion, mutilation or other modification of the performance which would be prejudicial to their reputation, These moral rights subsists even after a transfer of copyright and, where the performer dies, may be exercisable by a legal





		representative of until the expiry of the economic rights.
6	Economic Rights of Performers in their Unfixed Performances	Grants a performer the exclusive right to authorize the broadcasting and fixation of their unfixed performances.
7	Right of Reproduction	Grants a performer the exclusive right to authorize reproduction of his or her fixed performances in any form.
8	Right of distribution	Grants a performer the exclusive right to authorize the distribution of the original and copies of his or her performances fixed in audiovisual fixations through sale or other transfer of ownership.
9	Right of Rental	Grants a performer the exclusive right to authorize the commercial rental to the public of the original and copies of his or her performances fixed in audiovisual fixations even after their distribution of them by, or pursuant to, authorization by the performer.
10	Right of Making Available of Fixed Performances	Grants a performer the exclusive right to authorize the making available to the public of his or performances fixed in audiovisual fixations, by wire or wireless means.
11	Right of Broadcasting and Communication to the Public	<ul style="list-style-type: none"> <li>• Grants a performer the exclusive right to authorize the broadcasting and communication to the public of his or performances fixed in audiovisual fixations.</li> <li>• It alternatively, allows a contracting party to lodge a notification with the Director General of the World Intellectual Property Organization (WIPO) declaring that instead of granting the exclusive right to authorize the broadcasting and communication to the public of his or performances fixed in audiovisual fixations, it 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.</li> <li>• A contracting party is allowed to lodge reservation with regard to its application of the right to authorize broadcasting and communication to the public of fixed performances or the right to equitable remuneration in respect of certain uses, or its total non-implementation of the two rights.</li> </ul>
12	Transfer of rights	Allows a Contracting Party to provide in its national law for the transfer of all exclusive rights of authorization in Articles 7 to 11 to the producer of an audiovisual fixation. The law may



		require that the contract be in writing and signed by both parties to the contract or by their representatives
13	Limitations and Exceptions	Allows a contracting party to include in its national laws on the rights of performers, the same exceptions and limitations it applies to other literary or artistic works in a manner that does not conflict with the normal exploitation of a performance and does not unreasonably prejudice the legitimate interests of a performer
14	Term of Protection	Grants every performance copyright protection for a period of fifty years from the date of fixation.
15	Obligations concerning Technological Measures	Obliges a contracting party to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures by performers in the exercise of their rights under the Treaty to restrict unauthorized acts.
16	Obligations concerning Rights Management Information	Obliges a contracting party to provide, in its national legislation, adequate legal remedies for— <ul style="list-style-type: none"> <li>(a) the removal or alteration of any electronic rights management information on a work without authority;</li> <li>(b) the distribution, importation for distribution, broadcasting, communication or making available to the public, without authority, of performances or copies of performances fixed in audiovisual fixations with the knowledge that that electronic rights management information has been removed or altered without authority.</li> </ul>
17	Formalities	Provides for the enjoyment and exercise of the rights provided for in the Treaty without a performer being required to comply with any formal requirements e. application for registration
18	Reservations and Notifications	<ul style="list-style-type: none"> <li>• The Treaty does not allow for the making of any reservations except with regard to— <ul style="list-style-type: none"> <li>(a) Whether a contracting party will apply the right to authorize broadcasting and communication to the public of fixed performances or the right to equitable remuneration in respect of certain uses only, or that it will not implement the two rights in their entirety.</li> <li>(b) The intention by a contracting party not to apply the provisions of Articles 7 to 11 to fixed performances existing at the moment of the entry into force of the Treaty for each Contracting Party.</li> </ul> </li> </ul>



		<ul style="list-style-type: none"> <li>Such reservations are to take effect on the date of entry into force of the Treaty if notified in the instruments of ratification or accession; or three months after the lodging of a notification with WIPO, if the notification is made later.</li> </ul>
19	Application in time	<p>Outlines that the obligations under the Treaty apply with regard to fixed performances that exist at the moment of the entry into force of the Treaty and to all performances that occur thereafter save for where a contracting party reserves its application of the provisions of Art. 7 to 11 to certain contracting parties.</p>
20	Provisions on Enforcement of Rights	<p>Obliges contracting parties to—</p> <ul style="list-style-type: none"> <li>(a) adopt, in accordance with their legal systems, the measures necessary to ensure the application of the Treaty; and</li> <li>(b) provide adequate enforcement procedures to enable effective action against infringement of rights covered by the Treaty.</li> </ul>
21	Assembly	<ul style="list-style-type: none"> <li>Establishes an Assembly of Contracting Parties which are each to be represented by one delegate who may be assisted by alternate delegates, advisors and experts.</li> <li>The expenses of each delegation to the Assembly are to be borne by the Contracting Party that has appointed the delegation but the Assembly may request WIPO to grant financial assistance to facilitate the participation of delegations from developing countries or countries in transition to a market economy.</li> <li>The Assembly is charged with— <ul style="list-style-type: none"> <li>(a) overseeing the maintenance and development of this Treaty and its application and operation;</li> <li>(b) admitting certain intergovernmental organizations to become party to the Treaty; and</li> <li>(c) deciding the holding of a diplomatic conference for the revision of the Treaty and instructing to the Director General of WIPO to make preparations for the diplomatic conference.</li> </ul> </li> <li>Each State Contracting Party is to have one vote, while a 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 that are party to the Treaty.</li> <li>An intergovernmental organization may not vote if any one of its Member States exercises its right to vote</li> <li>The Assembly shall meet when a meeting is notified by the</li> </ul>



		<p>Director General and, in the absence of exceptional circumstances, during the General Assembly of WIPO.</p> <ul style="list-style-type: none"> <li>• Decisions of the Assembly are to be made, in the first instance by consensus. The Assembly is to develop its own rules of procedure, including the holding of extraordinary sessions, the requirements of a quorum and the required majority for various kinds of decisions.</li> </ul>
22	International Bureau	Obligates the International Bureau of WIPO to perform the administrative tasks concerning the Treaty.
23	Eligibility for Becoming Party to the Treaty	<p>The following are eligible for membership—</p> <ul style="list-style-type: none"> <li>(a) any Member State of WIPO;</li> <li>(b) any intergovernmental organization which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by the Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to the Treaty; and</li> <li>(c) the European Union.</li> </ul>
24	Rights and Obligations under the Treaty	Unless otherwise provided in the Treaty, each Contracting Party is to enjoy all rights and assume all obligations under the Treaty.
25	Signature of the Treaty	<ul style="list-style-type: none"> <li>• This Treaty was open for signature at the headquarters of WIPO by any eligible party for one year after its adoption. (2012-2013).</li> <li>• Kenya signed the Treaty on 26<sup>th</sup> June 2012.</li> </ul>
26	Entry into Force of the Treaty	The Treaty is to enter into force three months after at least 30 eligible parties have deposited their instruments of ratification or accession. 27 states have so far ratified or acceded to the Treaty.
27	Effective Date of Becoming Party to the Treaty	<p>The Treaty is to bind—</p> <ul style="list-style-type: none"> <li>(a) the 30 eligible parties to it from the date on which it enters into force;</li> <li>(b) any other contracting party thereafter at the expiry of expiration of three months from the date on which it deposits its instrument of ratification or accession</li> </ul>
28	Denunciation of the Treaty	A contracting Party must file a written notification of its denunciation of the Treaty. The denunciation is to take effect after a one (1) year period.
29	Languages of the	The versions of the Treaty in English, Arabic, Chinese, French,





	Treaty	Russian and Spanish languages are equally authentic.
30	Depositary	The Director General of WIPO is the Depositary for the Treaty on whom all instruments of ratification or accession and any notifications are deposited.

**Constitutional implications:**

9. In accordance with Article 2(6) of the Constitution and the Treaty Making and Ratifications Act, No. 45 of 2012, once the treaty is signed and ratified it shall form part of the laws of Kenya.
10. The Treaty if ratified will provide additional protection of audiovisual performers at the international level; recognize performers rights in the online environment; and provide a modern international framework for the rights of performers in motion pictures, television programs and other audiovisual works.

**Obligations imposed on Kenya by the treaty**

11. The Beijing Treaty on Audiovisual Performance requires the amendments of the Copyright Act to provide for legal remedies against the circumvention of technological measures used by performers in connection with the exercise of their rights and against the alteration of information; and to ensure that enforcement procedures are available to permit effective action against any act of infringement of rights covered by the treaty.

**Financial Implications**

12. There are no financial implications imposed on Kenya by the treaty and no expenditure of public funds will be incurred in implementing the Treaty.

**Implications on matters relating to Counties**

13. The treaty relates to matters under Part 1, Section twelve of the Fourth Schedule to the Constitution that provides for intellectual property therefore it is not a matter concerning counties.



### **3.0 CONSIDERATION OF THE SUBMISSIONS BY THE STAKEHOLDERS**

14. Pursuant to Article 118(1)(b) of the Constitution and Section 8 of the Treaty Making and Ratification Act, 2011 which provides for public participation, the Committee considered the submissions of various stakeholders as highlighted herein below-

#### **3.1 SUBMISSIONS BY THE KENYA COPYRIGHT BOARD**

On 25<sup>th</sup> March, 2019, Mr. Edward Sigei, the Executive Director of the Kenya Copyright Board herein after referred to as “KECOBO”. informed the Committee as follows; -

15. The WIPO Beijing Treaty for the Protection of Audio Visual performers was adopted in 2012 after twenty years of intense negotiations.
16. Kenya signed the Treaty in Beijing and the process of ratification begun immediately thereafter. The BTAP offers substantive rights to performers in audio visual works (actors) marking a departure from the Rome Treaty of 1961.
17. Currently performer’s earnings are subject to contract entered with the procedures of sound recordings. In many cases the actors are disadvantaged and are denied fair terms by the producers of audio-visual works who have a stronger bargaining power and thereafter monopolize income and hold substantive rights exclusively.
18. The Treaty makes amends by creating new rights that can be subject of the negotiation thereby expanding earning options for actors beyond the initial lump sum payments.
19. The domestication of the treaty will take care of the-
  - i.) Scope of the performers rights vis-a- vis the existing producer rights;
  - ii.) Term of new rights;
  - iii.) Managing exceptions and limitations;
  - iv.) Managing technical protection measures especially in the light of the need to respect the space of exceptions and limitations;
  - v.) The extension of the scope of newly introduced moral rights;
  - vi.) The management of the new performer rights preferably under collective management;
  - vii.) In terms of Article 12, KECOBO favours the re-establishment of equitable right to remuneration along the line of the repealed Section 30A if the parties cannot determine the issue by way of contract.



20. KECOBO supports the ratification of the Beijing Treaty for the following reasons:-

- i.) The ratification will enable the Country to expand the rights of the audio-visual performers;
- ii.) The treaty offers an opportunity to re-balance of the bargaining relationship between the performers and producers as it currently favours the latter;
- iii.) The treaty offers actors an assurance of income if the audio visual work they are part of is a commercial success;
- iv.) The Treaty will support collective management and other forms of organization for actors;
- v.) The ratification will enable Kenyan actors to earn royalties from their performances exploited abroad; and
- vi.) Expand the scope of exploitation of audio-visual works to new environment in the digital world.

