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OVERVIEW OF THE INTERNATIONAL PROTECTION OF COPYRIGHT AND NEIGHBORING RIGHTS: FROM THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS TO THE AGREEMENT ON TRADE-RELATED ASPECTS OF INTELLECTUAL PROPERT RIGHTS (THE TRIPS AGREEMENT)

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1. Copyright protection in Sudan

Sudanese works

As we know, many things in our daily life have one connection or another with intellectual property. Things we use can be patented or they may be branded products where the trademark protection or the protection of designs come in. We are also surrounded by works of art or music or, in particular, literature, and our computers run on computer programs and we access data bases in order to obtain information. Here copyright and related rights come into focus.

Much of those matters are of Sudanese origin and protected under the copyright law of the country.

Copyright in Sudan is governed by The Copyright and Neighbouring Rights Protection Act, 0f 1996. This means in essence that rights under that Act applies in Sudan to Sudanese nationals and also to works first published in Sudan, all according to the provisions of Article 4 of the Act.

However, certainly also a number of works which are used in Sudan are works of foreign authors. Here comes the question of the copyright protection of foreigners. In this respect it is important to note that Sudan is, since December 28, 2000, party to the Berne Convention. From this fact follows that also foreign works are protected in Sudan. Thus, Article 4.2 of the Act contains provisions which extends the protection to works of foreign authors which are published or made available to the public in a foreign country on the basis of either a reciprocal treatment or international instruments to which Sudan may become a party.

As regards Sudan´s international relations it should also be noted that Sudan is member of WIPO and, as just mentioned, also a party to the Berne Convention. Sudan does not seem to have acceded to any of the conventions in the field of neighbouring rights. As regards the World Trade Organization, Sudan submitted its application for membership in October 1994 and the latest meeting of the Working Party set up to consider the application met in March 2004. It is to be expected that the country would comparatively soon join WTO. This will mean some new intellectual property obligations but of course also considerable trade benefits for the country.

The following parts of the presentation tries to give a brief overview of the international system for the protection of copyright and related rights and how it affects and would affect Sudan..

2. Main features of the international system

Copyright protection is based on national law

In Sudan as in all other countries the protection of copyright and related rights is provided by a national legislation that has effects on the territory of the country.

Mechanisms for copyright protection of foreigners in Sudan

Protection of works which are not by Sudanese authors and not published for the first time in the Kingdom are not per se covered by the national law. They are, instead protected by the fact that Sudan is party to the Berne Convention. The main mechanism of that Convention is

the following. Essentially the same applies to other treaties in the copyright/related rights field.

a) National treatment

The first obligation is that Sudan is obliged to grant protection pursuant to the national law of Sudan to works from all other member states of the Berne Convention. This is generally called the ***"national treatment."***

b) Minimum rights

The protection to those foreign authors must not be below a certain level. This means that certain rights which are specified in the Convention must be provided for in respect of those foreign works, that the term of protection must not be shorter that mentioned in the Convention, and that the limitations on the rights must conform with what the Convention prescribes. This is called the principle of ***"minimum rights."*** Those minimum rights apply only to the foreign authors and not necessarily to the authors who are protected under the national law itself.

c) No formalities

A third important element consists of a prohibition against ***any formalities*** as a condition for protection of those foreign authors. Registration, a copyright notice or any other formalities are prohibited in this respect. On the other hand, for instance registers may well be kept for other purposes, as is the case with Sudan, but the protection must not depend on whether such a recording has been made or not.

d) Some details about the international copyright system

The following part of this presentation contains some more detailed information about the international system in this field.

This part will deal with three main subjects

1. The system under the Berne Convention and its impact on Sudan

2. The system for the international protection of related rights

3. The World Trade Organization (WTO) and the so-called TRIPS Agreement and its impact when the Sudan enters WTO.

3. **The Berne Convention**

3.1. The history of the Convention; why is it there

As just indicated, copyright in any given country is governed by a national law on the subject matter which lays down the basic rules about the protected works, the rights in such works, period of protection, sanctions for infringements of those rights, etc.

National laws apply, however, only on the territory of the country concerned, that is, to acts that are accomplished or committed on that territory, and they have no effect in other countries.

a) International dissemination of works

Works of the mind - which is the subject matter of protection under copyright law - are intended to be disseminated regardless of national borders. In order to encourage such international dissemination and at the same time protect such works even if they are used outside their country of origin, countries started already during the last century to conclude international agreements. France was in this respect a leading country.

b) Bilateral agreements

The international agreements were at the outset bilateral, that is, they were concluded between two countries, but became later multilateral, i.e. with validity between several countries. Whichever the case was, the countries bound by such international agreements undertook to give protection to works from the other country or countries bound by that same agreement in the same way as protection was given to works from that country itself.

c) International agreements; the Berne Convention

As the bilateral agreements were nor comprehensive nor particularly uniform, the need was soon felt to establish a multilateral treaty on the subject matter. This led to the adoption of ***the Berne Convention for the Protection of Literary and Artistic Works,*** on September 9, 1886. That Convention is administered by the World Intellectual Property Organization (WIPO), in Geneva.

d) Revisions of the Convention

The original text of that Convention has since been revised several times in order to deal with the social and technological developments that affect the contents and the application of copyright law. Thus, the Convention was revised in Berlin in 1908, in Rome in 1928, in Brussels in 1948, in Stockholm in 1967 and in Paris 1971. It should be mentioned that the Stockholm Conference was intended not only to revise the substance of the Convention but was also a first effort to deal, in the context of international copyright law, with the special problems which the developing countries were faced with. The efforts in Stockholm were, however, not successful, and new provisions in this respect were introduced in the Paris text of the Convention, which are briefly dealt with below.

