



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

FEB 26 2016

The Honorable Joseph R. Biden
President of the Senate
Washington, D.C. 20510

Dear Mr. President:

The Administration is pleased to forward for your consideration the enclosed draft legislation, entitled the "Beijing Treaty Implementation Act of 2016." This draft bill proposes limited changes to the Copyright Act and an associated statute to implement the Beijing Treaty on Audiovisual Performances, done at Beijing on June 24, 2012 (Beijing Treaty). The Beijing Treaty was negotiated and concluded under the auspices of the World Intellectual Property Organization to update international standards for the protection of audiovisual performers. The United States signed the treaty on June 26, 2012.

The bill amends the Copyright Act to ensure protection for audiovisual performers' rights in their live performances, akin to the protections already in place for musical performers. The bill subjects those rights to the Copyright Act's fair use and library exceptions, as well as providing a term from the date of the fixation based on the term of copyright protection for anonymous works and works made for hire, and makes a few technical amendments. Adoption of this legislation and adherence to the Beijing Treaty would allow the United States to enjoy the benefits of a multinational system to protect audiovisual performers, while allowing maintenance of the U.S. "work made for hire" system.

The Office of Management and Budget advises that there is no objection to the transmittal of this legislative proposal to the Congress and that its enactment would be in accord with the program of the President. If you have any further questions, please contact me or Steve Haro, Assistant Secretary for Legislative and Intergovernmental Affairs, at 202-482-3663.

Sincerely,

A handwritten signature in black ink, reading "Michelle K. Lee".

Michelle K. Lee
Under Secretary and Director

Enclosures

A BILL

To amend title 17, United States Code, to implement provisions of the Beijing Treaty on Audiovisual Performances.

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Beijing Treaty Implementation Act of 2016”.

SEC. 2. TREATY IMPLEMENTATION.

(a) DEFINITIONS.—Section 101 of title 17, United States Code, is amended—

(1) in the definition of “international agreement”—

(A) by striking “and” at the end of item (6);

(B) by redesignating item (7) as item (8); and

(C) by inserting after item (6) the following:

“(7) the Beijing Treaty on Audiovisual Performances; and”; and

(2) by inserting after the definition of “Audiovisual works” the following:

“The “Beijing Treaty on Audiovisual Performances” is the Beijing Treaty on Audiovisual Performances done at Beijing, China, on June 24, 2012.”.

(b) EFFECT OF BEIJING TREATY ON AUDIOVISUAL PERFORMANCES.—Section 104 of title 17, United States Code, is amended by adding at the end the following new subsection:

“(e) EFFECT OF BEIJING TREATY ON AUDIOVISUAL PERFORMANCES.—Notwithstanding the provisions of subsection (b), no works other than motion pictures shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Beijing Treaty on Audiovisual Performances.”.

(c) COPYRIGHT IN RESTORED WORKS.—Subsection 104A(h) of title 17, United States Code, is amended—

(1) in paragraph (1)—

(A) by striking “or” in subparagraph (D);

(B) by redesignating subparagraph (E) as subparagraph (F); and

(C) by adding after subparagraph (D) the following:

“(E) a nation adhering to the Beijing Treaty on Audiovisual Performances; or”;

(2) in paragraph (3)—

- (A) by striking “or” in subparagraph (D);
 - (B) by redesignating subparagraph (E) as (F); and
 - (C) by adding after subparagraph (D) the following:
“(E) adheres to the Beijing Treaty on Audiovisual Performances; or”; and
- (3) in paragraph (6)—
- (A) by striking “and” at the end of subparagraph (D);
 - (B) by inserting “and” at the end of subparagraph (E); and
 - (C) by adding at the end the following new subparagraph:
“(F) if the source country for the work is an eligible country solely by virtue of its adherence to the Beijing Treaty on Audiovisual Performances, is a motion picture.”.

(d) **UNAUTHORIZED FIXATION AND TRAFFICKING.**—The chapter heading for chapter 11 of title 17, United States Code, and the section head for section 1101 are amended by striking “Music” and “music”.

(e) **UNAUTHORIZED ACTS, LIMITATIONS, DURATION OF PROTECTION.**—Section 1101 of title 17, United States Code, is amended—

- (1) in paragraph (a)(1)—
 - (A) by inserting “, images,” after “the sounds”;
 - (B) by striking “musical” after “live”; and
 - (C) by inserting “of a literary, musical, dramatic, choreographic or pantomime work” before “in a copy”;
- (2) in paragraph (a)(2)—
 - (A) by inserting “, images,” after “the sounds”;
 - (B) by striking “musical” after “live”; and
 - (C) by inserting “of a literary, musical, dramatic, choreographic or pantomime work” after “performance”;
- (3) by redesignating subsection (b) as (d), subsection (c) as (e) and subsection (d) as (f);
- (4) by inserting new subsections (b) and (c) as follows:

“(b) **LIMITATIONS.**--An act that falls within the limitations to exclusive rights provided in Section 107 or 108 shall not be considered a violation of this Section.

