

BCC response to The IPO's Call for views: Beijing Treaty on Audiovisual Performances

1. The British Copyright Council (BCC) is a not-for-profit organisation that provides a forum for discussion on copyright law and related issues within the creative industries. We have 30 member organisations that span the creative industries from creators of literature, music, tv and film, photography, illustrations and other visual art - to publishers and producers. Many of whom will be submitting individual responses representing their varied perspectives. Therefore, whilst the BCC is supportive of the government's intention to ratify the Beijing Treaty, we welcome that this call for views will be the first in a number of opportunities to input to the UK's approach.
2. The questions raised in the call for views on broadcasting and communication to the public are particularly important and our members have differing views on the most appropriate approach. Therefore, we recommend that the IPO consults on Article 11 further once this initial call for views has allowed the IPO, and once the responses are published, the industry, to better understand views across all stakeholders.

Moral Rights

One way of introducing moral rights for audiovisual performances would be to amend Chapter 3 of Part II of the CDPA to extend the UK's existing moral rights to audiovisual performances, without any other changes. In your view,

Q1) Would this approach provide sufficient protection for audiovisual performers?

3. The important principle must be that the moral rights of performers whose performances are fixed in film, or other audio-visual media, should not be subject to a lesser degree of protection than performers whose performances are fixed in phonograms or sound only media. That said, the agreed statement concerning application of Article 5 of the Treaty is recognised and essential.¹
4. The provisions of s205C CDPA (**Right to be identified as a performer**) already potentially make fair provision for persons whose performances link to audiovisual media. The current references in ss 205C (2) (c) and (d) to sound recordings should also expressly accommodate "film". Subject to this, the contractual terms by which the right to be identified should be asserted are usually already relatively easily covered by the credit provisions within contracts (led to a large extent by the collective bargaining terms negotiated under Equity Agreements) but should be subject to practicalities. An example from the PACT/Equity 2019 Television Agreement shows the contractual balance secured for both recognition of the right

¹ Agreed statement concerning Article 5: For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

and consideration of the nature of audiovisual fixations. Clause (T25) CREDITS from the PACT/Equity 2019 Television Agreement provides as follows:

“Clause (T25) CREDITS

The Producer recognises the importance of credits for all Artists contracted under this Agreement. The Producer undertakes to ensure that each Artist shall be accorded a credit on the final version of the production and that in normal circumstances such Artists will be given on screen credits subject to the requirements of the commissioning broadcaster/financier.

The Producer is not however in a position to guarantee on screen credits and therefore no casual or inadvertent failure or failure or refusal by third parties to accord the Artist a credit in accordance with this clause would constitute a breach of this agreement by the Producer and the Artists will therefore not be able to claim any damages for such a breach or be entitled to prevent the exhibition, distribution, advertising, exploitation or marketing of the production”.

5. In contrast, the provisions of s205F CDPA (**Right to object to derogatory treatment of performance**) do not as yet encompass the right when a qualifying performance is by means of a film or other audiovisual media played in public, or broadcast or otherwise communicated, or made available to the public – which we believe they should.

Q2) Would this approach result in any problems in the normal use of audiovisual performances? If so, in what ways and how could this be resolved?

6. As previously stated, levelling the rights for all qualifying performances is an important step forward. The existing exception of s205G CDPA means that the wider application of the right for audiovisual performers will not cause production disruption as it is aligned with Beijing Treaty provisions. The provisions of s205G (3) – “The right is not infringed by modifications made to a performance which are consistent with normal editorial or production practice”, will remain important for maintenance of balance.
7. Additionally, resolution of dispute processes is already well established when contracts link to collective bargaining agreements.

Q3) Would this approach result in any problems for freedom of expression? If so, in what ways and how could this be resolved?

8. Article 13 of the Treaty provides for national legislation to provide the same kinds of limitations and exceptions for the protection of performers as they provide in their national legislation, in connection with the protection of copyright in literary and artistic works. The UK already recognises exceptions for news reporting and reporting current events in s205E and s205G CDPA.
9. The approach to accommodating the relevant moral rights of all qualifying performances under Chapter 3 of the CDPA will not result in problems for freedom of expression when:
 - (a) existing provisions for exceptions have been developed recognising the limitations of the Berne Three Step Test as set out expressly in Article 13 (2) of the Treaty; and
 - (b) ratification of the Treaty will link to the Agreed Statement concerning Article 13 of the Beijing Treaty, which provides that “The Agreed statement concerning Article 10 (Limitation and Exceptions) of the WIPO Copyright Treaty (WCT) is applicable

mutatis mutandis also to Article 13 (on Limitations and Exceptions) of the Beijing Treaty.²

10. These statements in effect enable to extension of current exceptions and limitations linked to developments in the digital environment. The use of AI technologies and challenges (such as algorithmic prioritisation) which it poses to opportunities for freedom of expression may require either judicial or legislative review in the future. It will be important that licensing consent options remain open should fixations of audio-visual performances be used in delivering AI outputs. These licensing options should avoid abuse of moral rights in similar ways to the protections currently afforded under collective bargaining agreements.”