After the Paris Conference, the Berne Convention has not been revised. It has been considered politically impossible, because any revision must build on consensus and such is very difficult to obtain in to-day´s world.

New international norms in the field of copyright came into being not through a revision of the Berne Convention but through the adoption of the 1996 WIPO Copyright Treaty (WCT).

The Berne Convention is by far the most important convention in the field of copyright.

3.2. The Basic Principles of the Convention

The basic aim of the Convention is to provide an effective and uniform protection of the rights of authors. For that purpose, the Convention relies on some basic principles. These are essentially the same general principles that were mentioned above. In the context of the Berne Convention, they are essentially the following. As Sudan is party to the Berne Convention, this also shows which commitments that Sudan has towards the other around 150 members of the Convention.

a) The principle of national treatment.

This means that in each country bound by the Convention works originating in another country also bound the same Convention shall be given the same protection as the former country grants to its own author

b) The principle of automatic protection.

This means that such national treatment shall not be depending on any formality, such as registration or deposit or special marking of copies of the works.

c) The principle of independent protection

This means that the enjoyment and exercise of the rights in a protected work in a certain country is independent of the existence or non-existence of protection in the country of origin or in any other country.

d) The principle of minimum rights

This means that certain rights, which are described fairly in detail in the Convention, always shall be granted to authors who enjoy protection under the Convention. It should be noted in this context that the mechanism of the Convention is to provide for protection for works originating in other countries and not to guarantee protection to works originating in that same country.

3.3 Subject Matter of Protection; what must be protected under the Berne Convention

a) Literary and artistic works

The subject matter of protection under the Berne Convention is ***literary and artistic works"*** by which is meant any original production in the literary, scientific or artistic domain, regardless of the mode or form of its expression. Provisions in this respect are included in Art. 2. of the Convention.

As examples can be mentioned novels, short stories, musical tunes, artistic works, audiovisual works and, according to an increasing trend in the world to-day, also, for instance, computer programs and data bases; some countries also protect sound recordings under copyright, although most of those countries give protection for them not as works but as subject matter other than works.

Also so-called derivative works are protected, that is, works which are created on the basis of other pre-existing works, for instance, translations, adaptations and arrangements of music.

Those are types of works where it is mandatory to grant protection. In the case of other special categories of works the protection is optional, for instance as regards official texts of a legislative, legal or administrative nature, works of applied art, lectures, addresses and oral works and works of folklore.

b) No need for fixation in order to be protected

Generally, protection under the Convention does ***not*** presuppose that the work be ***fixed in a material form,*** e.g. that a piece of music is actually written down on paper or recorded. The Convention allows, however, the countries to make protection depending on the work being fixed in such a material form.

3.4 Beneficiaries of the protection; to whom must copyright protection be given

a) The authors

The persons who enjoy protection under the Berne Convention are ***the authors and their successors in title.***

b) Provided that they have certain links to the Convention

Authors are protected under the Convention under certain conditions ***(points of attachment),*** namely that they are nationals or residents of a country which is party to the Convention or, if this condition is not met, if they first publish their works in such a country (or do so simultaneously in such a country and in a non-party country). As mentioned above, the aim of the Convention is to protect foreign authors; consequently, the protection does not operate in what is called the country of origin of the work, which is primarily the country where the work is first published.

3.5. Rights to be granted; minimum standards of protection

The Berne Convention prescribes certain minimum standards of protection, that is, certain standards that have to be granted to those authors who enjoy protection under the Convention in a certain country (that is, primarily, foreign authors). Those standards apply to the rights that have to be granted and to the period of protection.

The rights that shall be granted are the so-called ***economic rights*** and the co-called ***moral rights***.

3.5.1. The economic rights

a) The rights

Those rights include the rights to

- ***translate/adapt/arrange or otherwise alter*** the work,

- ***reproduce*** it in any manner or form, and to

- ***make it available to the public*** (e.g. perform publicly dramatic, dramatico-musical and musical works, to broadcast and communicate the work to the public by wire etc., to recite the work publicly, and to make cinematographic adaptations and reproductions of the work.

b) The exclusive nature of the rights

Those rights have to be ***exclusive,*** that is, no one else than the right-owner, or a person having his authorization, is entitled to carry out an act covered by the right in question.

c) The mandatory nature of the rights

Also, those rights that have been mentioned now are ***mandatory*** in the sense that they have to be provided for**.** Another right, namely the so-called *"droit de suite"* (right to a share in the proceeds from the selling of original works of art and original manuscripts) is, however, optional and applies only if the country to which the author belongs so permits.

