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Assessing Malaysia's Readiness for the Beijing Treaty on Audiovisual Performances through Copyright Act 1987

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ABSTRACT

The Beijing Treaty on Audiovisual Performances known as the 'Beijing Treaty' represents a crucial international treaty designed to enhance the protection of audiovisual performers and their rights in audiovisual performances. To successfully implement the treaty, addressing issues related to defining the scope of protection, transfer of rights and establishing mechanisms for collective rights management for audiovisual performers is important. Given the dynamic evolution of the global audiovisual entertainment industry, it is paramount for countries like Malaysia to thoroughly assess their readiness to effectively implement the Beijing Treaty in the copyright legal framework. Malaysia's commitment and policy decision to evaluate crucial aspects of the issues will ultimately determine the success of its involvement in the broader global initiative to strengthen copyright protection for audiovisual performers within the copyright law spheres. Hence, this article will comprehensively examine the provisions related to the Beijing Treaty and determine whether Malaysia is prepared for the implications and requirements set forth by the Beijing Treaty to be incorporated in the Copyright Act 1987. This article also aims to guide the



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policymakers in crafting strategies for effective integration of the treaty into the national legal framework particularly in the Copyright Act 1987.

Keywords: Beijing Treaty on Audiovisual Performances; Collective management organisation; Performers; Malaysia; Copyright Act 1987

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1. Introduction

The journey leading to the establishment of the Beijing Treaty on Audiovisual Performances reflects a global acknowledgement of the indispensable role played by audiovisual performers in the cultural and economic spheres. First adopted on 24th June 2012 and enforced on 28 April 2020, the Beijing Treaty on Audiovisual Performances aims to strengthen the protection of audiovisual performers and their rights while addressing historical oversights within traditional copyright frameworks where their contributions were often overlooked.¹ The Beijing Treaty on Audiovisual Performances also marks a transformative shift from the WIPO Performances and Phonograms Treaty which was concluded on 20 September 1996 and enforced on 20 May 2002.² While the WIPO Performances and Phonograms Treaty played a crucial role in safeguarding the rights of performers and producers in the context of phonograms, it fell short of extending comprehensive protection to performers in audiovisual fixations.³ This limitation requires the need for a dedicated legal instrument that recognises and addresses the unique rights and challenges faced by audiovisual performers.⁴ Unlike the WIPO Performances and Phonograms Treaty, the Beijing Treaty on Audiovisual Performances specifically focuses on the rights of audiovisual performers encompassing performances captured in films, television programs, and music videos or moving images accompanied by sounds.⁵

At the outset, acknowledging the potential of the Beijing Treaty on Audiovisual Performances in the Copyright Act 1987 is essential. The rights of audiovisual performers traditionally have been marginalised in copyright frameworks often overshadowed by other creative contributions.⁶ A key aspect of the Beijing Treaty on Audiovisual Performances potential lies in its exclusive focus on the current and additional protection afforded to audiovisual rights performances as well as establishing mechanisms for their collective rights management which will be discussed in the later part of this article.

¹ Beijing Treaty on Audiovisual Performances (entered into force on 28 April 2020).

² *ibid.*

³ Mathilde Pavis, 'Sixty Years of International Performers' Rights: Time for a Performers' Copyright?' in Hayleigh Bosher and Eleonora Rosati (eds), *Developments and Directions in Intellectual Property Law: 20 Years of The IPKat* (Oxford University Press 2023) 243–256 <<https://academic.oup.com/book/46572/chapter/408277982>>.

⁴ Beijing Treaty on Audiovisual Performances (n 1).

⁵ *ibid.*

⁶ 'Audiovisual Performances' (WIPO) <https://www.wipo.int/copyright/en/activities/audio_visual.html>.

For too long, the contributions of audiovisual performers have been undervalued and overlooked.⁷ The Beijing Treaty on Audiovisual Performances seeks to rectify this by introducing minimum standards that elevate the status of audiovisual performers by granting them rights that are commensurate with the significance of their creative contributions. As Malaysia may consider adopting the Beijing Treaty on Audiovisual Performances in the future, the recognition of performers' rights in audiovisual works should be central to granting them rights that reflect the significance of their creative contributions. The recognition enshrined in the Beijing Treaty on Audiovisual Performances will guide the integration process into national legal frameworks, particularly in the Copyright Act 1987.

The current provisions of the Copyright Act 1987 for instance predominantly address the rights of performers in phonograms performances. However, they may not comprehensively cover most aspects of audiovisual performances. Hence, the integration of the Beijing Treaty on Audiovisual Performances into the Copyright Act 1987 provides an opportunity to bridge this gap and offer comprehensive protection to audiovisual performers which requires amendments to the current act to encompass the unique aspects and challenges faced by audiovisual performers in line with international standards globally. As such, this article seeks to evaluate Malaysia's readiness for the Beijing Treaty on Audiovisual Performances with a specific focus on performer's rights to be integrated into the existing Copyright Act 1987. To achieve this, researchers will assess the compatibility of the existing Copyright Act 1987 with the provisions outlined in the Beijing Treaty on Audiovisual Performances focusing on performer's rights and the necessary legal amendments. In this article, doctrinal research is adopted and the Copyright Act 1987 will be confined to the evaluation of relevant provisions concerning audiovisual performances.

