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

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I. INTERNATIONAL COPYRIGHT PROTECTION

A. The Berne Convention

1. Development of Copyright from the First National Laws to the Berne Convention

1. The origins of copyright are closely related to the development of printing, which enabled rapid production of copies of books at relatively low cost. The growth of literacy created a large demand for printed books, and the protection of authors and publishers from unauthorized copying was recognized as increasingly important in the context of this new means of making works available to the public. The first copyright laws were enacted as a result.

2. The Statute of Anne, enacted by the British Parliament in 1710, was the world's first copyright law. It provided that, after the lapse of a certain period, the privilege enjoyed by the Stationers' Company to make and distribute copies of works, would revert to the authors of the works, who then had the right to assign the privilege to another publisher. Failure to register the book prevented an action for damages against an infringer, but did not invalidate copyright. The Statute of Anne served to promote competition in the publishing business by restricting monopolies, and recognized the author as the holder of the right to authorize copying.

3. From this beginning, copyright spread into other countries. Denmark recognized the rights of authors in an Ordinance of 1741. In 1790, the United States of America promulgated its first federal copyright statute. In pre-Revolutionary France, copyright belonged to publishers in the form of a privilege granted by the sovereign. During the Revolution, two decrees of 1791 and 1793 established the protection of authors of literary and artistic works. In Germany, where printing originated, copyright principles first emerged in the form of rules regulating publishing agreements. In the mid-nineteenth century, the various German States enacted laws recognizing authors as the owners of rights in their works. Around the same time, laws were passed in Austria and Spain. National codification also took place in some of the Latin American countries following their independence: in Chile (1834), Peru (1849), Argentina (1869) and Mexico (1871).

4. It is a well-established principle that copyright is territorial in nature, that is, that protection under a given copyright law is available only in the country where that law applies. Thus, for works to be protected outside the country of origin, it is necessary for the country to conclude bilateral agreements with countries where the works are used. In the mid-nineteenth century, such bilateral agreements were concluded among European nations, but they were neither consistent nor comprehensive. As a result of the need for a uniform system of protection, the first international agreement for protection of the rights of authors was concluded and adopted on September 9, 1886, in Berne, Switzerland: the Berne Convention for the Protection of Literary and Artistic Works. The countries which adopted the Convention formed the Berne Union to ensure that the rights of authors in all member countries were recognized and protected. The Berne Convention is administered by the World Intellectual Property Organization (WIPO) in Geneva, Switzerland.

5. The 1886 text of the Convention has been revised several times to take into account the fundamental changes in the means of creation, use and dissemination of literary and artistic works which have taken place over the years, mostly resulting from technological development. The first major revision took place in Berlin in 1908, followed by the Rome revision in 1928, the Brussels revision in 1948, the Stockholm revision in 1967, and the Paris revision in 1971.

6. The Stockholm revision was a response not only to technological change that had taken place since the Brussels revision of 1948, but also a response to the needs of newly independent developing countries for access to works for the purpose of national education, and an attempt to reorganize the administrative and structural framework of the Berne Union. Preferential provisions for developing countries adopted in Stockholm were refined further at the Paris Revision Conference in 1971. The substantive provisions of the Stockholm Act never entered into force; they were adopted by the Paris Revision Conference in substantially unchanged form.

7. In recent years, accessions to the Berne Convention have accelerated, due to the growing awareness that copyright protection is a crucial part of the new global trading system; international trade in goods and services protected by intellectual property rights is a booming, worldwide business, and both developed and developing countries have recognized that it is in their interest to provide strong protection of intellectual property rights in order to participate in the benefits of such trade. The Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), which incorporates the substantive provisions of the Paris Act of the Berne Convention (see below), is clear proof of the importance now attached to intellectual property protection by many countries of the world.

2. The 1971 Paris Act of the Berne Convention

a. Basic Elements of the Protection Granted Under the Convention

8. There are two basic elements of protection under the Berne Convention: first, "national treatment," according to which works originating in one of the member States must be protected in each of the member States in the same way that such States protect the works of their own nationals; second, minimum rights, which means that the laws of member States must provide the minimum levels of protection established by the Convention.

b. Formality Free Protection

9. The Berne Convention provides that copyright protection may not be conditioned on compliance with any formality, such as registration or deposit of copies.

c. Works Protected

10. Article 2 contains an illustrative, non-exhaustive list of protected works, which include "any original production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." Works based on other works, such as translations, adaptations, arrangements of music and other alterations of a literary or artistic work, are also protected (Article 2(3)). Some categories of works may be excluded from protection; thus, member States may deny protection to official texts of a legislative, administrative and legal nature (Article 2(4)), works of applied art (Article 2(7)), lectures, addresses and other oral works (Article 2*bis*(2). Furthermore, Article 2(2) allows States to require that works must be

fixed in some material form in order to be protected. For example, in a country with such a fixation requirement, a work of choreography could only be protected once the movements were written down in dance notation or recorded on videotape.

d. Owners of Rights

11. Article 2(6) of the Convention provides that protection under the Convention is to operate for the benefit of the author and his successors in title. For some categories of works, however, such as cinematographic works (Article 14*bis*), ownership of copyright is a matter for legislation in the country where protection is claimed; for example, member States may provide that the initial owner of rights in such works is the producer, rather than the director, screenwriter, or other persons who contributed to creation of the work.

