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THE INTERNATIONAL PROTECTION OF COPYRIGHT AND RELATED RIGHTS: FROM THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS, TO THE TRIPS AGREEMENT TO THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

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I. THE BERNE CONVENTION AND THE RELATED RIGHTS CONVENTIONS AND THE "GUIDED DEVELOPMENT" PERIOD

Main Features of the Berne Convention and Related Rights Conventions

1. In the field of *copyright* the *Berne Convention* "for the Protection of Literary and Artistic Works" is the basic international treaty. After its adoption in 1886, the Berne Convention was revised quite regularly, more or less every 20th year, until the "twin revisions" which took place in Stockholm in 1967 and in Paris in 1971. The revision conferences were convened, in general, in order to find responses to new technological developments (such as phonography, photography, radio, cinematography, television).

2. As a result of the regular revisions, the Berne Convention offers a comprehensive regulation at a very high level of harmonization, based on the principle of *national treatment* (with some minor exceptions) combined with provisions fixing the *minimum levelof protection* (Article 5(1)).

3. It determines the *works to be protected* ("every production in the literary, scientific and artistic domain, whatever may be the mode or form of expression" with a non-exclusive list (Article 2(1)), and with clarifications that protection extends to translations, adaptations and other alterations, as well as to those collections of works which, by reasons of the selection and arrangement of their contents, constitute intellectual creations (Article 2(3) and (5)). It allows national laws to make*fixation* as a condition of protection (Article 2(2)), but forbids the prescription of *formalities* (such as registration, deposit or notice) as a condition (Article 5(2)). The minimum *duration of protection* – as a general rule, during the life, and still 50 years after the death, of the author – is also fixed, with some exceptions (Article 7).

4. The Convention provides for those *rights* which – as a minimum – should be granted in all member countries of the Berne Union; both *moral rights* (Article 6*bis)* and *economic rights*: the right of reproduction (Article 9), the right of distribution (explicitly only in the case of works adapted for cinemetographic works and for cinematographic works themselves; Articles 14 and 14bis), the right of translation (Article 8), the right of adaptation (Article 12 and, in respect of cinematographic adaptation, Article 14), the right of public performance (of certain categories of works; Article 11), the right of public recitation (of literary works; Article 11*ter*), the right of broadcasting (Article 11*bis*) the right of communication to the public by wire (Articles 11, 11*bis*, 11*ter*, 14, 14*bis*), and a special right – for the recognition of which, in contrast with the other rights, there is no real obligation -- in respect of the resale of original works of art and original manuscripts, the *droit de suite* (Article 14*ter*).

5. All the above-mentioned rights are *exclusive rights* of authorization, except for the *droit de suite* which is a simple right to remuneration. It had been found necessary to also provide for some *exceptions* to, *limitations* of, these rights, which are provided for in the Convention in an exhaustive manner; that is, no exceptions and limitations are allowed in cases other than those determined by the Convention. These exceptions and limitations extend to allowing free reproduction or providing for non-voluntary licenses (a mere right to remuneration) for reproduction if the conditions of the so-called three-step test are met (which means that the exception or limitation (i) only extends to a special case; (ii) does not conflict with the normal exploitation of works; and (iii) does not unreasonably prejudice the legitimate interests of authors (and other owners of rights); Article 9(2)); and, in limited cases and under precisely

determined conditions, also to free quotations (Article 10(1)), free inclusion of works in publications, broadcasts or sound or visual recordings for teaching (Article 10(2)), free use of official texts (Article 2(6)), free use of certain speeches, lectures and addresses (Article 2 *bis*), free re-use of articles published in newspapers or periodicals on current economic, political or religious topics and of broadcast works of the same character (Article 10*bis*(1)), free use for reporting current events (Article 10*bis*), and free ephemeral recordings by broadcasting organizations (Article 11*bis*(3)). The Convention also allows compulsory licensing in certain strictly determined cases; these cover broadcasting and retransmission of broadcast programs (Article 11*bis*(2)); the recording of musical works (Article 13); and, only for developing countries, translation and reprint of works (Appendix). In addition to these free uses and non-voluntary licenses provided for in the text of the Convention, the records of the diplomatic conferences revising the Convention also refer to the possibility of certain "minor reservations" (in reality, minor exceptions) -- in certain marginal cases, on the basis of the application of the *de minimis* principle – to the right of public performance.