2. Issues of Performers Rights in Audiovisual Industry in Malaysia

The article would not be complete if the issues of performers' exclusive rights and remuneration rights were not explored within the broader context that they encountered before the discussion on the provisions of the Copyright Act 1987 itself. In Malaysia, several issues have been reported from 2019 until 2022 indicating the need for a comprehensive examination of the existing legal framework and its practical implications for performers in audiovisual. In recent developments, the former Chief Executive Officer of National Film Development Corporation Malaysia (FINAS) pressed the issue of film royalties and the necessity to scrutinise it to safeguard the interests of actors, producers, directors, and stakeholders in the local creative industry in audiovisual.⁸ FINAS expressed that addressing the royalty issue has been a focal point for FINAS aiming to provide benefits to individuals involved in the film industry, similar to the compensation received by artists in another field of copyright akin to music.⁹

⁷ Silke Von Lewinski, 'The Beijing Treaty on Audiovisual Performances' (Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-08, 2013) <<https://papers.ssrn.com/abstract=2239109>>.

⁸ 'LensaFINAS' (Finas) <<https://www.finas.gov.my/en/lensafinas-23/>>.

The Former Malaysian Prime Minister of Malaysia YBhg Dato' Sri Ismail Sabri bin Yaakob emphasised the disparity between royalties for singers and those for actors known as performers of audiovisual work in the film industry.¹⁰ He said that while singers receive continuous royalties, actors often receive a one-off payment for their performances. He illustrated this point with examples such as the film 'Mat Kilau' where actors sign contracts, but if the film is aired a century later, they receive no additional compensation.¹¹ Even worse, while the copyright law is there, some actors argue that the existing system does not adequately benefit actors and there is a necessity for a re-evaluation of the framework and the establishment of a protective body similar to the Screen Actors Guild to safeguard the overall rights of actors.¹² Other actors believe that every income generated through a rerun of past performances including drama, TV series, and even those advertising activities associated together with actors should be shared with the actors involved particularly in TV and digital platforms.¹³ It has also been reported that television stations and producers have failed to provide royalties and compensation despite multiple broadcasts of dramas and films on television, especially behind-the-scenes crew.¹⁴ In recent discussions, the former Minister of Communications and Multimedia which is now formally known as the Ministry of Digital and Ministry of Communications, also highlighted the need for intervention by the government particularly for actors who have sold their performance rights and are not receiving royalties for their work.¹⁵

While the issue is there, it is evident that the law is lagging in effectively addressing the challenges faced by performers in the audiovisual industry.¹⁶ The existing legal framework, particularly the Copyright Act of 1987, acknowledges performers but falls short of providing comprehensive protection for their exclusive rights and fair remuneration. As such, examining performer's exclusive and remuneration rights will determine how the current

⁹ Yusmizal Dolah Aling, 'Isu Royalti Penggiat Filem Bakal Dimuktamadkan' *Harian Metro* (31 July 2020) <<https://www.hmetro.com.my/mutakhir/2020/07/605755/isu-royalti-penggiat-filem-bakal-dimuktamadkan>>.

¹⁰ Ahmad Suhael Adnan 'Isu Pembayaran Royalti Industri Filem Perlu Dilihat Semula' *Berita Harian* (Hulu Kelang, 24 October 2022) <<https://www.bharian.com.my/berita/nasional/2022/10/1016212/isu-pembayaran-royalti-industri-filem-perlu-dilihat-semula>>.

¹¹ Hakimi Ismail, 'Kaji Semula Isu Royalti Filem—PM' *Utusan Malaysia* (Kuala Lumpur, 24 October 2022) <<https://www.utusan.com.my/nasional/2022/10/kaji-semula-isu-royalti-filem-pm/>>.

¹² Mohammad Al Faizal Abdul Karim, 'Kaji Semula Sistem Perlindungan Harta Intelek—Nadiya Nisaa' *Utusan Malaysia* (Kuala Lumpur, 30 January 2023) <<https://www.utusan.com.my/nasional/2023/01/kaji-semula-sistem-perlindungan-harta-intelek-nadiya-nisaa/>>.

¹³ Serimah Mohd Sallehuddin, 'Mira Tersentuh Nasib Pelakon Veteran' *Berita Harian* (Kuala Lumpur, 21 July 2020) <<https://www.bharian.com.my/hiburan/celebriti/2020/07/713249/mira-tersentuh-nasib-pelakon-veteran>>.

¹⁴ Wafa Aula, "'Mana Royalti? Satu Persen Pun Tak Apalah" —Tanya Amerul Affendi' (*Getaran*, 13 December 2021) <<https://www.getaran.my/artikel/celebriti/16046/mana-royalti-satu-persen-pun-tak-apalah-tanya-amerul-affendi>>.

¹⁵ 'Isu Royalti Filem Dalam Tindakan KKMM: Annuar' *Sinar Harian* (Kuala Lumpur, 1 December 2021) <https://www.sinarharian.com.my/article/175550/BERITA/Nasional/Isu-royalti-filem-dalam-tindakan-KKMM-Annuar#google_vignette>.

¹⁶ 'IIPA 2023 Special 301 Report on Copyright Protection and Enforcement, United States Trade Representative' (International Intellectual Property Alliance) <<https://www.iipa.org>>.

legal framework particularly the Copyright Act of 1987 acknowledges and addresses their unique concerns.

