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PROTECTION OF COPYRIGHT AND RELATED RIGHTS IN THE DIGITAL CONTEXT. THE WIPO "INTERNET TREATIES"

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I. INTRODUCTION

1. The paper describes the spectacular development of digital technology and the ever more widespread use of the Internet which both offer new opportunities and pose new challenges from the viewpoint of the creation, production and dissemination of works and objects of related rights. This is followed by a general description of the two treaties, and a separate analysis of each of the issues settled under the so called “digital agenda” described in the paper mentioned in the preceding paragraph. Finally, the last part of the paper deals with the entry into force of, and the present status of adherence to, the treaties.

II. DIGITAL TECHNOLOGY AND THE INTERNET. OPPORTUNITIES AND CHALLENGES

2. Around the beginning of1990s, the developmen t of digital technology and the expansion of the Internet accelerated spectacularly due to some new technical solutions, for example, in the field of compression and error correction technologies. Since then, information technologies have accounted for a large share of investment and made a significant contribution to economic growth. Businesses, individuals and governments have all profited from the benefits delivered by the ever-increasing and broadening use of the Internet.

3. The explosion of the Internet, and the increase in enterprises based on it, has profoundly shaken the economic world and has generated new commercial models. Following a period of sudden growth, in 2001 the Internet-related businesses nevertheless experienced a significant crash, of such a magnitude that questions were raised as to how the global network would develop in the future. It seems, however, that after this what some experts describe as “short-term turbulence", the Internet, even if in certain aspects its development will be somewhat slower, to play a major role in the world economy and exchange of information.

4. It is interesting to note that now about 10% of the world's population is connected to the Internet, representing more than 605 million users. Despite of the above-mentioned temporary slowing down, this figure is increasing more quickly than earlier foreseen, given that 1999 forecasts envisaged only 250 million Internet users in 2002. Now certain forecasts even estimate that the world online population could reach one billion by 2005. Also the number of countries connected to the Internet has increased significantly in the past ten years. Whereas, at the beginning of the 1990s, a little over ten countries were connected to the Internet, this figure stood at 214 at the end of 2001. The rate of Internet penetration still remains unbalanced throughout the different regions of the world. The regions with the largest numbers of users are mainly the North American (37%), Asian (31%) and European (29%) regions. However, recent statistics demonstrate that the regional pattern in terms of number of Internet users is changing. In May 2002, the countries or regions with the highest level of Internet penetration were located primarily on the European continent: Sweden (64.6%), Denmark (60.3%), Netherlands (58.07%), United Kingdom (56.88%) and Norway (54.4%); in the Asian region: Hong Kong, SAR of China (59.58%); and in North America: United States (59.22%) and Canada (52.79%). By contrast, although the number of users has increased slightly in Africa, the lack of telecommunications infrastructure means that this region of the world still represents less than 2% of the world online population.

5. The value of commercial transactions on the Internet has increased substantially over the past five years. Whereas in 2000, it was estimated at US$ 433 billion, it was foreseen that in 2002 it would represent US$ 1.9 trillion and, the forecast for 2004 is US$ 6 trillion.

6. It should be seen that, in spite of the significant value of commercial transactions over the Internet (including sale or purchase of goods or services between businesses, households, individuals, public or private organizations, over the Internet), their share of global trade remains small. In certain OECD countries the use of the Internet in commercial transactions represents 0.4 to 3.78% of all commercial transactions. It appears, therefore, that businesses use the Internet mainly as a marketing tool rather than as a commercial tool and that consumers are still reluctant to make transactions over the Internet.

7. However, the role and importance of the Internet goes beyond its economic impact. At the time when the World Wide Web was first developed in the 1990s, it transformed the Internet from a technological infrastructure into a popular network linking people in diverse communities throughout the world. It has become the instrument by which people throughout the world exchange and share ideas, information and, gradually, cultural products, as well as different kinds of goods and services. What began originally as a military and research tool has grown into conduit for electronic commerce. The Web now contains several billion pages of information, growing at the rate of more than seven million pages each day. It is this ready availability of information on every conceivable subject, combined with advancements in digitization, that has made the Internet such a revolutionary tool.

8. It is to be noted that the protection of copyright and related rights has a special role in electronic commerce.

9. 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.