### **3.2 SUBMISSION BY CONTENT DEVELOPMENT & INTELLECTUAL PROPOERTY TRUST ORGANIZATION**

On 25<sup>th</sup> March, 2019, Mr. Alex Gakuru, the Executive Director of the organization informed the Committee as follows:-

21. The Constitution of Kenya requires the law to ensure optimal benefits to the bona fide copyright owners and hence the need for the actual performers rights being elevated to their deserved position with equitable remuneration without imposing undue barriers to the growth of the creative economy, access to information and knowledge and freedom of expression in Kenya.
22. The Treaty radically transforms hitherto unfair audio-visual performers intellectual and labour input rewards vis-a-vis composite productions and preservation of copyright owners rights. He noted that one of the most common misunderstanding regarding intellectual property rights, particularly copyright was and remains that the actual creators are the main beneficiaries of the grant. Yet in reality, it is the large companies that employ creators and then strip them of their copyright through contracts who benefit from the grant that the society intended to be a reward for authors.
23. The Treaty grants the performers four kinds of economic rights for their performances fixed in audio-visual fixations which include -
  - (i) the right of reproduction;
  - (ii) the right of distribution;
  - (iii) the right of rental; and
  - (iv) the right of making available.
24. The remedies provided by the Beijing Treaty were aimed at addressing some of the ills that have been visited against performers for a very long period of time such as -
  - (i) The unjust historical neglect of audio-visual performers rights over composite audio-visual productions copy/rights holders has resulted in documented countless prior



famous artistes sadly dying very poor compelling their bereaved to hold harambees to assist on burial expenses.

- (ii) Audio-visual performers are among the forefront copyright owners unfortunately they are often relegated to Intellectual Property Rights back benches, if not in the deep trenches.
  - (iii) Dominant motion pictures and music industries cartels practically blackmail lone audio-visual performers into signing away their rights if just to have a shot at being included in their recording agreements. Industry 'Payola' practice – that is, bribing broadcast stations to play of audio-visual productions they have vested interests in is, to state the obvious – outright corruption, considered illegal in certain jurisdictions. The law should always have mechanisms of protecting the disadvantaged, weak party in a contract.
  - (iv) Lucrative "IP Industry" agents threaten elimination of private copying rights (such as fair use or fair dealing). It is important to note that not all copying is illegal. In fact, MUCH unauthorized copying is entirely legal (copying for education, commentary, criticism, research, private use, etc).
  - (v) In a digital world, one of the greatest threats to freedom of expression, creativity and innovation included excessive and unbalanced intellectual property rights. The Internet makes copies in order to display info, so copyright rules are implicated in order to read or share information on the internet.
  - (vi) Well legally-provided space for Composers Rights, Mechanical Rights, Producers Rights, Modification Rights, Rights to Reproduce, Display Rights, Performance Rights, Distribution Rights and Broadcasters Rights needed to be matched with legally-provided audio-visual performer's rights.
25. CODE-IP Trust supported the ratification of The Beijing Treaty on Audio visual Performances, 2012 by Kenya for remedying the above stated injustices.
26. The ratification and domestication of the treaty will extend the protection of Intellectual Property to audio-visuals, as well as the protection of live performances that were not protected before.
27. The Treaty enforces moral right of an author or performer which is in section 32 of the Copyright Act of Kenya. It allows the performer to retain the moral rights of integrity and attribution provided by the treaty.
28. Article 11 of the Constitution of Kenya recognizes culture as the foundation of the nation, its promotion, compensation and protection was therefore very pertinent. The Beijing Treaty





on the other hand ensures protection of performances of folklore and the use of audio-visuals as vehicles for other expressions of creativity and cultural identity.

29. The Beijing treaty allows performers to transfer their rights. It also provides for rights to audio-visual performers that were not provided for in contracting parties. This new right may provide the performer with additional leverage in negotiations with the producer.
30. The Beijing Treaty provides for additional rights only to the performers of audio-visual rights, because producers of audio-visual works already receive those rights under other existing treaties. The definition of the word 'broadcast' has not been included though the definition of the word 'broadcasting' has been included in Article 2 of the Beijing Treaty.
31. Royalties and equitable remuneration are included in the treaty. Equitable remuneration in articles 4,11 (2) and 12 and royalties Article 12 (3).
32. The Treaty does not mention a time limit for which an ISP can remove or disable access to content. However, it states that 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 in Article 20 of the Beijing Treaty.
33. Further in Article 16 states that 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.

### **3.3 SUBMISSION BY THE CREATIVE ECONOMY WORKING GROUP**

On 25<sup>th</sup> March, 2019, Mr. Kimani Njogu, the Chairperson of Creative Economy Working Group (CEWG) comprising of Content Development and Intellectual Property Trust, the Godwon Arts Centre, Twaweza Communications, Kenya Actors Guild, Creative Garage, Kwani Trust, Book Bunk, Gosheng Services, Docubox, Content House and the Nest Collective, informed the Committee -

34. He stated that CEWG supports the Beijing Treaty for the following reasons -
  - (i) The Constitution of Kenya in *Article 11* provides for culture as the foundation of the nation. Intellectual property rights are a means of enhancing cultural expressions and the Treaty will further this cause even more.
  - (ii) Certain provisions of the Copyright Act specifically section 30 have been lifted from the Treaty and enacted into law through the said Treaty while awaiting Kenya's ratification of the said Treaty.
  - (iii) Constitutional Petition Number 317 of 2015 and the Constitutional Petition Number 5 of 2016 held that Section 30A of the Copyright Act was unconstitutional, thereby



mandating its deletion from the Act. Deletion of the section left the performers stranded in the collection of their royalties. The Treaty will give a basis for correction of the injustice occasioned to the performers upon deletion of the section 30 of the Act and also give a room to a deeper protection of the rights of performers.

(iv) It will provide a basis for the implementation of a policy on performing rights in Kenya as well as how they should be effectively managed, whether through collective management organizations or otherwise.

(v) It will offer performers deeper protection on digital versions of their works. This will strengthen the demands upon internet Service Providers and digital platforms to offer enhanced protection to the artist on their works online within Kenya.

### **3.4 SUBMISSION BY THE KENYA ACTORS' GUILD**

The Kenya Actors Guild submitted as follows, that -

35. Fixed Performances as per Beijing Treaty are included the Right of Reproduction, the Right of Distribution, the Right of Rental and the Right of making available. Of productions which were going to be protected.
36. The Treaty will provide an opportunity for the performers to have an avenue to earn extra revenue over and above their offered remuneration for their works in the performer consenting in the release of these rights.
37. Further it provides an opportunity for the performers to know where their works are being viewed for them to follow up on their Royalties in countries where The Beijing Treaty is applicable.
38. Unfixed Performances as per Beijing Treaty (Live Performances) – Economic Rights are the right of the Broadcaster (except in the case of rebroadcast), the right of communication to the public (except where the performance is a broadcast performance) and the right of fixation. This covers stage performances which also caters for educational and community theatre at County and National celebrations.
39. Fundamental rights of the performer as per Beijing Treaty are; Moral Rights, Transfer of rights, Limitations and exceptions and Copyright/Ownership
40. All other issues that the Beijing Treaty brings to light such as legal dispute resolution mechanism and terms of agreement between contracting parties within the National Laws of the Land will be adhered to by the country that ratifies this treaty.



### 3.5 SUBMISSION BY MS.ANGELA NDAMBUKI

Angela Ndambuki submitted as follows, that -

41. On the definition section of the treaty she stated that the BTAP defines performers as 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. It also includes those who perform a literary or artistic work that is created or first fixed in the course of a performance. She noted that the copyright Act did not define performers.
42. Modelled from authors' rights protection, performers' rights are divided into two main rights namely moral rights and economic rights.

#### **Moral rights**

43. The BTAP provides for the performer's moral rights for both live performance and fixed performance in audiovisual works. Moral rights are independent of economic rights and exist even after the transfer of the economic rights and in particular exclusive rights. The BTAP provides for two types of moral rights as follows-
  - (i) Right of Attribution (Paternity Right);- The attribution right provides the right to be identified as the performer which includes the right to claim to be identified as the performer of his performances. The right under the Treaty is however limited in its application in that it is not applicable where omission is dictated by the manner of the use of the performance. The Act provides for the right to attribution under section 30(5)(a).
  - (ii) Right of integrity;- The integrity right provides the right to object to derogatory treatment which includes the right 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. This right however is conditionally enforceable only where it is objectively prejudicial to the performer's reputation in a substantial way. The word substantial leaves room to question what it constitutes and may lead to unfavorable outcomes once put to test. The Act provides for this under section 30(5)(b).
44. BTAP indicates that moral rights should persist at least during the lifetime of a performer as provided in the Act as referenced here in above. The treaty further makes it clear that moral rights do not affect the normal course of exploitation modifications such as editing, compression, duping, formatting and other technological advancements. This was to cater for the concerns of producer member states in regards to the extent to which moral rights might affect the normal exploitation of a performance.
45. Unlike authors' rights, performers do not have a statutory right of false attribution; therefore, they tend to rely on other claims such as passing off. She observed that the question that remained was whether the imitation of performance characteristics is protectable. US have held protection for the imitation of well-known voices of professional singer for example being used for advertising.



## **Economic Rights**

46. She submitted that economic rights are concerned with the right to control the exploitation of one's work. They mainly include exclusive rights and equitable remuneration rights. Exclusive rights are enjoyed by the owner of the copyright or related rights and confer the power to authorize or prohibit certain acts in relation to his works.
47. Equitable remuneration on the other hand refers to remuneration in respect of a performance in an amount and manner consistent with what may be regarded a normal commercial standard in case of authorization on the same act by the owner of copyright and related rights.
48. The BTAP provides for economic rights for both unfixed and fixed performances. This includes exclusive rights of the performer in the following -
- i. Rights in unfixed performances (live performance) which includes the rights to control includes; - broadcasting of the live performance, Communication to the public of their unfixed performances and the fixation of the same
  - ii. Rights in fixed performances includes; Reproduction right, Distribution Right and Rental Right.

## **Transfer of Rights**

49. Article 12 of the BTAP holds the crux of the treaty in matters pertaining to the transfer of rights. The provisions for the transfer of rights include:
- (i) Exclusive Rights Transfer: Transfer of exclusive rights to produce once a performer has consented to fixation of his performance in an audiovisual fixation, subject to any contract to the contrary. This reflects Art 19 of the Rome Convention as referenced hereinbefore. This position should not be adopted as an option as it retains the status quo where most performers assign their rights in perpetuity to producers hence do not benefit as they should from the exploitation of their performances. The treaty further provides that such consent or contract may be required in writing and signed by both parties or their duly authorized representatives.
  - (ii) The Guarantee of Remuneration Rights;- Independent of the transfer of exclusive rights, an audiovisual performer has the right to receive equitable remuneration or royalties for the making available right, broadcasting and communication to the public of his performances. This right ordinarily is unassignable except to a collecting society to administer the rights on behalf of the performer. The management of remuneration rights are therefore subject to compulsory collective management to ensure the proper administration of the same.

## **Terms of protection and formalities**

50. Under the BTAP, the term of protection shall last, at least, until the end of a period of 50 years computed from the end of the year in which the fixation of the performance took place. This provision in the Act may be extended to 70 years. The word 'at least', leaves it open for states to increase the term as they deem fit. Like copyright, rights in of performers





in audiovisual works, being rights akin to copyright, does not require any formalities to enjoy protection. This is already the current position under the Act. The Act provides for the performer's moral right term of protection subsisting for the life of the performer.

#### **Exceptions and Limitations**

51. The BTAP employs the three-step test in providing for exceptions and limitations which includes application in 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. It further provides that these exceptions and limitations may be as provided for other performers. It states that Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable mutatis mutandis also to Article 13.