Q4) Do you have any other comments on the issue of moral rights for audiovisual performances?

11. In general, the collective bargaining agreements applied to production of film and television programmes across the UK audiovisual sector have already established sensible rules for the recognition of the moral rights of qualifying performances despite the gaps in Chapter 3 protection referred to above. Therefore, the minor adjustments referred to should support ratification of the Treaty and level the position of all qualifying performances.

Broadcasting and communication to the public of performances in audiovisual fixations

Q5) To what extent do audiovisual performers currently benefit when their performances are broadcast or communicated to the public, including being played in public, in the UK? Is the remuneration that audiovisual performers receive for these uses appropriate?

12. The current position regarding statutory protection for the rights of performers whose work is fixed in an audiovisual medium, differs to those in a sound recording. This has to an extent been addressed by collective bargaining agreements and bespoke agreements between performers and producers. These agreements establish contractual terms, which both, form contractual protections for the way in which performers are engaged for work by producers and broadcasters, and set out agreed terms upon which payments will be made contractually when additional uses (including broadcasting and some forms of communication to the public) occur.
13. Some BCC members have concerns regarding the collective bargaining agreement-based system because it:
 - does not apply when contracts are concluded without reference to the collective bargaining agreements; (which is the case for foreign productions and some UK productions); and
 - does not protect the rights of performers in countries where there are no strong collective bargaining agreements in place covering representation of audiovisual performers.
14. Careful consideration should be given to how national treatment and reciprocity principles would operate in the context of a solely contractually based system.

² Agreed statement concerning Article 10 WIPO Copyright Treaty: It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

Q6) What would be the impact of introducing exclusive rights for audiovisual performers over these uses?

15. Some BCC members are of the view that ratification of the Beijing Treaty and its provisions provide the opportunity to ensure that the exclusive rights of audiovisual performers are supported in law beyond the contractual limits of collective bargaining agreements. They view this as both future proofing for the rights of performers and of particular importance when addressing the national treatment issues.
16. Their view is that while digital technology creates a wealth of new opportunities for performers, it also significantly increases the risk of performers losing control over their work, through the unauthorised use of their images or performances. Therefore (in their view), ratification and application of the Treaty under national laws around the world would provide performers with protection in the digital environment by contributing to safeguarding of the rights of performers against the unauthorised use of their performances in audiovisual media, such as television, film and video.
17. Other BCC members are of the view that the current system of negotiating remuneration for audiovisual performers through contractual agreements is working. Therefore, a statutory backstop is not required. Given in their view the status quo is working, they believe the government should consider the discretion it has to make declarations under Article 11 of the Treaty. These members are also of the view that whilst the digital marketplace is evolving, the uncertainty in how this will evolve and the impact it will have on rightsholders should not be presumed.
18. Accordingly, government should consider carefully its discretion as regards the various options under Article 11 and seek further evidence as to whether change is required, and if so what change, before proceeding with any legislative amendments. The BCC therefore welcomes the IPO's stated commitment that there will be further and more detailed consultation on policy options in due course, including impact assessments.

Q7) What would be the impact of introducing rights to receive equitable remuneration for audiovisual performers over these uses (similar to those already provided for performances in sound recordings under section 182D of the CDPA)?

19. Some BCC members believe that equitable remuneration systems are unnecessary. They believe that introducing equitable remuneration for audiovisual performers could disrupt longstanding contractual practice and destabilise carefully negotiated agreements. Producers invest heavily in performers irrespective of whether the resulting work is commercially successful. These members believe that introducing additional remuneration to a remuneration system which producers believe is already appropriate and fair to performers, risks leaving producers with less to invest in audiovisual works.
20. Other BCC members believe that equitable remuneration paid by the user for some secondary uses is fair and an essential safeguard for performers' income. In the context of TV and film, producers can opt to clear the secondary exploitation rights for the first few years for payment of an upfront flat fee, not proportionate to the success of the film. In their view, performers often struggle to enforce payment obligations against producers in this context. These members believe that ratification of the Beijing Treaty without granting equitable remuneration will make protection of audiovisual performers less coherent and less compatible globally and, as a result, the exchange of remuneration between collective

management organisations (CMOs) internationally will be hindered to the financial detriment of all performers at a time when they can least afford it.