10. In the case of indirect electronic commerce, many activities take place through the Internet, such as offering products, advertising, concluding contracts, transferring 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.

11. 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.

12. 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".

13. The "global information society" foreseen in the early days of the Internet has yet to become a worldwide reality, but the focus on information remains the key element of the policy considerations concerning the Internet. Although a good proportion of the information on the Web is freely available, it is now an increasingly significant amount in respect of which owners of rights intend to exercise and enforce their intellectual property rights, mainly copyright and related rights.

14. As a result of the vast availability of protected material on the Internet, the ease of copying and distribution of copies and the relative anonymity afforded to these digital transactions, copyright and related rights have been faced with a number of complex challenges emerged Key among these challenges is the expectation among many users that any such material should be free of charge in the "cyberspace" of the Internet world. Many companies took the approach that it was initially more important to make their products (information) available freely, and thereby establish a market presence on the global net, and to address issues of revenue and profit at a later stage. Most of these companies did not endure the burst of the crash in March 2000. Many of them that continue to operate in the online environment have developed other business models, often relying on advertising revenue or value-added service charges to finance their free services. Surveys have shown that consumers are gradually becoming more willing to pay for online content. However there remains a general reticence to pay for material that was once free.

15. The copyright community is now exploring ways in which they may make their products available online, while protecting their rights and recouping their investment. To some extent, the uptake of fee-based intellectual property services is dependent on the efficient management of these rights, as well as the availability of workable and secure methods of "micropayments" that would enable pay-per-unit purchases, and the building of consumer confidence in online payment security, privacy and consumer protection. At the same time, however, creators and intellectual property rights holders need to feel sure that they can protect their property from piracy and control its use, before they will be willing to make it available online.

16. The WIPO "Internet treaties" described below adapt the international norms on copyright and related rights to facilitate the dissemination of protected material over the Internet Very much depends, however, on these rights may be exercised in the new environment. One approach is to employ business models by which subscribers, eager to access music, film, software or literary works, can be persuaded to legitimately purchase these products, instead of relying upon illegal markets. Surveys have shown that the priority for users of online music services is availability of a wide number of compositions and ready access with reasonable costs. Subscription services, based on secure and monitored access are being explored. In the music industry, for example, subscription music downloads and streaming services are available through a variety of proprietary systems including, eMusic, MusicNet, FullAudio, Rhapsody, Liquid Audio, Inc. and Pressplay, that seek to replace the popularity of more than 200,000 unauthorized online music sharing sites, including Morpheus, Gnutella and KaZaA. These "peer-to-peer" (P2P) networks enable millions of users to upload and share their music and film files via the Internet. The industry in various countries has taken legal action to prevent the widespread piracy via networks, with some success, although the problem is not yet solved. Some systems, like Napster, use a centralized server to process the transfers, while

others are decentralized and are difficult to regulate: The industry has grappled with how to target millions of individual unauthorized users and rapidly evolving technological methods. Although the music industry is now embracing the online medium, it continues to grapple with the problem of piracy, as 950 million pirated music discs were sold in 2001, in a world pirate-music market valued at US$ 4.3 billion.

17. As regards audiovisual works, their distribution has been held back until recently by the lack of bandwidth, which has prevented the relatively large data files required to transmit video to be downloaded or streamed at a speed or quality acceptable to consumers. Nevertheless, more than a million users are typically online with Morpheus, a P2P site that enables users to trade video files, and most PCs now come with CD burners that can be used to compress and store films on discs without any significant loss in quality. While the technology is still developing to facilitate accessible video-on-demand and digital pay-per-view, the film industry is yet to match the progress of the music industry, and most legitimate film sites are webcasters that distribute short made-for-online film and animation material which is largely experimental and available free of charge. As in the music industry, copyright owners in the film industry are also reluctant to release their audiovisual works online while there is a lack of adequate copy protection that could protect them from rampant piracy, that today sees 400,000 to 600,000 films downloaded illegally every day. For these reasons, major studio executives have forecast that lawful film distribution via the Internet will account for only 4% of revenue by distribution channel by 2010.