6. The Convention, in general, does not contain norms on *enforcement measures*, except for the seizure of infringing copies (Article 16). Furthermore, as regards the *settlement of disputes* in case of violation of treaty obligations, the Convention provides only one possibility: bringing the case before the International Court of Justice, but a newly acceding country may declare that it does not consider itself bound by this provision (Article 33).

7. The basic treaty on *related rights* is the *Rome Convention* ("International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations") adopted in 1961. This convention is also based on the double pillars of *national treatment* and *minimum obligations* but the minimum prescribed by it is lower than in the case of the Berne Convention.

8. *Performers* enjoy a "possibility of preventing" certain acts rather than full-fledged exclusive rights; these acts include, with certain limitations, broadcasting, communication to the public and fixation of their performances without their consent, and reproduction, without their consent, of a fixation of their performances (Article 7). *Producers of phonograms and broadcasting organizations* are granted exclusive rights; the former for direct or indirect reproduction of their phonograms (Article 10), and the latter for rebroadcasting and fixation of their broadcasts, as well as for reproduction, without their consent, of fixations of their broadcasts, and – with various possible limitations and with the possibility of a reservation in respect of this right – communication to the public of their television broadcasts in publicly accessible places against payment (Articles 13 and 16.1(b)).

9. Article 12 of the Convention provides for a *single remuneration* to be paid to the performers, or to the producer of phonograms, or to both, for broadcasting or communication to the public of a phonogram published for commercial purposes; Article 16.1(a), however, allows reservations to this provision which may go so far as the complete denial of its application.

10. The minimum *duration of protection* is only 20 years (Article 14) in contrast with the 50-year term under the Berne Convention.

11. The *exceptions and limitations* allowed under the Rome Convention (Article 15) are similar to those which are permitted under the Berne Convention. A specific, sweeping exception applies to the rights of performers: once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 on the rights of performers have no further application.

12. The adherence to the Rome Convention had not been sufficient enough, and several countries were unable to accede to it due to the specific features of their legal system; this led to the adoption of two *specific conventions* the objective of which is to fight the piracy of phonograms and broadcast signals. These two conventions only contain a few simple obligations and the countries party to them have broad freedom in implementing those obligations.

13. The *Phonograms Convention* ("Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of Their Phonograms") was adopted in 1971, in Geneva. The only obligation of a Contacting State is to "protect producers of phonograms who are nationals of another Contracting State against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public" (Article 2). This obligation may be fulfilled by means of granting copyright or other specific ("related") rights; protection by means of the law relating to unfair competition or protection by means of penal sanctions (Article 3).

14. The *Satellites Convention* ("Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite") concluded in 1974, in Brussels, leaves even greater freedom to a Contracting State; it contains no limitation how they implement the only obligation under the Convention, which is "to take adequate measures to prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended" (Article 2(1)). The importance of this convention has decreased since its adoption, because it does not cover direct broadcasting satellites (the program of which may be directly received by the public), but only "telecommunication" satellites (Article 3), and now the overwhelming majority of satellite transmissions may be received directly by the public.

The "guided development" period

15. In the 1970s and 1980s, a great number of important *new technological developments* took place (reprography, videotechnology, compact cassette systems facilitating "home taping," satellite broadcasting, cable television, the increase of the importance of computer programs, computer-generated works and electronic databases, etc.). For a while, the international copyright community followed the strategy of "*guided development*," through adopting mere recommendations, guiding principles and model provisions, rather than trying to establish new international norms (Professor Sam Ricketson used this expression to refer to the relevant WIPO activities in his book published in 1986 on the, then 100-year-old, Berne Convention).

16. The recommendations, guiding principles and model provisions worked out by the various WIPO bodies offered guidance to governments how to respond to the challenges of new technologies. They were based, in general, on the *interpretation of the existing international norms* (for example, concerning computer programs, databases, "home taping," satellite broadcasting, cable television); but they also included some new standards (for example, concerning distribution and rental of copies).

17. The guidance thus offered in the said "guided development" period had quite important impact on national legislation, and contributed to the development of copyright all over the world. However, at the end of the 1980s, it was recognized that mere guidance would not be sufficient any more; new binding international norms became indispensable.

18. The *preparation of new norms* started in three forums. In the competent bodies of the European Community, at GATT, in the framework of the Uruguay Round negotiations, and at WIPO, first, in one committee of experts and, later, in two parallel committees of experts. The preparatory work in the WIPO committees was slowed down, since the governments concerned wanted to avoid any undesirable interference with the much more complex negotiations on the trade-related aspects of intellectual property rights (TRIPS) within the Uruguay Round.