21. Traditionally, broadcasting of sound recordings was a secondary use of commercial sound recordings driven by demand from radio services. This contrasts with film, where the initial broadcast window remains a vital part of securing production finance for the work. Therefore, contracts governing initial consents to broadcast are key for film. In the case of secondary uses, CMO systems for revenue collection and distribution provide additional revenue opportunities for audiovisual performers without being disruptive to the film/programme distribution business. The principles of fair remuneration for performers in both instances remains. There is a balance to be struck between contractual agreements and CMO systems.
22. Within both the film and audiovisual sectors, contractual arrangements have been established (usually linked to collective bargaining agreements) to dictate how and when a producer or distributor of a film or audiovisual fixation is obliged to report to performers about the use or exploitation of their work and when contractual payments should be made. When equitable remuneration systems are applied in the audiovisual field they must ensure revenues are paid in ways which complement rights recognised in law, without disruption to the contractual terms which are negotiated between producers and performers. Further, direct reporting chains, and any administration by CMOs, must remain appropriate and proportionate so as not to become onerous or detrimental to any of the Contracting Parties.

Q8) What approach would you want the government to take and why?

23. Given the breadth of views likely to be received in response to this question the BCC agrees with the IPO's stated approach of conducting further consultation with stakeholders after the call for views allows the IPO and industry to have sight of and consider the range of perspectives. Therefore, we suggest that it is too early in the consultation process to put forward one approach. As this is an international treaty, any decisions made should take into account the potential impact it would have on audiovisual performers worldwide as well as in the UK.

Transfers of rights

Q9) In your view, should existing rules on the transfer of performers' rights be maintained? If not, how should they be changed? Please provide any evidence to support your comments.

24. Again, different BCC members have different views.
25. Some members believe that the only way to secure appropriate and fair remuneration for performers is for them to receive equitable remuneration payments for certain uses from users, in addition to contractual payments from producers. Collective bargaining terms already carve out from the assignment of rights to the producer, the right for performers to benefit from the right to receive equitable remuneration under collective management systems applied around the world. These members hold the view that the UK ratification of the Treaty must preserve the ability of audiovisual performers to benefit from such equitable remuneration systems without disrupting the distribution of audiovisual works by producers, broadcasters, and other investors in the creation of films and audiovisual recordings.
26. Other members believe that the current practice of contractual assignment of rights from performers to audiovisual producers works well, paying appropriate and fair remuneration in return for rights to be transferred by contract.

Protection of foreign performances

Q10) If the UK introduces rights of broadcasting and communication to the public for audiovisual performers, how should these apply to nationals of other countries that are party to the Beijing Treaty?

27. As required by the Treaty the UK should provide national treatment, including the reservations provided by Article 4 of the Treaty, for performers from other countries party to the Treaty. Otherwise, Article 4 has the potential to exclude claims for statutory equitable remuneration when other countries will only acknowledge statutory protections.
28. The success of the UK's film and television industries and exports around the world mean that keeping doors open between the UK and other Beijing ratifying countries, which protect and preserve flows of "equitable remuneration" to performers from uses under those national laws, will become increasingly important in a digital world where "tracking and tracing" platform and retransmission uses will be more easily secured with the involvement of CMOs representing the interests of audiovisual performers.
29. At present the UK position is covered either by:
 - (a) the contractual terms agreed at the time a performance is given agreeing to "fixation" and specified uses;
 - (b) permitted acts under exceptions and limitations falling outside contractual terms; or
 - (c) in cases where contractual terms are *not* specific:
 - (i) contractual requirements to negotiate and agree further consents (based upon collective bargaining agreements); or
 - (ii) the rights provided for in the CDPA not linked to or relevant to any contract.

Q11) Do you have any other comments on how the UK should extend audiovisual performers' rights to foreign performers or the impact of doing so?

30. CMOs in EU Member States have raised concerns with one of our members about their ability to pay equitable remuneration to UK audiovisual performers since the UK left the EU. The BCC recommends the IPO gathers evidence on the potential impact of reciprocity issues when considering the UK's choice of options under Article 11 before deciding how to proceed.

Other issues

Q12) Are there any other areas where you consider it necessary for the government to take action in the course of ratifying the Beijing Treaty? Please provide any evidence to support your comments.

31. We reiterate our view that further consultation will be vital once this call for views allows a better understanding of the range of perspectives, concerns, and evidence available.
32. If you would like to discuss anything in our response further please contact Rebecca Deegan, Director of Policy & Public Affairs (director@britishcopyright.org).