

PARLIAMENT
OF KENYA
LIBRARY



REPUBLIC OF KENYA

CABINET MEMORANDUM ON RATIFICATION OF THE BEIJING TREATY ON AUDIOVISUAL PERFORMANCES TO DEAL WITH THE INTELLECTUAL PROPERTY RIGHTS OF PERFORMERS IN AUDIOVISUAL PERFORMANCE

SECRETARY'S OFFICE
06 JUN 2017
Sign:.....
PAPER LAID

1.0 PURPOSE

The purpose of this Memorandum is to seek the Cabinet's approval:

- a) To ratify the Beijing Treaty on audiovisual performances to deal with the intellectual property rights of performers in audiovisual performances.

2.0 BACKGROUND AND JUSTIFICATION

- 2.1 The World Intellectual Property Organization (WIPO) is one of the specialized agencies of the United Nations (UN) system of organization. The convention establishing the World Intellectual Property Organization was signed in Stockholm in 1967 and entered into force in 1970.
- 2.2 The Republic of Kenya joined the World Intellectual Property Organization in 1971. She signed the Beijing Treaty on audiovisual performances on the 26th day of June, 2012.
- 2.3 The Beijing Treaty on Audiovisual Performances was adopted on 26 June 2012 by the Diplomatic Conference on the Protection of Audiovisual Performances of the World Intellectual Property Organization, in which 156 WIPO member states, six intergovernmental, and six non-governmental organizations participated. Forty-eight countries including Kenya signed the Treaty on 26 June, 2012 followed by 19 other countries in 2012 and 2013. Eleven states have ratified or acceded to the treaty. The Treaty will enter into force three months after it has been ratified or acceded to by at least 30 eligible parties.
- 2.4 In addition the Republic of Kenya is a signatory to other copyright Treaties like the Universal Copyright Convention, The Paris Treaty, The Agreement on Trade Related Aspects of Intellectual Property Rights, Marrakech Treaty, the WIPO Performances and Phonograms Treaty and The WIPO Copyright Treaty.

SECRET

- 2.5 The Treaty brings audiovisual performers into the fold of the international copyright framework in a comprehensive way, by incorporating clauses dedicated to protecting their works on the Internet. It addresses the issue of the copyright system discriminating against certain groups of performers, as the previous Treaties, focused more on the sound than visual aspects.
- 2.6 The Treaty expands the economic rights and moral rights of audiovisual performers giving them an opportunity to share the income collected by producers from internationally distributed audiovisual works. The moral rights granted includes the right to be identified as the performer and the right to object to any distortion, mutilation or other modification that would prejudice the performers' reputation.
- 2.7 The Treaty grants performers rights both for the offline and on line exploitation of their performances (e.g. the distribution or rental of their performances - for instance in DVDs - by making them available on the Internet and so on. Hence allowing performers to be fairly remunerated when their performances are used.
- 2.8 The Treaty provides a modern international framework for the rights of performers in motion pictures, television programs, and other audiovisual works, similar to that already in place for producers of such works, for authors, and for performers and producers of sound recordings, pursuant to other WIPO copyright Treaties.

3.0 THE OBJECTS AND SUBJECT MATTER OF THE TREATY:

- 3.1 Beijing Treaty on Audiovisual Performances grants performers rights both for the offline and online exploitation of their performances and allows performers to be fairly remunerated when their performances are used as well as recognizing performers' moral rights.
- 3.2 Performers from countries ratifying or acceding to the Treaty will enjoy the minimum level of protection granted by the Treaty in addition to national treatment.
- 3.3 The Treaty grants performers four kinds of economic rights for their performances fixed in audiovisual fixations. These rights include:
- a) The right of reproduction; right to authorize reproduction of the performance fixed in an audio visual fixation or any other form

SECRET

- b) The right of distribution; right to authorize making available to the public original or copies of the performance fixed in an audio visual fixation
- c) The right of rental; right to authorize commercial rental to the public of original or copies of the fixed performance and
- d) The right of making available; right to authorize making available to the public by wire or wireless means, the fixed audiovisual work. This covers interactive making available through the internet.
- 3.4 In relation to unfixed (live) performances, the Treaty grants performers three kinds of economic rights:
- a) The right of broadcasting (except in the case of rebroadcasting);
- b) The right of communication to the public (except where the performance is a broadcast performance); and
- c) The right of fixation.
- 3.5 The Treaty also grants performers moral rights, that is, the right to claim to be identified as the performer (except where such an omission would be dictated by the manner of the use of the performance); and the right to object to any distortion, mutilation or other modification that would be prejudicial to the performer's reputation, taking into account the nature of the audiovisual fixations.
- 3.6 The Treaty provides that performers shall enjoy the right to authorize the broadcasting and communication to the public of their performances fixed in audiovisual fixations. However, Contracting Parties may establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or communication to the public instead of the right of authorization. Any Contracting Party may restrict or deny this right provided that it makes a reservation to the Treaty. In the case and to the extent of a reservation by a Contracting Party, the other Contracting Parties are permitted to deny, *vis-à-vis* the reserving Contracting Party, national treatment ("reciprocity").