(c) **DURATION OF PROTECTION.**--It shall not be a violation of this Section to do any of the acts enumerated herein more than 95 years after the live performance described in paragraph (1) or (2).”;

- (5) by amending redesignated subsection (d) to read as follows:

“(d) **DEFINITIONS.**—In this section—

- (1) the term “images” means a series of related images which, when shown in succession, impart an impression of motion; and

(2) the term “traffic” has the same meaning as in section 2320(f)(5) of title 18.”; and

(6) by amending redesignated subsection (e) to read as follows:

“(e) APPLICABILITY.—With respect to live musical performances, this section shall apply to any act or acts that occur on or after the date of the enactment of the Uruguay Round Agreements Act. With respect to other live performances, this section shall apply to any act or acts that occur on or after the date the provisions of the Beijing Treaty Implementation Act of 2016 take effect.”.

SEC. 3. EFFECTIVE DATE.

The provisions of Section 2 of this Act shall take effect on the date on which the Beijing Treaty enters into force with respect to the United States.

The “Beijing Treaty Implementation Act of 2016” Statement of Purpose and Need and Sectional Analysis

The proposed Beijing Treaty Implementation Act of 2016 would make limited changes to U.S. law in order to implement the Beijing Treaty on Audiovisual Performances (Beijing Treaty), done at Beijing on June 24, 2012, and signed by the United States on June 26, 2012. This Treaty was negotiated and concluded under the auspices of the World Intellectual Property Organization (WIPO) to update international standards for the protection of audiovisual performers. What follows is a brief description of the background of the Treaty, the provisions of the Treaty and its relation to current U.S. law, and discussion of the proposed changes.

PROVISIONS TO IMPLEMENT THE TREATY

Background

The Beijing Treaty is intended to provide up-to-date copyright protection for audiovisual performers in the United States and in countries around the world. It provides a modern international framework for performers’ legal rights – an increasingly important assurance in today’s world where audiovisual works are distributed globally in digital form. It also fills a gap in the international copyright system by extending to such performers the type of protections previously accorded to authors and to performers and producers of sound recordings, pursuant to existing international agreements to which the United States is a party. The Treaty’s framework is consistent with existing U.S. standards and its further adoption worldwide would advance national economic interests in the appropriate development, protection, and exploitation of the intellectual property generated by America’s creative artists and industries.

The provisions of the Beijing Treaty were carefully negotiated over a period of more than fifteen years, following the conclusion of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), which the United States ratified in 1999. At the time of the original diplomatic conference devoted to the Treaty in 2000, no international consensus could be reached on the issue of how performers could transfer to producers, by contract or otherwise, their exclusive rights regarding the uses of their performances. In 2010, the United States, with input and support from U.S. movie studios as well as artists’ representatives, worked to develop language that permits, but does not require, parties to provide in their domestic law for such a transfer of rights, once a performer has consented to the fixation of his or her performance. This compromise, reflected now in Article 12 of the Treaty, attracted support from other key jurisdictions and paved the way for the text to be finalized at a diplomatic conference in Beijing on June 24, 2012. The outcome avoids prejudicing what is known in the United States as the “work made for hire” doctrine, a bedrock of U.S. motion picture industry practice.

The Beijing Treaty includes provisions on audiovisual performers’ exclusive rights of authorizing the broadcasting, communication, and fixation of their live performances; their exclusive rights of reproduction, distribution, rental, making available and communication to the public of their fixed performances; technological protection measures and rights management information; certain moral rights; and national treatment. The rights provided

for are modeled on, and similar to, the rights provided to performers and producers of sound recordings pursuant to the WPPT. (Authors are accorded similar rights pursuant to the Berne Convention for the Protection of Literary and Artistic Works and the WCT.)

U.S. law is already generally compatible with the Beijing Treaty provisions. In addition to a few technical amendments, implementation only requires extending to audiovisual performers the protections against unauthorized fixation of their performances that were provided to musical performers in 1994 when the United States implemented the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) as part of the Uruguay Round Agreements Act (URAA).

