E

WIPO-ESCWA/EC/BEY/03/4.A
ORIGINAL: English
DATE: April 2003

THE LEBANESE REPUBLIC

UNITED NATIONS ECONOMIC AND SOCIAL COMMISSION FOR WESTERN ASIA (ESCWA)

WORLD INTELLECTUAL PROPERTY ORGANIZATION

WIPO-ESCWA ARAB REGIONAL CONFERENCE ON INTELLECTUAL PROPERTY AND ELECTRONIC COMMERCE

organized by
the World Intellectual Property Organization (WIPO)
and
the United Nations Economic and Social Commission for Western Asia (ESCWA)

in cooperation with
the Ministry of Economy and Trade

Beirut, May 7 and 8, 2003

INTELLECTUAL PROPERTY AND THE INTERNET: COPYRIGHT AND RELATED RIGHTS

Lecture prepared by Dr. Mihály Ficsor, Director,
Center for Information Technology and Intellectual Property (CITIP), Budapest

I. INTRODUCTION

1. The protection of copyright and related rights has a special role in electronic commerce.

2. Electronic commerce is categorized in different ways, such as B2B (business to business), B2C (business to consumer), P2P (peer to peer), etc. It seems, however, that the most substantive categorization may be made between indirect electronic commerce and direct electronic commerce.

3. In the case of indirect electronic commerce, many activities take place through the Internet, such as offering products, advertizing, concluding contracts, transfering payments, etc,, but the products themselves are not transferred through the digital network, they are rather are delivered traditionally in the "real world", and if they are to be delivered to another country, they have to cross national borders with the possibility of border control.

4. Direct electronic commerce differs from indirect electronic commerce in a decisive aspect. In the case of it, the same activities may take place through the network, but also the products themselves are transmitted through the Internet! For this, those products must be transformed into digital – binary – impulses ("zeros" and "ones"), since only such impulses may be transmitted in this way. The majority of works protected by copyright (texts, graphic works, photographic works, musical works, audiovisual works, etc.) and objects of related rights (performances, phonograms, broadcasts) may be transformed in this manner, and, thus, may be transmitted through the Net.

5. Works and objects of related rights become very much vulnerable to infringing and piratical activities when they are included in, and transmitted through, interactive digital networks. This and the questions relating to the legal characterization of the acts involved raised serious challenges to copyright and related rights. These challenges have been responded by the two WIPO "Internet treaties".

II. THE DEVELOPMENT OF THE INTERNATIONAL NORMS ON COPYRIGHT AND RELATED RIGHTS AFTER THE ADOPTION OF THE 1971 PARIS ACT OF THE BERNE CONVENTION; THE ADOPTION OF THE WIPO "INTERNET TREATIES"

6. 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). In the field of related rights, the Rome Convention contains the basic international norms. It was adopted in 1961, and has not been revised yet.

7. 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.

8. 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).

9. 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.

10. The preparation of new norms started in two forums. 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.

11. 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. After the adoption of the TRIPS Agreement, a new situation emerged. The TRIPS Agreement included certain results of the period of "guided development," but it 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.

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

13. 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." 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.

14. 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.

15. Article 1(2) contains a safeguard clause similar to the one included in Article 2.2 of the TRIPS Agreement: "Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works." The scope of this safeguard clause differs from the one included in the TRIPS Agreement. The latter has importance also from the viewpoint of at least one article of the Berne Convention which contains substantive provisions–namely Article 6*bis* on moral rights–since the TRIPS Agreement confers no rights or obligations in respect of that article. On the other hand, Article 1(2) of the WCT only has relevance from the viewpoint of Article 22 to 38 of the Berne Convention containing administrative provisions and final clauses which are not included by reference (either in the WCT or in the TRIPS Agreement) and only to the extent that those provisions provide for *obligations* of the Contracting Parties.

16. 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 wording 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" (namely, 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.

17. 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, as Eve was born from a rib of Adam, 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.

18. 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 (í) in general, the application of the

substantive provisions of the Rome Convention is not an obligation of the Contacting Parties; (íí) 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 (ííí) 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.