18. In the broadcasting and "webcasting" industry, Internet radio has been luring customers away from traditional media sources by providing access to thousands of global radio broadcasts in real time. Since January 2001, the total audience time spent listening to monitored Web radio stations increased by 749%. For some time, Internet radio was unregulated, however in certain countries now it is established that webcasters must pay royalties to record companies that hold the song rights for the copyright music they play under statutory compulsory licenses for digital performances.

19. In this environment, the need for a review, and for a necessary strengthening of the international norms of copyright and related rights has emerged inevitably. It was clear, however, that due attention should be made also to the need for maintaining the traditional well-balanced nature of the international norms on copyright and related rights, and that the public interests related to education, scientific research and the reasonable availability of valuable works and objects of related rights in the new environment be also fully taken into account. The WIPO "Internet treaties" correspond to these complex requirements.

III. GENERAL DESCRIPTION OF THE TWO WIPO "INTERNET TREATIES"

20. 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.

21. 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.

22. 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.

23. 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.

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

Instrument" to cover the rights of producers of phonograms and, along with those rights, also the rights of performers.

25. The relationship between this "New Instrument" – that is, the WPPT – and the Rome Convention has been regulated in a way similar to the relationship between the TRIPS Agreement and the Rome Convention. This means that (i) in general, the application of the substantive provisions of the Rome Convention is not an obligation of the Contacting Parties; (ii) only a small number of provisions of the Rome Convention is included by reference (Article 3(2) and (3) on the criteria of eligibility for protection); and (iii) Article 1(2) of the Treaty contains, *mutatis mutandis*, practically the same provisions as Article 2.2 of the TRIPS Agreement: it provides that nothing in the Treaty derogates from obligations that Contracting Parties have to each other under the Rome Convention. The level of protection provided by the WPPT, in general, corresponds to the level of protection under the Rome Convention and the TRIPS Agreement; however (i) it does not extend to the rights of broadcasting organizations; (ii) as far as the rights of performers are concerned, it only extends to the aural aspects of performances and their fixations (on sound recordings); and (iii) it also contains plus elements in respect of those provisions which have been worked out on the basis of the so-called "digital agenda" of the preparatory work and the Diplomatic Conference.

26. 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.

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

27. The texts of the two treaties and of the agreed statements related to them were agreed upon during a series of informal consultation meetings of Main Committee I held during the third week of the Conference. During these consultations, a great amount of time was devoted to discuss Article 7 of the draft WCT and Articles 7 and 14 of the draft WPPT. In the draft texts, those articles contained provisions to clarify the scope of application of the right of reproduction.

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

29. Article 7(1) of the draft of the WCT contained the following clarification: "The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the 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." Article 7(1) of the draft of the WPPT included a similar provision: "Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their [Alternative A: musical performances fixed in phonograms,] [Alternative B: performances fixed in any medium,] in any manner or form." Article 14 of the WPPT contained essentially the same provision concerning phonograms.

30. Paragraph (2) of all the three articles, subject to the relevant general provisions on limitations and exceptions, provided for the possibility of specific limitations "in cases where a temporary reproduction has the sole purpose of making the [work] [performance] [phonogram] [perceptible] [audible] 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] [performance] [phonogram] that is authorized by the [author] [performer] [producer of phonograms] or permitted by law."

31. The fact that the storage of works in electronic memories is an act of reproduction has been recognized - and has never been questioned - for a long time. It was as early as 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."

32. The questions which emerged in respect to the scope of reproduction in the digital environment did not, actually, concern storage in electronic form in general, but only certain kinds of storage, namely those transient and incidental forms of temporary reproduction which are mentioned in paragraph (2) of each of the three above-mentioned articles. It was believed by some that such reproductions should not he covered by the operation of the exclusive right of authorizing reproduction.

33. During the preparatory work, three schools of thought emerged concerning the operation of the right of reproduction in respect to such transient and incidental reproductions. The followers of the first school were of the view that no specific limitations or exceptions were needed, since the flexibility of the general provisions on limitations and exceptions (based on the three-step test established by Article 9(2) of the Berne Convention) provided a sufficient legal framework. According to the second school, any "too much" transient and incidental reproduction simply should be excluded from the definition of "reproduction." It was, however, pointed out that, first, to exclude some reproduction on the basis of the duration of reproduction, would be a very subjective exercise (what should he the limit: some hours, some minutes, some seconds, some nanoseconds?), and, second, that, as long as the acts involved correspond to the concept of reproduction, the exclusion of such acts from that concept would conflict with Article 9(1) of the Berne Convention, which clearly covers reproduction "in any manner or form." Therefore, quite naturally, a third school gained more support, namely that no temporary reproduction should be excluded from the definition of "reproduction" (since this would be in conflict with the Berne Convention) but that appropriate limitations on the right of reproduction should be made possible in respect to certain transient and incidental reproduction where this is justified. The above-quoted provisions in the draft treaties followed the latter idea.