#### **Enforcement of Rights**

52. The BTAP provides that states should apply measures to ensure adequate enforcement as exists in their laws to enable effective action against any act infringement of rights covered by the Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

53. The Kenyan law provides for both civil remedies and creates offences for criminal liability. Remedies available for infringement are those provided under copyright and they include damages, injunctions, delivery up, seizure. An infringement of a performer's property rights is actionable by the rights owned.

54. BTAP has closed the gap in the international rights system by providing for performers protection extended from the sound recordings to the audiovisual performer in the management of their intellectual property rights through provision of statutory protection. However, at the same time it has also provided leeway provisions for the member states to maintain status quo where the performers rights are transferred to the producers without further compensation in form of equitable remuneration or otherwise.

55. Article 26 of BTAP provides that the treaty shall enter into force three months after 30 eligible parties have deposited their instruments of ratification or accession. The Treaty now stands at 27; as at February 8, 2019 the first ratification being made by Syrian Arab Republic in March, 2013.

56. Kenya should therefore make the requisite steps to ratify the BTAP so as to enable its entry into force to allow international protection of audiovisual performers in Kenya. The Treaty is indeed capable of substantially changing the current landscape of protection available to audiovisual performers in Kenya especially with technological advancements, if it is ratified and implanted in Kenya in a way that ensures the protection of the performer.

### **3.6 SUBMISSION BY PERFORMERS RIGHTS SOCIETY OF KENYA**

On 25<sup>th</sup> March, 2019, Mr. Ephantus Kamau the Chairperson of the Performers Rights Society of Kenya appeared before the Committee and highlighted that PRISK supports the Treaty for the following reasons -



57. Kenya's cultural heritage is of great relevance; by protecting the Kenyan performers rights on their audio visual, the Treaty would serve as an instrument for protecting Kenya's cultural heritage so widely used in international audio-visual projects involving the African Continent.
58. The Treaty was adopted in June 2012 with the highest consensus ever reached by a Treaty of this nature;122 Countries signed the final act of the Diplomatic Conference and 73 Countries signed the Treaty. The Treaty would help boosting revenues generated abroad in favour of Kenyan performers, impacting positively in the Kenyan balance of payments.
59. The ratification by Kenya, opting for a right to equitable remuneration for performers would-
- (i) Strengthen and consolidate the protection of audio-visual performance granted by the Copyright Act
  - (ii) Increase the ability to obtain royalties for Kenyan actors generated in foreign Countries that are also parties to the Treaty
  - (iii) Enable possibility for foreign digital platforms that distribute audio visual content to pay royalties to Kenyan performances, even when the exploitation takes place abroad
  - (iv) The Treaty fulfils the objective of offering a channel of reciprocal exchange of audio visual content under minimum and comparable conditions with other Countries, being also that the World Trade Organization (WTO) has its fundamental basis the harmonization of rights integrated in Intellectual Property;
  - (v) The Treaty provides for a minimum level of protection of performers rights on their audio visual performances with which the Kenyan Copyright Act is in Compliance. This would mean re-inserting the repealed section 30A of the Act or coming up with a similar mechanism in order to secure the economic protection granted by the Treaty to performers;
  - (vi) The Treaty aims to develop and maintain the protection of the rights of performers in their audio visual performances in a manner as effective and uniform as possible;
  - (vii) Articles 5 to 11 of the Treaty provide the minimum level of protection that Contracting Parties must grant performers. The Copyright Bill should therefore include clear provisions granting performers the moral rights of paternity and integrity on their live performances and on their performances fixed I audio visual fixations as well as the exclusive right to authorize the fixation and the communication to the public on their live performances;



(viii) The need of legal certainty for both the producer and the end user results in the need to consolidate all the exclusive rights on the producer. Such consolidation of the rights on the producer cannot deprive performers of protection as the goal of the Treaty is to secure protection to performers; and

(ix) Statutory remuneration and collective management are expressly provided under the Treaty at least making available broadcasting and communication to the public.

60. The repealed Section 30A of the Copyright Act 2001 should be subjected to public participation in accordance with the dictates of the Constitution. Amending the Act will ensure that the provision is consistent with relevant standards under international law.



#### 4.0 COMMITTEE OBSERVATIONS

61. The Committee having received both written and oral submissions from the public and other stakeholders observes that the ratification of the treaty will -
- I. Enable the Kenyan actors and performers to earn royalties from their performances exploited abroad;
  - II. Expand the scope of exploitation of audio-visual works to new environment in the digital world;
  - III. Boost investment by encouraging effective and well enforced copyright and related rights legislation which will be conducive to the development of a balanced framework;
  - IV. Develop and maintain the protection of the rights of performers in their audio-visual performances in an effective and uniform manner;
  - V. Provide a basis for the implementation of a policy on performing rights in Kenya as well as how they should be effectively managed, whether through collective management organizations or otherwise; and
  - VI. Offer performers deeper protection on digital versions of their works. This will strengthen the demands upon internet Service Providers and digital platforms to offer enhanced protection to the artist on their works online within Kenya.

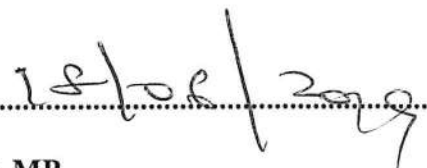
#### 5.0 RECOMMENDATION

62. The Committee recommends **THAT**, pursuant to Section 8 of the Treaty Making and Ratification Act, the House **approves** the ratification of the Beijing Treaty on Audio-Visual Performances.

SIGNED.....



DATE.....



HON. WILLIAM KISANG, MP

CHAIRPERSON

COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION





# ANNEX 1 - MINUTES



**MINUTES OF THE 22<sup>ND</sup> SITTING OF THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION HELD IN 11<sup>TH</sup> FLOOR PROTECTION HOUSE PARLIAMENT BUILDINGS ON TUESDAY 18<sup>TH</sup> JUNE, 2019 AT 11.30AM.**

---

**PRESENT**

1. Hon. George Macharia Kariuki, M.P. **-Vice- Chairperson (Chairing)**
2. Hon. Maritim Sylvanus,MP
3. Hon. Joshua Kimilu Kivinda, M.P.
4. Hon. Innocent Momanyi Obiri, M.P
5. Hon. Godfrey Osotsi Atieno, M.P
6. Hon. Erastus Nzioka Kivasu, M.P
7. Hon. Jonah Mburu, M.P
8. Hon. Liza Chelule Chepkorir ,M.P
9. Hon. Marwa Kitayama Maisori, M.P
10. Hon. Annie Wanjiku Kibeh,M.P
11. Hon. Alfah O. Miruka, M.P

**APOLOGIES**

1. **Hon. William Kipkemoi, M.P.** **-Chairperson**
2. Hon. John Kiarie Waweru, M.P
3. Hon. Gertrude Mbeyu Mwanyanje, M.P
4. Hon. Mwangaza Kawira, M.P
5. Hon. Mwambu Mabongah, M.P
6. Hon. Anthony Oluoch, M.P.
7. Hon. (Eng.). Mark Nyamita, M.P
8. Hon. Wamuchomba Gathoni, M.P

**IN ATTENDANCE**

**Secretariat**

1. Ms.Ella Kendi - Clerk Assistant III
2. Ms.Lorna Okatch - Research Officer III
3. Mr.Simon Muinde - Audio Officer
4. Mr.Albert Atunga - Serjeant at arms

**MIN.NO/NA/CII/2019/92: PRELIMINARIES**

The meeting was called to order at thirty minutes past eleven o'clock followed by a word of prayer.

**MIN.NO/NA/CII/2019/93: CONFIRMATION OF THE MINUTES OF THE PREVIOUS MEETING**

The agenda was deferred to the next meeting.

**MIN.NO/NA/CII/2019/94: ADOPTION OF THE REPORT ON THE CONSIDERATION OF THE BEIJING TREATY ON AUDIO-VISUAL PERFORMANCES**

The Committee considered the report and adopted it with the following observations and recommendations having been proposed by Hon.Innocent Momanyi, MP and seconded by Hon.Joshua Kimilu, MP.

**Committee observations**

The Committee observed that the ratification will;

1. Enable the Kenyan actors and performers to earn royalties from their performances exploited abroad;
2. Expand the scope of exploitation of audio-visual works to new environment in the digital world;
3. Boost investment by encouraging effective and well enforced copyright and related rights legislation which will be conducive to the development of a balanced framework;
4. Develop and maintain the protection of the rights of performers in their audio-visual performances in an effective and uniform manner;
5. Provide a basis for the implementation of a policy on performing rights in Kenya as well as how they should be effectively managed, whether through collective management organizations or otherwise; and
6. Offer performers deeper protection on digital versions of their works. This will strengthen the demands upon internet Service Providers and digital platforms to offer enhanced protection to the artist on their works online within Kenya.

**Recommendation;**

The Committee recommends **THAT**, Pursuant to the Section 8 of the Treaty Making and Ratification Act, the House approves the ratification of the Beijing Treaty on Audio Visual Performances.

**MIN.NO/NA/CII/2019/95: ANY OTHER BUSINESS**

1. The Committee was informed that a legislative proposal on Data Protection and Privacy Bill, 2019, sponsored by Hon. Mohamed Maalim, MP had been referred to the Committee for consideration an report to the House within twenty one days.
2. On Digital Literacy Programme inspection visit to Dagoretti South, seven Members of the Committee were requested to confirm the attendance for planning purpose. Further, the Chairperson indicated that the inspection visit to Makueni County had been postponed to the next financial year.

**MIN.NO/NA/CII/2019/96: ADJOURNEMENT**

There being no other business, the meeting was adjourned at fifty minutes past twelve o'clock.

SIGNED.....*25/06/2019*.....DATE.....*William Kisang*.....

**HON.WILLIAM KISANG, MP - CHAIRPERSON**



# ANNEX 2 ADOPTION LIST




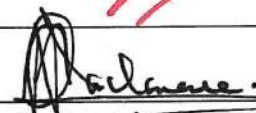
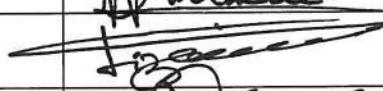

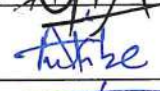
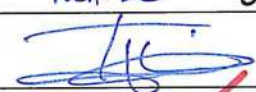
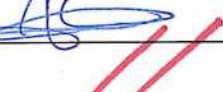

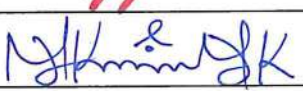
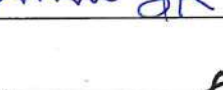
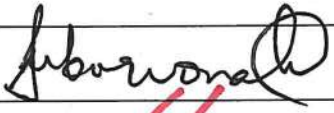





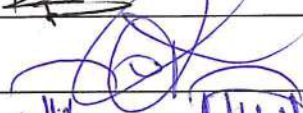

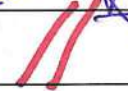


**THE DEPARTMENTAL COMMITTEE ON COMMUNICATION, INFORMATION AND INNOVATION**

**ADOPTION LIST**

**ADOPTION OF THE REPORT ON THE CONSIDERATION FOR RATIFICATION OF THE BEIJING TREATY ON AUDIO- VISUAL PERFORMANCES**

DATE.....18<sup>th</sup> June, 2018.....TIME.....11:30am.....VENUE.....11<sup>th</sup> Floor, Protea House.

