E

WIPO/IP/BIS/GE/03/4
ORIGINAL: English
DATE: November 6, 2003

MOST

MINISTRY OF SCIENCE AND TECHNOLOGY
THE PEOPLE'S REPUBLIC OF CHINA

WORLD INTELLECTUAL
PROPERTY ORGANIZATION

WIPO-MOST INTERMEDIATE TRAINING COURSE ON PRACTICAL INTELLECTUAL PROPERTY ISSUES IN BUSINESS

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the Ministry of Science and Technology
of the People's Republic of China

Geneva, November 10 to 14, 2003

COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL ENVIRONMENT

prepared by the International Bureau of WIPO

I. Introduction

1. Various aspects of the application of copyright and related rights in the digital environment have been discussed under the aegis of the World Intellectual Property Organization (WIPO) for almost three decades. The recent cornerstones in this respect are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) which were adopted at a Diplomatic Conference, convened by WIPO, in December 1996. However, without going into details, it should be noted that the fundamental principle that storage of protected works in computer memories is considered a reproduction was agreed on at a meeting of governmental experts in Paris, jointly convened by WIPO and UNESCO, in 1982. This principle was reaffirmed in agreed statements to the WCT and the WPPT.

2. It may also be noted that the first WIPO initiatives concerning the legal protection of computer programs were taken in 1971, and the decisive breakthrough in the choice of copyright as the appropriate form of protection of computer programs was a meeting of a group of experts in Geneva, convened jointly by WIPO and UNESCO, in February 1985. This was witnessed by the development which followed immediately thereafter: in June/July, 1985, four countries, France, the Federal Republic of Germany, Japan and the United Kingdom all passed legislation clarifying that computer programs were considered works protected under copyright. Later on, this was confirmed at the international level through Article 10.1 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) and Article 4 of the WCT. The confirmation of these two principles, however, is only a clarification. The same results had already been established by way of interpretation of the fundamental international convention on Copyright, the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention).

3. These two historic examples indicate some contours of the importance of copyright and related rights in the information society. Practically all the material available on the Internet is stored in computer memories, except only for certain live transmissions (but they are normally stored simultaneously as they take place), and the computer programs that make it all happen are protected under copyright. Therefore, it is not necessary to discuss whether copyright and related rights play a role in the global information society; that is obviously the case. Copyright and related rights are the fundamental legal building blocks for production and trade in the information society, and as such they play a similarly important role as the property rights in land and tangible objects have played in the agricultural and industrial societies.

4. The questions that need to be addressed relate rather to how the role of copyright and related rights is played, and what is the impact on the practical life in the global information society? what is to be protected, and against which acts? how is the protection to be balanced against important general and special priorities in society, such as the special needs of the educational and research communities and the necessary social considerations? how can the rights be enforced? how will the rights be managed? and how can legitimate users be secured the simplest possible authorization procedures? This paper does not aim at answering all of these questions, but to give an overview of the present situation and certain trends regarding future developments.

II. Rights Granted Under the WCT and the WPPT

5. The WCT and the WPPT establish an important benchmark in the scope of copyright and related rights protecton in that they establish that the interactive communication of a work, a performance or a phonogram must be covered by exclusive rights. National legislation is given some scope to determine which right under national law that will apply, but the protection must cover "the making available to the public of [...] 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" (WCT Article 8, similar wordings relating to performances fixed in phonograms and phonograms, respectively, are included in WPPT Article 10 and 14).

6. When this protection is seen together with the principles on storage of works, established in 1982 (see paragraph 1, above) it emerges that there is now legal clarity as regards the most important ways in which works, performances and phonograms are used in digital networks, including the Internet. The owners of rights are granted exclusive rights, both in respect of the storage of works in the computers from which they are transmitted over the network, and in respect of the transmission itself.

III. Technological Measures for Protection

7. Even though digital technology presents new problems and challenges to the right owners as regards the enforcement of their rights, it also offers new tools for the right owners in this respect. In particular, conditional access systems and encryption are means by which right owners may limit access to and use of works to those customers who are willing to accept certain obligations as regards the use they will make and the payment to be made for such use. It must be recognized, however, that such systems can be circumvented, and that the tools for such circumvention, such as computer programs that break encryption codes or otherwise provide unauthorized access, can be made quickly and widely available through digital networks. Therefore, legal measures against such circumvention have become necessary as a complement to the existing enforcement measures.

8. Provisions to this effect have been included in WCT Article 11 and WPPT Article 18. According to these provisions, adequate legal protection and effective legal remedies shall be provided against the circumvention of effective technological measures that are used by authors or other right owners in connection with the exercise of their rights and that restrict acts, in respect of their works, performances or phonograms, which are not authorized by the right owners concerned or permitted by law. Like the provisions on rights management information, discussed above, these provisions show that the convergence of computers, telecommunication, and the copyright industries mean that new approaches must be used to ensure that copyright and related rights protection will function adequately in the networked digital environment.