19. In the following parts, the "digital agenda" concerning both the WCT and the WPPT and the solutions chosen by the Diplomatic Conference are dealt with. This includes four major issues: (i) the application of the right of reproduction in the digital environment; (ii) the right or rights applicable for digital interactive transmissions; (iii) exceptions and limitations in the digital environment; and (iv) obligations concerning technological measures of protection and rights management information.

III. THE "DIGITAL AGENDA": APPLICATION OF THE RIGHT OF REPRODUCTION IN THE DIGITAL ENVIRONMENT

20. In the texts of the WCT and the WPPT as adopted, this is not the case anymore, but their drafts contained provisions to clarify the scope of application of the right of reproduction. Those draft provisions turned out to be the most controversial ones, and an extremely great amount of time was spent on the discussion of them.

21. The issues covered in those draft provisions mainly related to the fact that, during transmissions through digital networks, a series of reproductions take place and that the on-demand use of works and objects of related rights (even "browsing") involves the making of at least temporary copies in the receiving computers.

22. Article 7(1) of the draft of the WCT included the following clarification: "The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form."

Paragraph (2) of the same article, subject to the relevant general provisions on exceptions and limitations, provided for the possibility of specific exceptions or limitations "in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law." Article 7 of the draft of the WPPT contained, *mutatis mutandis,* the same provisions.

23. The fact that the storage of works in an electronic memory is an act of reproduction had been recognized – and had never been questioned – for a long time. It was as early as in June 1982 that the Second WIPO/UNESCO Committee of Governmental Experts on Copyright Problems Arising from the Use of Computers for Access to or the Creation of Works clarified this as part of a set of recommendations. The relevant recommendation reads

as follows: "Storage in and retrieval from computer systems (input and output) of protected works may, as the case may be, involve at least the following rights of authors provided for in either international conventions or national legislation on copyright or both: ...(b) the right to reproduce any work involved..." (see "Copyright" (WIPO's monthly review, September 1982, pp. 244-245).

24. The questions which emerged in respect of the scope of reproduction in a digital environment did not, in fact, concern storage in electronic form in general, but only certain kinds of storage, namely those transient and incidental forms of temporary reproductions which were mentioned in paragraph (2) of Article 7 of both draft treaties. It was believed by some delegations that such reproductions should not be covered by the operation of the right of reproduction.

25. The Diplomatic Conference did not adopt the proposed Articles 7. There were delegations which supported those provisions (in fact, there was widespread support for paragraph (1), and the broad consensus only fell apart on the issue of limitations and exceptions addressed by paragraphs (2)). There were some others which were in favour of excluding transient and incidental reproductions from the concept of reproduction (which would have been in a head-on crash with Article 9(1) of the Berne Convention), and there were also some delegations which, in principle, would have been ready to accept the above-mentioned provisions, with the important difference, however, that the application of the exceptions and limitations mentioned in paragraph (2) of the Article should not be only a possibility left to Contracting States, but that it should rather be an obligation of Contracting States. Finally, the Diplomatic Conference was unable to reach agreement on those provisions and the Article was left out from the text of the Treaty. Thus, the position of those delegations prevailed which were of the view that the general provisions of Article 9 are sufficient and no specific provisions are needed.

26. At the same time, the Diplomatic Conference adopted agreed statements which, in respect of the WCT, reads as follows: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention." A *mutatis mutandis* version of this agreed statement was also adopted concerning the relevant provisions of the WPPT.

27. The first sentence of each of these agreed statements was adopted by consensus, and it states the obvious: reproduction, under Article 9(1) of the Berne Convention (the application of which is an obligation following Article 1(4) of the WCT) extends to reproduction "in any manner of form"; therefore, it is not allowed to exclude a reproduction from the concept of reproduction just because it is in digital form, through storage in an electronic memory, or just because it is of a temporary nature. At the same time, it also follows from the first sentence of the agreed statement that Article 9(2) of the Berne Convention and Article 16 of the WPPT (on limitations and exceptions) are fully applicable, and this offers an appropriate basis to introduce exceptions in certain cases of transient and incidental reproductions in national legislation, in harmony with the "three-step test" provided for in those provisions (or to settle the issue, even without any specific statutory provisions, on the basis of existing legal institutions such as fair use, fair dealings, the *de minimis* principle or the concept of implied licenses).