e. Eligibility for Protection

12. Article 3 provides for protection of authors who are nationals or residents of a State party to the Convention (that is, a country which is a member of the "Berne Union"); authors who are not nationals or residents of such a country are protected if they first publish their works in a member country, or simultaneously publish in a non-member and a member country.

f. Rights Protected

13. The exclusive economic rights granted to authors under the Convention include the right of translation (Article 8), the right of reproduction "in any manner or form" (Article 9), the right of public performance of dramatic, dramatico-musical and musical works (Article 11), the right of broadcasting and communication to the public by wire, by re-broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work (Article 11*bis*), the right of public recitation (Article 11ter), the right of adaptation (Article 12), the right of making cinematographic adaptation and reproduction of works, and the right of distribution of the works thus adapted and reproduced (Article 14). The so-called "droit de suite" provided for in Article 14*ter* (concerning original works of art and original manuscripts) is optional, and may be subject to reciprocity; that is, countries with laws which recognize the droit de suite are only obligated to apply it to foreign works if legislation in the country to which the author of such works belongs also recognizes it.

14. Independently of the author's economic rights, Article 6bis provides for recognition of so-called "moral rights", the right of the author to claim authorship of his work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to his honor or reputation.

g. Limitations

15. In order to maintain an appropriate balance between the interests of copyright owners and users of protected works, the Berne Convention allows certain limitations on economic rights, that is, cases in which protected works may be used without the authorization of the owner of the copyright, and without payment of compensation. These limitations are commonly referred to as "free uses" of protected works, and are set forth in Articles 9(2) (reproduction in certain special cases), 10 (quotations and use of works by way of illustration for teaching purposes), 10*bis* (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events), and 11*bis*(3) (ephemeral recordings for broadcasting purposes).

16. There are two cases in which the Berne Convention provides the possibility of non-voluntary licenses: in Articles 11*bis*(2) (in respect of the right of broadcasting and communication to the public by wire, by re-broadcasting or by loudspeaker or any other analogous instrument of the broadcast of the work) and 13(1) (in respect of the right of sound recording of musical works, the recording of which has already been authorized). The Appendix to the Paris Act of the Convention also permits developing countries to implement non-voluntary licenses for translation and reproduction of works in certain cases, in connection with educational activities (see section (i) below).

h. Duration of Protection

17. Article 7 establishes the minimum term of protection, which is the life of the author and 50 years after his death. There are exceptions to this basic rule for certain categories of works. For cinematographic works, the term may be 50 years after the work has been made available to the public, or, if not made available, 50 years after the making of such a work. For photographic works and works of applied art, the minimum term of protection is 25 years from the making of the work (Article 7(4)). In respect of moral rights, the duration of protection of moral rights must be for at least as long as the duration or protection for economic rights.

i. Preferential Provisions Concerning Developing Countries

18. The 1971 Paris Act of the Berne Convention was primarily intended to ensure the universal effect of the Convention, and to simplify its operation, particularly in relation to the growing number of newly independent States facing difficulties in the early stages of their economic, social and cultural development as independent nations. The special provisions concerning developing countries were incorporated in an Appendix which now forms an integral part of the Convention.

19. Under the Appendix, countries which are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations may, under certain conditions, depart from the minimum standards of protection provided in respect of the rights of reproduction and translation.

20. The Appendix to the Berne Convention provides developing countries with the possibility of granting non-voluntary licenses in respect of (i) translation for the purpose of teaching, scholarship or research, and (ii) reproduction for use in connection with systematic instructional activities, of works protected under the Convention; the term systematic instructional activities including systematic out-of-school or non-formal education. These licenses may be granted under certain conditions to any national of a developing country which has duly availed itself of one or both of the faculties provided for in the Appendix concerning such compulsory licenses.

3. Main Advantages of Acceding to the Berne Convention

21. A major practical advantage to a country in adhering to the Berne Convention is that works of its authors are automatically protected in all countries party to the Convention, with the result that these authors may derive financial benefits from the expansion of markets for their works. Adherence may also reduce the incentive of national authors to seek publishers and distributors of their works in countries which are already members of the Convention as a means of obtaining protection in all member countries. Further, the competitive position of

national authors in the domestic market may be improved, because, once the country is a member of the Berne Convention, the works of foreign authors can only be distributed with their permission, and no longer at prices set lower than domestic works, for which authorization would be required for distribution.

22. There are also advantages of a macroeconomic nature. Regardless of its level of social or economic development, by joining the Berne Convention a country becomes part of the international system for protection of authors' rights, and by extension, the international trading system for goods and services protected by copyright. This is important for exchange of culture, entertainment, information, and technology; moreover, as the inclusion of the substantive standards of the Berne Convention in the TRIPS Agreement demonstrates, observance of minimum standards of intellectual property protection is virtually indispensable in order for a country to achieve economically significant levels of trade-based foreign exchange. Membership in the Berne Union sends an important signal that the country is willing to exert the political will necessary to protect the rights of authors from other countries; this signal may also be a pre-condition to successful international cooperation, including attracting foreign investment in sectors of the economy other than intellectual property. For example, the emergence of a "global information infrastructure" (GII) may have the effect that international investment becomes multi-sectoral to an unprecedented extent; effective development of the GII will require state-of-the-art telecommunications infrastructure, advanced computer networks, and a steady supply of entertainment- and information-based goods and services, in order to function on a worldwide basis with benefits for all countries. In sum, membership in the Berne Union, an achievement in itself, has become a piece of a much larger puzzle; without effective copyright protection for all works, foreign and domestic, countries may find themselves deprived of timely access to needed information that will become increasingly a condition to economic and cultural survival in the twenty-first century.