3.5.2. The moral rights

Those rights are independent from the economic rights and include

- the right of the author to claim authorship to his work (called ***the paternity right***) and

- the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work, if such an act would be prejudicial to his honour or reputation (called ***the right to integrity).***

3.6 Limitations/exceptions to the economic rights

The Convention contains provisions giving possibilities for countries to provide for ***certain limitations on the exclusive rights.*** In certain of those cases, the limitations mean that certain uses are permitted without the authorization of the author and without payment of any remuneration *("free use").*

One of those possible limitations concern reproduction in certain special cases if that reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. This is called ***the three-step-test.*** This is an important provision because it is a standard against which a court has to judge whether a certain limitation and its use is actually admissible. It appears also in the TRIPS Agreement.

Other such limitations concern the use of works for the purpose of quotations or by way of illustration for teaching purposes, reproduction of newspaper or similar articles or of works for the purpose of reporting current events. In other cases use is permitted without authorization by the author but against payment of a remuneration (generally called "*statutory licenses").* This is the case in respect of the right of broadcasting or communication to the public by wire and the right to make sound recordings of musical works in case authorization for such use has earlier been granted.

3.7 Duration of the protection

As far as the ***duration of the protection*** is concerned, that is, the period for which the rights shall last, the general rule is that the term shall be the life of the author and 50 years after his death. For cinematographic works the term may be calculated to be 50 years after the work was made available to the public. For photographic works and works of applied art, the minimum term is 25 years from the making of the work.

The rationale for the limitation in time is two-fold. First, it is considered that works should after a certain time form part of the cultural heritage and thus be free for use. On the other hand the time has to be sufficient to provide an economic incentive for authors to create.

3.8 Administration of the Convention, etc.

The Berne Convention is administered by the ***World Intellectual Property Organization (WIPO).*** Its secretariat, the International Bureau, is also the secretariat of the Union ("the Berne Union") of which all Contracting States to the Convention are members.

A State can become party to the Berne Convention by depositing an instrument of accession with the Director General of WIPO; the accession becomes effective three months after the deposit of the instrument. As just mentioned, presently around 150 countries are party to the Berne Convention; those include both developing countries and industrialized countries in all the continents.

4. International Conventions in the Field of Related Rights.

4.1. General

As mentioned above, there are three "classical" international conventions in the field of the so-called neighbouring rights:

- The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ***(the Rome Convention)*** of 1961;

- The International Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (the ***Phonograms Convention),*** of 1971;

- The Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (the ***Satellites Convention)*** of 1974.

To these Conventions should be added the 1996 ***WIPO Performances and Phonograms Treaty (WPPT),*** which provides for protection of performing artists in audio contexts (not audiovisual performers), and also phonogram producers.

As its name indicates, the Rome Convention provides for protection of all three categories of right-owners in the field of related rights/neighbouring rights, while the other two conventions provide for protection only of one category, namely phonogram producers and a special type of broadcasters, viz. operators of certain types of satellite transmissions.

As Sudan is presently not party to those Conventions they are left aside in the main body of this document. A description is contained in ***Annex.***

Instead some attention is given to the World Trade Organization (WTO) because Sudan is presently negotiating its entry into that Organization which means that new intellectual property obligations will arise for Sudan.

5. The World Trade Organization; The TRIPS Agreement

The TRIPS regime that was briefly mentioned above contains provisions also on the protection of copyright and related rights. In order to fully understand the TRIPS system and its place in the context of international intellectual property law it is necessary to give a short summary of the main features of the developments leading to the setting up of the World Trade Organization (WTO) and the adoption of the TRIPS Agreement. This is of special importance for Sudan when it enters the WTO.

5.1. General about the TRIPS Agreement

On December 15, 1993, the negotiations under the Uruguay Round in the framework of the General Agreement on Tariffs and Trade (GATT) were concluded. One of the many areas of negotiations was intellectual property that had not before been under the GATT regime. The result of the negotiations in the field of intellectual property is contained in the above-mentioned Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (generally called "TRIPS").

The Agreement was formally signed by 111 of the members of GATT at Marrakesh in Morocco on April 15, 1994, and entered into force on January 1, 1996 (The new organization set up under the Uruguay Round, the World Trade Organization, WTO, started its work on January 1, 1995).

WTO has presently 148 members.

To put matters into a proper context, it should be emphasized that the results of the Uruguay Round was

a) ***the Convention Establishing the WTO,***
b) ***14 multilateral trade agreements,***
c) ***the General Agreement on Services (GATS),***
d) ***the TRIPS Agreement and,***
e) ***four so-called plurilateral agreements (on government procurement, civil aircraft, diary products and bovine meat).***

The TRIPS Agreement contains a special regime for intellectual property which is partly self-contained, partly based on the contents of the conventions administered by WIPO, primarily the Paris and the Berne Conventions and the Rome Convention and also, in the industrial property field, the so-called Washington Treaty on Integrated Circuits.

The TRIPS regime consists of several elements, primarily

- ***norms on the contents of the rights ("standards")***
- ***certain basic principles***
- ***enforcement***
- ***dispute prevention and settlement***
- ***transitional arrangements, and***
- ***institutional arrangements.***

The system means that ***protection for intellectual property*** must be given according to the standards prescribed in the Agreement and that there must be a system for ***enforcement*** which is in accordance with the detailed provisions contained in the Agreement. If a country does not live

up to these obligations, there is a risk that the country will be subject to a ***dispute settlement procedure*** and as a possible end result also trade sanctions for non-implementation of TRIPS.

