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Questions arise over new treaty to protect audiovisual performances

This month promised fireworks in Beijing that would rival those of the queen's Diamond Jubilee last month or the opening of the Summer Olympics next month. On June 20, the Diplomatic Conference on the Protection of Audiovisual Performances opened in Beijing.

The Beijing Conference was expected to result in a long-delayed international treaty granting performers, such as actors, musicians and dancers, rights to their performances in audiovisual works. Among the rights performers would be granted is the previously unrecognized right to royalties if any film, video or other audiovisual work containing their performance is "communicated to the public." Given the present debate over the posting and sharing of video content, adding an additional party with rights to control such actions promises to add fire to an already contentious international issue.

The Beijing Conference is the first multilateral conference dealing with intellectual property rights to be held in China. It represents an acknowledgement of China's growing role as a voice for alternative treatment of intellectual property rights. From its new policy to encourage Chinese inventors to file more international patents, to its well-known marks registry and domestic working obligations for patents, China has increasingly created domestic laws that push the boundaries of international protection.

Performance rights have had an uneasy relationship with copyright provisions in the United States. Currently, musicians, singers and other performers of musical works have the right to prohibit the unauthorized recording of their live performances and the subsequent reproduction or public communication of such recordings under Section 1101 of the U.S. Copyright Act (the "anti-bootlegging" provision). They also have the right to control the reproduction of "sound recordings" containing their performances under

Section 106 and to receive compensation for the public performance of such sound recordings "by means of a digital audio transmission" (webcasting). They have no present right to compensation for any other public performance, including by radio or other broadcast medium. By contrast, composers have the right to compensation for the public performance of their works regardless of the medium and receive valuable royalties for such rights.

Actors, dancers and other performers in audiovisual works have even fewer performance rights in the United States. They receive neither anti-bootleg protection, nor webcasting compensation. Similar to composers for musical works, scriptwriters earn the royalties for these rights. These compensation practices are contrary to general international standards. For performers of musical works, they may also be contrary to international law.

In 1996, the WIPO Performances and Phonograms Treaty (WPPT) recognized the rights of performers to control the fixation, public communication and broadcast of their live aural performances (Article 6). It also recognized their rights to control the reproduction, distribution and "making available" of such fixations ("phonograms") (Articles 7, 8 and 10, respectively). Critically, the WPPT also recognized performers' rights to a "single equitable remuneration" shared with phonogram producers (Article 15). At least 89 countries have signed the WPPT. Even the United States ratified it in 1999.

In its earliest drafts the WPPT also included provisions that extended protection to performers in audiovisual works. These provisions were rejected during the 1996 negotiations. Instead, a resolution was issued recommending the adoption of an audiovisual performance treaty by 1998. Efforts to create such a treaty in 2000 failed largely over disagreements regarding the nature of any transfer of rights from performers to producers. The United States



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supported language that established the automatic transfer of such rights, subject to contractual obligations to the contrary. By contrast, the European Union supported a more nuanced approach that allowed the laws of the "country most closely connected with a particular audiovisual fixation" to control the transfer issue. Article 12 of the proposed treaty currently being considered contains a compromise that allows each country to fashion its own approach to transfers, including establishing automatic transfers subject to contrary contractual obligations.

Depending on your point of view, the current Audiovisual Performances Treaty (AV treaty) either provides a necessary blueprint for developing countries' evolving laws on copyright and the Internet or represents another misguided effort to raise the copyright protection bar even higher by adding new rights-holders. Fortunately, unlike the non-

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transparent negotiations of the Anti-Counterfeiting Trade Agreement (ACTA) and the Trans Pacific Partnership (TPP), WIPO negotiations are a model of transparency. The proposed treaty and agenda are available at wipo.int/dc2012/en/. Position papers regarding proposed modifications were posted as of May. Additional position papers, and suggested amendments during the Beijing Conference, were also posted.

Most observers said they believe the AV treaty will ultimately be adopted by the international community in some form. Some of its provisions, however, promise sharp debates. Although developed members generally discuss the AV treaty as a simple extension of agreed-upon standards, this approach ignores the rapid change in technology that has occurred since the WPPT. Napster, PirateBay, YouTube, Facebook and other social media sites that encourage "sharing" of copyrighted material were developed post-WPPT. The public acceptance of strong copyright protection has generally eroded as demonstrated by the recent successful Internet-directed challenges to ACTA and the Stop Online Piracy Act (SOPA). Anticircumvention measures (required under the draft AV treaty) have also been severely criticized. Even royalties for webcasts have proven largely evanescent in the face of increased illegal streaming activities.

The AV treaty will not resolve these issues. The Beijing Conference has, however, raised a much-needed spotlight on performers rights. On June 6, a House Communications and Technology subcommittee held a hearing titled "The Future of Audio." Describing the lack of royalties for terrestrial broadcasters as a "free ride," witnesses from across the spectrum demanded performance rights. The fireworks in Beijing may be the push needed to bring U.S. practice into compliance with international norms. For those representing such performers, however, the Battle for Royalties may have just begun.