23. A final point should be made concerning the cost to countries of accession to Berne: the Governing Bodies of WIPO and the Unions administered by WIPO adopted, in September 1993, a unitary contribution system. Under that system, a State pays the same contribution irrespective of the number of treaties to which it is a party.

B. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)

24. The TRIPS Agreement, concluded in 1994 as part of the Uruguay Round of negotiations under the former GATT (now the World Trade Organization) also contains provisions on copyright protection. It provides that member countries shall comply with Articles 1 to 21 of, and with the Appendix to, the 1971 Paris Act of the Berne Convention (generally speaking, the substantive provisions of the Convention). There is one important exception: the Agreement provides that no rights or obligations are created in respect of moral rights. It also contains a provision stating the well-known principle that copyright protection extends to expressions, not to ideas, procedures, methods of operation or mathematical concepts.

25. In addition to its incorporation of Berne Convention standards, the TRIPS Agreement requires that the laws of member States make clear that computer programs are protected as literary works under the Convention. The Agreement also states that compilations of data shall be protected as original creations, provided that they meet the criteria of originality by reason of the selection or arrangement of their contents, regardless of whether the compilation exists in machine-readable or other form, and without prejudice to protection under copyright

or otherwise of the material included. The Agreement provides a right in respect of commercial rental of copies of computer programs and audiovisual works; the right does not apply to the latter works, however, unless rental practices have led to widespread copying which is "materially impairing" the exclusive right of reproduction.

26. The duration of protection is 50 years following the death of the author, and, for works in respect of which the term cannot be calculated on the basis of the author's life, 50 years from the end of the year of authorized publication or from making of the work. Limitations on rights are to be confined to special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. The TRIPS Agreement also contains detailed provisions on enforcement of intellectual property rights, including copyright. Finally, a mechanism applies with regard to the settlement of disputes among members concerning compliance with the Agreement.

II. INTERNATIONAL CONVENTIONS IN THE FIELD OF RELATED RIGHTS

27. This part of the presentation is devoted to the international conventions in the field of related rights, namely, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961, known as the Rome Convention), the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971, known as the Phonograms Convention), and the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite (Brussels, 1974, known as the Satellites Convention). Relevant provisions of the TRIPS Agreement will also be discussed.

A. The Rome Convention

1. Genesis of the Rome Convention

28. Related rights are primarily a result of technological development. The first organized support for protection of related rights came from the phonogram industry, which sought (and gained, at least in countries following the common-law tradition) protection under copyright law against unauthorized copying of phonograms under copyright. In the United Kingdom, for example, the Copyright Act 1911 granted a copyright to producers of sound recordings, and this copyright approach has been followed in countries such as the United States and Australia. The development of the phonogram industry also led to the first expressions of support for protection of the rights of performers whose performances were included in phonograms.

29. At the international level, the first proposals concerning protection of producers of phonograms and performers took form at the 1928 Rome diplomatic conference to revise the Berne Convention. Around the same time, the International Labor Office (ILO) took an interest in the status of performers as employed workers. Further discussions took place at the Brussels revision conference in 1948, where it became clear that, due to the opposition of authors' groups, legal protection of the rights of performers and producers of phonograms would not be provided under copyright, although there was support for development of an international instrument providing adequate protection. Different committees of experts prepared draft conventions, including the rights of broadcasting organizations. Finally, in 1960, a committee of experts convened jointly by BIRPI (United International Bureaux for the Protection of Intellectual Property, the predecessor organization to WIPO), United Nations

Educational, Scientific and Cultural Organization (UNESCO) and the ILO, met at The Hague and drew up the draft convention which served as a basis for the deliberations in Rome, where a Diplomatic Conference agreed upon the final text of the International Convention for the Protection of performers, Producers of Phonograms and Broadcasting Organizations, the so-called Rome Convention, on October 26, 1961.

2. Relationship Between the Protection of Related Rights and Copyright

30. The Diplomatic Conference at Rome established, in Article 1 of the Rome Convention, the so-called "safeguard clause," which 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. Consequently, no provision of the Rome Convention may be interpreted as prejudicing such protection. Under Article 1, it is clear that whenever the authorization of the author is necessary for the use of his work, the need for this authorization is not affected by the Rome Convention. The Convention also provides that in order to become party to the Convention, a State must not only be a member of the United Nations, but also a member of the Berne Union or party to the Universal Copyright Convention (Article 24(2)). Accordingly, a Contracting State shall cease to be a party to the Rome Convention as from that time when it is not party to either the Berne or the Universal Copyright Convention (Article 28(4)). Because of this link with the copyright conventions, the Rome Convention is sometimes referred to as a "closed" convention, since it is only open to States which meet the above requirements.