IV. Rights Management Information

9. One of the key issues regarding management of rights in a digital environment is the automated monitoring and registration of the use of works. In order to function with the ease and speed that are the hallmarks of well functioning digital networks, it is important that whenever a work or an object of related rights is requested and transmitted over the network, the fact of the use is registered together with all the information necessary to ensure that the

agreed payment can be transferred to the appropriate right owner(s). Various technologies in this respect are available or being developed which will enable the necessary feedback to the right owners. It is crucial, however, that such information is not removed or distorted, because the remuneration of the right owners would in that case not be paid at all, or it would be diverted. From a practical point of view, this would be as prejudicial to the interests of the right owners as an outright infringement of the rights.

10. This issue has been addressed in WCT Article 12 and WPPT Article 19. These provisions oblige national legislation to provide adequate and effective legal remedies against those who, without authority, remove or alter electronic rights management information, or distribute, import for distribution, broadcast, communicate or make available to the public works, copies of fixed performances of phonograms, knowing that such information has been removed or altered without authority. The remedies must apply when this has been done 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 those Treaties. These provisions are important steps in the recognition of the fact that management of rights in a digital network environment must be embedded in the technology itself, and its integrity must be protected by national legislation.

V. Enforcement of rights

11. The necessity of effective and efficient legal rules and institutions for the enforcement of copyright and related rights is generally recognized, and major steps in this respect on the international level are the detailed provisions on enforcement in the TRIPS Agreement and the more generally worded, but wide-ranging, provisions in WCT Article 14 and WPPT Article 23. It is clear, however, that digital networks present new problems to the right owners as regards the enforcement of their rights. It has been claimed that it is practically impossible to enforce rights in such networks, because works and objects of related rights can be placed on the network by anybody and it would be an insurmountable task to monitor the innumerable transactions that take place on the networks. This, of course, is not true, but it is clear that right owners face problems that differ in nature from the more “traditional” cases of infringement. Some right owners, for example, have had success in using investigators to “surf” the Internet in search of infringing copies of their works and objects of related rights, and these investigators can use the same search engines to locate the infringing copies that the infringers’ customers use in order to get access to those copies.

12. It is clear, however, that having investigators to surf the net, and taking legal and other action to close infringing Internet sites is costly and will often relate to works and objects of neighboring rights which are owned by a large number of different right owners. Therefore, right owners will often stand to benefit substantially from joint and/or coordinated efforts.

13. A question which has been discussed extensively is the possible contributory liability of Internet online service providers. While in most cases such service providers only make available the technical means of storage and transmission, without interfering with the contents placed on the Internet by the users, it remains a question to which extent such access providers may assume contributory liability. This might, for example, be the case if an access provider has been informed by right owners that infringements occur on a given site, but nevertheless chooses not to take action against that site, for example, by closing it down.

14. Questions regarding contributory liability are solved differently in various national laws, and frequently the question is not regulated, or only regulated in broad terms, in the legislation because the many nuances as regards the factual circumstances mean that jurisprudence in any case is an important source of law in this field. For this reason, and because existing treaties in the field of copyright and related rights do not address the question, provisions in this respect were not included in WCT and WPPT. In some countries, however, legal provisions regarding the liability of access providers have been passed or are under consideration, and it is in any case clear that this question must be analyzed and discussed further.

VI. Individual and Collective Management of Rights

15. Copyright and related rights (or neighboring rights as they are sometimes called) are individual property rights, which initially belong to the authors, performers, phonogram producers and broadcasters whose works or objects of related rights are protected. Therefore, as a starting point, it is up to those right owners themselves to detect and pursue possible infringements, to decide whether specific uses should be licensed and to decide on which terms, including payment, such licenses should be granted. This does not change in the situation where the rights have been assigned to others, for example commercial entities such as publishers or production companies, as the assignees will assume the same rights as the original right owners had. From a practical viewpoint, however, owners of large multitudes of rights frequently are able to establish more cost-efficient and streamlined management systems than owners of few rights.

16. While individual management of rights has the advantage of giving the right owner the direct and immediate control over the rights and their exploitation, it has also some important backdrops. For many years, for example, it has been generally recognized that the individual owners of rights in musical works—whether composers, lyric writers or music publishers—are not able in practice to monitor, license and enforce their rights, because musical works are constantly used in innumerable contexts, worldwide. Therefore, these right owners have established national organizations, internationally linked together with reciprocal agreements, which are mandated and able to license, on behalf of the right owners, the users of music. Similar systems have also been established for various other categories of works and objects of related rights where this has been deemed appropriate by the right owners.