28. The second sentence of each of the agreed statements was not adopted unanimously (but by a majority of the votes, which was far much larger than the two-third majority required for the adoption of the text of the Treaty itself). The validity of what is included in that sentence, for the reasons explained above, could hardly be questioned. Storage of works and objects of related rights is reproduction; there seemed to be no need to state this in agreed statements. In fact, even during the preparatory work and the preceding debates at the Diplomatic Conference, this was not an issue; what was only an issue was the legal status of certain temporary, transient act of storage (reproduction) taking place when works and objects of related rights are transmitted through a digital network (as discussed above).

IV. THE "DIGITAL AGENDA": THE RIGHT OR RIGHTS APPLICABLE FOR TRANSMISSIONS IN DIGITAL NETWORKS

29. During the preparatory work of the treaties, it was agreed that the transmission of works on the Internet and in similar networks should be subject to an exclusive right of authorization of authors; with appropriate exceptions, of course.

30. There was, however, no agreement on which right should be chosen of the two main candidates: the right of communication to the public and the right of distribution. The need for the application of one or both of those rights had emerged because, although it was recognized that reproductions take place throughout any transmissions in digital networks, the application of the right of reproduction alone did not seem to be sufficient. It would not reflect which acts are truly relevant; it would not correspond to the extremely dynamic nature of the Internet-type networks, and, furthermore, it alone would not offer satisfactory and readily enforceable basis for liability of those who make available works to the public in such networks.

31. "Making available works or objects of related rights to the public in an interactive electronic network." This seems to be a more or less precise description of the act – or series of acts –which should be covered by appropriate rights. Thus, the idea might have emerged to simply recognize such a right to cover such acts. Why not, one might have said. We were not, however, completely free here. We did not act in a *tabula rasa* situation. We could not get rid of the categories, rights and exceptions included in existing treaties and laws. We could not forget that, on the existing categories, rights and exceptions, well-established practices were based, that, on the basis of them, long-term contractual relations had been formed, and so on. Thus, it was quite normal that, both at national level and at the level of international norms,there was quite a general wish to try and apply existing norms to this new phenomenon.

32. In this respect, we had to face the reality that, at the level of the existing international norms, there was no such broad economic rights as the "right to make available to the public." (It is another matter that the concept existed in a different context; see the role of the (first) making available of a work to the public in the calculation of the term of protection of certain works under Article 7(2) and (3) of the Berne Convention. And it was still another matter that some national laws provide for such broad rights.)

33. At the international level, and under the majority of national laws, the acts of making available a work or an object of related right to the public are covered by two separate groups of rights: copy-related rights and non-copy-related rights.

34. Copy-related rights (such as the right of distribution, the right of rental or the right of public lending (where recognized)) cover acts by means of which copies are made available to the public; typically for "deferred" use, since the act of making available and the perception (studying, watching, listening to) of the signs, images and sounds in which a work is expressed or a sound recording (that is, the actual "use") by the members of the public differ in time.

35. Non-copy-related rights (such as the right of public performance, the right of broadcasting, the right of communication to the public by wire), on the other hand, cover acts through which works or objects of related rights are made available for direct–that is not "deferred"–use (perceiving, studying, watching, listening to) by the members of the public.

36. Digital transmissions scramble the beautifully arranged, dogmatically duly characterized and justified picture of these two families of rights. They scramble it in two ways.

37. First, it seems that the commercial dissemination of protected material in digital networks will take place with the application of technological measures which will allow access only if certain conditions are met by the members of the public. It is foreseen that, for example, so-called "software envelopes" will be used. Such an electronic "envelope" contains certain information freely available to the public, without technological protection, such as encryption (hence, its similarity to traditional envelopes on which some information appears but the contents of the letter is only available to the person who has the right to open it). The information identifies the material and the owner of the rights, and indicates the licensing conditions. First, of course, a member of the public who would like to get access to the material should give his subscription number or, in open systems, for example, hiscredit card number. Then he may study the menu of possible uses indicated on the "envelope." He may learn that, for browsing, at least to a certain extent, he does not have to pay anything or, perhaps, he has to pay a minimum service charge; that, for being able to further study the material, to watch still or moving images or to listen to music or other sounds included in the material, he has to pay a certain amount of money; that, for downloading the material on a more permanent basis, he has to pay more. Thus, the actual extent of the use is not determined at the moment of making available (uploading) and is not determined by the person or entity alone who or which carries out the act of making available, it is the given member of the public, who, through his "virtual negotiation" with the system, determines the extent of use, and whether the use will be "deferred" (through obtaining a more than transient copy) or direct (such as on-line studying a database, on-line watching moving images, on-line listening to music).