3. The Principle of National Treatment Under the Rome Convention

31. Like the Berne Convention, protection accorded by the Rome Convention consists basically of the national treatment that a State grants under its domestic law to domestic performances, phonograms and broadcasts (Article 2(1)). National treatment is, however, subject to the minimum levels of protection specifically guaranteed by the Convention, and also to the limitations provided for in the Convention (Article 2(2)). That means that, apart from the rights guaranteed by the Convention itself as constituting the minimum of protection, and subject to specific exceptions or reservations allowed for by the Convention, performers, producers of phonograms and broadcasting organizations enjoy the same rights in Contracting States as those countries grant to their nationals.

4. Eligibility for Protection

32. Performers are entitled to national treatment if the performance takes place in another Contracting State (irrespective of the country to which the performer belongs) or if it is incorporated in a phonogram protected under the Convention (irrespective of the country to which the performer belongs or where the performance actually took place) or if it is transmitted "live" (not from a phonogram) in a broadcast protected by the Convention (again, irrespective of the country to which the performer belongs) (Article 4). These alternative criteria of eligibility for protection are intended to ensure application of the Rome Convention to the largest possible number of performances.

33. Producers of phonograms are entitled to national treatment if they are nationals of another Contracting State (criterion of nationality), if the first fixation was made in another

Contracting State (criterion of fixation), or if the phonogram was first or simultaneously published in another Contracting State (criterion of publication) (Article 5).

34. The Convention allows reservations in respect of these alternative criteria. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may at any time declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Any State which, on the day the Convention was signed at Rome, granted protection to producers of phonograms solely on the basis of the criterion of fixation, can exclude both the criteria of nationality and publication. Thus the implementation of the Rome Convention can easily be adapted to conditions of protection already existing under different national laws.

35. Broadcasting organizations are entitled to national treatment if their headquarters is situated in another Contracting State (principle of nationality), or if the broadcast was transmitted from a transmitter situated in another Contracting State, irrespective of whether the initiating broadcasting organization was situated in a Contracting State (principle of territoriality). Contracting States may declare that they will protect broadcasts only if both the condition of nationality and of territoriality are met in respect of the same Contracting State (Article 6).

5. The Minimum Protection Required by the Convention

36. The minimum protection guaranteed by the Convention to performers is provided by "the possibility of preventing" certain acts done without their consent. Instead of enumerating the minimum rights of performers, this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of penal statutes, determining offenses and penal sanctions under public law. It was agreed, however, that the enumerated acts which may be prevented by the performer require his consent in advance. Performers are to be granted the "possibility of preventing" (i) broadcasting or communication to the public of a "live" performance; (ii) recording an unfixed performance; (iii) reproducing a fixation of the performance, provided that the original fixation was made without the consent of the performer or the reproduction is made for purposes not permitted by the Convention or the performer (Article 7).

37. Producers of phonograms are provided the right to authorize or prohibit the direct or indirect reproduction of their phonograms (Article 10). The Rome Convention also provides for the payment of equitable remuneration for broadcasting and communication to the public of phonograms (see below).

38. Broadcasting organizations have the right to authorize or prohibit (i) the simultaneous rebroadcasting of their broadcasts, (ii) the fixation of their broadcasts, (iii) the reproduction of unauthorized fixations of their broadcasts or reproduction of lawful fixations for illicit purposes, and (iv) the communication to the public of their television broadcasts by means of receivers in places accessible to the public against payment (Article 13). It should be noted that this last-mentioned right does not extend to communication to the public of merely sound broadcasts, and that it is a matter for domestic legislation to determine the conditions under which such a right may be exercised. It should also be observed that the Rome Convention does not protect against cable distribution of broadcasts.

6. Provisions for Discretionary Regulation of the Exercise of Rights

39. In light of the fact that the Rome Convention was created at a time when few countries had legislation protecting all three categories of beneficiaries, the Convention included provisions allowing national legislators a certain degree of discretion in implementing it.

40. In respect of the protection of performers, protection against rebroadcasting and fixation of performances for broadcasting purposes, where the performer has consented to broadcasting, is left to national law. The existence of contractual arrangements for use of performances was recognized in a provision stating that performers cannot be deprived of the ability to control by contract their relations with broadcasting organizations (Article 7(2)); it was understood, likewise, that the meaning of "contract" in this context includes collective agreements and decisions of arbitration boards. Another area where member States were allowed discretion was in respect of the participation of more than one performer in a performance; Article 8 of the Rome Convention provides that, if several performers participate in the same performance, the manner in which they should be represented in connection with the exercise of their rights may be specified by each Contracting State.

41. Perhaps the most notorious provision of the Convention which provides discretion to States is Article 12, concerning what has come to be known as "secondary use" of phonograms. It provides that if a phonogram published for commercial purposes is used directly for broadcasting or any communication to the public, an equitable remuneration shall be paid by the user to the performers, to the producers of the phonogram, or to both. The article does not grant an exclusive right either to performers or producers of phonograms in respect of secondary use of a phonogram; rather, by providing for a single remuneration, it seems to establish a kind of non-voluntary license. Yet, Article 12 does not specify that payment of remuneration is mandatory for either beneficiary; it states only that at least one of them should be paid for the use, and that, in the absence of agreement between these parties, domestic law may establish conditions for sharing of the remuneration.

