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Proposal for a

COUNCIL DECISION

on the signing, on behalf of the European Union, of the WIPO Treaty on Audiovisual Performances

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

With this proposal for a Council Decision the Commission seeks authorisation from the Council to sign, on behalf of the European Union, the WIPO Treaty on Audiovisual Performances adopted in Beijing on 24 June 2012 (hereinafter the "Beijing Treaty").

The Beijing Treaty establishes a set of new international rules which aim at ensuring the adequate protection and remuneration of audiovisual performers, i.e. performers such as actors, musicians or dancers, whose performances are incorporated in an audiovisual work (e.g. a film or a TV programme).

The Treaty is a significant step forward in the international protection of neighbouring rights and the first multilateral instrument adopted in this area since 1996. It delivers a long awaited update of the protection of audiovisual performers at international level and modernizes this protection by recognising performers' rights in the digital environment. In doing so it fills a gap in the protection of performers' rights that had been left open since 1996 when the WIPO Performances and Phonograms Treaty (hereinafter WPPT) was adopted.

The WPPT, which the European Union acceded to in 2000, provided for an international protection of the rights of authors and certain holders of related rights that, for the first time, took into account the economic and technological developments of the digital environment. However, no agreement could be reached at that time to include in the scope of these instruments the protection of performers with regard to their performances fixed in audiovisual works (the WPPT only covers the rights of performers in relation to their performances in phonograms).

A Diplomatic Conference was held in Geneva from 7 to 20 December 2000 but WIPO Members could not agree on the text of a new Treaty. The failure of the 2000 Diplomatic Conference suspended the works for more than ten years. In June 2011 the WIPO Standing Committee on Copyright and Related Rights (22nd session) reached a provisional agreement on the main issue remained unsolved in 2000, the provision on transfer of performers' rights to producers of audiovisual works. Further to that the General Assembly of WIPO decided, at its 40th session in October 2011, to reconvene the Diplomatic Conference that had been suspended in 2000. The reconvened Diplomatic Conference took place in Beijing from 20 to 26 June 2012 and led to the adoption of the Treaty on 24 June 2012.

The Commission was authorised by the Council to conduct negotiations in view of adoption of an instrument for the protection of performers' rights in their audio-visual performances by a Decision of 7 November 2000. On 18 June 2012 the Council updated the negotiations directives attached to the Decision to take into account the changes in the EU copyright *acquis* after 2000 (the adoption of the 2001/29 Directive on Copyright in the Information Society) and to acknowledge the reconvention of the Diplomatic Conference in Beijing from 20 to 26 June 2012.

The Beijing Diplomatic Conference adopted the Treaty on 24 June 2012.

The European Union signed the final act of the Diplomatic Conference at the closing of the Diplomatic Conference. The European Parliament was informed of the outcome of the Diplomatic Conference at the meeting of the Committee on Legal Affairs on 9 July 2012.

2. LEGAL ELEMENTS OF THE PROPOSAL

The European Union has played a very active role in shaping the provisions of the Beijing Treaty, so as to ensure that audiovisual performers enjoy a level of protection consistent with the EU *acquis*, and that European audiovisual performers can benefit at international level from the same level of protection they enjoy under EU legislation. Indeed, the majority of issues covered by the Treaty are already harmonised at EU level.

Many of the provisions of the Beijing Treaty are modelled upon the 1996 WPPT and by and large the two treaties follow the same structure. The beneficiaries of the protection under the Beijing Treaty are performers who are nationals of the signatories of the Treaty, or who have their habitual residence in one of signatory countries.

The protection is granted on the basis of national treatment which means that every country treats performers (nationals of another country), with regard to the exclusive rights and the right to equitable remuneration granted in the Treaty, in the same way as it treats its own nationals. The scope of national treatment can be limited as regards certain rights on the basis of the specific provisions of the Treaty.

The Treaty provides that independently of economic rights, and even after the transfer of those rights, the performers shall have certain moral rights as regards live performances or performances fixed in audiovisual fixations.

As concerns economic rights, the Treaty grants performers exclusive rights with respect to their unfixed and fixed performances.