3. Definitions

To start, section 3 of the Copyright Act 1987 for instance defines performers to include a range of individuals involved in the performance of audiovisual performances, such as:

actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore.

This expansive definition provided by the act forms the basis for recognising and safeguarding the rights of performers in general. The general definition of performers in the current act connotes that the performers may include not only the main actors and singers but also supporting actors, musicians, dancers, and other individuals whose artistic contributions are essential to the overall audiovisual performance.¹⁷ The Copyright Act 1987 also seems to adopt a similar definition to Article 2(a) of the WPPT which is in *pari materia* with Article 2(a) of the Beijing Treaty. Section 3 of the Copyright Act 1987 also defines the term ‘fixation’ to mean:

... the embodiment of sounds, images or both, or the representation thereof, in a material form sufficiently permanent or stable to permit them to be perceived, reproduced or otherwise communicated during a period of more than transitory duration by using a device.

The definition by default is consistent with international standards of WPPT¹⁸ which Malaysia is a party and Article 2(a) of the Beijing Treaty although Malaysia is not yet a party to it. When it comes to the definition of audiovisual, the Copyright Act 1987 impliedly uses the term ‘film’ under section 3 of the Copyright Act 1987 to mean:

... any fixation of a sequence of visual images on material of any description, whether translucent or not, so as to be capable by use of that material with or without any assistance of any contrivance—

(a) of being shown as a moving picture; or

(b) of being recorded on other material, whether translucent or not by the use of which it can be so shown,

and includes the sounds embodied in any soundtrack associated with a film;

In the context of the Copyright Act 1987, the term ‘fixation’ when combined with ‘film’ refers to the same concept. The definition implies that a ‘film’ is a type of ‘fixation’. To be qualified for film under the Copyright Act 1987 the work must meet the criteria outlined in

¹⁷ Silke Von Lewinski (n 7).

¹⁸ WIPO Performances and Phonogram Treaty, Accession by Malaysia’ (WIPO) <https://www.wipo.int/treaties/en/notifications/wppt/treaty_wppt_82.html>.

the definition.¹⁹ Meanwhile, “fixation” itself is a broader concept encompassing the embodiment of sounds, images, or both, in a material form that is sufficiently permanent or stable to allow perception, reproduction, or communication for a period beyond transitory duration.²⁰ This definition of “fixation” under the Copyright Act 1987 is crucial as it lays the foundation for recognising and safeguarding the rights of performers not only in film but also in audiovisual works.

Hence, the researcher opined that such terminology used in the Copyright Act 1987 is consistent with the generic and specific understanding of the definition of “audiovisual fixation” under the Beijing Treaty on Audiovisual Performances. The general recognition provided by the Copyright Act 1987 and the Beijing Treaty is just the beginning. The use of the same definition but differences in terminology is also common since both definitions refer to the same concepts and rights so long as it does not affect substantive rights granted to performers is fair.²¹ For instance, Malaysia maintains the term “sound recording” to substitute the term “phonogram” while complying with trade policy review terms in acceding WPPT.²² What truly matters is the essence of the rights protected and the level of safeguarding provided to performers in audiovisuals. In this context, the subsequent sections particularly Section 16A and Section 16B will investigate the specifics of performer’s rights in general as follows:

3.1 Performers’ Exclusive Rights

Section 16A of the Copyright Act 1987 empowers performers with exclusive rights in granting them control over various aspects of usage of their performances. This ‘control’ is not merely symbolic but translates into tangible legal mechanisms that dictate how their works are used, distributed, and commercialised. Performer’s exclusive rights as defined by Section 16A(1), encompass the following:

¹⁹ Copyright Act 1987, s 3.

²⁰ Khaw Lake Tee and Tay Pek San, *Khaw on Copyright Law in Malaysia* (4th edn, Sweet & Maxwell Asia 2017) 52.

²¹ ‘The Lifespan for Copyright of Audiovisual Works’ (*European Sources Online*, 2012) <<https://www.europeansources.info/record/the-lifespan-for-copyright-of-audiovisual-works/>>.

²² ‘WT/TPR/M/292/Add.1’ (World Trade Organisation, 30 April 2014) <https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=124354,123898,123743,123643,123644,121995,122030,100157,100985,109385&CurrentCatalogueIdIndex=0&FullTextHash=>>.

Types of Rights (section 16A)	Example (B as performer)
The communication to the public of a performance, except where the performance used in such communication is itself a live broadcast performance	The TV station intends to broadcast a recorded performance performed by A on its television or internet. The TV station needs B's consent to broadcast its performance before doing so. However, if the concert is being communicated to the public is itself a live broadcast concert, the performer loses the right as similar rights have been assigned to the broadcasters in section 15(1) of the Copyright Act 1987.
The fixation of an unfixed performance	B performs a live television show. A TV station intends to record the live performance of B. A TV station needs B's consent to do that.
The reproduction of the fixation of a performance	Upon recording a live performance performed by B, a TV station intends to reproduce the copies of the recorded performance for various purposes. The TV station needs B's consent to do that.
The first distribution to the public of a fixation of a performance, or copies thereof, through sale or other transfer of ownership	To distribute copies of the recorded performance for various purposes by TV station, A TV station needs B's consent to do that.
The commercial rental to the public of a fixation of a performance, or copies thereof, irrespective of the ownership of the copy rented	If the TV station plans to commercially rent copies of the recorded performance to the public, the TV station needs B's consent to do that.