42. Apart from the flexibility allowed to States in implementing the obligation itself, under Article 16 a State may declare that it will not apply the provisions of Article 12 at all, or that it will not apply the article in respect of certain uses, such as communication to the public other than broadcasting. It is also possible to apply Article 12 only as regards phonograms of which the producer is a national of another Contracting State. Furthermore, as regards phonograms of which the producer is a national of another Contracting State, the extent and term of protection can be limited to that granted by the other State concerned.

7. Limitations

43. Like the Berne Convention, the Rome Convention permits member States to establish certain limitations on rights. States may provide for limitations allowing private use, use of short excerpts in connection with reporting current events, ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts, and uses solely for the purpose of teaching or scientific research (Article 15(1)). In addition to the limitations specified by the Convention, States may also establish the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as they provide in connection with copyright protection, except that compulsory licenses may be provided only to the extent to which they are compatible with the Rome Convention (Article 15(2)).

44. From the standpoint of the rights of performers, Article 19 of the Convention provides a significant limitation, second only to Article 12 in the controversy it has generated over the

years since the Convention was established. Article 19 provides as follows: "Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 [which sets out the rights of performers] shall have no further application." Article 19 was intended to ensure that the Convention did not apply to the cinema industry, because film producers feared incursions on their interests if performers were to enjoy rights in films. Article 19 does not, however, affect performers' freedom of contract in connection with the making of audiovisual fixations.

8. Duration of Protection

45. The minimum term of protection under the Rome Convention is twenty years from the end of the year in which (i) the fixation was made, as far as phonograms and performances incorporated therein are concerned, or (ii) the performance took place, as regards performances not incorporated in phonograms, or (iii) the broadcast took place, for broadcasts (Article 14).

9. Restriction of Formalities

46. If a country requires compliance with formalities as a condition of protecting related rights in relation to phonograms, these are fulfilled if all commercial copies of the published phonogram or its packaging bear a notice consisting of the symbol "P," accompanied by the year date of the first publication. If the copies or their packaging do not identify the producer or his licensee, the notice shall also include the name of the owner of the rights or the producer and, if the copies or packaging do not identify the principal performers, the notice shall also include the name of the person who owns the performers' rights (Article 11).

10. Implementation of the Rome Convention

47. The Rome Convention has been referred to as a "pioneer convention." While the copyright conventions concluded at the end of the nineteenth century followed in the wake of national laws, the Rome Convention elaborated standards of related rights protection at a time when very few countries had operative legal rules protecting performers, producers of phonograms and broadcasting organizations. The number of countries party to the Convention is growing, however, and its influence on the development of national legislation has been significant: since 1961, a number of countries have legislated on the protection of related rights, increasing the number of national laws protecting producers of phonograms or broadcasting organizations. A growing number of States have also granted specific protection to performers.

B. Other International Conventions in the Field of Related Rights

48. This part of the presentation is devoted to two other conventions in the field of related rights, the "Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971, known as the Phonograms Convention), the

"Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite" (Brussels, 1974, known as the Satellites Convention), and to the TRIPS Agreement, which also contains provisions on related rights.

49. In relation to the Rome Convention, the Phonograms Convention and the Satellites Convention may be regarded as special agreements, insofar as they grant to performers, producers of phonograms or broadcasting organizations "more extensive rights" than those granted by the Rome Convention or contain other provisions "not contrary" to the Convention (Rome Convention, Article 22). As a result, the Phonograms and Satellites Conventions are sometimes referred to as the "special conventions" in the field of related rights. They differ from the Rome Convention in three notable respects: first, rather than granting exclusive rights to authorize or prohibit certain acts, the Phonograms and Satellites Conventions leave States free to choose the legal means for implementing their obligations. Second, while the Rome Convention is based on national treatment, the special conventions only obligate States to provide protection against certain specific unlawful acts; thus, countries are not obligated to grant foreign owners of rights all of the rights which they grant to their own nationals. Third, the Phonograms and Satellites Conventions are "open" agreements; that is, unlike the Rome Convention, adherence to which is restricted to countries party to the Berne or Universal Copyright Conventions, the special conventions are open to all States which are members of the United Nations or its specialized agencies, or which are parties to the Statute of the International Court of Justice (practically speaking, this covers most countries of the world).

1. The Phonograms Convention

50. The Phonograms Convention was concluded as a response to the phenomenon of record piracy, which had attained epic proportions by the end of the 1960s, due principally to technological developments (the emergence of high-quality analog recording techniques and the audiocassette), which made it possible for multinational pirate enterprises to flood many of the world's markets for recorded music with cheap, easily transported and easily concealed copies of protected phonograms. The Convention was developed in record time, 18 months from the time it was first proposed in 1970 during a preparatory meeting for revision of the copyright conventions and its conclusion in Geneva in October 1971. The Phonograms Convention soon achieved wide acceptance, for two principal reasons: the widely-shared view that a major international campaign against record piracy was necessary, and the flexibility allowed to States in respect of the means of implementing the Convention.