With regard to unfixed performances, performers enjoy the right to authorise the broadcasting and communication to the public of their unfixed performances as well as to authorise the fixation of their unfixed performances.

With regard to performances fixed in audiovisual fixations, performers enjoy the right to authorise their direct or indirect reproduction, their distribution, and the commercial rental to the public of the original and copies of the performances (even after authorising their distribution).

Performers enjoy the exclusive right of authorizing the making available to the public of their performances (e.g. the on-line downloading of a film incorporating their performance). Finally the Treaty grants performers the right to authorise the broadcasting and communication to the public of their performances. Contracting Parties are entitled to replace this right by a right to equitable remuneration or to derogate from this right entirely.

As regards the transfer of rights, Contracting Parties are given full flexibility to organise it. They may decide for instance that, once a performer has consented to the fixation of a performance, his exclusive rights are transferred to the producers, unless a contract between a performer and a producer states differently. In any event, the provision does not impose on Contracting Parties any obligation to provide for an automatic transfer.

In line with the WPPT, the Beijing Treaty specifies that national legislation may provide for the same kinds of limitations or exceptions with regard to the protection of performers as it provides for in connection with the protection of copyright in literary and artistic works, in compliance with the so called "three step test". Similarly to the WPPT, the new Treaty also requires Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of technological protection measures used by performers in connection with the exercise of their rights and adequate and effective legal remedies against the removal or alteration of electronic rights management information attached to a

performance fixed in an audio-visual fixation. Finally, the term of protection is at least 50 years after the fixation of the audiovisual performance.

The last part of the Treaty consists of the usual administrative and procedural provisions, also in this case largely inspired by the corresponding provisions of the WPPT.

The Treaty also includes a number of agreed statements, some of which (relationship of the Treaty with WPPT and TRIPS, definition of performer, technological protection measures in relation to limitations and exceptions) were the subject of specific negotiations during the 2012 Diplomatic Conference.

Article 23 of the Beijing Treaty provides that the European Union may become party to the Treaty "having made the declaration", during the Diplomatic Conference, that it is competent in respect of, and has its own legislation binding on all its Member States on matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to the Treaty. As the Commission had been duly authorised by the Council to negotiate, and as reflection of this authorisation, the European Union made this declaration at the Beijing Diplomatic Conference. As a next step the Treaty should be signed by the European Union pursuant to a decision of the Council based on Article 218(5) TFEU.

The Commission has judged the results of the negotiations to be satisfactory and requests the Council to authorise the signature, on behalf of the European Union, of the WIPO Beijing Treaty on Audiovisual Performances adopted in Beijing on 24 June 2012.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 in conjunction with 218(5) thereof,

Having regard to the proposal from the European Commission,

Whereas:

- (1) On 7 November 2000 the Council authorised the Commission to negotiate in the context of the World Intellectual Property Organisation to ensure participation of the European Community in the Diplomatic Conference held in Geneva from 7 to 20 December 2000 with the aim to draw up an instrument to protect performers' rights in their audiovisual performances.
- (2) The negotiations were successfully concluded at a reconvened Diplomatic Conference held in Beijing from 20 to 26 June 2012 and the WIPO Beijing Treaty on Audiovisual Performances was adopted on 24 June 2012.
- (3) The Treaty establishes a set of new international rules in the area of neighbouring rights which aim at ensuring the adequate protection and remuneration of audiovisual performers.
- (4) The Treaty shall be open for signature by any eligible party for one year after its adoption. Therefore, it should be signed on behalf of the European Union, subject to its conclusion at a later date.

HAS ADOPTED THIS DECISION:

Article 1

The signing of the WIPO Beijing Treaty on Audiovisual Performances on behalf of the Union is hereby approved, subject to the conclusion of the said Treaty at a later date.

The text of the Treaty to be signed is attached to this Decision.

Article 2

The Council Secretariat General shall establish the instrument of full powers to sign the Treaty, subject to its conclusion, for the person(s) indicated by the European Commission.

Article 3

This Decision shall enter into force on the day of its adoption.

Done at Brussels,

*For the Council
The President*