The results of the Uruguay Round form ***one package,*** or, in other words, the Round forms ***"a single undertaking"*** including also the TRIPS Agreement. It is not possible to adhere to the World Trade Organization without also becoming bound by all the Agreements attached to it, for instance the TRIPS Agreement. It is, in other words, not possible to opt out of the TRIPS Agreement. Consequently, when a country has adhered to that Organization, the Agreement will, as from that date, have effect in the State concerned. (As regards transitional measures; see below).

The basic obligation of the Agreement is that member States have ***to give effect to it***. In other words, the protection provided for in the Agreement must be granted. Members may, in addition, grant more far-reaching rights provided that they do not contravene the Agreement, for instance by violating the principle of national treatment.

The ***method of implementation*** is left to each State. Such implementation may, for instance, by carried out by incorporating the contents of the Agreement in domestic law or by a provision of self-execution.

5.2. The Standards to be Applied; which obligations will arise for Sudan

a) Beneficiaries to whom the standards apply

A WTO member State shall grant the protection ***to the nationals of other members of the WTO.***

A "national" shall be understood as meaning those natural or legal persons who would be eligible for protection if all Members of WTO were also bound by the Paris, Berne and Rome Conventions and of the Washington Treaty on Intellectual Property in Respect of Integrated Circuits (generally called "IPIC"). The protection to be given under the TRIPS Agreement is consequently to be given on the basis of nationality. After accession to the WTO Sudan will consequently have to give protection for all intellectual property rights covered by the Agreement to nationals from all other WTO members.

b) Standards for the protection

A general remark is that TRIPS contains very detailed provisions on what the intellectual property legislation of any WTO member must contain. Those provisions are essentially based on the standards in the industrialised world. The effects of this comparatively high standard of protection for intellectual property on developing countries has caused some discussion. One remedy is that there are transitory regimes for developing countries and there are also some other specific measures to assist in the implementation of the Agreement.

As regards industrial property, the Agreement contains detailed provisions on what the protection for patents, trademarks, geographical indications, industrial designs and lay-out designs for integrated circuits must contain and also provisions for the protection to be given to trade secrets. The standards which apply to industrial property rights are, however, left aside in this presentation.

c) The copyright regime under TRIPS

The standards applicable to copyright consist of ***one general provision and several special provisions.***

The general provision states that members of WTO shall comply with Articles 1-21 of the 1971 Paris Act of the Berne Convention and, where applicable, with the Appendix to that Act (containing special provisions for developing countries). This means that there is an obligation under TRIPS for the WTO member States to comply with the substantive provisions of Berne Convention. In practical terms most countries carry out this obligation through accession to that text of the Convention (and Sudan is party to the Convention). It also means that the WTO dispute settlement mechanism will be applicable in case of non-compliance with those obligations.

An important exception from the application of the Berne standard concerns ***the moral rights;*** there are no rights or obligations under the Agreement in respect of those rights (contained in Article 6bis of the Berne Convention). Consequently, the Agreement may not be invoked in respect of those rights; the Berne Convention remains solely applicable.

The general provision also expresses a general principle in copyright law, namely that copyright protection ***extends only to the expression*** and not to the ideas, procedures, methods of operation or mathematical concepts as such. (Algorithms, for instance in computer programs, are not mentioned). This provision merely restates that copyright is a protection of the individual expression that the author has given to his ideas and not to the ideas as such and not to the facts or the data contained in the work.

The special provisions in the copyright field prescribe the following.

Computer programs shall be protected as literary works under the Berne Convention; this protection shall apply both to source code and object code. This means, *inter alia*, that the provisions on literary works in the Convention are applicable, that limitations on the rights must be kept within the framework of what that Convention allows, that the period of protection shall comply with the 50-year standard in that Convention and that the principle of national treatment shall apply, meaning that computer programs from other Berne Convention member States shall be protected.

Compilations of data ("data bases") shall be protected as intellectual creations (that is, as works) provided that they meet the criteria of originality by reason of the selection or arrangement of their contents. Protection shall apply regardless of whether the compilation exists in a machine-readable form or another form. The protection of the compilation does not extend to the data or material itself and it shall be without prejudice to the copyright or other protection for that material included.

A right in respect of commercial rental shall be granted as regards copies of ***computer programs*** (except when the program itself is not the essential object of the rental, such as when it is incorporated in various appliances) and of ***cinematographic works*** (this does, however, not apply unless such rental has lead to widespread copying which is materially impairing the exclusive right of reproduction). A rental right shall be granted also in respect of ***phonograms;*** see below.

The ***term of protection for works*** (other than photographic works and works of applied art) where the term is not calculated from the death of the author shall be 50 years from the end of

the year of authorized publication or, if such publication has not taken place, from the year of the making of the work.

Finally, certain provisions are given on the possibility to provide for ***limitations on the rights.*** Those shall be confined to a) certain special cases which b) do not conflict with a normal exploitation of the work and, 3) do not unreasonably prejudice the legitimate interests of the author (the so-called ***"three-step test"*** which was mentioned above in the context of the Berne Convention where the test applies, however, only to the right or reproduction).