II. THE TRIPS AGREEMENT

Context and legal nature

19. The Uruguay Round negotiations in the framework of the General Agreement of Tariffs and Trade (GATT) were started in 1988 and concluded in December 1993. The results included the Agreement Establishing the World Trade Organization (WTO) and a number of specific agreements, among them the Agreement on Trade-Related Aspects of Intellectual Property Rights (the *TRIPS Agreement*). These agreements were signed on April 15, 1994, in Marrakech. The WTO Agreement entered into force on January 1, 1995, and the TRIPS Agreement on January 1, 1996. However, for developing countries a *transition period* was available until January 1, 2000; and least-developed countries enjoy an even longer transitional period: until January 1, 2006 (Article 65).

20. The Marrakech agreements form one package; it is not possible to join the WTO without also becoming bound by the TRIPS Agreement.

21. The Agreement, in addition to substantive norms on the protection of copyright and related rights, also contains such norms on the protection of trademarks, geographical indications, industrial designs, patents, layout designs (topographies) of integrated circuits and unclosed information, as well as on control of anti-competitive practices in contractual licenses.

The principle of national treatment and the most-favored-nation principle are among the basic principles of the TRIPS Agreement, and are applicable to all intellectual property rights covered by the Agreement, including, of course, copyright and related rights.

22. The *principle of national treatment* (Article 3), in respect of copyright, is practically the same as under the Berne Convention, but in respect of related rights, it is very much limited, and, in fact, is closer to the principle of material reciprocity, since it only applies to the rights specifically provided in the Agreement.

23. The *most-favored-nation principle* (Article 4) implies that any advantage, favor, privilege or immunity with regard to the protection of intellectual property must be immediately and unconditionally accorded to all other Members. However, in respect of copyright and related rights, this principle does not apply in the cases where the Berne Convention and the Rome Convention allow material reciprocity; furthermore, as far as related rights are concerned, this principle, similarly to the principle of national treatment, only extends to the rights specifically provided in the Agreement. A more general exception relates to agreements having entered into force before the entry into force of the Agreement (for example, bilateral and regional agreements).

24. It is to be noted that developing and least-developed country Members of the WTO do not enjoy the transitional period mentioned above concerning these two principles. That is, they must grant national treatment and most-favored nation treatment from the beginning of their membership in the WTO (see Article 65.2)

Substantive Provisions on Copyright and Related Rights

25. The TRIPS Agreement, as regards substantive norms on copyright and related rights, have introduced only few new elements. It is rather in the field of certain branches of industrial property where the Agreement contains more norms of this nature.

26. As far as *copyright* is concerned, the basic obligation is to *comply with the substantive provisions of the Berne Convention*, that is with Article 1 to 21, except for the provisions on moral rights (Article *6bis*) (Article 9.1).

27. There are some *provisions* which are **of an** *interpretative nature* in relation to the Berne Convention (that is, they state certain things which also follow from an appropriate interpretation of the Berne Convention). These relate to the basic copyright principle that protection extends to expression, and not to ideas, procedures, methods of operation or mathematical concepts as such (Article 9.2), copyright protection of computer programs and databases (Article 10) and the calculation of the duration of protection where it is not based on the life of a natural person (Article 12). In a way, Article 13 – which extends the application of the "three-step test" provided for in Article 9(2) of the Berne Convention with respect to the right of reproduction (see above) to all economic rights – is also of an interpretative nature, since it is recognized that, if the provisions of the Berne Convention on specific exceptions and limitations are interpreted appropriately, they are supposed to correspond to the three-step test; and that Article 13 does not authorize any exceptions and limitations that are not allowed under the Berne Convention. The truly *plus* element, in contrast with the Berne Convention, is included in Article 11: the recognition of a rental right for computer programs and, under certain conditions, for cinematographic works.

28. About the provisions on *related rights* (Article 14), it may be said that they provide practically the same level of protection as the Rome Convention, with, however, certain *plus* and *minus* elements.

29. The *plus elements* are the following ones: granting rental rights in respect of phonograms (Article 14.4); a longer minimum term of protection (50 years) for the rights of performers and producers of phonograms than under the Rome Convention (Article 14.5); the extension of the application of Article 18 of the Berne Convention (on so-called retroactive protection) to the rights of performers and producers of phonograms (Article 14.6).