SECRET

- 3.7 Article 13 of the Treaty incorporates the so-called "three-step" test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention, extending its application to all rights. The accompanying Agreed Statement provides that the Agreed Statement of Article 10 of the WCT applies similarly to the Beijing Treaty, that is, that such limitations and exceptions as established in national law in compliance with the Berne Convention may be extended to the digital environment. Contracting States may devise new exceptions and limitations appropriate to the digital environment. The extension of existing or the creation of new limitations and exceptions is allowed if the conditions of the "three-step" test are met.
- 3.8 The Treaty obliges Contracting Parties to provide for legal remedies against the circumvention of technological measures (e.g., encryption) used by performers in connection with the exercise of their rights, and against the removal or altering of information – such as the indication of certain data that identify the performer, performance and the audiovisual fixation itself – necessary for the management (e.g., licensing, collecting and distribution of royalties) of the said rights ("rights management information").
- 3.9 It also provides for the transfer of rights. Contracting Parties may stipulate in their national laws that once a performer has consented to the audiovisual fixation of a performance, the exclusive rights are transferred to the producer of the audiovisual fixation (unless a contract between the performer and producer states otherwise). Independent of such a transfer of rights, 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 the Treaty.
- 3.10 The Treaty will achieve the following:-
- a) It will provide additional protection of audiovisual performers at international level
 - b) It will recognize performers rights in the online environment.
 - c) It will provide a modern international framework for the rights of performers in motion pictures, television programs, and other audiovisual works

SECRET

CONSTITUTIONAL IMPLICATIONS OF THE TREATY

- 4.1 Beijing Treaty on Audiovisual Performances does not propose any amendments to the Constitution of Kenya 2010
- 4.2 The treaty is consistent with the Constitution and promotes constitutional values and objectives and in particular the following Articles of the Constitution;
 - a) Article 10 (2) (b) which provides that the national values and principles of governance include among others, non discrimination and protection of the marginalized. This includes creators/authors of works.
 - b) Article 11 (2) which obligates the state to promote all forms of national and cultural expressions
 - c) Article 21(4) which requires Kenya to adopt the necessary implementing legislation to fulfill its international obligation in respect of human rights and fundamental freedoms, intellectual property rights being among them.
 - d) Article 40 (5) which obligates the state to support, promote and protect the Intellectual Property rights of the people of Kenya.

5.0 OBLIGATIONS IMPOSED ON KENYA BY THE TREATY

- 5.1 The Beijing Treaty on Audiovisual Performances requires the amendment 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 removal or altering of information
- 5.2 The Treaty obliges Kenya to amend the Copyright Act to ensure that enforcement procedures are available under its law so as to permit effective action against any act of infringement of rights covered by the Treaty.

6.0 FINANCIAL IMPLICATIONS

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

SECRET

7.0 MINISTERIAL RESPONSIBILITY

7.1 The Ministry responsible for implementing the Treaty will be on the Attorney General in Accordance with Section 2(1) of the Copyright Act Cap 130 of the Laws of Kenya as well as Executive order No. 2 of 2013.

8.0 IMPLICATION ON MATTERS RELATING TO COUNTIES

8.1 Intellectual Property matters remain the mandate of the National Government.

9.0 RECOMMENDATIONS TO THE NATIONAL ASSEMBLY

9.1 The National Assembly is required to;

- a) Consider the contents of this Memorandum, and
- b) Authorize the ratification of the Treaty.

Signed..... *ZM* Date..... *October 25/16*

~~GITHU MUIGAI EGH, SC
ATTORNEY GENERAL~~

Signed..... *[Signature]* Date..... *19.12.2016*

AMB. AMINA MOHAMED, CBS, CAV
CABINET SECRETARY
MINISTRY OF FOREGN AFFAIRS AND INTERNATIONAL TRADE