38. Second, with digital transmissions, some hybrid forms of "making available" emerge which do not respect the pre-established border between copy-related and non-copy-related rights. It is sufficient to refer to the fact that also on-line uses in such digital systems do involve– as an indispensable step – obtaining, at least, temporary copies.

39. It is, therefore, not a surprise, that, when the study started on the question of which existing rights might be applied to cover digital transmissions, the various countries did not find themselves necessarily on the same side of the copy-related rights/non copy-related rights border. Two major trends emerged: one trying to base the solution on the right of distribution and the other one preferring some general communication to the public right. The United States of America seemed to favour the first option, while, for example, the European Community (after a brief adventure with the idea to apply the right of rental) appeared to prefer the latter.

40. It is not by chance why this or that country favours this or that solution. The responses very much depend on the existing national laws (which rights, and to what extent, exist), on the practices established, the positions obtained on the basis of those laws, and, as a consequence, on the related national interests involved.

41. When it became clear that the international copyright community was faced with two basic options-- the application of the right of distribution or the application of the right of communication to the public – and, of course, also with the further possibility of combining these options somehow, it was soon recognized that the adoption of those options was not so easy, and certainly not something which would only require a simple decision and then the rest would be arranged automatically.

42. First, the present concepts of distribution and communication to the public may not be applied directly without some important clarification. As far as distribution is concerned, in many countries, its concept closely relates to the transfer of property and/or possession of tangible copies. Thus, if the right of distribution is applied, it should be accepted and clarified that*distribution through reproduction through transmission* – that is, making available copies by making such copies, through transmission of electronic signals, in the receiving computers and/or by their terminals (such as printers) – is also covered by the concept of distribution. Similar clarifications are needed in respect of the concept of communication to the public. First of all, it should be accepted and clarified that this concept extends not only to the acts that are carried out by the "communicators" themselves (that is, to the acts as a result of which a work an object of related right is, in fact, made available to the public and the members of the public do not have to do more than, for example, to switch on a equipment necessary for reception), but also to the acts which only consist of making the work *accessible* to the public, and in the case of which the members of the public still have to *cause the system to make it actually available* to them. Further clarification was needed in respect of the notion of the "public," more precisely in respect of what is to be considered to be made available (accessible) "to the public." It had to be made clear that on-demand "transmissions" are also covered.

43. Second, as far as the international norms were concerned, the said clarifications were not sufficient, since, for example, the Berne Convention does not provide for a right of distribution for all categories of works, but only for cinematographic works (see Articles 14(1)(i) and 14*bis*(1)), and, although the coverage of the right of communication to the public (see Articles 11(1)(ii), 11*bis*(1), 11*ter*(ii), 14(1)(ii) and 14*bis*(1)) is broader, it still does not extend to all categories of works in all forms. In order that any of the above-mentioned solution might work, the gaps in the international norms had to be eliminated; the coverage of the rights involved had to be completed.

44. Third, and this seemed to be for a long while the most difficult problem, it was found that it would be difficult for various countries to go along with a specific solution which would not recognize as legitimate any alternative solution. At the same time, however, there was quite general agreement on which acts should be covered by exclusive rights, and the differences only related to the specific legal characterization of those acts.

45. Therefore, a compromise solution was proposed; namely, that the act of digital transmission should be described in a neutral way, free from specific legal characterization (for example, as making available a work to the public by wire or by wireless means, for access); that such a description should not be technology-specific and, at the same time, it should express the interactive nature of digital transmissions in the sense that it should go

along with a clarification that a work or an object of related right is considered to be made available "to the public" also when the members of the public may access it from different places and at different times; that, in respect of the legal characterization of the exclusive right–that is, in respect of the actual choice of the right or rights to be applied–sufficient freedom should be left to national legislation; and, finally, that the gaps in the Berne Convention in the coverage of the relevant rights -- the right of communication to the public and the right of distribution –should be eliminated. This solution was referred to as the "umbrella solution."