NO.	NAME	SIGNATURE
	Hon. Kisang, William Kipkemoi, M.P - <b>Chairperson</b>	
	Hon. George, Macharia Kariuki, M.P - <b>Vice – Chairperson</b>	
	Hon. Liza, Chelule Chepkorir, M.P.	
	Hon. Alfah, O. Miruka, M.P.	
	Hon. Annie Wanjiku Kibeh, M.P.	
	Hon. Joshua Kimilu, Kivinda, M.P.	
	Hon. Marwa Kitayama Maisori, M.P.	
	Hon. Mwambu Mabongah, M.P.	
	Hon. Maritim Sylvanus, M.P.	
	Hon. Mwangaza Kawira, M.P.	
	Hon. Jonah Mburu, M.P.	
	Hon. Gertrude Mbeyu Mwanyanje, M.P.	
	Hon. Wamuchomba, Gathoni, M.P.	
	Hon. (Eng). Mark Nyamita Ogola, M.P.	
	Hon. John Kiarie Waweru, M.P.	
	Hon. Erastus Nzioka Kivasu, M.P.	
	Hon. Godfrey Osotsi, Atieno, M.P.	
	Hon. Innocent Momanyi, Obiri, M.P.	
	Hon. Anthony, Tom Oluoch, M.P.	



# ANNEX 3 - ADVERTISEMENT



# REPUBLIC OF KENYA



## THE NATIONAL ASSEMBLY TWELFTH PARLIAMENT - THIRD SESSION

In matter of consideration by the National Assembly of the Ratification of the Beijing Treaty on Audio-Visual Performances

### SUBMISSION OF MEMORANDA

Article 118(1)(b) of the Constitution provides that, "*Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees*". Further, Section 8 of the Treaty Making and Ratification Act, 2012 provides for the consideration and Ratification of Treaties by Parliament and subsection (3) states that, "*the relevant Parliamentary Committee shall, during its consideration of the Treaty, ensure Public Participation in the ratification process in accordance with laid down parliamentary procedures*".

**The Beijing Treaty on Audio-Visual Performances** has been submitted to the National Assembly for ratification. The Treaty seeks to provide additional protection to audio-visual performers at international level; recognize performers rights in the online environment; and provide a modern international framework for the rights of performers in motion, pictures television programs, and other audio-visual works.

**The Beijing Treaty on Audio-Visual Performances** has been committed to the **Departmental Committee on Communication, Information and Innovation** pursuant Standing Order 216(5)(fa) for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) of the Constitution and Section 8 of the Treaty Making and Ratification Act, 2012, the Committee invites interested members of the public to submit any representations they may have on the said Treaty. The representations may be forwarded to the **Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi**; or hand-delivered to the **Office of the Clerk, Main Parliament Building, Nairobi**; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before **Monday, 11<sup>th</sup> March, 2019 at 5.00 pm.**

**MICHAEL R. SIALAI, EBS  
CLERK OF THE NATIONAL ASSEMBLY**



# ANNEX 4 - WRITTEN SUBMISSIONS





350

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – THIRD SESSION

In matter of consideration by the National Assembly of the Ratification of the Beijing Treaty on Audiovisual Performances.

SUBMISSION OF MEMORANDA

BY ANGELA NDAMBUKI; INTELLECTUAL PROPERTY LAWYER.

ATTN: CLERK OF THE NATIONAL ASSEMBLY

MICHAEL R. SIALAI, EBS

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INTRODUCTION

“Actors and audiovisual performers are fundamental to our capacity to experience the art that an author or composer has created. They are, as their ancient Greek name indicated, interpreters, who mediate between the creative work and the audience. Their performances instruct, move and enrich us and are intrinsically worthy of protection.” – Francis Gurry, Director General, World Intellectual Property Organization (WIPO) at the Diplomatic Conference on the Protection of Audiovisual Performances Opening Ceremony, Beijing, June 20 to 26, 2012.

Performers rights form a third of the rights that generally compose of neighbouring or related rights to copyright,<sup>1</sup> other rights comprising of phonogram producer rights and broadcasters rights. Performers rights encompass protection for live performances, performances in phonograms (sound recordings) and performances in audiovisual works (cinematographic works).

Over the years, performers have found themselves in a prejudicial position as compared to their counterparts in intellectual property protection, the authors and the producers; the authors having very strong exclusive rights and the producers controlling the performers rights through issuing a total buy out of rights, leaving the performers in a desolate state.

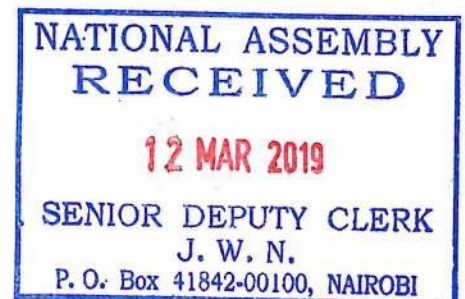
The World Intellectual Property Organisation (WIPO) in its mandate to develop new international norms that contribute to the harmonization of laws and regulations, facilitated the adoption of the Beijing Treaty on Audiovisual Performances (BTAP) to ensure the international protection of audiovisual performers.

**HISTORICAL OVERVIEW OF PERFORMERS PROTECTION**

**1. International Performers' Protection**

Historically, performers were not protected due to the fact that they did not need protection as exploitation was through performances in public which was catered for by admission fees. Just as in copyright, with the advent of technology, the need arose to protect performers in their fixed performances. The development of the film industry from silent films to recorded sound pictures in the late 19<sup>th</sup> century to the early 20<sup>th</sup> century gave rise to the concept of performers rights in audiovisual works, for the first time, these performances were reproduced and distributed both locally and internationally.

<sup>1</sup> The term 'related rights' origin was derived from the term *droit voisins* which was adopted by the Brussels Conference for the Revision of the Berne Convention in 1948 and has been adopted by EU through various Directives. UK law however does not give reference to the same.



The need to protect performers rights gave rise to the Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention)<sup>2</sup> in 1961.<sup>3</sup> However, performers and especially audiovisual performers have enjoyed limited international protection since its adoption. Of significance to this memoranda is the fact that the Convention provided that once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 on minimum protection shall have no further application hence creating no rights for performers in films.<sup>4</sup>

Another reason for performers enjoying limited protection may be attributed to the fact that unlike Berne Convention that harmonized copyright already existing in member states, the Rome Convention was providing for rights that did not exist in most legislations hence states had to provide minimum standards for the same before ratification. This coupled with other resistance for example from International Federation of the Phonographic Industry (IFPI) led to performers being given a lesser protection.<sup>5</sup> This however was remedied through provision of exclusive rights to authorise and prohibit certain acts in preceding laws.

The Trade Related Aspects of Intellectual Property (TRIPS)<sup>6</sup> played an important role in establishing minimum standards of authorisation rights and ensuring the enforcement of the provisions and providing an extension of performers rights from 20 years as provided by the Convention to 50 years from the end of the calendar year which the performance took place.<sup>7</sup>

In the advent of technological advancements, further protection was required for performers giving rise to the 1996 adoption of WIPO Performances and Phonograms Treaty (WPPT). However, reference to audiovisual performers was not taken into consideration as the WPPT focused on sound recordings performances, particularly in relation to digital uses, leaving audiovisual performers without a substantive legal framework to protect their international rights. A resolution was therefore passed to work on a protocol to the Treaty on audiovisual performances.<sup>8</sup>

This led to a WIPO diplomatic conference on the protection of performers in their audiovisual performances in 2000 where negotiations begun through the drafting of the BTAP. 19 out of 20 Articles were concluded. Article 12 was in contention on the transfer of rights, USA had favoured a mandatory exclusive rights rebuttable presumption of transfer to the producer or a mandatory rebuttable presumption of the entitlement of the producer to exercise the exclusive performer's rights after his consent to the audiovisual fixation.<sup>9</sup> Following informal negotiations between the performers and producers, an agreement on the Article 12 was reached at the 22<sup>nd</sup> meeting of the WIPO Standing Committee on Copyright and Related Rights in June 2011 and later endorsed by the 40<sup>th</sup> WIPO General Assembly.<sup>10</sup> The effect of the BTAP is generally to extend the WPPT protection to the audiovisual performers.

<sup>2</sup> The Rome Convention was formulated by the Berne Union, the International Labour Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO)

<sup>3</sup> See Arnold (5<sup>th</sup> Edition) 21, par 1.53 for a summary of steps that led to the Rome Convention.

<sup>4</sup> See Rome Convention, Art. 19

<sup>5</sup> See Masouye and Wallace, WIPO Guide to the Rome Convention, 1981 confirmed by the Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations, Rome, 1961 (ILO/UNESCO/BIRPI, 1968) pp.43, 136-137

<sup>6</sup> The TRIPS Agreement is Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994.

<sup>7</sup> TRIPS, Art 14.

<sup>8</sup> Resolution (CRNR/DC/99) concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 20, 1996

<sup>9</sup> See Silke von Lewinski, The Beijing Treaty on Audiovisual Performances, 5, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-08 (Auteurs & Media 2012, issue 6, p. 539-546)

<sup>10</sup> See R Arnold, Performers Rights (5<sup>th</sup> Edition), 42 for a detailed account of BTAP.

The adoption of BTAP is aimed at having the following effects:

- i. strengthening the AV performers position by providing a clearer legal basis for the international use of their audiovisual performances.
- ii. safeguarding the rights and interests of performers against unauthorized use of their audiovisual performances.
- iii. enabling performers to share revenues generated internationally for audiovisual productions with producers.
- iv. granting performers moral rights to ensure they are rightly attributed to their performances and preventing derogatory treatment of their performances.

Internationally, there is further protection for performers through the European Directives such as European Directive on Rental and Lending and Certain Related Rights<sup>11</sup> which harmonized the protection of performers rental and lending rights, and further provides performers with rights related to copyright in fixations, reproduction, broadcasting and communication to the public and distribution rights.<sup>12</sup> Further where performers have been deemed to have assigned their rights to phonogram or film producers, it provided for an **unwaivable right to equitable remuneration for the performer**. This is a good provision to ensure protection of performers in Kenya. The Satellite and Cable Directive<sup>13</sup> extended these rights to the satellite broadcasts and introduced a form of compulsory licensing for collective management. The Term Directive<sup>14</sup> provided that performers rights term should be 50 years from the end of calendar year which the performance took place or was published. The European Directive on the Harmonization of Copyright and Certain Related Rights in the Information Society (Infosoc Directive)<sup>15</sup> provided for performers rights in the digital environment as a result of the WPPT provisions. It touched basically on exclusive rights for reproduction and making available on demand for the performer's fixations.<sup>16</sup>

Other Directives include the Enforcement Directive,<sup>17</sup> where performers can apply for the application of the measures, procedures and remedies<sup>18</sup>, the Term Amendment Directive<sup>19</sup> retaining 50 years for non phonogram fixations including audiovisual works. The Orphans Works Directive<sup>20</sup> provided for exceptions where performers cannot be traced to make the works available to the public, for reproduction purposes and most importantly provided fair compensation for rightsholders who emerge later to claim their rights.<sup>21</sup> The Collective Management Directive<sup>22</sup> aims at improving the functioning of collective management organisations and simplifying the granting of EU-wide licensing of musical works for online transmissions.

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<sup>11</sup>Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. This Directive was repealed and replaced by Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version).

<sup>12</sup> See Chapter II of the 92/100/EEC rental and lending directive Arts. 6-9.

<sup>13</sup> Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

<sup>14</sup> Council Directive No. 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

<sup>15</sup> Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>16</sup> See *ibid*, Arts 2 and 3.

<sup>17</sup> Council Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights

<sup>18</sup> *Ibid*, Art. 5(b)

<sup>19</sup> European Parliament and Council Directive 2011/77/EU of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights.