30. There are also three *minus elements*: the possibility of performers to prevent fixation of their live performances, without their consent, does not extend to audiovisual fixations (Article 14.1); the Agreement does not contain those kinds of provisions as the ones included in Article 12 of the Rome Convention (on single remuneration for performers and/or producers of phonograms in case of broadcasting or communication to the public of phonograms published for commercial purposes); and the rights of broadcasting organizations are only optional (Article 14.3).

Enforcement of Rights:

31. The TRIPS Agreement, in its Part III, contains *detailed provisions on the enforcement of intellectual property rights.*

32. Part III prescribes some *general obligations* (Section 1), of which the most basic one is contained in Article 41.1: “Members shall ensure the enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

33. The detailed norms provide for *specific obligations* concerning civil and administrative procedures and remedies (Section 2); provisional measures (Section 3); requirements related to border measures (Section 4); and criminal procedures and sanctions (Section 5).

DisputePrevention and Settlement

34. Besides the detailed regulation of the obligations concerning enforcement of rights, the other important new feature of the TRIPS Agreement is that it provides for an efficient system to prevent and settle disputes about violations of obligations.

35. The provisions on *dispute prevention* (Article 63) serve the transparency of the measures taken for the implementation of the Agreement. WTO Members are obliged to publish all laws and regulations, as well as final judicial decisions and administrative rulings in the fields related to their TRIPS obligations, and notify such laws and regulations. They

also must, upon request, provide information to each other on the implementation and application of the Agreement.

36. Article 64 extends the application of the GATT/WTO *dispute settlement mechanism* to disputes concerning the TRIPS Agreement. The Dispute Settlement Body established by the WTO Agreement has the authority to establish panels (if other means, such as consultations, good offices, conciliation and mediation procedures, are not sufficient to settle the dispute), adopt panel and Appellate Body reports, monitor the compliance with rulings and recommendations, and, in case of non-compliance, authorize the suspension of concessions or other obligations – depending on which measure is necessary to obtain compliance – related to the branch of intellectual property concerned, any other branch covered by the TRIPS Agreement, or any other WTO agreement (read: to apply*serious trade sanctions*).

III. THE WIPO "INTERNET TREATIES"

Context and Legal Nature

37. After the adoption of the TRIPS Agreement, a *new situation* emerged. The TRIPS Agreement did not respond to all challenges of new technologies, and, whereas it, if properly interpreted, has broad application to many of the issues raised by the spectacular growth of the use of *digital technology*, particularly through *the Internet*, it does not specifically address some of those issues. The preparatory work of the new copyright and related rights norms in the WIPO committees was, therefore, accelerated, and that led to the relatively quick convocation of the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, which took place in Geneva from December 2 to 20, 1996.

38. The Diplomatic Conference adopted two treaties: the *WIPO Copyright Treaty (WCT)* and the *WIPO Performances and Phonograms Treaty (WPPT).*

39. The international press, which followed the Diplomatic Conference with great attention, frequently referred to those treaties simply as *"Internet treaties"*. In a way, such a reference was quite justified. Although the treaties, as discussed below, contain also certain other provisions, their importance is mainly due to those provisions which offer responses to the challenges posed by digital technology.

40. The first sentence of Article 1(1) of the WCT provides that "[t]his Treaty is *a special agreement* within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention."

41. Article 20 of the Berne Convention contains the following provision: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." Therefore, the above-quoted provision of Article 1(1) of the WCT has a specific importance

for the interpretation of the Treaty. It makes it obvious that no interpretation of the WCT is acceptable which might result in any decrease of the level of protection granted by the Berne Convention.

42. Article 1(4) of the WCT establishes a further guarantee for the fullest possible respect of the Berne Convention, since it includes, by reference, *all substantive provisions of the Berne Convention* in providing that "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention." Article 1(3) clarifies that, in this context, the Berne Convention means the 1971 Paris Act of the Convention. These provisions should be considered in the light of the provisions of Article 17 of the Treaty, referred to below, under which not only countries party to the 1971 Paris Act, and, in general, not only countries party to any act of the Berne Convention, but also any member countries of WIPO, irrespective of whether or not they are party to the Convention, and also certain intergovernmental organizations, may adhere to the Treaty.