46. The WCT applies this "umbrella solution," in a specific way. Since the countries which preferred the application of the right of communication to the public as a general option seemed to be more numerous, the Treaty, first, extends the applicability of the right of communication to the public to all categories of works, and then clarifies that that right also covers transmissions in interactive systems described in a legal-characterization-free manner. This is included in Article 8 of the Treaty which reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." As a second step, however, when this provision was discussed in Main Committee I, it was stated–and no delegation opposed the statement–that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights as long as the acts of such "making available" are fully covered by an exclusive right (with appropriate exceptions). By the "other" right, of course, first of all, the right of distribution was meant, but a general right of making available to the public, might also be such an "other" right.

47. The above-quoted statement seems to be valid, not only because it was not opposed by any delegation participating in the Diplomatic Conference, but also because, it is in harmony with an age-old practice followed by the member countries of the Berne Union in the application of the various rights granted by the Convention (practice the compatibility of which with the Berne Convention has never been questioned), namely that the legal characterisation of a right is frequently not the same under national laws as under the Convention. For example, in certain countries the right of public performance covers not only those acts which are referred to in the provisions of the Berne Convention as public performances of works but also the right of broadcasting and the right of communication to the public which, under the Berne Convention, are separate rights. In other countries, the right of communication to the public is such a general right covering all the three categories of rights mentioned. Still in other countries, it is the right of broadcasting which also covers communication to the public by wire.

48. With the "umbrella solution," the differing legal characterization may involve crossing the border of copy-related rights and non-copy-related rights, but this is just the consequence of the fact that, with digital interactive transmissions, for the first time, we are faced with hybrid acts. (The acceptability of such differing legal characterizations of acts, of course, depends on whether or not the obligations to grant a minimum level of protection, in respect of the acts concerned, are duly respected. If, for example, the right of broadcasting were extended to acts which, under the Berne Convention are qualified as communication to the public by wire ("cable-originated programs") and a compulsory license were applied also for the latter act,

citing the fact that Article 11*bis*(2) of the Berne Convention allows such licenses for broadcasting, this would be in clear conflict with the Berne Convention which does not allow such licenses for "cable-originated programs.")

49. In the case of the right of distribution, the WCT also eliminates the gaps existing in the Berne Convention. Article 6(1) of the WCT provides for an exclusive right to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership, that is, an exclusive right of distribution.

50. As mentioned above, under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly. According to certain views, such a right, surviving at least until the first sale of copies, may be deduced from the right of reproduction as an indispensable corollary of that right, and, in some legal systems such a right is actually recognized on such a basis. Other experts are, however, of a different view and many national laws do not follow the solution based on the concept of implicit recognition of such a right. Therefore, that provision of the WCT should be considered, as a minimum, a useful clarification of the obligations under the Berne Convention (and also under the TRIPS Agreement which includes by reference the relevant provisions of the Convention) but probably it is more justified to consider that provision as a Berne-*plus*-TRIPS-*plus* element.

51. The WPPT applies the "umbrella solution" in a more direct way. Its Articles 10 and 14 provide for a specific right of "making available to the public", an act which is described practically in the same way as the interactive on-demand transmissions in digital networks are described in Article 8 of the WCT. Article 10 reads as follows: "Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or by 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." Article 14 provides essentially the same right fpr producers of phonograms.

52. It should be noted that the Diplomatic Conference also adopted an agreed statement which was intended to address the issue of liability of service and access providers and of "common carriers" in respect of transmissions in interactive, on-demand networks. It reads as follows: "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty [the WCT] or the Berne Convention. It is further understood that nothing in Article 8 [of the WCT] precludes a Contracting Party from applying Article 11*bis*(2)."

53. The agreed statement states the obvious, since it has always been evident that, if a person carries out an act other than an act directly covered by a right provided for in the Convention (and in corresponding national laws), that person has no direct liability for the act covered by such a right. It is another matter, that, depending on the circumstances, he may still be liable on the basis of some other forms of liability, such as contributory or vicarious liability. Liability issues are, however, very much complex; the knowledge of a very large body of statutory and case law is needed in each country so that a given case may be judged. Therefore, international treaties on intellectual property rights, understandably and rightly, do not cover such issues of liability. The Diplomatic Conference followed this tradition.