As already indicated, this provision in the Agreement is of great significance both for national legislators and for the courts. When a country becomes a member of the WTO it is a legal necessity to interpret all limitations in the light of the three-step test.

d) The protection of "Related Rights" under TRIPS

Performing artists shall under the TRIPS Agreement have the right to prevent the fixation of their unfixed performances on phonograms, the wireless broadcasting and communication to the public of such performances, and the reproduction of a fixation of the performances. It is important to note that the TRIPS Agreement does not cover audiovisual artists but only performances that are recorded on phonograms.

This right is construed as a right to prevent and not as an ownership-type right to authorize or prevent the acts concerned.

Furthermore, there are no provisions on rights - whether exclusive rights, right to prevent or simply a right to remuneration - in respect of the broadcasting or communication to the public. As mentioned, audiovisual fixations of performances are not covered. Consequently, the rights provided for in the TRIPS Agreement are in some respects lower than the ones provided for in the Rome Convention.

Producers of phonograms shall under the TRIPS Agreement enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Direct reproduction means direct copying from a master copy; indirect copying is, for instance, when the sounds of a record are broadcast and then recorded by the receiver. The right is an exclusive ownership-type right.

Broadcasting organizations - both sound radio and television bodies -shall have the right to prohibit (once again, simply a prohibition right and not an exclusive right) the fixation of their broadcasts, the reproduction of such fixations and the wireless re-broadcasting of such broadcasts and the communication to the public (by wireless means or by wire) of television broadcasts (not sound radio broadcasts). However, if rights are not granted to broadcasting organizations, owners of the rights in the works broadcast shall have the possibility of preventing the acts now mentioned.

As indicated above, the Agreement provides ***for a rental right in respect of producers and other right-owners in phonograms*** as determined in domestic law. If, however, a country on the date of the Ministerial Meeting adopting the TRIPS Agreement (April 15, 1995) had in force a system of only an equitable remuneration for rental of phonograms, this system may be maintained as long as such rental does not give rise to "material impairment" of the exclusive right of reproduction of the right-holders concerned. This provision aims specifically at Japan, which has in force such a remuneration system.

The ***minimum term of protection*** is 50 years for performers and producers of phonograms and 20 years for broadcasters. The former period of protection corresponds to the international trend and is higher than the one provided for in the Rome Convention where the minimum term is 20 years.

Generally, ***the same limitations*** etc. may be provided for as regards the related rights as those that are allowed under the Rome Convention. There is, however, as regards the ***application in time***, an obligation to apply Art 18 of the Berne Convention in respect of the rights of performers and producers of phonograms. This means, in essence, that, when national laws implement the provisions on protection of those beneficiaries, the protection shall apply to all subject matter that has not fallen into the public domain at that time.

5.3. The Basic Principles under which the TRIPS standards shall apply

a) The Principle of National Treatment

As mentioned above, the basic obligation under the Agreement is to give effect to it under national law in the sense that it shall apply in relation to right-owners from other member States of WTO.

This principle is expressed in two ways in the Agreement. First, there is a provision on national treatment. This provision prescribes that each Member of WTO shall ***accord to nationals of other members the same treatment that it accords to its own nationals with regards to the protection of intellectual property.*** This means that right-owners from other WTO member States shall, in this respect, be assimilated to the national right-owners.

Application to copyright

The principle applies in different ways in relation to copyright and in relation to the related rights***. As regards copyright it applies globally to all rights, that is, not only those expressly provided for in the Agreement but also those flowing from other sources,*** principally the Berne Convention. This principle parallels the one provided for in Art. 5 (1) of the Berne Convention.

Application to related rights

As regards the ***rights related to copyright,*** (performers', phonogram producers' and broadcasting organizations' rights) the principle of national treatment ***applies only to the rights provided for in the Agreement.*** If a country grants wider rights (for instance, remuneration to artists and phonogram producers for the use of phonograms in broadcasting), there is no obligation under the Agreement to grant those also to foreigners

The principle of national treatment in the field of copyright and related rights under the TRIPS Agreement is subject to those exceptions as already provided for in the Berne Convention and the Rome Convention. It is a particularly important provision because developing countries are obliged to apply that principle already from the time when they become bound by the TRIPS Agreement even if they may be entitled to apply the standards for protection only from January 1, 2000 or January 1, 2006 (se below under Transitional provisions).

b) The Most-Favoured-Nation Principle (MFN)

The Agreement contains, moreover, a ***Most-Favoured-Nation Principle***. This implies that ***any advantage, favour, privilege or immunity with regard to the protection of intellectual property shall immediately and unconditionally be accorded to nationals of all other Members.***

There are some exceptions from this principle. As far as the copyright and related fields are concerned, one exception is that it need not apply in case the Berne Convention or the Rome Convention allows reciprocity (as is the case, for instance, in respect of the *droit de suite*). Another exception concerns the related rights; here, MFN need not be applied to rights other than those provided for in the Agreement. A third exception relates to what may be provided for in agreements that have entered into force before the Agreement (for instance bilateral agreements or the so-called NAFTA Agreement between the United States, Canada and Mexico).