Performer exclusive rights, as outlined in Section 16A of the Copyright Act 1987 give the performers with control over the communication, fixation, reproduction, first distribution, and commercial rental of their performances. The examples illustrate how these exclusive rights apply in various scenarios involving TV stations and the need for the performer's consent. However, the exclusive rights given under 16A to performers may be subject to limitations where:

A performer shall cease to have the exclusive right under paragraph (1)(b) once he has given consent to the fixation of his performance

The above provision for instance simply establishes a limitation or condition under which the performer's exclusive right may cease to apply. In other words, it addresses the scenario where a performer's exclusive right to control the fixation of their performance is no longer in effect once the performer agrees to have their performance recorded or fixed in a tangible form.²³ For example, in the music industry, when *B* (a singer) negotiates with a record label that gives explicit consent over her voice or performance for the recording, and such voice or performance is fixed in the form of sound recording (phonogram), *B* in this matter has voluntarily relinquished the exclusive right.

3.2 Performers' Rights to Equitable Remuneration

To rectify section 16A(1)(b) of the Copyright Act 1987, section 16B of the Copyright Act 1987 comes into rescue which is taken from the Article 15 of WPPT. Section 16B(1) of the Copyright Act provided that:

Where a sound recording is published for commercial purposes or a reproduction of such recording is publicly performed or used directly for broadcast or other communication to the public, an equitable remuneration for the performance shall be payable to the performer by the user of the sound recording.

The key elements of section 16B (1) of the Copyright Act 1987 come in two ways. One is to ensure that when a sound recording is published with the intention of commercial gain, performers have the right to receive equitable remuneration. Second is when a reproduction of the sound recording is publicly performed or used for broadcast or other communication to the public, performers are also entitled to the same equitable remuneration. The only limitation attached to the provision is that equitable remuneration under Section 16B is limited to the exploitation of sound recordings and the performances embodied in those recordings. In other words, it simply means that performers are only entitled to equitable remuneration (as a means of compensation) when their work is in the form of sound recordings and not audiovisual works. Thus, the specific exclusion of audiovisual works from Section 16B raises a question about whether performers in audiovisual works in Malaysia have a right to equitable remuneration. Since there is no specific provision in the Copyright Act 1987 addressing equitable remuneration for performers in audiovisual works, such rights perhaps may be governed by industry agreements or it is not covered at all.²⁴ Here, the Beijing Treaty on Audiovisual Performances comes into the picture to perhaps rectify this issue of the absence of such provision in the Copyright Act 1987. Article 11(2) of the Beijing Treaty on Audiovisual Performances provides that:

(2) Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorisation provided

²³ Khaw Lake Tee and Tay Pek San (n 20).

²⁴ Jane C Ginsburg and André Lucas, 'Study on Transfer of the Rights of Performers to Producers of Audiovisual Fixations: Conclusion' (WIPO, 12 May 2004) <https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=34545>.

for in paragraph (1), they will 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. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.

Article 11(2) of the Beijing Treaty on Audiovisual Performances suggests that the treaty may offer a new equitable remuneration framework for performers in audiovisual works. The provision allows contracting parties to declare their approach to extend the current state of the rights of performers including the option to 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. The contracting parties also have the flexibility to set conditions in their legislation for the exercise of the right to equitable remuneration.

In the context of the Copyright Act 1987 in Malaysia, establishing equitable rights for performers in audiovisual work involves introducing specific provisions within the legislation to address remuneration for such works apart from section 16B of the act which is exclusively given to performers in sound recording. The introduction of the new equitable remuneration rights for audiovisual performers shall specify the conditions and criteria under which performers are entitled to such remuneration before any introductions are made under the act. Before that, Malaysia needs to examine the audiovisual industry itself in totality to ensure a comprehensive and well-informed approach to establishing equitable rights for performers in audiovisual works which currently remain unknown.²⁵ It is to be noted that there is a huge difference in consideration of ownership and rights that needs to be understood among the audiovisual performers and music performers. In the audiovisual industry, contractual agreements between performers and producers have historically been structured differently. Performers in audiovisual works often enter comprehensive contracts that may involve a one-time payment or a negotiated fee for their services or contributions.²⁶ In the music industry, performers generally enter into a standalone contract agreement known as a “recording contract” with record labels to create, produce, and distribute sound recordings.²⁷ The recording contract generally outlines issues like fair calculation of current and future royalties as well as ownership of master recordings where their “voice” or musical performance is a key feature of the recording.²⁸

In contrast, in audiovisual works, the performer’s contribution is part of a larger production that includes various elements such as script, direction, cinematography, and

²⁵ Rokiah Alavi and Ida Madiha Abdul Ghani Azmi, ‘The Copyright Reward System and Content Owners in the Creative Industry: A Study of the Malaysian Film and TV Industry’ (2019) 22 *The Journal of World Intellectual Property* 129–145 <<https://doi.org/10.1111/jwip.12121>>.

²⁶ Katherine Sand, ‘WIPO Review of Contractual Considerations in the Audiovisual Sector’ (WIPO, 2013) <<https://www.wipo.int/publications/en/details.jsp?id=366>>.