17. It is frequently stated that collective management of rights is an indispensable necessity in the digital environment. Producers of multimedia products, whether these are to be distributed on CD ROM or via the Internet, need access to, and license to use, such a multitude of works of different types and objects of related rights that it would be impossible for them to contact directly the individual right owners and negotiate the terms for each single work and object of related rights. Also for the right owners it would represent a major, if not unbearable, burden to respond to all such requests. A possible solution of this problem is what has been termed the “one stop shop,” a coordinated collective management of all relevant rights, established on a global basis. Whether this is a feasible solution, at least in the short term, is doubtful, because the owners of rights in certain categories of works are hesitant to give up their present direct and immediate control over their works. Owners of rights in feature films, to mention just one example, exercise the rights to the various uses of their films (such as cinema, video, cable, television, etc.) in a carefully planned way, corresponding to the economic potential and success of each work. They seem generally to prefer being able to consider each request for use individually.

18. The existing collective management organizations, on the other hand, are bracing themselves for the increased use of works in digital contexts. For example, they have worked (and are working) intensely on the modernization of their registration and documentation systems in order for these to function efficiently where works and objects of related rights are being used in digital networks, such as the Internet. Some organizations are also considering more fundamental changes in the ways in which they are managing the rights. So far, the most common approach has been that licensing and distribution conditions are standardized, in such a way that the fee is the same for a popular and an unknown work, and the popular work has therefore only received higher payments as a function of the more intense use that it is normally subject to. In some areas of collective management, however, it is now being considered whether the individual right owners should be able to control the fees to be paid, in such a way that these fees may reflect what is considered to be the commercial value of each work.

19. The collective management organizations in some countries have also forged strategic alliances in order to enable them to offer users a wide array of rights. In France, for example, five existing collective management organizations have joined forces in the organization SESAM which has the task to identify existing works and corresponding right owners in the various fields of artistic creation, such as fine arts and graphic arts, photography, music, literature, film and video, and to deliver authorizations for the use of such works. In this work, SESAM benefits from the existing databases of its member organizations.

VII. Present AND FUTURE WIPO ACTIVITIES

20. As the intergovernmental organization, responsible for the promotion and development of intellectual property rights, including copyright and related rights, WIPO has played, and will play in the future, a key role in the establishment and adaptation of copyright and related rights, in line with the realities of the digital networks and in the corresponding establishment of management and enforcement infrastructures and procedures. The WCT and the WPPT are very good examples of this, but the work is continuing.

21. In December 2000, WIPO organized a Diplomatic Conference on the Protection of Rights in Audiovisual Performances. The protection granted under the WPPT covers, in general, only the exploitation of performances on phonograms, and not in audiovisual media, such as film, television or video. While the scope of this Conference included a number of basic questions regarding that protection, it was also an important step in establishing appropriate rights in connection with the convergence of the digital and audiovisual worlds. The Conference resulted in a general understanding between the participating government delegations concerning all the substantive provisions of a WIPO audiovisual performances treaty, except for one, dealing with the international recognition of transfer of rights under national law. The Diplomatic Conference recommended to the WIPO Assembly of Member States, at its meeting in September 2001, to reconvene the Conference in order to finally adopt the new treaty. The Assemblies, in their turn, encouraged the parties to continue negotiations and they will revert to the issue at their session in September 2004.

22. Another issue that is presently being discussed in the WIPO Standing Committee on Copyright and Related Rights is the protection of broadcasting organizations. These “classic” but highly important media institutions should not be left out of the picture when we focus on digital networks, and Internet broadcasting is already an established reality, whether in the

form of broadcasting directly through the net or rediffusion of over-the-air broadcasts. There is a general consensus that it is high time to review the somewhat aging provisions on protection of the rights of broadcasters and to update them to present day realities.

23. Finally, and much more controversially, the Standing Committee is discussing a possible protection of investment-heavy databases which do not, by virtue of the selection or arrangement of the data, qualify for copyright protection. Many governments have indicated that this issue need thorough analysis and study, not least because of the need to safeguard free flow of, and access to, information, not least for the education, science and research communities in developing countries.

24. At the level of international fora, working groups and groups of consultants, WIPO has also been studying other issues, including, for example, the questions of applicable law and jurisdiction of courts in relation to infringements taking place in global networks, the question of liability for service and access providers and the implementation and protection of technological measures of protection.

25. Discussions on some of these issues will eventually be included in the agenda of the WIPO body preparing international norms, that is, the Standing Committee on Copyright and Related Rights. In addition, of course, these issues will be addressed in other activities of WIPO, including the cooperation with developing countries within the framework of WIPO's program for Cooperation for Development and the WIPO Worldwide Academy.

[End of document]