43. The *WCT* contains now *the most up-to-date international copyright norms* since, in addition to the obligation to apply the substantive norms of the Berne Convention, it (i) also includes–not by reference but by reproducing the relevant norms with some drafting changes– the *substantive copyright norms of the TRIPS Agreement* which may be considered clarification or extension of the protection granted by the Berne Convention (namely, the same clarification as in the TRIPS Agreement concerning the protection of computer programs and databases, and the recognition of a right of rental for the same categories of works and under the same conditions as in the TRIPS Agreement); (ii) provides for *certain new elements of copyright protection not necessarily related to the so-called "digital agenda"* (in particular, the explicit recognition of a right of distribution of copies in respect of all categories of works–which under the Berne Convention is only provided explicitly for cinematographic works–leaving the issue of exhaustion of this right to national legislation, and assimilating the term of protection of photographic works to the term of other works); and (iii) offers appropriate *response to the challenges of digital technology and particularly the Internet* by clarifying the application of the existing norms of the Berne Convention, and by adapting the international system of copyright protection, where necessary, to the conditions and requirements of the digital environment.

44. When the preparatory work started in 1990-91, only one single treaty was foreseen which was tentatively called a protocol to the Berne Convention and which became later the WCT. According to the terms of reference, that treaty was to also cover the protection of sound recordings and thus serve as a "bridge" between the various legal systems. That was not acceptable to those countries which feel strongly about the need to separate copyright and related rights. Thus, a separate project was born under the (unofficial) name of "a New Instrument" to cover the rights of producers of phonograms and, along with those rights, also the rights of performers.

45. The relationship between this "New Instrument" – that is, the *WPPT* – and the Rome Convention has been regulated in a way similar to the relationship between the TRIPS Agreement and the Rome Convention. This means that (i) in general, the application of the substantive provisions of the Rome Convention is not an obligation of the Contacting Parties; (ii) only *a small number of provisions of the Rome Convention* is included by reference (Article 3(2) and (3) on the criteria of eligibility for protection); and (iii) Article 1(2) of the

Treaty contains, *mutatis mutandis,* practically the same provisions as Article 2.2 of the TRIPS Agreement: it provides that nothing in the Treaty derogates from obligations that Contracting Parties have to each other under the Rome Convention. The level of protection provided by the WPPT, *in general*, corresponds to *the level of protection under the Rome Convention and the TRIPS Agreement;* however (i) it *does not extend to the rights of broadcasting organizations*; (ii) as far as the rights of performers are concerned, it *only extends to the aural aspects of performances and their fixations (on sound recordings*); and (iii) it also contains plus elements in respect of those *provisions* which have been *worked out on the basis of the so-called "digital agenda"* of the preparatory work and the Diplomatic Conference.

46. The WCT and the WPPT do not contain detailed provisions on *enforcement of rights*. It is interesting to note, however, that Article 14 of the WCT and Article 23 of the WPPT contain the following – identical text – which, in turn, is a *mutatis mutandis* version of Article 41.1 of the TRIPS Agreement (quoted above): "Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements."

47. The two treaties provide *no mechanism for dispute settlement.*

The "digital agenda"

48. When the Diplomatic Conference was convened, the *debates* about the impact of digital technology were already in their third stage. In the*first stage* , there was, on the one hand, a kind of euphoria, and, on the other hand, a great fear of this new phenomenon. It was in that period that some Internet "gurus" predicted the death of copyright as an unworkable legal institution in the global digital network. In the *second stage***,** a strong anti-thesis was the response to these extreme views; many copyright experts expressed the view that no changes were needed in the international, regional and national norms; they might function without any problem, also in the digital environment. By the time of the Diplomatic Conference, the international copyright community reached the *third stage*: that of a synthesis; there was an agreement that certain modifications were necessary in the norms on copyright and related rights but those modifications should consist of adaptation, rather than a fundamental alteration of the system of protection.

49. In harmony with this, what the new treaties did was that, first, they *clarified* how *the existing norms* should be applied in the digital environment, and in particular to the Internet; second, in certain cases, they *adapted the existing norms* to this new technology; and, third, they introduced *some new norms* where it was indispensable in order to maintain an appropriate level of protection for copyright and related rights in due harmony with the relevant public policy considerations.

50. The so-called digital agenda included the following *main issues*: (a) the application of the right of reproduction in the digital environment; (b) the right or rights applicable for interactive transmissions; (c) exceptions and limitations in the digital environment; (d) the protection of technological measures; and (e) the protection of rights management information. Issues (a) and (c) have been settled through clarification of the existing

international norms, and issue (b) through adaptation thereof to the requirements of the network environment; while, for the settlement of issues (d) and (e), certain indispensable new norms have been adopted.