²⁷ Horace Trubridge, ‘Safeguarding the Income of Musicians’ (WIPO, May 2015) <https://www.wipo.int/wipo_magazine/en/2015/02/article_0002.html>.

²⁸ ‘Contracts & Agreements With Record Labels’ (Musicians’ Union, 3 January 2023) <<https://musiciansunion.org.uk/working-performing/recording-and-broadcasting/working-as-a-recording-artist/record-label-contracts-agreements>>.

editing.²⁹ Thus, it may seem challenging to directly apply the same equitable remuneration models used in the music industry to the audiovisual sector.³⁰ Perhaps that is why the Beijing Treaty on Audiovisual Performances designed Article 11(2) to accommodate the diverse customs, norms, and structures inherent in the audiovisual industry of respective member states. Unlike the WIPO Performances and Phonogram Treaty, performer's rights in music focus are often on the individual musical performance rather than the Beijing Treaty on Audiovisual Performances which focuses on the collaborative nature of audiovisual fixations.³¹ A study reported in Malaysia highlights that 'one-off' payment is the widely accepted practice in Malaysia, and changing it might be met with huge challenges.³² This issue has also brought a greater concern about the potential challenges in the audiovisual industry in Malaysia transitioning from a one-off model towards a remuneration-based model structure which may require careful consideration under the state of review in 2022 by the Ministry of Communication and Digital.³³ As such, understanding the existing one-off payment practices in Malaysia and evaluating the industry's readiness for a potential shift towards audiovisual performer's remuneration models is crucial before embracing the principles outlined in the Beijing Treaty on Audiovisual Performances.

4. Additional Performers Exclusive Rights Provided by the Beijing Treaty

Performers in audiovisuals play a crucial role in the creative industries, yet their rights are often overlooked or inadequately protected. In Malaysia, performers' exclusive rights are governed by Section 16A in the Copyright Act 1987 as discussed. However, section 16A is not fully in line with the provisions of the Beijing Treaty, which grants performers audiovisual additional exclusive rights, including the right to authorise the fixation of their unfixed performances, particularly in audiovisual works. Article 6 of the Beijing Treaty provides that:

Performers shall enjoy the exclusive right of authorising, as regards their performances:

(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and

²⁹ Erik Knudsen, 'The Total Filmmaker: Thinking of Screenwriting, Directing and Editing as One Role' (2016) 13 *New Writing* 109–129 <<https://doi.org/10.1080/14790726.2016.1142571>>.

³⁰ 'AV Remuneration Study' (CISAC) <<https://www.cisac.org/services/reports-and-research/av-remuneration-study>>.

³¹ 'The Beijing Treaty: What Consequences for Musicians?' (FIM, 7 July 2020) <<https://www.fim-musicians.org/beijing-treaty-enters-into-force/>>.

³² Ahmad Fadhli AB Wahab@Masri and Rohani Hashim, 'Pekerja Filem Dan Isu Bayaran Dalam Industri Filem Malaysia' (2021) 23 *Jurnal Pengajian Media Malaysia* 17–38 <<https://jppmm.um.edu.my/index.php/JPPMM/article/view/29349>>.

³³ 'Isu Royalti Filem Dalam Tindakan KKMM: Annuar' (*n* 15).

(ii) the fixation of their unfixed performances

If we look carefully, section 3 of the Copyright Act 1987 defined “performance” as:

(a) Includes

- (i) a performance of a dramatic work, or part of such a work, including such a performance given with the use of puppets, or the performance of an improvised dramatic work;
- (ii) a performance of a musical work or part of such a work, or the performance of an improvised musical work;
- (iii) the reading, recitation or delivery of a literary work, or part of such a work, or the reading, recitation or delivery of an improvised literary work;
- (iv) a performance of a dance;
- (v) a performance of a circus act or a variety act or any similar presentation or show; or
- (vi) a performance in relation to expressions of folklore, which is given live by one or more persons in Malaysia, whether in the presence of an audience or otherwise; but

(b) Does not include

- (i) any reading, recital or delivery of any item of news or information;
- (ii) any performance of a sporting activity; or
- (iii) a participation in a performance by a member of an audience;

The definition of ‘performance’ in Section 3 of the Copyright Act 1987 is broad and non-exhaustive, encompassing various types of performances, including those in dramatic, musical, literary, dance, circus, and folklore works¹. However, it does not explicitly mention performances in audiovisual works. Given the provisions of the Beijing Treaty on Audiovisual Performances and the evolving landscape of the creative industries, Malaysia may need to revisit and potentially introduce a new definition of performances to include performances in audiovisual works in section 3(a)(viii). By extending the definition of “performance” in Section 3 to include performances in audiovisual works, Malaysia would align its legal framework with international standards and ensure that performers in audiovisual works are adequately protected and fairly compensated.

5. Performers’ Moral Rights in Audiovisual Works

Apart from performers exclusive rights and remuneration rights, the Beijing Treaty on Audiovisual Performances also introduces significant provisions regarding moral rights for

performers in the context of audiovisual works. Article 5 of the Beijing Treaty on Audiovisual Performances requires that the Moral Rights shall be afforded to Performers:

1. Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, have the right:
 - (i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and
 - (ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation, taking due account of the nature of audiovisual fixations.