51. In respect of eligibility for protection, the Phonograms Convention requires only the criterion of nationality as a condition of granting protection (Article 2). Any Contracting State which on October 29, 1971, afforded protection solely on the basis of the place of first fixation may, however, declare that it will apply this criterion (Article 7(4)).

52. The protection granted to producers of phonograms under the Convention is against the making of "duplicates without their consent, and against distribution, and importation for the purposes of distribution, of such duplicates" (Article 2). The means of implementing this protection may be by means of copyright "or other specific right," unfair competition, or penal sanctions (Article 3).

53. The Convention permits the same limitations as those provided in relation to the protection of authors, and allows non-voluntary licenses if reproduction is intended exclusively for teaching or scientific research, limited to the territory of the State whose

authorities give the license, and if equitable remuneration is provided (Article 6). The same minimum duration is required by the Phonograms Convention as by the Rome Convention: 20 years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published (Article 4).

54. The Phonograms Convention also contains a provision referring to other owners of rights. Article 7(1) provides that the Convention shall "in no way be interpreted to limit or prejudice the protection secured to authors, to performers, to producers of phonograms or to broadcasting organizations." Article 7(2) refers specifically to performers; it states that the national legislation of each Contracting State may determine the scope of protection afforded to performers whose performances are fixed on a phonogram, and the conditions of enjoying such protection.

2. The Satellites Convention

55. The Satellites Convention was developed in response to the proliferation of satellites in international telecommunications, including broadcasting, since about 1965. Under the Rome Convention, "broadcasting" is defined as the transmission by wireless means for public reception of sounds or of images and sounds. At the time the Satellites Convention was under preparation, there was doubt that satellite transmissions could be considered "broadcasting" because of the "public reception" and "wireless means" aspects of the definition; i.e., the signals emitted to the satellite (uplink) could not be received directly by the public, and the signals emitted by the satellite (downlink) were received by earth stations prior to distribution to the public, which was often by wire (cable, for example) rather than by wireless means. Thus, the development of the Satellites Convention was undertaken in response to a perceived need to provide protection for broadcasting organizations in respect of the distribution of program-carrying signals transmitted by satellite. "Distribution" is defined in the Convention as the operation by which a distributor transmits derived signals to the public; thus, unlike broadcasting, protection under the Convention extends to cable distribution.

56. It should be noted that one of the premises on which the Satellites Convention was based, that satellite signals cannot be received directly by the public, is not necessarily valid today. The evolution of satellite and earth station technology has made it commercially possible for individual homes and businesses to receive satellite signals directly, and there is little doubt that such reception may be legally qualified as broadcasting. By its own terms (Article 3), the Convention does not apply to direct broadcasting by satellite, because the Berne and Rome Conventions already cover such acts. Nonetheless, the Convention provides protection against unauthorized distribution of satellite signals by intermediaries, such as cable systems, who receive program-carrying satellite signals and transmit them to subscribers for a fee without permission from the owners of rights in the programs transmitted. For this reason, acceptance of the Convention is growing. The basic obligation of the Satellites Convention is to "prevent the distribution of programme-carrying signals by any distributor for whom the signals passing through the satellite are not intended."

57. As in the case of the Phonograms Convention, this obligation may be implemented in a number of ways, under copyright, telecommunications law, or through penal sanctions. It should be noted that the Convention does not protect the transmitted program itself; rather, the object of protection is the signals emitted by the originating organization. In respect of intellectual property rights in the programs, the Convention simply states that it may not be interpreted in any way as limiting or prejudicing the protection afforded to authors, to performers, to phonogram producers and to broadcasting organizations.

58. The Satellites Convention also permits certain limitations on protection; the distribution of program-carrying signals by non-authorized persons is permitted if the signals carry short excerpts containing reports of current events or, as quotations, short excerpts of the program carried by the emitted signals, or, in the case of developing countries, if the program carried by the emitted signals is distributed solely for the purposes of teaching, including adult teaching or scientific research. The Convention does not establish a term of protection, leaving the matter to domestic legislation.

3. The TRIPS Agreement

59. The TRIPS Agreement, concluded in 1994 as part of the Uruguay Round of negotiations under the former GATT (now the World Trade Organization) also contains provisions on the protection of related rights. Under the Agreement, related rights are provided to performers, producers of phonograms and broadcasting organizations.

60. Performers are granted the rights to "prevent" (not the right to authorize) the fixation of their unfixed performances on phonograms, the wireless broadcasting and communication to the public of such performances, and the reproduction of fixations of such performances. There are no rights in respect of broadcasting and communication to the public of fixed performances, as in the Rome Convention.

61. Producers of phonograms are provided the right to authorize or prohibit the direct or indirect reproduction of their phonograms. Producers of phonograms also have a right to authorize rental of copies of their phonograms. There is an exception to the rental right in the case of countries which had in place a system of equitable remuneration for rental on the date the TRIPS Agreement was adopted; such countries may maintain the system of equitable remuneration as long as rental practices do not give rise to "material impairment" of the exclusive right of reproduction of the owners of rights.