Discussion

As discussed more fully in the sectional analysis below, the proposed Beijing Treaty Implementation Act of 2016 makes limited changes to the federal copyright law and a related provision contained in Title 17 of the United States Code. Six technical amendments to Title 17 involve adding a definition of the Beijing Treaty; adding the Treaty to the list of international agreements that may serve as a basis for granting copyright protection to foreign nationals; ensuring that Treaty membership results in protection for Treaty subject matter only; and clarifying the treatment of pre-existing fixations of performances. Substantive amendments relating to unauthorized fixations of live performances are made in Section 1101 of Title 17, parallel to the way that U.S. law protects the rights of musical performers. Because these changes would broaden the scope and potential impact of this section, these provisions are also amended to make them subject to certain copyright exceptions and to limit the protection to a fixed term consistent with the relevant applicable copyright term.

Current U.S. Law and Proposed Changes:

1. Technical Amendments

a) Definitions and Effect of Beijing Treaty on Audiovisual Performances

Article 3 of the Treaty obliges parties to provide the protections set forth in the Treaty to nationals of other Parties to the Treaty as well as to performers who have their habitual residence in one of the Parties.

The Copyright Act sets forth points of attachment that provide the basis for protecting foreign authors and other rights holders under U.S. law. *See* 17 U.S.C. 104. Under Section 104, full copyright protection is available to a fixation of a performance by a national or a domiciliary of a country that is a “treaty party,” or where the fixation was first published in the United States or in a country that is a “treaty party.” 17 U.S.C. 104(b)(1) and (2). A “treaty party” is defined in Section 101 as “a country or intergovernmental organization other than the United States that is a party to an international agreement,” while “international agreement” is defined in the same section as “(1) the Universal Copyright Convention; (2) the Geneva Phonograms Convention; (3) the Berne Convention; (4) the WTO Agreement; (5) the WIPO Copyright Treaty; (6) the WIPO Performances and

Phonograms Treaty; and (7) any other *copyright* treaty to which the United States is a party.” *See* 17 U.S.C. 101 (italics added).

Although it would be possible to rely on paragraph (7) to cover the Beijing Treaty, overall clarity, consistency with past practice when the U.S. joined the WCT and WPPT, and legislative history support the alternative approach of expanding the list of international agreements when the United States joins a new copyright treaty. *See* H.Rept. 105-551, pt. 1, at 16 (1998) (“If we join any future treaties, they can simply be added to the list of ‘international agreements’ without any detailed amendments repeating the criteria for eligibility.”). The proposed bill, discussed in the sectional analysis below, includes these definitional changes and language to limit the protection of works from foreign countries that are members of the Beijing Treaty and not other copyright treaties.

b) Already-fixed Performances

Article 19(1) provides that the Treaty applies to fixed performances that exist on the date of entry into force of the Treaty for a party and to all performances that take place after the entry into force of the Treaty for that party. Notwithstanding this provision, Article 19(2) permits a party to elect not to apply the economic rights set forth in Articles 7-11 to existing fixed performances through a notification to the Director General of WIPO. Where a party elects not to provide such protection, other parties may apply material reciprocity and limit the application of Articles 7-11 accordingly as to that party.

When the United States implemented TRIPS, the Copyright Act was amended to restore U.S. copyright protection to qualifying foreign works that have forfeited copyright in the United States for one or more specified reasons, as long as the term of protection they would otherwise enjoy has not expired. 17 U.S.C. 104A. For copyright to be restored to a foreign work, at least one author or right holder must be a national or domiciliary of an “eligible country,” or the work must be first published in an eligible country and not published in the United States during the 30-day period following that first publication. 17 U.S.C. 104A(h)(6)(D). In implementing the WPPT, the name of the treaty was added to the lists of relevant treaties in the definitions in Sections 104A(h)(1) and 104A(h)(3), and a paragraph was added to the definition of “restored work” in Section 104A(h)(6) to ensure that copyrighted works other than sound recordings do not qualify for restoration where the sole basis for protection in the United States is the source country’s adherence to the WPPT. *See* H.Rept. 105-551, pt. 1, at 16 (1998), S. Rept. 105-190, at 26-27 (1998). As discussed in the sectional analysis below, the proposed bill includes similar changes to implement the Beijing Treaty.

2. Right to Prevent Unauthorized Fixations

a) Performers’ Fixation Right

Article 6 of the Treaty provides for an exclusive right of performers to authorize the fixation of their unfixed performances. An Agreed Statement to Article 2(a) expresses the Parties’ understanding that the definition of “performers” includes “those who perform a literary or artistic work that is created or first fixed in the course of a performance” – in other words, actors who ad lib or engage in extemporaneous improvisation.