Section 25A of the Copyright Act 1987 on the other hand provided that:

A performer shall, as regards his performance or performance fixed in phonogram, have the right—

- (a) to claim to be identified as the performer of his performance, except where omission is dictated by the manner of the use of the performance; and
- (b) to object to any distortion, mutilation or other modification of his performance that would be prejudicial to his reputation.

Based on the reading, it appears that the grant of moral rights to performers in Section 25A of the Copyright Act 1987 is limited to performances or performances fixed in phonograms. Article 5 of the Beijing Treaty on the other hand extends the scope of moral rights to include performances or performances fixed in audiovisual fixations. Section 25A of the Copyright Act 1987 as such may not be broad enough to cover the moral rights outlined in the Beijing Treaty on Audiovisual Performances. Thus, there may be a need to introduce or amend provisions in section 25A of the Copyright Act 1987 to explicitly cover moral rights for performers in audiovisual fixations ensuring that performers have the right to be identified and can object to prejudicial modifications to their audiovisual performances.

6. Rules on the transfer of Performer's Rights

The Beijing Treaty on Audiovisual Performances provides specific rules regarding the transfer of audiovisual performer's rights. Article 12(1) of the Beijing Treaty on Audiovisual Performances generally provides a situation where a contracting party has the option to include a provision in its copyright law allowing the transfer of exclusive rights from performers to producers under certain conditions which are:

... subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.³⁴

³⁴ Beijing Treaty on Audiovisual Performances (n1), Art 11.

This means that while a contracting party may establish general rules in its national law for the transfer of exclusive rights from performers to producers, the specific terms agreed upon in the contract between the performer and the producer will take precedence. The provision also includes additional considerations under Article 12(2) of the Beijing Treaty on Audiovisual Performances such as the potential requirement for written consent or contracts. When the provision emphasises the word “consent”, the provision signifies that the transfer of exclusive rights from performers to producers requires the explicit and voluntary agreement of the performer. This is to ensure that performers are not forced or compelled to transfer their rights and emphasis is on voluntary and mutually agreed-upon contracts between performers and producers.³⁵

Article 12(3) of the Beijing Treaty on Audiovisual Performances introduces an important aspect regarding performers’ rights to receive royalties or equitable remuneration, independent of the transfer of exclusive rights described in Article 12(1). This means that even if performers transfer their exclusive rights or remuneration rights, they may still be entitled to receive royalties or equitable remuneration for the use of their performances. For instance, when a performer signs a contract with a producer for a film and transfers their exclusive rights (such as those under section 16A of the Copyright Act 1987) to the producer, the contract may include provisions allowing the performer to receive royalties or equitable remuneration for the use of their performance. This provision ensures that performers are not left without compensation for uses beyond the initially transferred rights.³⁶ However, there is currently no explicit provision in the Copyright Act 1987 to guarantee performers’ rights to royalties or remuneration beyond the transferred exclusive rights. To comply with the standards of the Beijing Treaty on Audiovisual Performances, Malaysia could consider adopting legal provisions that grant performers the inalienable right to receive royalties or equitable remuneration independently of the transferred exclusive rights.

Hence, it is important to have clear delineation in the proposed legal provisions in the Copyright Act 1987 to ensure that performers are adequately protected and compensated based on their contributions. This clarity is crucial to address potential power imbalances and ensure fairness and justice for performers, particularly in cases where the automatic transfer of rights may not adequately reflect the value of their contributions.³⁷ Illustratively, consider a scenario where a performer in a film or television show contributes significantly to the success of the production. Under the current system of rules of transfer of performers’ rights in section 16A of the Copyright Act 1987, once a performer agrees to have their performance recorded or captured in a fixed form (such as in a film or recording), they cannot later claim exclusive rights over the use or distribution of that fixed performance. In practice, this means that once the performer may only receive a one-off payment for their services, their rights automatically been transferred to the producer.

³⁵ ‘AV Remuneration Study’ (n 30).

³⁶ Silke Von Lewinski (n 7).

³⁷ Strasbourg, ‘Fair Remuneration for Audiovisual Authors and Performers in Licensing Agreements IRIS Plus’ (European Audiovisual Observatory, 1 February 2024) <https://www.obs.coe.int/en/web/observatoire/home/-/asset_publisher/wy5m8bRgOygg/content/fair-remuneration-for-audiovisual-authors-and-performers-in-licensing-agreements>.

This transfer of rights gives the producer the authority to exploit the performance, including its distribution, broadcast, and reproduction, without needing further permission from the performer.³⁸ Hence, this automatic transfer can often result in a power imbalance, with performers relinquishing their exclusive rights in exchange for a one-off payment that may not accurately reflect the true value of their contributions.³⁹ Despite this, the transfer is a practical necessity for legal certainty, especially for broadcasters, cinema exhibitors, and other licensees who invest substantial amounts in audiovisual fixations to claim ownership over their investment. To address this imbalance, it is essential to ensure that the Copyright Act 1987 works in practice in line with its preamble to make better provisions of copyright for all parties and afford the best economic and moral rights, particularly for performers.⁴⁰ One proposed remedy is to grant performers non-waivable rights to equitable remuneration, ensuring that they are fairly compensated for their contributions, even after transferring their exclusive rights.