The Most-Favoured-Nation Principle implies that it is not possible to treat different members of WTO differently as regards the protection of intellectual property. Like the national treatment principle also the MFN principle applies to developing countries from the outset even if they may not be bound by the standards.

5.3 Enforcement

The part of the TRIPS Agreement that applies to enforcement is of particular significance. This is the first time that an international instrument in the intellectual property field contains detailed provisions on enforcement measures. Also, it is part of TRIPS obligations and failure to respect them may entail sanctions under the dispute settlement system in WTO.

The enforcement provisions in the TRIPS Agreement are dealt with more in detail in a separate presentation and are therefore left out in this context.

5.4 Dispute Prevention and Settlement

A particularly important element of the TRIPS Agreement are the rules on dispute prevention and on dispute settlement. These provisions concern disputes between member States concerning whether the obligations under any of the WTO Agreements, including TRIPS, have been properly implemented. Consequently, these provisions concern mainly relations between states and not disputes between individuals.

However, there does not seem to be any need for any detailed description of the WTO dispute settlement system in this context. Only a few general remarks shall be made.

The intellectual property conventions administered by WIPO in general do not contain any detailed provisions on dispute settlement. The Berne and the Paris Conventions provide for recourse to the International Court of Justice in the Hague in case of a dispute between States concerning the implementation of the conventions. Such recourse has, however, hardly ever occurred. Countries have generally preferred to solve potential disputes bilaterally.

The provisions on dispute prevention and settlement under the TRIPS Agreement have a different structure. First, they concern both measures aiming at preventing disputes and measures for solving disputes that have arisen and failure to comply with the results of a process under the dispute settlement procedures may result in trade sanctions.

Even if there has been some dispute settlement cases in the copyright field, this part of the TRIPS Agreement is, as just said, not further dealt with here.

5.5. Entry into force of TRIPS

The TRIPS Agreement as well as the entire WTO trade regulatory system has been in force since the middle of the 1990s. However, ***developing countries*** which were members of WTO, and ***also countries which were in the process of transformation into a market free-enterprise economy*** and therefore had special problems in adapting their intellectual property systems could, if they so desired, avail themselves of an additional period of four years to comply with that Agreement, which meant that the obligations did not have to be applied until **January 1, 2000.**

The corresponding period for ***Least-developed countries*** is ***2006.*** Upon a specified request, that period may be extended on an *ad hoc* basis.

This possibility for a later application of the Agreement did not apply to certain provisions, namely those on the Most-Favoured-Nation treatment and on National Treatment. The provisions of those Articles had to be respected as from the date when the country became a member of the WTO.

6. The "Internet treaties" of 1996

At a Diplomatic Conference in Geneva in December 1996 two treaties were adopted which aimed at regulating a number of issues concerning the application of copyright and certain related rights in the digital environment. As Sudan is not presently party to any of those treaties, only a brief mention is made here of their contents.

6.1. WIPO Copyright Treaty (WCT)

This treaty entered into force on March 6, 2002, when 30 States had adhered to it. Presently there are around 45 members of that Convention.

As indicated above, the treaty is intended to provide copyright protection for certain phenomena in the digital environment, especially in the domain of the Internet.

As both the WCT and the WPPT will be covered by separate presentations, only a brief mention shall be made here of their content.

To some extent the Treaty mirrors the provisions in the TRIPS Agreement and thus confirms existing provisions (for instance by prescribing protection for computer programs and for data bases).

In other respects the Treaty provides new and extremely important rules. One such rule concerns an exclusive right in respect of so-called ***interactive on-demand-services***. Those are situations where protected works are made available in such a way that ***members of the public can access them at a time and from a place chosen by those members***. This is of course a particularly important right in the Internet age when much material, be it computer programs, music or films, is being distributed in precisely this way.

Furthermore – and this is particularly important – the Treaty contains obligations to provide legal protection against manipulation of so-called ***technical protection devices*** (encryption and other forms of technological protection against unauthorised use of protected works and

contributions). This is a remarkable step because it means that a new layer of protection has been added; in addition to the protection flowing from the rights now also the technical measures used for protection of those rights are have been given legal protection. Finally, the Treaty contains a similar prohibition against manipulation of so-called ***electronic copyright management information*** (by which is means information identifying the right-owner, the work and any terms and conditions about the use of that work).

6.2. The WIPO Performances and Phonograms Treaty (WPPT)

Also this Treaty was adopted by the above-mentioned Diplomatic Conference in Geneva and entered into force on May 20, 2002. The Treaty now has around 45 member States.

The WPPT mirrors to a large extent the provisions in the Rome Convention on the protection of performers and phonogram producers and to some extent also the TRIPS Agreement. Like to WCT, also the WPPT contains new provisions, for instance on rights in interactive on-demand-services and on protection of technological protection devices and copyright management information. Moreover, the treaty prescribes, for instance, for the first time in international law moral rights for performers and contains provisions on a distribution right and a rental right etc. but it deals, as far as performers are concerned, only with aural performances and not with audiovisual performances).