<sup>20</sup> European Parliament and Council Directive 2012/28/EU of 25 October 2012 on certain permitted uses of orphan works

<sup>21</sup> *Ibid*, Art. 6.

<sup>22</sup> European Parliament and Council Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market

## 2. Kenya Performers' Protection

Rights of performers in Kenya are provided under **section 30** of the Copyright Act, Cap 130, Laws of Kenya. Under the Act, a performer shall have the exclusive right to carry out broadcast his performance except where the broadcast is made from a fixation of the performance authorized by the performer, communicate to the public his performance except where the communication is made from a fixation of the performance or is made from broadcast of the performance authorized by the performer, make a fixation of a previously unfixed performance, reproduce a fixation of the performance where the performance was initially fixed without the authorization of the performer or where the reproduction is made for purposes different from those for which the performer gave his authorization, rent for commercial purposes to the public the original and copies of their fixed performances, distribution and the making available to the public of his fixed performance, by wire or wireless means in such a way that members of the public may access them from a place or a time individually chosen by them.

**Section 30A that provided for an equitable remuneration for the performer was Deleted by Act No. 11 of 2017. This section provision should be re-introduced without further delay to ensure the protection of performers in Kenya.**

### BEIJING TREATY ON AUDIOVISUAL PERFORMANCES PROVISIONS

#### Nature of Rights Available for the Performer under BTAP

The BTAP defines performers as defined as 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.<sup>23</sup> It also includes those who perform a literary or artistic work that is created or first fixed in the course of a performance.

The Copyright Act does not define performers.

Modelled from authors' rights protection, performers rights are divided into two main rights namely moral rights and economic rights.

#### 1. Moral Rights

The BTAP provides for the performer's moral rights for both live performance and fixed performance in audiovisual works. Moral rights are independent of economic rights and exist even after the transfer of the economic rights and in particular exclusive rights. The BTAP provides for two types of moral rights as follows:

*i. Right of Attribution (Paternity Right)*

The attribution right provides the right to be identified as the performer which includes the right to claim to be identified as the performer of his performances.<sup>24</sup> The right under the Treaty is however limited in its application in that it is not applicable where omission is dictated by the manner of the use of the performance. The Act provides for the right to attribution under section 30(5)(a).

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<sup>23</sup> BTAP, Art 2(a).

<sup>24</sup> Art 5 (1) (i).

ii. *Right of Integrity*

The integrity right provides the right to object to derogatory treatment which includes the right 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.<sup>25</sup> This right however are conditionally enforceable only where it is objectively prejudicial to the performer's reputation in a substantial way. The word substantial leaves room to question what it constitutes and may lead to unfavourable outcomes once put to test. The Act provides for this under section 30(5)(b).

BTAP indicates that moral rights should persist at least during the lifetime of a performer<sup>26</sup> as provided in the Act as referenced hereinabove. The treaty further makes it clear that moral rights do not affect the normal course of exploitation modifications such as editing, compression, dubbing, formatting and other technological advancements. This was to cater for the concerns of producer member states in regards to the extent to which moral rights might affect the normal exploitation of a performance.<sup>27</sup>

Unlike authors rights, performers do not have a statutory right of false attribution, therefore they tend to rely on other claims such as passing off. Question remains whether the imitation of performance characteristics is protectable. US has held protection for the imitation of well-known voices of professional singers for example being used for advertising.<sup>28</sup>

## 2. Economic Rights

Economic rights are concerned with the right to control the exploitation of one's work. They mainly include exclusive rights and equitable remuneration rights. Exclusive rights are enjoyed by the owner of copyright or related rights and confers the power to authorize or prohibit certain acts in relations to his works.<sup>29</sup>

Equitable remuneration on the other hand refers to remuneration in respect of a performance in an amount and manner consistent with what may be regarded a normal commercial standards in case of authorisation of the same act by the owner of copyright and related rights.<sup>30</sup>

The BTAP provides for economic rights for both unfixed and fixed performances. This includes exclusive rights of the performer in the following:

- i. Rights in Unfixed Performances<sup>31</sup> (live performances) which includes the rights to control:
  - a. the broadcasting of the live performance
  - b. communication to the public of their unfixed performances<sup>32</sup> and
  - c. the fixation of the same.
- ii. Rights in Fixed Performances
  - a. Reproduction Right<sup>33</sup>

This right extends to the digital environment.

<sup>25</sup> Art 5 (1) (ii).

<sup>26</sup> Art 5 (2).

<sup>27</sup> See Waelde, Laurie, Brown, Kheria and Cornwell, Contemporary Intellectual property: Law and Policy, (3rd edition, Chapter 7) 229 par. 6.37.

<sup>28</sup> See *Midler v Ford Motor Co* 849F. 2d 460 (9<sup>th</sup> Cir., 1988) and *Waits v FritoLay Inc* 23 USPQ 2d 1721 (9<sup>th</sup> Cir., 1992).

<sup>29</sup> Mihaly Fiscor, Guide to the Copyright and Related Rights Treaties Administered by WIPO, Glossary of Copyright and Related Rights Terms, 287

<sup>30</sup> ibis, 286

<sup>31</sup> BTAP 2012, Art 6

<sup>32</sup> This provision carries an exception where the performance is already a broadcast performance.

<sup>33</sup> BTAP 2012, Art 7

- b. Distribution Right<sup>34</sup>  
Should include making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.
- c. Rental Right.<sup>35</sup>  
The rental right deals with tangible copies. An option would be to provide for a presumed transfer of rental rights in films to producer in exchange for an unwaivable equitable remuneration right.
- d. 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<sup>36</sup>.

### Transfer of Rights<sup>37</sup>

Article 12 of the BTAP holds the crux of the Treaty in matters pertaining to the transfer of rights. The provisions for the transfer of rights include:

- i. *Exclusive Rights Transfer*  
Transfer of exclusive rights to producer once a performer has consented to fixation of his performance in an audiovisual fixation, subject to any contract to the contrary.<sup>38</sup> This reflects Art 19 of the Rome Convention as referenced hereinbefore. This position **should not** be adopted as an option as it retains the status quo where most performers assign their rights in perpetuity to producers hence do not benefit as they should from the exploitation of their performances.

The treaty further provides that such consent or contract may be required in writing and signed by both parties or their duly authorised representatives.<sup>39</sup>

- ii. *The Guarantee of Remuneration Rights*  
Independent of the transfer of exclusive rights, an audiovisual performer has the right to receive equitable remuneration or royalties for the making available right, broadcasting and communication to the public of his performances. This right ordinarily is unassignable except to a collecting society to administer the rights on behalf of the performer. The management of remuneration rights are therefore subject to compulsory collective management to ensure the proper administration of the same.

The BTAP provides for both exclusive and equitable remuneration (in place of the exclusive right) options for broadcasting and communication to the public.<sup>40</sup>

<sup>34</sup> BTAP 2012, Art 8

<sup>35</sup> BTAP 2012, Art 9

<sup>36</sup> BTAP 2012, Art 10

<sup>37</sup> BTAP 2012, Art 12

<sup>38</sup> BTAP 2012, Art 12(a)

<sup>39</sup> BTAP 2012, Art 12(b)

<sup>40</sup> BTAP 2012, Art 11

It is important to note that performers normally enter into agreements with film producers for the transfer of rights. Despite having exclusive rights which normally yield power to control, performers almost always find themselves in a weaker bargaining position of inferior *vis a vis* the producer.<sup>41</sup> Unfortunately these contracts usually assign all rights in perpetuity and an individual performer would find it very difficult to negotiate on terms on contracts. Collective bargaining is important to ensure that performers interests are protected while signing these contracts. In UK for example, a strong collective bargaining position has been secured by performer groups and this is what is relied heavily upon in the audiovisual sector as opposed to statutory provisions of intellectual property protection. This is considered to strike a balance that enables producers to market their films without restrictions, but at the same time guarantees performers' remuneration<sup>42</sup>. This has not been adopted in Kenya and performers still have a weak bargaining power.

The BTAP therefore offers an '*a la carte*' clause where states are left to choose which option they would prefer to administer the transfer of rights in audiovisual performances. Option i above would be heavily regulated by contracts while ii would be statutory obligation for remuneration. It is important to know that contractual rights are limited to an extent in protection of the performer as opposed to remuneration rights which may be exercised against anyone regardless of the existence of a contractual relationship with the performer.<sup>43</sup> Collective agreements are usually more successful to ensure the protection of performers as individual bargaining often leads to poorer outcomes for the performer as they are easily replaceable except for a few who have enough clout in the industry as stars to negotiate their contracts individually.

Option ii, as the better option to ensure the protection of the performer, would be administered for example by a collective management organisation (CMO) whose main objects are to:

- negotiate with the users an appropriate tariff for the use of works, in this case being the performances in AV works,
- collect license fees from the users of these works,
- monitor the use of works wherever possible and
- distribute royalties to the rightsholders being the performers of AV works in this case.

An Association of European Performers' Organisations (AEPO-ARTIS)<sup>44</sup> study demonstrates that approximately 92% of performers' collections stem from the right to equitable remuneration for broadcasting and communication to the public and remuneration for acts of private copying. In addition 7% of the total collection stems from cable retransmission rights based on compulsory collective management as per Satellite and Cable Directive.<sup>45</sup>

The audiovisual performers would therefore benefit extensively if Kenya included **unwaivable equitable remuneration provisions in its law.**

<sup>41</sup> See José María Montes, Collective Management for Audiovisual Performers, WIPO Regional Workshop on the Opportunities and Challenges in the Implementation of the Beijing and Marrakesh Treaties, 3, 2015, <[http://www.wipo.int/edocs/mdocs/mdocs/en/wipo\\_reg\\_cr\\_sin\\_15/wipo\\_reg\\_cr\\_sin\\_15\\_t\\_6.pdf](http://www.wipo.int/edocs/mdocs/mdocs/en/wipo_reg_cr_sin_15/wipo_reg_cr_sin_15_t_6.pdf)> accessed on 14 December 2015.

<sup>42</sup> Tarja Koskinen, Nicholas Lowe, Management of copyright and related rights in the audiovisual field, 30, Par 2.2.2, August 31 2012

<sup>43</sup> See Katherine Sand, WIPO Review of Contractual Considerations in the Audiovisual Sector 11, June 7 2012, <[http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/review\\_of\\_contractual\\_considerations\\_in\\_av\\_sector.pdf](http://www.wipo.int/export/sites/www/copyright/en/activities/pdf/review_of_contractual_considerations_in_av_sector.pdf)> accessed on 14 December 2015.

<sup>44</sup> AEPO-ARTIS represents European performers' collective management organisations. For more information see [www.aepo-artis.org](http://www.aepo-artis.org)

<sup>45</sup> See AEPO-ARTIS Report, Performers' Rights in International and European Legislation: Situation and Elements for Improvement, 103, December 2014.

### **Term of Protection and Formalities**

Under the BTAP, the term of protection shall last, at least, until the end of a period of 50 years computed from the end of the year in which the fixation of the performance took place.<sup>46</sup> This provision is in the Act and may be extended to 70 years. The word 'at least', leaves it open for States to increase the term as they deem fit. Like copyright, rights in of performers in audiovisual works, being rights akin to copyright, does not require any formalities to enjoy protection.<sup>47</sup> This is already the current position under the Act.

The Act provides for the performer's moral right term of protection subsisting for the life of the performer.

### **Exceptions and Limitations**

The BTAP employs the three-step test in providing for exceptions and limitations which includes application in 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.<sup>48</sup> It further provides that these exceptions and limitations may be as provided for other performers. It states that Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable *mutatis mutandis* also to Article 13.