54. It seems that, depending on the legal system and tradition of the various countries, differing legal solutions will be used to address the issue of the liability of service and access providers. There are some countries, where this is intended to be left to case law (which has been able to settle similar issues in respect of the right of reproduction, the right of public

performance, the right of broadcasting, and so on). In other countries, however, statutory regulation is seen desirable (an example is the United States of America where the 1998 Digital Millennium Copyright Act (DMCA) contains detailed provisions in this respect as well as the 2000 E-commerce Directive of the European Community with similar, although somewhat less detailed provisions). Such statutory regulation will necessarily differ country by country in close connection with the legal structure into which it should fit and with the legal and drafting techniques traditionally applied in the countries concerned. Thus, it would be difficult to suggest detailed norms here. Some principles may only be outlined, such as the following: the regulation should be as much general and as little technology-specific as possible; marketplace solutions should be promoted based on licensing and contract conditions; liability rules should encourage cooperation between service and access providers and owners of rights in order of deterring the use of digital networks for copyright piracy, detecting and eliminating infringements, applying adequate technological measures, identifying and pursuing infringers; and, in general, promoting appropriate business practices and responsible behaviour of end users.

V. THE "DIGITAL AGENDA": LIMITATIONS AND EXCEPTIONS

55. An agreed statement was adopted concerning Article 10 of the WCT on limitations and exceptions, which reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital networked environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." This agreed statement is applicable, *mutatis mutandis*, also concerning Article 16 of the WPPT on limitations and exceptions.

56. This agreed statement requires appropriate interpretation. Both Article 10 of the WCT and Article 16 of the WPPT prescribe the application of the same three-step test as a condition for the introduction of any limitation on or exception to the rights granted by the Treaty as what is provided in Article 9(2) of the Berne Convention concerning the right of reproduction and in Article 13 of the TRIPS Agreement concerning any rights in literary and artistic works. Thus, any limitation or exception may only be introduced (i) in a special case; (ii) if it does not conflict with a normal exploitation of the works, performances or phonograms, respectively; and (iii) if it does not unreasonably prejudice the legitimate interests of the owners of rights.

57. The application of the three-step test to rights of performers and producers of phonograms is of particular importance, since it means that the out-of-date provisions of Article 15(1) of the Rome Convention -- which, for example, grant full discretion to the Contracting Parties to treat any personal use as not infringing related rights – have been rejected.

58. Article 10(2) of the WCT, similarly to Article 13 of the TRIPS Agreement, extends the application of the three-step test to all economic rights provided in the Berne Convention, while Article 16(1) of the WPPT provides that Contracting Parties may introduce "the same kinds of limitations and exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works".

59. The WIPO study on the "Implications of the TRIPS Agreement on Treaties Administered by WIPO" refers to the fact that "[t]he Berne Convention contains a similar provision concerning the exclusive right of reproduction (Article 9(2)) and a number of exceptions or limitations to the same and other exclusive rights (see Articles 10, 10*bis* and 14*bis*(2)(b)) and, it permits the replacement of the exclusive right of broadcasting, and the exclusive right of recording of musical works, by non-voluntary licenses (see Articles 11*bis*(2) and 13(1))." After this, it states the following: "None of the limitations and exceptions permitted by the Berne Convention should, if correctly applied, conflict with the normal exploitation of the work and none of them should, if correctly applied, prejudice unreasonably the legitimate interests of the right holder. Thus, generally and normally, there is no conflict between the Berne Convention and the TRIPS Agreement as far as exceptions and limitations to the exclusive rights are concerned."

60. As indicated in that analysis, the application of the three-step test for the specific limitations and exceptions allowed by the Berne Convention is an interpretation tool: it guarantees the appropriate interpretation and application of those limitations and exceptions

61. On the basis of this analysis, it is clear that what the above-quoted agreed statement refers to – namely the carrying forward and appropriate extension into the digital environment of limitations and exceptions "which have been considered acceptable under the Berne Convention"– should not be considered an automatic and mechanical exercise; all this is subject to the application of the three-step test. The conditions of normal exploitation of works are different in the digital environment from the conditions in a traditional, analog environment, and the cases where unreasonable prejudice may be caused to the legitimate interests of owners of rights may also differ. Thus, the applicability and the extent of the "existing" limitations and exceptions should be reviewed when they are "carried forward" to the digital environment, and they may only be maintained if -- and only to the extent that -- they still may pass the three-step test.

