



May 5, 2015

To: Shira Perlmutter, USPTO Chief Policy Officer and Director for International Affairs

Cc: Ann Chaitovitz, Attorney-Adviser at USPTO

From: Manon Anne Ress, Knowledge Ecology International (KEI)

Re: Beijing Audiovisual Treaty Implementation

Dear Ms. Perlmutter,

Knowledge Ecology International is writing to express concerns about the implementation language and ratification of the Beijing Audiovisual Treaty.

The USPTO previously wrote that the implementation of the Beijing Audiovisual Treaty “may require some technical amendments of the Copyright Act, in particular where Title 17 refers to existing international copyright obligations.”¹ In addition, more recently, there has been discussions between the USPTO, consumer and public interest groups on how the USPTO might amend language to be able to use 17 U.S. Code § 1101 - Unauthorized fixation and trafficking in sound recordings and music videos.

While KEI has been supportive of the WIPO Beijing Treaty on Audiovisual Performances of June 24, 2012 as "bringing audiovisual performers into the fold of the international copyright framework in a comprehensive way, for the first time²", and thus improving the performers' economic and moral rights, we have serious concerns over one of the specific proposals for implementation of the treaty in the United States.

A wrongful implementation could limit the fundamental scope of fair use for audiovisual works as well as other essential copyright exceptions. Article 13 of the Beijing Treaty allows

¹ http://www.uspto.gov/sites/default/files/news/WIPO_AVP_TREATY_FACT_SHEET.pdf

² http://www.wipo.int/pressroom/en/articles/2012/article_0013.html

signatories to extend their national “limitations or exceptions” in copyright to “performer’s rights.” But if the United States were to implement the Treaty by simply adding "audiovisual performers" to the flawed 17 U.S. Code § 1101 (which has no limitations no exceptions and which is a perpetual right), the treaty will cause more harm than good to performers and their audience, the public.

We recommend that either the USPTO tackles fixing the well-known flaws in § 1101, by introducing a term limit and providing that normal copyright exceptions apply to the rights created in the article, *or* add a totally new article for AV performers. The new article would then include a term limit and ensure that any new right be subject to the same limitations and exceptions that apply to copyrighted works, including but not limited to those related to fair use, private copyright, quotations, educational use and archiving, to mention a few.

If performers (or whomever acquired their rights by contracts) can prevent the creation of parodies, mashups or new versions of their performances, this would complicate the process (already too complex) of clearing rights to audiovisual works and adds a layer of legal uncertainty.

It is thus imperative that the "fair use" right is explicitly extended to the new regime, to limit any negative impact of the new performers' rights on legitimate uses of their performances.

We urge the USPTO to consider that adding another layer of legal restrictions on audiovisual performances by creating a new copyright-like right without necessary safeguards such as term limits, fair use and other exceptions will result in less access and less creativity and thus not be consistent with the spirit and the letter of the WIPO Beijing Treaty.

Sincerely,

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Annex

17 U.S. Code § 1101 - Unauthorized fixation and trafficking in sound recordings and music videos

Current through Pub. L. 113-296, except 113-287, 113-291, 113-295. (See Public Laws for the current Congress.)

(a) Unauthorized Acts.— Anyone who, without the consent of the performer or performers involved—

(1) fixes the sounds or sounds and images of a live musical performance in a copy or phonorecord, or reproduces copies or phonorecords of such a performance from an unauthorized fixation,

(2) transmits or otherwise communicates to the public the sounds or sounds and images of a live musical performance,
or

(3) distributes or offers to distribute, sells or offers to sell, rents or offers to rent, or traffics in any copy or phonorecord fixed as described in paragraph (1), regardless of whether the fixations occurred in the United States,

shall be subject to the remedies provided in sections 502 through 505, to the same extent as an infringer of copyright.

(b) Definition.— In this section, the term “traffic” has the same meaning as in section 2320 (e) [1] of title 18.

(c) Applicability.— 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.

(d) State Law Not Preempted.— Nothing in this section may be construed to annul or limit any rights or remedies under the common law or statutes of any State.