7. Addressing Imbalances in Rights Transfer: The Case for Non-Waivable Equitable Remuneration Rights for Performers in Malaysia

The “automatic” transfer of rights from performers to producers is a common practice in the global audiovisual entertainment industry globally.⁴¹ This is also evident and widely practised in Malaysia mainly because of Malaysian norms for producers to pay for the services performed by the performers with or without the need for individualised negotiations or agreements for each project.⁴² In part 6, the author also highlights the issue of power imbalance resulting from the automatic transfer of rights from performers to producers, noting that while this transfer is a practical necessity for legal certainty, it may not accurately reflect the true value of performers’ contributions. The payment that comes in one-off payment as discussed also implies that by default, a substantial or the whole rights will automatically belong to the producers once a performer contributes to a specific type of creative work such as in a film or television show.⁴³ To address this imbalance, the author suggests that the Copyright Act 1987 in Malaysia should be revised to ensure better provisions of copyright for all parties, particularly performers.⁴⁴ To do this, the introduction

³⁸ Ahmad Fadhli and others (n 32).

³⁹ Stéphanie Carre, Stéphanie LE Cam and Franck Macrez, ‘Buyout Contracts Imposed by Platforms in the Cultural and Creative Sector STUDY Requested by the JURI Committee’ <[https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU\(2023\)754184](https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)754184)>.

⁴⁰ Copyright Act 1987, preamble.

⁴¹ Ahmad Fadhli and others (n 32).

⁴² Siti Fariza Mohamad Isa, Megat Al-Imran Yasin, Hao Yinhua and Mohd Syaufiq Abdul Latif, ‘A Qualitative Study of Work Motivation Among the Media and Creative Workers in Malaysia’ (2023) 8 Malaysian Journal of Social Sciences and Humanities (MJSSH) e002611 <<https://msocialsciences.com/index.php/mjssh/article/view/2611>>.

⁴³ ‘Performers’ Rights – Background Brief’ (WIPO) <<https://www.wipo.int/pressroom/en/briefs/performers.html>>.

⁴⁴ Hannibal Travis, ‘WIPO and the American Constitution: Thoughts on a New Treaty Relating to Actors and Musicians’ (2013) 16 Vanderbilt Journal of Entertainment & Technology Law

of non-waivable rights to equitable remuneration for performers in Malaysia should be justified based on the need to ensure fair compensation for their contributions, regardless of the automatic transfer of rights. One way to justify the introduction of non-waivable rights is to emphasise the unique nature of performers' contributions to audiovisual works by granting non-waivable rights to equitable remuneration ensuring that they are fairly compensated for their contributions, regardless of the terms of their contracts. To introduce non-waivable rights to equitable remuneration for performers of audiovisual work in Malaysia, a new section 16C is required. For instance, new Section 16C could be introduced as follows:

Section 16C: Non-Waivable Right to Equitable Remuneration for Performers in Audiovisual Works

- (1) Notwithstanding any agreement to the contrary, performers in audiovisual works shall have a non-waivable right to receive equitable remuneration for the use of their performances. This right shall apply regardless of any transfer of exclusive rights to producers or other parties.
- (2) The non-waivable right to equitable remuneration under subsection (1) shall include the right to receive fair and proportionate remuneration for all types of exploitation of their performances in audiovisual works, including but not limited to public performances, broadcasts, and communication to the public.
- (3) The right to equitable remuneration under this section shall be managed collectively by a designated collective management organisation (CMO) representing performers in audiovisual works. The CMO shall be responsible for collecting and distributing remuneration to performers in accordance with this section.

Hence, it is suggested that this new section would establish a framework for non-waivable rights to equitable remuneration for performers in audiovisual works in Malaysia, ensuring that they are fairly compensated for their contributions, regardless of the terms of their contracts.

8. Collective Management of Remuneration Rights as an Alternative Solution

Alternatively, the author also proposes Section 16C (3) of the proposed amendment to the Copyright Act 1987 to emphasise the importance of fair and proportionate remuneration for performers in audiovisual works, which is to be managed collectively by a CMO. Collective management of equitable remuneration rights for instance that represent the interest of audiovisual performers is the alternative remedy to ensure performers are not burdened with the impractical task of individually monitoring the widespread use of their works by entities such as TV stations or any streaming platforms in case of mass use. In practical

<https://scholarship.law.vanderbilt.edu/jetlaw/vol16/iss1/3>.

terms, expecting every individual performer in a movie to monitor the use of their work by each TV station, cable operator, or other users is unrealistic.⁴⁵ Similarly, users cannot reasonably contact each performer individually whenever they want to utilise their movies. As Article 11(2) of the Beijing Treaty on Audiovisual Performances permits the contracting party to “set conditions in their legislation for the exercise of the right to equitable remuneration”, the researcher hence finds that the best solution to exercise this right is through a collective management organisation under section 27A of Copyright Act 1987. It is to be noted that the remuneration rights do not interfere with the licensing activities of “transferred” exclusive rights by the performer in the form of audiovisual fixations or authorise any exploitation attached to it. Rather, these rights entitle performers to receive equitable remuneration after the exploitation, which has been previously authorised by the producer takes place. The researcher also opined that exercisable non-waivable remuneration rights should be mandatorily given to collective management ensuring that performers cannot individually exercise or transfer them. It is worth noting that recently, Belgium became the first EU Country that provides nonwaivable rights for performers in its national law in exercising the flexibility imposed by Article 11(2) of the Beijing Treaty on Audiovisual Performances indicating a progressive approach towards protecting performers’ rights in the audiovisual industry.⁴⁶ While no country except Belgium has provided the provision, this approach could significantly benefit performers in the audiovisual industry and move forward towards modern in exercising their rights since the Beijing Treaty on Audiovisual Performances first performers in audiovisual rights introduction back in 2012.⁴⁷ This approach also could significantly benefit performers in the audiovisual industry by relieving them of the burden of individually monitoring the use of their works and ensuring they receive fair compensation for their contributions in exercising their unwaivable equitable remuneration rights.⁴⁸