7. Some words about present developments in the copyright/related rights field

The international system for the protection of copyright and related rights has developed for more than 100 years and has proved to function well also in to-day´s worlds. Inevitably, however, the political, economic and technological developments in recent years have put challenges to the traditional system. A need has emerged to develop that system in some respects. Some of those efforts have succeeded, for instance the adoption of the two WIPO "Internet treaties" in 1996. Other efforts have not succeeded so well. In the following part a short information is given about some of the present-day developments.

a) Performers in audiovisual performances

As just mentioned, the WPPT does not cover ***performers in audiovisual performances.*** A new Diplomatic Conference on this issue was held in December 2000 but failed to achieve a final result. The main reason was differing views between – primarily – the United States and the European Union concerning the desirability and designing of provisions in the treaty on the transfer of rights from the performer and the producer. Informal consultations are presently going on to see if there is sufficient progress to convene a new Diplomatic Conference on this issue.

b) Protection of broadcasters

Another issue which is presently dealt with in the framework of the WIPO Standing Committee on Copyright and Related Rights concerns the ***protection of broadcasters.*** The international protection of those is primarily based on the Rome Convention which is now more than 40 years old and of course fails to take into account the enormous technological development which have occurred since then. The discussions in the Standing Committee on a treaty dealing with these issues may result in a Diplomatic Conference in the nest few years to come.

c) Protection of non-original data bases

Furthermore, some discussions – although not as advanced as in the case of broadcasters – are going on concerning a possible treaty on the ***protection of non-original databases*** (i.e. databases that are not protected under copyright). This is, however, an issue which is contested by a number of developing countries.

d) Protection of traditional cultural expressions/folklore

Finally, it should be mentioned that some discussions are presently conducted on an issue that has links to copyright and neighbouring rights. Those are the deliberations on a possible international protection of ***traditional knowledge and folklore (or, more correctly, "traditional cultural expressions")*** Those issues are dealt with in a special Committee within WIPO, namely the Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore but they are far from finalised.

e) General trends

Finally, it should be added that the international environment for copyright has become more turbulent in recent years. One reason is an increasing tension between developing and developed countries in the field of trade as a result of the breakdown of the negotiations at the WTO Ministerial Meeting in Cancún. There are also some misgivings about the impact of TRIPS which has been experienced in certain developing countries.

Another reason lies in the divide between those who have access to new information technologies and the "have-nots" which came to surface for instance in the context of the World Information Summit in December 2003.

Therefore, it would seem that any international negotiations in the field of intellectual property and consequently also as regards copyright are becoming increasingly difficult.

Furthermore, at the WIPO Assembly in 2004 some developing countries proposed a **Development Agenda** for WIPO. The main point was that development concerns always should be taken into account in WIPO´s norm-setting activities and that more weight should be given to "the civil society". The details of this proposed Development Agenda are left aside here as that is a mainly political exercise and no end result exists. However, a mechanism has been set up in the WIPO framework to deal with this and the matter will be discussed further at the Assembly in September 2005.

8. Some words about regional cooperation in the field of copyright; the European Union

Regional cooperation for the development of intellectual property, including copyright/related rights is a rather common phenomenon. There are many examples of cases in both the Arab countries, Asia, Africa and Latin America where regional cooperation has developed in this field.

Only one example shall be mentioned in this context, and this is only by way of example, because it may show which the areas are where regional cooperation may play a role.

The European Union comprises now 25 member states with a combined population of around 450 million people.

The basis for that Union was originally to provide for a common market for goods and services. Such a common market presupposes that the copyright laws of the participating countries do not differ too much because this would create a distortion of the free circulation of goods and services. Consequently, it is desirable and even necessary to harmonize the copyright laws; different levels of protection within a "common market" obviously distorts trade.

The way in which harmonization within the European Community is achieved is by means of ***"Directives."*** Such Directives, which are adopted by the Council of Ministers of the Members States of the Community acting together with the European Parliament, consist of rather detailed instructions for how the national copyright laws of the Member States have to be changed, before a certain date, in order to comply with the directive in question. It is, by means of such uniformity in important areas, possible to facilitate the free flow of goods and services in the Community.

Until now, seven directives have been adopted in the copyright area. Those are

1) the Computer Program Directive (91/250 EEC)
2) the Rental and Lending Directive (92/100/EEC)
3) the Satellite and Cable Directive (93/83/EEC)
4) the Term of Protection Directive (93/98/EEC) and
5) the Data Base Directive (96/9/EC).
6) **the Directive on Copyright and Neighboring Rights in the Information Society ("The Infosoc .Directive")** ***and***
7) the Directive on Authors´ Resale Right (Droit de Suite).

In addition, a ***Directive on Enforcement*** has been adopted which covers both copyright and industrial property. This Directive is basically an elaboration of the provisions in the TRIPS Agreement and is the subject of a special presentation.

The contents of the other Directives are not dealt with here. It shall only be noted that the ***Computer Program Directive*** provides that such programs shall be protected as literary works under copyright law and that ***the Term of Protection Directive*** provides, details aside, for a term of 70 years for the protection of copyright and 50 years for the protection of neighboring rights. The ***Data Base Directive*** provides, in essence, that such bases which are original are to be protected as literary works under copyright law; data bases which do not meet the criterion of creativity enough to qualify as works but which nevertheless represent a significant investment are to be protected under a "*sui generis*" right which includes a right to prevent unfair extraction of data. The ***Infosoc Directive*** contains provisions on copyright/neighboring rights issues in relation to the new technologies and its implementation will also make it possible for the European Community to join the 1996 WIPO treaties ("the Internet Treaties").