### **Enforcement of Rights**

The BTAP provides that states should apply measures to ensure adequate enforcement as exists in their laws to enable effective action against any act of infringement of rights covered by the Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.<sup>49</sup>

The Kenyan law provides for both civil remedies and creates offences for criminal liability. Remedies available for infringement are those as provided under copyright and include damages, injunctions, delivery up, seizure. An infringement of a performer's property rights is actionable by the rights owner.

### **Conclusion**

*"The conclusion of the Beijing Treaty is an important milestone toward closing the gap in the international rights system for audiovisual performers and reflects the collaborative nature of the multilateral process, the international copyright framework will no longer discriminate against one set of performers." WIPO Director General, Mr. Francis Gurry*

In conclusion and in agreement with the statement by Francis Gurry, the BTAP has indeed closed the gap in the international rights system by providing for performers protection extended from the sound recordings to the audiovisual performer in the management of their intellectual property rights through provision of statutory protection. However, at the same time it has also provided leeway provisions for the member states to maintain status quo where the performers rights are transferred to the producers without further compensation in form of equitable remuneration or otherwise.

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<sup>46</sup> BTAP 2012, Art 14.

<sup>47</sup> BTAP 2012, Art 17

<sup>48</sup> The Origin of 'three-step test' may be found in the Main Committee I of the Stockholm revision conference describing how to apply the exceptions: pages 1145-1146, paragraph 85 which subsequently formed Article 9 (2) Berne Convention for the Protection of Literary and Artistic Works (1886).

<sup>49</sup> BTAP, Art. 20



This is the bone of contention that determines the future of audiovisual performers rights. The state is left to determine whether or not performers should be given their deserved protection by either providing for the equitable remuneration provision to the benefit of performers or total transfer of rights to their detriment.

Article 26 of BTAP provides that the treaty shall enter into force three months after 30 eligible parties have deposited their instruments of ratification or accession. The Treaty now stands at 24; as at February 8, 2019 the first ratification being made by Syrian Arab Republic in March 2013.

Kenya should therefore make the requisite steps to ratify the BTAP so as to enable its entry into force to enable international protection of audiovisual performers in Kenya. The treaty is indeed capable of substantially changing the current landscape of protection available to audiovisual performers in Kenya especially with technological advancements, if it is ratified and implemented in Kenya in a way that ensures the protection of the performer.



11<sup>TH</sup> MARCH 2019.



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Ratification of the Beijing Treaty of Audio Visual Performances

12/3/19

## Submission of Memorandum

Prepared by the Creative Economy Working Group  
Box 66872-00800  
Nairobi

Submitted to

Clerk of the National Assembly

The National Assembly, Main Parliament Building  
Nairobi

11th March 2019





We make reference to the Notice inviting members of the public to submit representations on the Ratification of the Beijing Treaty of Audio-Visual Performances. We appreciate being consulted on the treaty and recognise it as an opportunity to highlight our views for the continued growth of the Creative Industry in Kenya.

The Creative Economy Working Group, a network of practitioners in the culture and creative industries, hereby submits the annexed Memorandum of Views for your consideration.

We pray that our Memorandum deserves your due attention and consideration.

Respectfully submitted,



**Prof. Kimani Njogu**

**Chairman**

**Creative Economy Working Group**



### **About The Creative Economy Working Group (CEWG)**

The Creative Economy Working Group (CEWG) was founded by thirteen institutions working in the culture and creative sector in 2012 in order to explore how a facilitative policy and legislative framework could be developed for the advancement of culture, arts and media in Kenya. Previously, members of the Working Group had been actively involved in entrenching rights related to artistic and cultural expression in the Constitution of Kenya. At that time the group met as the Consultative Committee on Culture and the Constitution and worked closely with the Ministry of Culture. With the promulgation of the Constitution in 2010, the Committee was disbanded and some members reconvened to form the Creative Economy Working Group to focus mainly on policy and legislative issues related to the creative sector in Kenya and within the East African Community through advocacy, knowledge sharing forums, publications and partnership building.

The following institutional members of the Creative Economy Working Group endorse the Memorandum of Views.

#### **Institution:**

1. Content Development & Intellectual Property Trust
2. The GoDown Arts Centre
3. Twaweza Communications
4. Kenya Actors' Guild
5. The Creative Garage
6. Kwani Trust
7. The Book Bunk
8. GoSheng Services
9. Docubox - EADFF
10. Content House
11. The Nest Collective





We support the Beijing Treaty on Audiovisual Performances, 2012 (the Treaty) for the following reasons:-

1. The Constitution of Kenya, 2010 (the Constitution) in Article 11 thereof provides for culture as the foundation of the nation. Intellectual property rights are a means of enhancing cultural expressions, and the Beijing Treaty will further this cause even more.
2. Article 40(5) of the Constitution mandates the State to support, promote and protect the intellectual property rights of the people of Kenya. Ratification of the Treaty is one way in which the State will be carrying out its mandate.
3. Certain provisions of the Copyright Act, specifically section 30, have been lifted from the Treaty and enacted into law through the said Act while awaiting Kenya's ratification of the Treaty. Basic elements of the Treaty have therefore been domesticated, and ratification will open up discussion on a robust legal framework for performers' rights.
4. *Constitutional Petition Number 317 of 2015* and *Constitutional Petition Number 5 of 2016* held that Section 30A of the Copyright Act was unconstitutional, thereby mandating its deletion from the Copyright Act. Section 30A provided for the economic rights of performers. Its deletion left performers somewhat stranded in the collection of their royalties. The Treaty will give a basis for correction of the injustice suffered upon performers through its deletion. It will even give room to deeper protection of the rights of performers than section 30A provided.
5. It will provide a basis for the implementation of a policy on performing rights in Kenya as well as how they should be effectively managed, whether through collective management organizations or otherwise.
6. The Treaty will offer performers deeper protection on digital versions of their works. This will strengthen the demands upon Internet Service Providers and digital platforms to offer enhanced protection to the artists on their works online within Kenya.

The above list is by no means exhaustive. It only serves to give a broad overview of the enormous advantages that will be accorded to the artists once the Treaty is ratified.

The Treaty has provided clauses in which Contracting States may give exceptions to. Performing rights protected by the Treaty affect several stakeholders like broadcasters, singers, actors, storytellers, dancers, poets, and the public at large, just to name a few. Due to the competing interests of these stakeholders, our position is that the Beijing Treaty be ratified in its entirety without exception. Any exceptions will be better dealt with through domestic legislation after extensive consultations and deliberations have been held.

Once again the Creative Economy Working Group expresses its support for the ratification of the Beijing Treaty on Audiovisual Performances, 2012 with no reservations to any of the provisions of the Treaty.

We look forward to further engagement with you on the same.

Respectfully submitted,



**Prof. Kimani Njogu**

**Chairman**

**Creative Economy Working Group**



Annex: Notice on Submission of Memoranda

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY  
TWELFTH PARLIAMENT - THIRD SESSION

In matter of consideration by the National Assembly of the Ratification of the Beijing Treaty on Audio-Visual Performances

**SUBMISSION OF MEMORANDA**

Article 118(1)(b) of the Constitution provides that, "Parliament shall facilitate public participation and involvement in the legislative and other business of Parliament and its Committees". Further, Section 8 of the Treaty Making and Ratification Act, 2012 provides for the consideration and Ratification of Treaties by Parliament and subsection (3) states that, "the relevant Parliamentary Committee shall, during its consideration of the Treaty, ensure Public Participation in the ratification process in accordance with laid down parliamentary procedures".

The Beijing Treaty on Audio-Visual Performances has been submitted to the National Assembly for ratification. The Treaty seeks to provide additional protection to audio-visual performers at international level; recognize performers rights in the online environment; and provide a modern international framework for the rights of performers in motion, pictures television programs, and other audio-visual works.

The Beijing Treaty on Audio-Visual Performances has been committed to the Department Committee on Communication, Information and Innovation pursuant Standing Order 216(5)(f) for consideration and thereafter report to the House.

Pursuant to Article 118(1)(b) of the Constitution and Section 8 of the Treaty Making and Ratification Act, 2012, the Committee invites interested members of the public to submit any representation they may have on the said Treaty. The representations may be forwarded to the Clerk of the National Assembly, P.O. Box 41842-00100, Nairobi, or hand-delivered to the Office of the Clerk, Main Parliament Building, Nairobi; or emailed to [clerk@parliament.go.ke](mailto:clerk@parliament.go.ke); to be received on or before Monday, 11<sup>th</sup> March, 2019 at 5.00 pm.

MICHAEL R. SIALAI, EBS  
CLERK OF THE NATIONAL ASSEMBLY



# The Beijing Treaty on Audiovisual Performances (2012)

## Submission of Memorandum

Prepared by:

Content Development & Intellectual Property (“CODE-IP”) Trust

Box 75474-00200

Nairobi

Submitted to

The Departmental Committee Communications, Information and Innovation

The National Assembly, Twelfth Parliament of Kenya

25 March, 2019

25 March, 2019

Honourable Chairman,  
Honourable Members,  
The Departmental Committee on Communication, Information and Innovation,  
The National Assembly, Twelfth Parliament of Kenya

**RE: SUBMISSION OF MEMORANDUM IN SUPPORT OF THE RATIFICATION  
OF THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES (2012)**

Reference is made to the letter date 14 March, 2019 inviting CODE-IP Trust to submit memorandum on the title, which is herein below made. We thank the Departmental Committee on Communication, Information and Innovation for inviting copy right stakeholders input on *The Beijing Treaty on Audiovisual Performances (2012)*. We appreciate being consulted on the Treaty which tremendously strengthens performers rights hitherto relegated to the creative productions rights back seat.

The Constitution of Kenya requires the law to ensure optimal benefits to the *bona fide* copyright owners and hence the need for the actual performers rights being elevated to their deserved forefront with equitable remuneration without imposing undue barriers to the growth of the creative economy, access to information and knowledge and freedom of expression in Kenya.

The Treaty radically transforms hitherto unfair audiovisual performers intellectual and labour input rewards *vis-a-vis* composite productions copyright owners rights. One of the most common misunderstandings regarding intellectual property rights, particularly copyright, is that the actual creators are the main beneficiaries of the grant. In reality, it is the large companies that employ creators and then strip them of their copyright through contracts who actually benefit from the grant society intended as a reward for authors. This important misunderstanding is no accident. Misleading "romantic notions of authorship" are systematically spun by the companies who stand in the shoes of creators to justify the generous monopoly right rewarded to them.<sup>1</sup>

1 Robin Gross: Dispelling the "Intellectual Property" Myths "*Tragedy of the Commons*": *Intellectual Property Rights in the Information Age* <https://www.imaginelaw.com/tragedy-of-the-commons-intellectual-property-rights-in-the-info-age.html> and <http://www.ipjustice.org/digital-rights/tragedy-of-the-commons-ipr-in-the-info-age/>

We support The Treaty for granting performers four kinds of economic rights for their performances fixed in audiovisual fixations (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available.

But whereas emboldening justice to audiovisual performers, push-back against the Beijing Treaty on Audiovisual Performances may not be entirely unexpected from current *status-quo* dominant beneficiaries analogous to the resistance on advancing promotion of the rights to create, own and earn from works from book publishers and Collective management organizations (CMOs) in South Africa, if just for comparison.<sup>2</sup>

CODE-IP Trust hereby submits the annexed Memorandum of Views for your consideration. Our submission focuses on the benefits audiovisual performers stand to gain hence our qualified total support of ratification of the Treaty by Kenya.

We pray that our Memorandum deserves your due attention and consideration.