Section 1101 of the U.S. Copyright Act, sometimes referred to as the “anti-bootlegging law,” provides fixation rights to performers, but only in respect of their live musical performances. 17 U.S.C. § 1101(a). Section 1101 is also limited to “sounds or sounds and images,” and does not cover images without sound. In order to cover audiovisual performances as provided for by Article 6, the proposed amendment extends the protection currently given to musical performances under section 1101 to performances of all types of works that are capable of being performed.

Given the expanded scope of coverage, the unlimited nature of perpetual statutory protection against reproduction or dissemination of unauthorized fixations could create more potential for overbreadth. As discussed in the sectional analysis, the proposed amendment therefore makes the prohibitions in section 1101(a) subject to the principal limitations applicable to the copyright rights of reproduction and distribution – the fair use and library limitations contained in sections 107 and 108 – and to a term based on the term of copyright protection in the U.S. Copyright Act. This broadened coverage would be prospective only (i.e., only relate to unauthorized fixations made after the date of enactment).

b) Enforcement

Article 20 of the Treaty obliges Parties to ensure the availability of enforcement procedures under their laws so as to permit effective action against any act of infringement of rights covered by the Treaty, including expeditious remedies to prevent infringement and deter further infringement.

Under the U.S. Copyright Act, both civil and criminal penalties are provided for infringement of the exclusive rights of the copyright owner, including those exclusive rights granted to performers. 17 U.S.C. § 501(a); 17 U.S.C. §§ 502-506. Violation of the civil anti-bootlegging law, § 1101, is subject to the civil remedies provided for copyright infringement. When section 1101 was first enacted in 1994 to provide civil remedies with respect to unauthorized fixations of musical performances, section 2319A was also added to title 18 to provide criminal remedies with respect to such conduct when committed knowingly and for purposes of commercial advantage or private financial gain. The proposed Beijing Treaty Implementation Act of 2016 would broaden section 1101 to prohibit unauthorized fixations of other kinds of performance. Although existing criminal copyright law provides criminal penalties for violations of many of the rights recognized by the Beijing Treaty, Congress should consider under what circumstances criminal along with other remedies should be available to address unauthorized fixations of non-musical performances.

Sectional Analysis

SECTION 1. SHORT TITLE: The short title is the “Beijing Treaty Implementation Act of 2016.”

SECTION 2. BEIJING TREATY IMPLEMENTATION

This section makes the following amendments to title 17 of the United States Code:

1. Definitions and Effect of Beijing Treaty on Audiovisual Performances

The definition of “international agreement” in Section 101 is amended to include a new item (7), “the Beijing Treaty on Audiovisual Performances.” The former item (7) becomes (8).

Section 101 is amended to provide a definition of the Beijing Treaty, as follows: “The ‘Beijing Treaty on Audiovisual Performances’ is the Beijing Treaty on Audiovisual Performances done at Beijing on June 24, 2012.”

Section 104 is amended to include a new subsection 104(e) on “Effect of Beijing Treaty on Audiovisual Performances” to provide that notwithstanding the provisions of subsection (b), no works other than motion pictures shall be eligible for protection under Title 17 solely by virtue of the adherence of the United States to the Beijing Treaty on Audiovisual Performances (Section 104(e)). This amendment ensures that, as to countries that are parties to the Beijing Treaty but not other copyright treaties to which the United States is a party, the United States will protect only motion pictures and will not provide protections for other subject matter (e.g., books or sound recordings). A similar amendment, now codified in Section 104(d), was made when the United States implemented the WPPT. The new subsection reads as follows:

“(e): EFFECT OF BEIJING TREATY ON AUDIOVISUAL PERFORMANCES.—Notwithstanding the provisions of subsection (b), no works other than motion pictures shall be eligible for protection under this title solely by virtue of the adherence of the United States to the Beijing Treaty on Audiovisual Performances.”

2. Already-fixed Performances

Unlike the WPPT and the Berne Convention, the Beijing Treaty leaves to national discretion whether or not to provide protection to the economic rights of performers in their performances that were fixed prior to the Beijing Treaty’s entry into force. Where a party elects not to provide such protection, other parties may apply material reciprocity and refrain from providing the benefits of the Treaty to already-fixed performances from that party (i.e., if the United States elects not to provide protection to performances that have already been fixed, other countries can deny protection to performances in existing U.S. films). Consistent with the approach taken in Berne and WPPT implementation, it is recommended that the United States apply protection to fixed performances in existence on

the date of entry into force under Article 19(1), rather than opting under Article 19(2) to treat audiovisual performances differently from other protected subject matter. Providing protection for performances that have already been fixed helps ensure that U.S. performers in existing audiovisual works will enjoy equivalent protection in foreign countries.