62. Broadcasting organizations are granted the right to prohibit (rather than to authorize) fixation of their broadcasts, the reproduction of such fixations, the wireless rebroadcasting of such broadcasts, and the communication to the public of television broadcasts (but not radio broadcasts). The obligation of countries party to the TRIPS Agreement to provide such protection to broadcasting organizations is subject to an alternative, however; countries may provide the owners of copyright in broadcast programming with the possibility of preventing the same acts, subject to the provisions of the Berne Convention (meaning that non-voluntary licenses may be implemented in certain circumstances).

63. The duration of protection for related rights is 50 years for performers and producers of phonograms and 20 years for broadcasting organizations. In general, the same limitations on rights may be applied as those allowed under the Rome Convention. An additional obligation requires application of Article 18 of the Berne Convention to the rights of performers and producers of phonograms; this means that the national legislation which implements the TRIPS Agreement must provide protection for all performances and phonograms which have not fallen into the public domain due to expiration of the term of protection in their country of origin. Finally, as noted above, the TRIPS Agreement contains detailed provisions on enforcement of intellectual property rights, including related rights, as well as a mechanism for settling disputes among members concerning compliance with the obligations under the Agreement.

C. The Related Rights Conventions and Developing Countries

64. The importance of protection of related rights to developing countries has been explored in a previous presentation. In brief, natural cultural expressions in the form of folklore may be preserved and protected as performances, phonograms and broadcasts under the Rome Convention. Accession to the Convention thus provides a means for the legal protection of such expressions in foreign markets, where the demand for them is great (witness the current popularity of so-called "world music," which consists largely of recorded musical performances of artists who are developing-country nationals), thus ensuring that the economic benefits flow into the country where the creative expression originated. Furthermore, the advantages of adherence to the Berne Convention, discussed above, are equally applicable in the context of related rights. The extent to which a country protects intellectual property rights is increasingly bound together with the range of possibilities available to that country to participate in the rapidly increasing volume of international trade in goods and services affected by such rights. The "convergence" of telecommunications and computer infrastructures will result in international investment across many sectors of the economies of both developed and developing countries, and those countries with poor records concerning, or a lack of demonstrated political commitment to, the protection of intellectual property rights will simply be left out of the picture. Thus, accession to the related rights conventions, like accession to the Berne Convention, is a positive step in the right direction for the future.

III. THE TWO WIPO "INTERNET" TREATIES

1. Introduction

65. The Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) was last revised at Paris in 1971 and, in the field of related rights, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention) dates back to 1961.

66. Technological and commercial developments and practices since then (such as reprography (in other words, photocopying and printing technologies), video technology, compact audio and video cassette systems facilitating home taping, satellite broadcasting, cable television, the increase of importance of computer programs, computer generated works and databases, and digital transmissions systems such as the Internet, etc.) have profoundly affected the way in which works can be created, used and disseminated.

67. As a result, it was recognized at the end of the 1980's that new binding international norms were needed, and work commenced at WIPO on the preparation of new instruments in the fields of copyright and related rights.

68. During the preparatory work that led to the new instruments, it became clear that the most important and pressing task of the drafting committees was to clarify existing norms and to offer new norms in response to the questions raised by digital technology, and particularly the Internet. The issues addressed in this context were referred to jointly as the "digital agenda."

69. This work culminated in the adoption, at a Diplomatic Conference held from December 2 to 20, 1996, of two new treaties, the WIPO Copyright Treaty (the WCT) and the WIPO Performances and Phonograms Treaty (the WPPT).

70. This part of the paper offers a brief summary of the substantive provisions of the WCT and the WPPT. First, the substantive provisions that appear in parallel in both treaties will be summarized, after which the more significant substantive provisions particular to each treaty will be discussed.

2. The Parallel Provisions

71. The treaties respond directly to the "digital agenda" in their provisions dealing with (1) the application of the reproduction right to the storage of works in digital systems, (2) the limitations and exceptions applicable in the digital environment, (3) technological measures of protection and (4) rights management information.

a. The right of reproduction

72. The WCT provides for a right of reproduction for authors by incorporating by reference Article 9 of the Berne Convention (Article 1 of the WCT). The WPPT provides explicitly for exclusive reproduction rights for performers and for phonogram producers (Articles 7 and 11, respectively).

73. The scope of the right of reproduction in the digital environment, a question that attracted extensive controversy during the preparation of the treaties, is not dealt with in the text of the treaties themselves. However, Agreed Statements adopted by the Diplomatic Conferences state that the reproduction right is fully applicable to the digital environment, as are the permissible limitations and exceptions to the right. The Agreed Statements also confirm that the storage of a work in an electronic medium constitutes a reproduction as referred to in the relevant Articles of the Berne Convention and the WPPT.

b. Rights applicable to transmissions in interactive, on-demand networks

74. Perhaps one of the most significant contributions of the WCT and the WPPT is their recognition of the rights of authors, performers and phonogram producers to authorize the on-line transmission of their works, fixed performances and phonograms, as the case may be.

75. The WCT and WPPT provide that authors, performers and producers of phonograms must be granted exclusive rights to authorize the making available of their works, performances fixed on phonograms and phonograms, respectively, by wire or wireless means, in such a way that members of the public may access those works, performances and phonograms from a place and at a time individually chosen by them (that is, interactive, on-demand services).

