

## **EXPLANATORY MEMORANDUM OF ACCESSION TO THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES, 2012 ('THE BEIJING TREATY')**

The Beijing Treaty on Audiovisual Performances is a multilateral Treaty, which regulates copyright for audiovisual performances and expands the performers' rights. The Beijing Treaty was adopted on 24 June 2012. South Africa as member state to WIPO is in terms of Article 23 eligible to be a party to the Treaty. The Treaty is not yet in force and will only come into force on ratification or accession by at least 30 member states (Article 26). Currently 20 member states have ratified the Treaty. The fact that the 30 member states have not ratified the Treaty and it is not yet in force does not preclude South Africa from exercising the rights that are provided by the Treaty.

Contracting Parties have the obligation to ensure that appropriate provisions exist in their national laws for the effective enforcement of the rights in the Treaty (Article 20). The Treaty is a non-self-executing Treaty and will not automatically become judicially enforceable once Parliament has approved it in terms of section 231(2) of the Constitution. It will hence only become judicially enforceable through the implementation of domestic legislation.

Legislation is also required to ensure that other parties to the Treaty are granted, under South African copyright law, the rights to which they are entitled under the Treaties. Acceding to the Treaty will not require amendments to the Constitution but will introduce new rights for performers which enhances intellectual property rights.

The Treaty requires Contracting Parties to accord protection to audiovisual performers on a national treatment basis only and not in respect of any additional rights granted in national law or where other Contracting Parties might have made reservations in relation to the rights covered by the Treaty (Articles 4 and 11). South Africa will need to ensure that the rights provided for in the Performers' Protection Act, 1967 (Act No. 11 of 1967)

are also extended to nationals of other Contracting Parties to the Treaty who perform in South Africa.

The Treaty grants performers four kinds of economic rights (i.e: the right of reproduction; the right of distribution; the right of rental; and the right of making available) for their performances fixed in audiovisual fixations, such as motion pictures. In terms of unfixed (live) performances, the Treaty grants performers three kinds of economic rights being the right of broadcasting; the right of communication to the public; and the right of fixation. Article 6 to 11)

The Treaty also grants performers moral rights on live performances and performances fixed in audiovisual fixations. That is the right to claim to be identified as the performer and the right to object to any distortion, mutilation and modification that would be prejudicial to the performer's reputation (Article 5). The intention of granting moral rights is to protect the personality of the performer over and above his or her economic interests.

The Treaty requires Contracting Parties to ensure that appropriate remedies are put in place against the circumvention of technological protection measures used by performers in connection to the exercise of their rights (Article 15). Adequate protection and remedies should exist against the alteration or removal of electronic rights management information attached to a performance fixed in an audiovisual fixation (Article 16).

Besides the expenses provided for in Article 21 of the delegates attending the Assembly to be constituted to deal with matters concerning the operation, application, development and maintenance of the Treaty and the annual WIPO member's fees which South Africa by virtue of being a WIPO member pays, no further expenses will be incurred with respect to this Treaty. Any financial implications that may be incurred by government or industry in the application of this Treaty will be offset by the greater benefits the Treaty introduces for audiovisual performers who have been excluded for a long time from benefiting from audiovisual works.