To extend this protection, several technical amendments are needed:

- 1) The name of the Treaty is added under the definition of “date of adherence or proclamation” in Section 104A(h)(1).
- 2) The name of the Treaty is added under the definition of “eligible country” in Section 104A(h)(3).
- 3) A subparagraph is added to the definition of “restored work” in Section 104A(h)(6) to ensure that copyrighted works other than motion pictures do not qualify as restored works where the sole basis for protection in the United States is adherence to the Beijing Treaty. In implementing the WPPT, a similar paragraph was added to ensure that copyrighted works other than sound recordings do not qualify for restoration where the sole basis for protection in the United States is adherence to the WPPT. The new subparagraph reads as follows:

“(F) if the source country for the work is an eligible country solely by virtue of its adherence to the Beijing Treaty on Audiovisual Performances, is a motion picture.”

3. Unauthorized Fixation and Trafficking

The title of section 1101 is amended to encompass performers in videos of all types of works, not just performers in music videos.

Unauthorized acts of fixation and transmission are amended to include fixations/transmissions of performances of literary, dramatic, choreographic and pantomime works (including such performances without sound) in addition to performances of musical works (Section 1101(a)(1) and (2)).¹ The proposed amendment to Section 1101 therefore extends the protection currently given to musical performances to performances of all types of works that are capable of being performed:²

¹ There is no need to make a similar amendment to Section 1101(a)(3), which makes it unlawful to “distribute, sell, offer to sell, rent or offer to rent, or traffic in any copy or phonorecord fixed as described in paragraph (1),” since that provision refers back to paragraph (1). However, the draft bill does make a technical amendment to] the definition of “traffic” in Section 1101(d)(2) to take into account the amendment, in the National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, 125 Stat. 1298, that moved the definition from paragraph (e) to paragraph (f)(5) of 18 U.S.C. 2320.

² As Congress determined when it crafted the public performance right in section 106(4), the categories of works that can be performed are “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” However, while performers can make live performances of literary, musical, dramatic, and choreographic works, they cannot make “live” performances of motion pictures and other audiovisual works. Therefore, the latter two categories are not included.

- 1) The expression “sounds or sounds and images” is amended to read “sounds, images, or sounds and images.”³
- 2) The reference to “a live musical performance” is expanded so that protection extends to “a live performance of a literary, musical, dramatic, choreographic or pantomime work.”

A new subsection provides that an act that falls within the limitations to the exclusive rights provided in Section 107 or 108 shall not be considered a violation of Section 1101 (Section 1101(b)). Given the expanded scope of coverage of different types of performances, the unlimited nature of the statutory protection against reproduction or dissemination of unauthorized fixations could create more potential for overbreadth. The proposed amendment therefore makes the prohibitions in section 1101(a) subject to the primary limitations applicable to the copyright rights of reproduction and distribution— the fair use and library limitations contained in sections 107 and 108.⁴ New subsection 1101(c) also limits the duration of the prohibitions to a term of 95 years after the live performance, a term consistent with the copyright term for anonymous works and works made for hire,⁵ as appropriate given that there may be multiple performers in any given live performance and it may be difficult to identify one or more of them or to determine his or her date of death.

Current subsection (c), which is redesignated as subsection (e), provides that section 1101 applies to acts that occur on or after the date of enactment of the Uruguay Round Agreements Act, which added section 1101 to title 17. In keeping with the aforementioned changes, that sentence is amended to add, at the beginning, “With respect to live musical performances,” as an introductory clause. A second sentence is added to address the applicability of the provisions expanding the scope of section 1101 to live performances of other categories of works: “With respect to other live performances, this section shall apply to any act or acts that occur on or after the date of enactment of the Beijing Treaty Implementation Act of 2016.” This ensures that the parts of Section 1101 that apply to live performances other than live musical performances apply only to acts that occur after the date of enactment of the legislation.

SECTION 3. EFFECTIVE DATE.

The effective date of section 2 of the Act will be the date on which the Beijing Treaty enters into force with respect to the United States.

³ A definition of “images,” solely for purposes of section 1101, is also added to section 1101 to make clear that the taking of a still photograph of a live performance would not violate section 1101. The definition is adapted from the current definition of “motion pictures” in section 101 of the Copyright Act.

⁴ The first sale doctrine codified in section 109, the other primary statutory exception applicable to the distribution of copies, applies only to copies that are “lawfully made under this title.” Unauthorized fixations made in violation of section 1101 are by definition not “lawfully made under this title.”

⁵ 17 U.S.C. 302 (c).