76. The WPPT provides this right as a "right of making available to the public" while the WCT includes it in the provision on a general right of communication to the public (which eliminates the gaps in the coverage of that right under the Berne Convention). During the discussions of the Diplomatic Conference, it was, however, noted that Contracting Parties might implement the obligation to provide an exclusive right in respect of such "making available" by way of a right of distribution (since in on-demand digital transmissions, copies of works, performances and phonograms are sometimes obtained in receiving computers in a way that members of the public may not even perceive the works, performances and phonograms during the transmission, but only thereafter, on the basis of the copies obtained).

77. An Agreed Statement accompanying the WCT provides that the mere provision of physical facilities for enabling or making such a communication does not in itself amount to a communication within the meaning of the WCT or of the Berne Convention. This, of course, does not exclude liability of access and service providers, for example, on the basis of contributory liability. The same applies to the WPPT, although the latter does not contain such an Agreed Statement.

c. Distribution rights

78. Article 6(1) of the WCT provides for authors to be afforded 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. Under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly, and the TRIPS Agreement does not provide for a right of distribution. Article 6(2) does not oblige Contracting Parties to select any particular form of exhaustion (that is, national, regional or international exhaustion) or, in fact, to deal with the issue of exhaustion at all.

79. Performers and phonogram producers are also granted similar exclusive rights of distribution (Articles 8 and 12 of the WPPT).

d. Rental rights

80. The WCT provides (Article 7) for a right of commercial rental in respect of computer programs, cinematographic works and, as determined in national law, works embodied in phonograms, subject to certain important exceptions contained in Articles 7(2) and 7(3);

81. The WPPT grants an exclusive right of commercial rental to, first, as determined in national law, performers in respect of their performances fixed in phonograms and, second, phonogram producers in respect of their phonograms (Articles 9 and 13 respectively).

e. Limitations and exceptions

82. Article 10 of the WCT and Article 16 of the WPPT incorporate the “three-step” test to determine limitations and exceptions as provided for in Article 9 of the Berne Convention, extending its application to all rights.

83. Agreed Statements accompanying the WCT and the WPPT provide that such limitations and exceptions, as they have until now been applied in compliance with the Berne Convention, may be extended to the digital environment. In addition, Contracting States may devise new exceptions and limitations appropriate in the digital environment. Of course, the extension of existing or creation of new limitations and exceptions is only allowed if it is acceptable on the basis of the “three step” test.

f. Technological protection measures and rights management information

84. It was recognized during the preparation of the two treaties that in a digital environment any new rights in respect of digital uses of works would, in order for the new rights to be effective, require the support of provisions dealing with technological measures of protection and rights management information.

85. In this regard, the treaties oblige Contracting Parties to provide adequate legal protection and effective remedies against the circumvention of measures used to protect the rights of authors, performers and phonogram producers in their works, performances and phonograms, respectively (examples of such measures would be “copy-protection” or “copy-management” systems, which contain technical devices that either prevent entirely the making of copies or make the quality of the copies so poor that they are unusable). This provision is contained in Article 11 of the WCT and Article 18 of the WPPT.

86. In so far as rights management information is concerned, the treaties oblige Contracting Parties to provide under certain conditions adequate remedies against the removal or alteration of rights management information, and certain related acts (Article 12 of the WCT and Article 19 of the WPPT).

g. Enforcement

87. Both the WCT and the WPPT contain the same enforcement provisions (Articles 14 and 23 respectively). These provisions are of a general nature, obliging Contracting Parties to take the necessary measures to ensure the application of the treaties.

h. Administrative and final clauses

88. The WCT and the WPPT include more or less identical administrative and final clauses which, in general, are similar to other such clauses of WIPO Treaties. Only two specific features should be mentioned, namely the possibility of inter-governmental organizations to become party to the Treaty and the relatively high number (30) of instruments of ratification or accession needed for the entry into force.

3. Provisions Specific to the WCT

89. The WCT confirms that computer programs are protected as literary works and that databases are protectable as copyright works. These provisions of the WCT merely confirm earlier provisions of the Berne Convention and/or the TRIPS Agreement.

90. The WCT extends the minimum term of protection in respect of photographs to 50 years.

4. Provisions Specific to the WPPT

91. In general, the WPPT provides for the same level of protection for performers and producers of phonograms as the TRIPS Agreement. It should be noted that this also means that the coverage of the rights of performers in the WPPT extends only to live aural performances and performances fixed in phonograms, except for the right of broadcasting and communication to the public of live performances, which extends to all performances.

92. However, for the first time at international level, moral rights are conferred upon performers (Article 5 of the WPPT).

93. In a further TRIPS-plus element, similar to Article 12 of the Rome Convention, Article 15 of the WPPT provides to performers and producers of phonograms a right of remuneration in respect of the broadcasting and communication to the public of phonograms, with the possibility of reservations, as under the Rome Convention. Under Article 15(3), Contracting Parties are able to reserve Article 15 partially or exclude it entirely, as under Article 16 of the Rome Convention. An Agreed Statement provides that Article 15 does not represent a complete resolution of this question in the digital age.

IV. CONCLUSION

94. The most important feature of the new treaties is that they include provisions designed to establish new norms for the digital age. It is hoped that many countries will join the treaties as doing so will place them in a position to participate fully in the rapidly expanding global information networks.

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