9. Assessment of Malaysia’s Copyright Act 1987 for Ratifying the Beijing Treaty

Similar to the UK’s situation, Malaysia faces the challenge of amending its existing copyright framework to be in line with the provisions of the Beijing Treaty on Audiovisual Performances.⁴⁹ The treaty introduces minimum standards for the protection of audiovisual performances encompassing (i) Exclusive rights (ii) Remuneration rights (iii) Moral Rights (iv) Provision on the transfer of rights and the need for (v) Collective Management of Remuneration Rights. In many aspects, Malaysia’s stance mirrors the United Kingdom

⁴⁵ ‘Collective Management of Copyright’ (WIPO) <<https://www.wipo.int/copyright/en/collective-management.html>>.

⁴⁶ ‘AEPO-ARTIS Thanks Belgium for Modernising Its Copyright Act the Right Way!’ <<https://www.aepo-artis.org/aepo-artis-thanks-belgium-for-modernising-its-copyright-act-the-right-way/>>.

⁴⁷ Mathilde Pavis (n 3).

⁴⁸ Stéphanie Carre, Stéphanie LE Cam and Franck Macrez (n 39).

⁴⁹ ‘Government Consults on Implementation of Beijing Treaty on Audiovisual Performances’ <<https://www.gov.uk/government/news/government-consults-on-implementation-of-beijing-treaty-on-audiovisual-performances>>.

Copyright Designs and Patents Act 1978, particularly regarding the challenges and considerations in implementing the Beijing Treaty on Audiovisual Performances.

The next steps towards ratifying and incorporating the Beijing Treaty on Audiovisual Performances would likely involve legislative measures. One area is to conduct a comprehensive review of Malaysia's Copyright Act 1987 to identify areas that require amendment to align with the provisions of the Beijing Treaty on Audiovisual Performances. This review would involve drafting new provisions or amending existing ones to incorporate the treaty's requirements regarding performers' rights. To search into the question of whether the Copyright Act 1987 is prepared for the implications and requirements set by the Beijing Treaty on Audiovisual Performances, it is imperative to find what specific area warrants attention and potential appeal. Firstly, Malaysia should evaluate whether its current legal framework adequately protects the exclusive rights of audiovisual performers, as outlined in the treaty. This assessment should consider the rights to control the copying, distribution, rental, and online sharing of their performances in audiovisual fixations.

Secondly, Malaysia should review its remuneration rights for audiovisual performers to ensure they receive fair and equitable compensation for the use of their performances. This review should also consider the treaty's provisions on the transfer of rights, including whether Malaysia's current laws allow for the effective transfer of performers' rights to producers. Thirdly, Malaysia should assess whether its Copyright Act 1987 provides adequate moral rights protections for audiovisual performers. This includes the right to be identified as the performer and the right to object to any distortion, mutilation, or other modification of their performance that would be prejudicial to their honour or reputation. Lastly, Malaysia should consider the need for collective management of remuneration rights for audiovisual performers. This involves establishing mechanisms to ensure that performers receive appropriate remuneration for the use of their performances, particularly in cases where individual negotiation may not be feasible. Moreover, Malaysia needs to assess the capacity and capabilities of existing collective management organisations (CMOs) in the audiovisual sector which has been declared under section 27A of the Copyright Act 1987. This assessment should determine whether these CMOs are equipped to effectively manage and distribute remuneration rights to audiovisual performers in accordance with the Beijing Treaty on Audiovisual Performances.

10. Conclusion

In conclusion, the Beijing Treaty on Audiovisual Performances having been enforced since 2020, represents a significant milestone in the global effort to enhance the protection of performer's rights in audiovisual. However, the decision to adopt this treaty requires a meticulous evaluation of several factors to facilitate a smooth integration into the existing legal framework and adapt to industry dynamics. The evaluation although limited to an assessment of the Copyright Act 1987 should also include a preparedness of the audiovisual industry to accommodate these changes which are not covered by this discussion.

Addressing the assessment and readiness of the Copyright Act 1987 in paragraph 7 will aid in crafting effective legal amendments as well as designing policies that not only comply with the minimum standards set by the Beijing Treaty on Audiovisual Performances but also reflect the unique needs and challenges of the performers in audiovisual work in the Malaysian context. The author would suggest that this assessment process should involve stakeholders from the audiovisual industry, legal experts, and policymakers to ensure a well-rounded perspective can be achieved. Through this collaborative effort, the goal is to create legal amendments and policies that not only comply with international standards but also contribute to the development of a vibrant and resilient audiovisual industry in Malaysia, with a particular focus on the welfare of performers which should be the primary aim of Copyright Act 1987.

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