Respectfully submitted,

Alex Gakuru  
Executive Director  
CODE-IP Trust

2 Sean Flynn: South Africa Moves Forward With Creator Rights Agenda <https://www.ip-watch.org/2019/03/21/south-africa-moves-forward-with-creator-rights-agenda/>

## **ANNEX I:**

### **MEMORANDUM IN SUPPORT OF THE RATIFICATION OF THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES (2012)**

Remedies provided by The Beijing Treaty.

1. The unjust historical neglect of audiovisual performers rights over composite audiovisual productions copy/rights holders has resulted in documented countless prior famous artistes sadly dying very poor compelling their bereaved to hold *harambees* to assist on burial expenses.
2. Audiovisual performers are among the forefront copyright owners unfortunately whom are often relegated to Intellectual Property Rights back benches, if not deep trenches.
3. Dominant motion pictures and music industries cartels practically blackmail lone audiovisual performers into signing away their rights if just to have a shot at being included in their recording agreements. Industry 'Payola' practice - that is, bribing broadcast stations to play of audiovisual productions they have vested interests in is, to state the obvious - outright corruption, considered illegal in certain jurisdictions. The law should always have mechanisms of protecting the disadvantaged, weak party in a contract.
4. Lucrative "IP Industry" agents threaten elimination of private copying rights (such as fair use or fair dealing). It is important to note that not all copying is illegal. In fact, MUCH unauthorized copying is entirely legal (copying for education, commentary, criticism, research, private use, etc). This key point is frequently misunderstood by the public and government officials, and this misunderstanding is enabled by IP industry, who disseminates false information about the rights of consumers and lobbies lawmakers to change the law and take more rights away from consumers.<sup>3</sup>

3 Robin Gross: 'Excessive and unbalanced intellectual property rights', Internet Bill of Rights Dynamic Coalition at the 2007 Internet Governance Forum (IGF), 13 November 2007 – Rio de Janeiro, Brazil <http://www.ipjustice.org/digital-rights/robin-gross-remarks-at-igf-2007-on-internet-bill-of-rights/>



5. In a digital world, one of the greatest threats to freedom of expression, creativity and innovation are excessive and unbalanced intellectual property rights. The Internet makes copies in order to display info, so copyright rules are implicated in order to read or share info on Internet.

6. Well legally-provided for Composers Rights, Mechanical Rights, Producers Rights, Modification Rights, Rights to Reproduce, Display Rights, Performance Rights, Distribution Rights and Broadcasters Rights need be matched with legally-provided audiovisual performers rights.

**Therefore,**

CODE-IP Trust supports ratification of The Beijing Treaty on Audiovisual Performances, 2012 by Kenya for remedying the above stated injustices and further following reasons:

1. The enactment of the treaty will extend the protection of Intellectual Property to audiovisuals, even live, that were not protected before.

Article 43 of the Constitution of Kenya recognizes the economic rights of the the citizens of Kenya. The Beijing Treaty will further this cause and reverse the judgment after section 30 A of the Copyright was declared unconstitutional in the case of *Mercy Munee Kingoo & Anor v. Safaricom Limited & Anor* Malindi High Court Constitutional Petition No. 5 of 2016. this is done through incentives ad compensation in regard to the international use of audiovisual performances and consolidation of performers organization.

The Beijing Treaty ensures the economic development of the performer through:

- International protection of national performers
- Increased foreign investment.
- Effective and secure distribution of audio visual content online.

1. The Beijing Treaty also includes the definition of audiovisual fixation which has not been include under the Copyright Act of Kenya.
2. The Beijing Treaty enforces moral right of an author or performer which is in section 32 of the Copyright Act of Kenya. It allows the performer to retain the moral rights of integrity and attribution provided by the treaty
3. Article 11 of the Constitution of Kenya recognizes culture as the foundation of the nation, its promotion, compensation and protection. The Beijing Treaty on the other hand ensures protection of performances of folklore and the use of audiovisuals as vehicles for other expressions of creativity and cultural identity.
4. The Beijing treaty allows performers to the transfer of rights. It also provides for rights to audiovisual performers that were not provided for in contracting parties. This new right may provide the performer with additional leverage in negotiations with the producer.
5. The Beijing Treaty provides for additional rights only to the performers of audiovisual rights, because producers of audiovisual works already receive those rights under other existing treaties. The definition of the word 'broadcast' has not been included though the definition of the word '**broadcasting**' has been included in Article 2 of the Beijing Treaty. It has been defined as:

***"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"*

6. However, there is no actual definition of 'audiovisual work' but 'audiovisual fixation' but one which local law could/should define.

7. Royalties and equitable remuneration are included. Equitable remuneration in articles 4,11 (2) and 12 and royalties Article 12 (3).

- Article 12 (3) states that 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 10 is about Right of Making Available of Fixed Performances and article 11 is about Right of Broadcasting and Communication to the Public.

8. The Treaty does not mention a time limit for which an ISP can remove or disable access to content. However, it states that 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 in Article 20 of the Beijing Treaty.

9. Further in Article 16 is states that 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.

--- ends ---

## **ANNEX II**

### **Executive Director's Statement:**

Alex Gakuru is the Executive Director of Content Development and Intellectual Property ("CODE-IP") Trust – a Kenyan nonprofit organization that promotes local content development and its intellectual property protection. CODE-IP Trust's public interest interventions focus on policy, law and regulation implemented under media and internet programmes.

Alex is a technology rights defender committed to a balanced approach on intellectual property rights wherein creators gain from their genius creativity while protecting the public interest, including access right - fairly enables societal advancement. He spearheaded the introduction of CopyrightX in six African countries including 3 affiliate faculties in Kenya. CopyrightX a twelve-week networked course that has been offered annually since 2013 under the auspices of Harvard Law School, the HarvardX distance-learning initiative, and the Berkman Klein Center for Internet and Society.

Alex Gakuru served as Chairman, Broadcasting Content Advisory Council, Communications Authority of Kenya (CA) Board from 2009 to 2013. He currently on his second, consecutive year, appointment as Chief Juror on *KUZA* Broadcasting Awards initiative by CA recognizing and awarding excellence in broadcasting. He also served as Regional Coordinator-Africa at Creative Commons from 2012 to 2016.

Gakuru is a renowned advocate for information and communication technologies consumers rights.

Respectfully Submitted,

Alex Gakuru  
25 March, 2019

Our Ref: **PRISK/PARL-COMM/25-03-19**

25<sup>th</sup> March, 2019

The Chairman  
National Parliament Departmental Committee  
Communication, Information and Innovation  
P.O Box 41842 – 00100  
National Parliament Building  
Nairobi.

**RE: MEMORANDA - BEIJING TREATY**

The above refers.

Performers rights society of Kenya – Prisk is a collective management organization licensed and regulated by Kenya copyright board as a representative of performers in sound recordings and audio visual works. The society registered in 2009 has over 4000 members spread across the country. As a society we have the sole mandate of ensuring that the rights of our members are well represented. Having read through the Beijing treaty and realized its value to the Kenyan Performers, we wish to join other African countries like Tunisia and Nigeria where this treaty has already been ratified by supporting its ratification and consequent domestication. As such the following forms our support Memoranda.

- 1. Kenya's cultural heritage is of great relevance; so much that the whole African continent is usually associated with the images and sounds from Kenya.** By protecting Kenyan performers' rights on their audiovisual performances (in films, dancing, folklore, etc.), the Beijing Treaty would serve as an instrument for protecting Kenya's cultural heritage, so widely used in international audiovisual projects involving the African continent. Kenya must preserve its cultural resources by ensuring Kenyan performers international protection. As such the Performers Rights Society of Kenya representing Actors, Singers, Dancers and Musicians call on the Kenyan government to ratify the Beijing Treaty and make any necessary amendments to the Copyright act to incorporate its terms in a way that truly benefits performers.
- 2. Kenya has all the resources for becoming an audiovisual power,** and the Beijing Treaty would help boosting revenues (royalties) generated abroad in favor of Kenyan performers, impacting positively in the Kenyan balance of payments.
- 3. The Beijing Treaty on Audiovisual Performances was adopted in June 2012 with the highest consensus ever reached by a Treaty of this nature:** 122 countries signed the final act of the Diplomatic Conference, and 73 countries, including Kenya, signed the Treaty.
- 4. The Kenyan delegation played an important role in the negotiations of the Treaty,** most notably by tabling relevant proposals, together with other countries, at the Diplomatic Conference. All those proposals were endorsed by the most relevant audiovisual powers.
5. The ratification of the Beijing Treaty by Kenya, opting for a right to equitable remuneration for performers would:



- **Strengthen and consolidate** the protection of audiovisual performances granted by the Copyright Act.

- **Increase the ability to obtain royalties** for Kenyan actors generated in foreign countries that are also Parties to the Treaty, for different uses: communication to the public, broadcasting, etc.

- **Enable the possibility for foreign digital platforms that distribute audiovisual content** (Netflix, HBO, etc.) to pay royalties to Kenyan performances, even when the exploitation takes place abroad.

6. Today, the “country image” and the ability that each sovereign State possesses in order to seduce the global consumer on the priority of its products depends on the audiovisual policy that it is capable of developing. **All the modern economic and cultural powers grant their audiovisual industry the character of strategic factor of first order to develop its economy, its culture, education and its various policies, both nationally and internationally.** In this sense, the Beijing Treaty fulfils the objective of offering a channel of reciprocal exchange of audiovisual content under minimum and comparable conditions with other countries, being also that the World Trade Organization (WTO) has as its fundamental basis the harmonization of rights integrated in Intellectual Property, in a broad sense.

7. From a spiritual dimension, both WIPO and UNESCO **consider audiovisual performances as a fundamental element for the development of peoples in all their spheres (economic, social and cultural), as well as for the achievement of the longed for cultural diversity in a broad sense,** of whose International Conventions UNESCO Kenya is also a Party.

8. **The Beijing Treaty provides for a minimum level of protection of performers’ rights on their audiovisual performances, with which the Kenyan Copyright Act is in compliance.** Therefore, its ratification by Kenya would not imply the need to greatly amend its legislation. In order to provide real protection for performers as possible under the treaty, it would be highly recommended to reinsert the repealed Section 30a, or a similar mechanism, in order to secure the economic protection granted by the Treaty to performers, in the terms explained below.

9. The only “option” that Kenya should choose in the instrument of ratification is in connection to Article 11.2 of the Treaty (right of broadcasting and communication to the public), is to declare within legislation, terms that grants or will grant performers the **right to equitable remuneration** for the direct or indirect use of audiovisual performances through broadcasting and communication to the public, in all its forms (also the making available, as contemplated in Article 12.3). In other words, a chapter similar to the repealed Section 30a should be reinserted in the Copyright Act, as it is the only mechanism that has proven to be effective in order to overcome the performers’ weak bargaining position vis-à-vis producers of audiovisual fixations and works.

10. Indeed, 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.**

11. In order to secure such effective protection, the Kenyan legislation should provide for at least three elements: (1) substantive rights; (2) a well-defined system for the exercise or transfer of such rights; and (3) a remedy for counterbalancing the bargaining position of performers vis-à-vis producers.





12. Articles 5 to 11 of the Beijing Treaty provide the minimum level of protection that Contracting Parties must grant performers. Thus, the Copyright Bill should include clear provisions granting performers the moral rights of paternity and integrity on their live performances and on their performances fixed in audiovisual fixations (Article 5 of the Beijing Treaty), as well the exclusive right to authorize the **fixation** and the **communication to the public** of their live performances (Article 6), as well as the **reproduction, distribution, rental, making available, broadcasting and communication to the public** of their performances fixed in audiovisual fixations (Articles 7 through 11). Most of these provisions are already in the Copyright Act.