VI. THE "DIGITAL AGENDA": OBLIGATIONS CONCERNING TECHNOLOGICAL MEASURES OF PROTECTION AND RIGHTS MANAGEMENT INFORMATION; THEIR ROLE IN COLLECTIVE MANAGEMENT OF RIGHTS

62. It was recognized during the preparatory work that it is not sufficient to provide for appropriate rights in respect of digital uses of works and objects of related rights, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information which are necessary to license and monitor uses. There was agreement that the application of such measures and information should be left to the interested rights owners, but there was also agreement that appropriate legal protection is needed for the use of such measures and information. Article 11 and 12 of the WCT obliges Contracting Parties to grant such legal protection.

63. Under Article 11, Contracting Parties must provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

64. Article 12(1) obliges Contracting Parties to "provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." Article 12(2) defines "rights management information" as meaning "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

65. An agreed statement was adopted by the Diplomatic Conference concerning Article 12 which consists of two parts. The first part reads as follows: "It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration." The second part reads as follows: "It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty."

66. Articles 18 and 19 of the WPPT contain practically the same provisions as Articles 11 and 12 of the WCT, and an agreed statement concerning Article 19 of the WPPT foresees the *mutatis mutandis* application of the above-quoted agreed statement also for that Article.

67. These provisions are of a sufficiently general nature, but contain the necessary elements on the basis of which appropriate provisions may be adopted at the national level. It follows from the general nature of these provisions that national legislators may have to go further and more in detail in order to offer efficient protection for technological measures and rights management information where technological developments so require and where such protection, taking into account all the legitimate interests, is justified.

68. In respect of technological measures of protection, it should be noted that it is impossible to provide "adequate legal protection and effective legal remedies" against the circumvention of technological measures of protection if only the act of circumvention is prohibited. The prohibition should extend to the importation, manufacture and distribution of illicit circumvention tools. Furthermore, both technologies that control access to protected material and technologies that control certain specific restricted acts (such as reproduction) should be protected, and not only complete devices but also their specific circumventing components and functions should also be covered. Finally, the similarity between "traditional" piracy and the commercial importation, manufacture and distribution of circumvention tool is conspicuous; the latter, in fact, is a new form of piracy; therefore, meaningful sanctions, including criminal penalties must be available against it.

69. The application of technological measures combined with appropriate rights management information offers the possibility and guarantee for an appropriate efficient exercise of rights in the network environment. This makes it possible for collective management organizations not only to authorize (or prohibit) and monitor the use of the works and/or objects of related rights in their repertoire but also a more precise and quicker distribution of the remuneration to their members..

VII. CONCLUSIONS

70. The two WIPO treaties offer adequate responses to the challenges of digital technology, and particularly to the Internet. They establish the indispensable legal conditions at the international level for the use of the digital network as a marketplace for the products of cultural and information industries, and they regulate the copyright and related rights aspects of electronic commerce in a way that they maintain the existing balance of interests in this field and also leave sufficient freedom for national legislation. It is certainly due to this that, at the end of 1997, which was the deadline for signing the treaties, there were no less than 51 signatories of the WCT and 50 of the WPPT.

71. The process of ratification of, or accession to, the treaties, as well as their implementation at regional and national levels, is going ahead in a very promising way. For the entry into force, 30 instruments of ratification or accession had to be deposited with the Director General of WIPO. The WCT entered into force on March 20, 2002, while the WPPT did so on May 20, 2002, and the process of ratification and accession by further countries is continuing in a promising way (at the moment of the completion of this paper – in April 2003 – there were 41 instruments deposited for both treaties).

72. It is hoped that the countries of the Arab region will also actively consider accession to these important instruments. This is clearly in the interest of any country which intends to benefit from the great opportunities offered by the Global Information Network and by electronic commerce for economic, social and cultural development.

[End of document]