51. As far as the *right of reproduction* is concerned, there was an attempt at the Diplomatic Conference to work out and adopt detailed norms concerning those numerous acts of reproduction (a series of temporary storage) which take place during transmissions through the Internet but which do not have any real relevance for the exploitation of the works and objects of related rights involved, neither have any importance from the viewpoint of the legitimate interests of owners of rights. Finally, no specific provisions were included in the text of the treaties; only an agreed statement was adopted, which clarified that copyright and related rights provisions on the right of reproduction are fully applicable in the digital environment, and that storage of works and objects of related rights is also an act of reproduction. The absence of specific provisions means that the general provisions on the right of reproduction are applicable (in the case of the WCT, Article 9 of the Berne Convention the compliance with which is an obligation of the Contracting Parties under Article 1(4) of the Treaty, and, in the case of the WPPT, Articles 7, 11 and 16, which practically, *mutatis mutandis*, took over the provisions of Article 9 of the Berne Convention). The result is that the concept of reproduction, and, thus, the exclusive right of reproduction, extend to any storage, including any temporary, transient one, since, under Article 9(1) of the Berne Convention and Articles 7 and 11 of the WPPT, the right of reproduction covers all acts of reproduction "in any manner or form." At the same time, however, Article 9(2) of the Berne Convention and Article 16 of the WPPT allow exceptions subject to the three-step test discussed above. On the basis of the latter provisions, the issue of the above-mentioned temporary acts of reproduction may be appropriately settled.

52. As regards *interactive transmissions* through the Internet, or any other similar future network, there was agreement that such acts should be covered by an *exclusive right* of owners of copyright and related rights. This was so because it had been recognized that, without that, owners of rights would not be able to control the use of their works or objects of related rights. There was, however, no agreement on which kind of exclusive right should be recognized. Transmissions through the Internet may be deemed to be similar both to acts of *communication to the public* by wire or by wireless means (broadcasting) since it takes place through transmissions of program-carrying signals and to acts of *distribution* since, as a result of the transmissions, copies of works and objects of related rights are obtained in the receiving computers. For a while, the absence of agreement about the legal characterization of interactive digital transmissions seemed to be a major obstacle. This, however, was solved through the famous *"umbrella solution."* The essence of that solution was a neutral description (neutral from the viewpoint of the above-mentioned two existing rights) which was included in the text of the two treaties in the following way: "making available to the public of (works) (performances fixed in phonograms) (phonograms), by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them". In the case of the WCT, the right of communication to the public has been extended to this act (in Article 8), but it has been clarified by the Diplomatic Conference that the obligation to grant an exclusive right for such an act may be fulfilled also on the basis of another right or the combination of different rights (another right may be, of course, the right of distribution, but also a separate right). The WPPT (in its Articles 10 and 14) applies the "umbrella solution" directly; that is, it provides for an exclusive right of

performers and phonogram producers for the act as described above (nevertheless, the flexibility to apply another exclusive right also exists under the WPPT).

53. On the issue of *exceptions and limitations*, agreed statements have been adopted according to which the exceptions and limitations which are considered acceptable in the traditional, analog environment may be extended to the digital environment, and also new exceptions and limitations may be devised for the context of the digital network environment. It is important, however, to note that any exception or limitation must correspond to the three-step test included in Article 10 of the WCT (but also in Article 9(2) of the Berne Convention with which, under Article 1(4) of the Treaty, Contracting Parties must comply) and Article 16 of the WPPT. That is, the existing exceptions and limitations may only be extended to the digital environment and new ones may only be devised if, under the new conditions of the digital environment, they (i) may be considered to be special cases; (ii) do not conflict with a normal exploitation of the works and objects of related rights concerned; and (iii) do not unreasonably prejudice the legitimate interests of owners of rights.

54. The truly new provisions of the two treaties are those which relate *to technological measures and rights management information.* It was recognized during the preparatory work and at the Diplomatic Conference that, in the digital network environment, it is not sufficient to grant appropriate rights; copyright and related rights cannot be efficiently protected and exercised without the support of technological measures (such as encryption of the protected material) and electronic rights management information (identifying the protected material, the owners of rights, the licensing conditions, etc.). The two treaties do not include any provision on the question of what kind of such measures and information should or may be applied. What they only do is that they oblige the Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of technological measures (and a Contacting Party may hardly provide such protection and remedies without also providing them against the manufacture, importation and devices, as well as against services, for circumvention) and against those who, knowing the relevant circumstances and consequences, remove or alter electronic rights management information without authority or use, without authority, works or objects of related rights or copies thereof knowing that such information has been removed or altered without authority (Articles 11 and 12 of the WCT and Articles 17 and 18 of the WPPT).

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