In addition to this cooperation in the legislative field there is a close cooperation between the Community Member States also in a number of other areas touching upon intellectual property. This is particularly so in the context of trade policy issues in the World Trade Organization.

Annex

Neighburing rights conventions.

1. The Rome Convention

The Rome Convention is often referred to as a pioneer convention in the sense that it - contrary to most other intellectual property conventions -was based on an effort to establish international regulations in a field where at that time few national legislations existed. Consequently, one of the main features of that Convention is the impact it had on national legislators rather than the number of accessions to the Convention.

The system under the Rome Convention is, as is the case in respect of most other intellectual property treaties, based on certain main principles.

The Convention determines only the protection that a Contracting State is obliged to ***grant in respect of beneficiaries from other Contracting States.*** Its aim is thus to provide for an international protection and not to protect the country's own performing artists etc.

The principle of ***national treatment*** applies, which means that a Contracting State is obliged to protect beneficiaries from other Contracting States in the same manner as it protects its own beneficiaries. This means that such foreign beneficiaries are assimilated to the national ones.

Also, the Convention provides for a certain ***minimum protection.*** This means that the protection granted to foreign beneficiaries must not be below a certain level, which implies that those beneficiaries must be granted certain minimum rights.

The ***principle of national treatment*** applies if certain criteria are met ("points of attachment"). In respect of performers Contracting States shall grant national treatment if the performance takes place in another such State or the performance is incorporated in a phonogram that is protected under the Convention or is included in a broadcast which is thus protected. Producers of phonograms shall enjoy national treatment if the producer is a national of another Contracting State or the first fixation of the sounds was made in such a State or the phonogram was first published in another such State. Finally, as regards broadcasters, national treatment shall be granted if the headquarters of the broadcasting organization is situated in another Contracting State, or the broadcast is transmitted from a transmitter in such a State.

The minimum rights under the Convention include

As regards performers, that they shall have the possibility to prevent the broadcasting or communication to the public of a live performance, the recording of such a performance and (under certain conditions) the reproduction of a recording of a performance;

As regards producers of phonograms, that they shall have the right to authorize or prohibit the direct or indirect reproduction of their phonograms; and

As regards broadcasting organizations, that they shall have the right to authorize or prohibit the re-broadcasting of their broadcasts, the recording of their broadcasts, the reproduction of recordings of their broadcasts (under certain conditions) and the communication to the public, against payment, of television broadcasts.

The Convention also contains a provision according to which an ***equitable*** **remuneration** shall be paid to the performers and/or phonogram producers if a phonogram published for commercial purposes is used directly for broadcasting or communication to the public. The Convention, however, allows Contracting States to exclude wholly or in part the application of this provision.

As can be seen, there are clear links between the rights of authors and the rights of the beneficiaries under the related/neighbouring rights concept. The intention is, however, that one shall not interfere with the other. Therefore, the first Article of the Convention provides that the protection granted under the Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works.

The Convention gives a possibility for States to provide for limitations to the rights, which limitations are similar to those under copyright law. The ***minimum period of protection is 20 years*** to be computed from the fixation of a phonogram or a performance, from the performance or the broadcast, as the case may be. There is also in the Convention a limitation on the formalities that may be requested as a condition for protection of phonograms. Such formalities shall always be considered as fulfilled if published phonograms have a notice consisting of the letter P within a circle, the name of the right-owner and the year of the first publication.

The Convention has presently around 70 members.

2. The Phonograms Convention

The Phonograms Convention is a typical anti-piracy convention; it was established in order to create an efficient international legal instrument designed to combat piracy, which at the time when the Convention came into being was becoming an increasingly harmful problem. A number of countries that wanted to improve the means to fight piracy were not able to adhere to the Rome Convention and thus a specialized convention like the Phonograms Convention was seen as the solution.

The substantive provisions of the Phonograms Convention are fairly simple. The Contracting States are obliged to protect phonogram producers who are nationals of other Contracting States against the reproduction of their phonograms without their authorization and against the importation of such unauthorized reproductions if the reproduction or the importation is made for the purposes of distribution to the public. This protection must last at least 20 years from the first fixation of the phonogram.

The Convention has presently around 70 members.

3. The Satellites Convention (or Brussels Convention)

The Satellites Convention is structured somewhat differently from the other conventions in this field; it does not confer rights to the beneficiaries but contains an undertaking for the Contracting States to take adequate measures in order to prevent distribution on or from their territory of programme-carrying signals by any distributor for whom the signal is not intended. The Convention does not apply to so-called direct broadcasting satellites (satellites where the signals can be received directly in individual households by means of fairly small antennas) but only to other types of satellites (so-called "fixed-satellite services" where the signals go to a receiving earth station from where they are distributed further). The

undertaking under the Convention can be met in different ways, such as by administrative or penal law or by the granting of exclusive rights similar to copyright.

The Convention has presently around 25 members.

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