13. The need of legal certainty for both the producer (who licenses the use of the audiovisual fixation) and the end user (the licensee, who exploits the audiovisual fixation – e.g. a TV station, a movie theatre, etc.) results in the need to consolidate all the above-mentioned exclusive rights on the producer. **But such consolidation of rights on the producer cannot deprive performers of protection, as the goal of the Treaty is, precisely, to secure such protection to performers.**

14. Needless to say that producers, businessmen and women after all, will try to consolidate such rights at the lowest possible cost. This would not be problematic if the bargaining position of both counterparts is balanced, in which case the contractual freedom of the parties will lead to a mutual satisfactory solution. But this is NOT the case with performers, who clearly are in a much weaker bargaining position than the producer. With very few exceptions, related to universally-acclaimed stars, actors are not in a position to negotiate decent terms with the producer, and in most cases, if not all, they end up transferring all their exclusive rights to the producer, who, in return, and in the best case scenario, will pay a lump (and symbolic) sum to the actor, which does not represent, by far, the value of the economic rights he or she is giving away – the so-called “buy out agreements”.

15. The Beijing Treaty notes all the circumstances above, together with the different legal systems and traditions, and its Article 12.1 grants Contracting Parties great flexibility for providing in their national legislation the way performers may exercise their exclusive rights. This is the second element referred to earlier: the need for a well-defined system for the exercise or transfer of exclusive rights.

16. In accordance to the said Article 12.1, such exercise takes place when the actor consents to the fixation of his or her performance in an audiovisual fixation, i.e. when concluding a contract with the producer of such 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 in the same Article 12.1, subject, in any case, to any provision to the contrary in the contract: (a) producer’s initial ownership of the exclusive rights; (b) producer’s entitlement to exercise such rights; or (c) presumption of transfer of such rights to the producer. **Any of such formulas, under Article 12.1 of the Beijing Treaty, is valid, insofar as the corresponding national legislation, in this case the Kenyan law can provide for the third element of the equation: a remedy for counterbalancing the bargaining position of performers vis-à-vis producers.**

18. **In this sense, and in the absence of a strong union (i.e. when performers lack collective bargaining power) the remedy that has proven to best serve the goal of the legislation on performers rights (such as the Beijing Treaty, i.e. to grant them an effective protection) is a system of un-waive able and non-transferable rights to equitable remuneration, payable by the end user and subject to mandatory collective management.**



19. Enacting the exclusive rights **is NOT enough**, it is also necessary to ensure that such legislation works in practice, serving the interests for which it was adopted– namely the protection of performer’s rights.

20. **Statutory remuneration and collective management are expressly provided under the Beijing Treaty, at least concerning the making available, broadcasting and communication to the public: Article 12.3, in connection with Articles 10 and 11.** Indeed, 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 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 do not 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.

We fully support its ratification and consequent domestication.  
Thank you.

**For and on behalf of the board**

  
.....

Mr. Ephantus W. Kamau  
Chairman

Performers Rights Society of Kenya – PRiSK.



# KENYA ACTORS' GUILD

① D/Amg  
12/3/19

## OFFICIAL SUBMISSION OF MEMORANDUM ON RATIFICATION OF THE BEIJING TREATY ON AUDIO VISUAL PERFORMANCES

② Emerson  
pls deal

## SUBMITTED TO THE NATIONAL ASSEMBLY OF THE REPUBLIC OF KENYA

FA  
13/3/19

### DOCUMENTS SUBMITTED

1. OFFICIAL MEMORANDUM FROM KENYA ACTORS' GUILD.
2. COPYRIGHT AMENDMENT BILL 2017(SUBMISSION OF MEMORANDUM).
3. CONSTITUTION OF KENYA ACTORS' GUILD.



# THE REPUBLIC OF KENYA

MINISTRY OF EDUCATION  
NATIONAL BUREAU OF STANDARDS  
P.O. BOX 29, NAIROBI

TECHNICAL DRAWING  
FORM 1

1964

PRINTED AND PUBLISHED BY THE NATIONAL BUREAU OF STANDARDS  
P.O. BOX 29, NAIROBI



March 10<sup>th</sup>, 2019

## **SUBMISSION OF MEMORANDUM**

**Prepared by: KENYA ACTORS' GUILD**

We make reference to the notice invitation to submit our memorandum on The Beijing Treaty on Audio-Visual Performances submitted to The National Assembly for Ratification.

Kenya Actors' Guild is dedicated to the development, improvement of standards and professionalism amongst its members through

- a) Promotion of Intellectual Property Rights within Kenya and in particular among performers through sensitization, education and empowerment of Kenyan performers.
- b) The preservation and expansion of work and training opportunities.
- c) Furtherment of the general welfare of its members.

More detailed information is accessible by the attached Kenya Actors' Guild Constitution.

### **OUR SUBMISSION**

#### **1. FIXED PERFORMANCES AS PER BEIJING TREATY**

- i. The Right of Reproduction.
- ii. The Right of Distribution
- iii. The Right of Rental
- iv. The Right of Making available.

This an opportunity for the performer to have an avenue to earn extra revenue over and above their offered remuneration for their works in the Performer consenting in the release of these rights. This is also another opportunity for the Performer to know where their works are being viewed for them to follow up on their Royalties in Countries where The Beijing Treaty is applicable.







## 2. UNFIXED PERFORMANCES AS PER BEIJING TREATY (LIVE PERFORMANCE) – ECONOMIC RIGHTS

- i. The right of the Broadcaster (except in the case of rebroadcast)
- ii. The right of communication to the public (except where the performance is a broadcast performance)
- iii. The Right of Fixation

This covers stage performances which also caters for educational and community theatre at County and National Celebrations.

## 3. FUNDAMENTAL RIGHTS OF THE PERFORMER AS PER THE BEIJING TREATY

- i. Moral Rights
- ii. Transfer of Rights
- iii. Limitations and Exceptions (This must be with special reference to the Berne Convention and in particular the laws pertaining to the digital environment).
- iv. Copyright/Ownership - We must also emphasize of the 50 years of copyright ownership by the performer before the works can enter into public domain. In addition in the demise of the Performer, the Copyrights/Ownership will be beneficial to their next of Kin. (Attached is a copy of Memorandum Submitted to the National Assembly from the Creative Economic Working Group on The Copyright (Amendment) Bill, 2017 of which Kenya Actors' Guild is a member.)

All other issues that the Beijing Treaty brings to light such as Legal dispute resolution mechanisms and terms of agreement between contracting parties within the National Laws of the Land will be adhered to by the Nation that Ratifies this treaty in our case Kenya. It is our most earnest wish and sincere desire that the Republic of Kenya can also take pride of place in the Family of Progressive Nations that ratifies this huge important and much needed document that will leave an enduring legacy in the promotion of the Arts.

Thank you and regards,



National Secretary  
Kenya Actors' Guild

C.C

Executive Director – Martin Githinji  
Chairman – Chris Kamau  
Management Committee Members  
Members



Copy. laid before the CII  
Committee on 25/3/2019  
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**CASE IN SUPPORT OF THE PROPOSED RATIFICATION OF BEIJING TREATY ON AUDIOVISUAL PERFORMANCES, 2012**

**Presented by Edward Sigei, Executive Director-Kenya Copyright Board to the Committee on Innovation, Communications and Technology**

**The Role of KECOBO**

Kenya Copyright Board (KECOBO) is a state agency established under section 3 of the Copyright Act to administer and enforce copyright. The State Agency reports to the Office of the Attorney General (OAG).

**Functions of the Board (section 5 Copyright Act)**

The functions of the Board shall be to—

- (a) direct, co-ordinate and oversee the implementation of laws and international treaties and conventions to which Kenya is a party and which relate to copyright and other rights recognized by this Act and ensure the observance thereof;
- (b) License and supervise the activities of collective management societies as provided for under this Act;
- (c) Devise promotion, introduction and training programs on copyright and related rights, to which end it may co-ordinate its work with national or international organizations concerned with the same subject matter;
- (d) Organize the legislation on copyright and related rights and propose other arrangements that will ensure its constant improvement and continuing effectiveness;
- (e) Enlighten and inform the public on matters relating to copyright and related rights;
- (f) Maintain an effective data bank on authors and their works; and
- (g) Administer all matters of copyright and related rights in Kenya as provided for under this Act and to deal with ancillary matters connected with its functions under this Act.

As part of its statutory mandate it participated in the negotiation of the Beijing Treaty. It subsequently initiated the preparation of the Cabinet Memorandum which forms part of your documentation. Further as the administrator of the Copyright Act, it shall be responsible for ensuring the domestication of the Beijing Treaty.

### **Background and reasons for Beijing Treaty**

The WIPO Beijing Treaty for the Protection of Audiovisual performers (thereafter Beijing Treaty or BTAP) was adopted in 2012 after 20 years of intense negotiation.

Kenya signed the Treaty in Beijing and the process of ratification begun immediately thereafter. I have seen the Cabinet Memorandum which was prepared with KECOBO input and associate ourselves entirely with its contents.

BTAP offers substantive rights to performers in audiovisual works (actors) marking a departure from the Rome Treaty, 1961.

### **Scope of the Beijing Treaty**

The Treaty substantially alters the related rights landscape as it establishes a set of new rights and assures actors of incomes hitherto monopolized by producers of audiovisual works.

**The main provisions are as follows (See the attached WIPO Reference Document Marked ANNEX 1).**

**Attached also is a publication of the FIA-International Federation of Actors marked ANNEX 2 that contains additional details on each of the provisions of the Beijing Treaty.**

### **Case for ratification**

Currently performer's earnings are subject to contract entered with the Producers of sound recordings. In many cases the actors are disadvantaged and are denied fair terms by the producers of audiovisual works who have a stronger bargaining power and thereafter monopolize income and hold substantive rights exclusively.

The treaty makes amends by creating new rights that can be subject of the negotiation thereby expanding earning options for actors beyond the initial lump sum payments.

### **Intended domestication**

KECOBO by virtue of being administrator of the Copyright Act is well prepared to complete the domestication of the Beijing Treaty once it is ratified.

The domestication will take care of the

- Scope of the performer rights vis-a-vis the existing producer rights
- Term of new rights
- Managing exceptions and limitations

- Managing technical protection measures especially in the light of the need to respect the space of exceptions and limitations
- The extension of the scope of newly introduced moral rights
- The management of the new performer rights preferably under collective management
- In terms of article 12, KECOBO favours the re-establishment of equitable right to remuneration along the line of the repealed Section 30A if the parties cannot determine the issue by way of contract.

### **Recommendation**

From the foregoing, Kenya Copyright Board (KECOBO) highly recommends to the Committee to support the ratification of the Beijing Treaty for the following reasons:

1. The ratification will enable the country expand the rights of the Audiovisual performers;
2. The treaty offers an opportunity to re-balance of the bargaining relationship between the performers and producers as it currently favours the latter;
3. The Treaty offers actors an assurance of income if the audiovisual work they are part of is a commercial success;
4. The treaty will support collective management and other forms of organization for actors;
5. The ratification will enable Kenyan actors to earn royalties from their performances exploited abroad; and
6. Expand the scope of exploitation of audiovisual works to new environment in the digital world

The above reasons are consistent with the stated objectives of the Beijing Treaty and KECOBO supports it entirely. I appreciate this opportunity offered to my organization to present views on the Treaty and hope the process will move quickly to enable us enact the necessary Legal Framework to support the creative sector.

END\*

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