34. Of course, there is an inevitable question we should respond to if we speak about the concept of reproduction, namely how we can actually describe that concept. The Berne Convention does not offer a specific definition, but the records of the various diplomatic conferences make it clear that fixation of a work is the basic element of the concept. With this, however, still nothing is truly settled since then the next inevitable question is what "fixation" is. Fortunately, in respect to that, there seems to be a quite well-established position

at the international level: fixation means sufficient stability of form so that what is *"fixed"* may be perceived, reproduced or otherwise communicated. A statement about this is also included in the report of the WIPO/UNESCO Committee of Governmental Experts quoted above. The report clarifies that "sufficient stability of a form in which a work is fixed should be considered from the functional side, in the sense that the work can be perceived, reproduced or otherwise communicated to the public with the aid of a computer system."

35. It is interesting to note in this context that, under Article 2(c) of the WPPT, "fixation" means "the embodiment of sounds, or of the representation thereof, from which they can be perceived, reproduced or communicated through a device." This indicates that the Diplomatic Conference has also recognized the above-mentioned basic elements of the concept of "fixation," and, through it, the concept of reproduction. It is hardly questionable that, in general, even transient and incidental storage of works and objects of neighboring rights in an electronic memory corresponds to these concepts since they are sufficiently stable so that, on the basis of them, the works and objects of neighboring rights stored may be perceived, further reproduced or further communicated.

36. Thus, it seemed appropriate to use the system of limitations and exceptions (subject to the "three-step test" included in Article 9(2) of the Berne Convention) where the application of the right of reproduction was not regarded to be justified in the case of such temporary storage, rather than trying to exclude such reproduction from the concept of "reproduction" and creating by this an unnecessary conflict with the Berne Convention.

37. Nevertheless, the Diplomatic Conference did not adopt Articles 7 of the two draft treaties and Article 14 of the draft WPPT. There were delegations which supported those provisions, there were some others which were in favor of excluding transient and incidental reproduction from the concept of reproduction, 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 limitations mentioned in paragraph (2) of each of the three articles 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 three articles were left out from the text of the treaties. Thus, that school prevailed which was against the introduction of specific limitations or exceptions.

38. At the same time, the Diplomatic Conference adopted an agreed statement which 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 similar agreed statement was adopted also concerning the WPPT.

39. The first sentence of the agreed statement was adopted by consensus. It follows from that first sentence that Article 9(1) of the Convention is fully applicable. This means that the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction "in any manner of form," must not be restricted just because a reproduction is in digital form, through storage in an electronic memory, or just because a reproduction is of a temporary nature. At the same time, it also follows from that sentence that Article 9(2) of the Convention is fully applicable, which offers an appropriate basis to introduce any justified exceptions in the above-mentioned cases of transient and incidental reproductions in national legislation, in harmony with the "three-step test" provided for in that provision of the Convention.

40. The second sentence of the agreed statement was not adopted unanimously but by a majority of the votes, which was much larger than the two-third majority required for the adoption of the text of the treaties themselves; therefore, its validity cannot be questioned. (Certain views have been expressed that the second sentence could not serve as an interpretation tool because the Vienna Convention on the Law of Treaties only accepts an agreement as such a tool if it was made between all parties by consensus in connection with the conclusion of the treaty. The text of the Vienna Convention, however, does not confirm this position. Its Article 31.2.(a) speaks about "any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaties". This only requires that all the parties – the same parties as those which adopt the text of the treaty (and not only a group thereof) -- participate in the adoption of the agreement and that the agreement be made in connection with the conclusion of the treaty. That is exactly the way these agreed statements were adopted during the last "crazy night" of the diplomatic conference. The Convention allows that the rules of procedure of a diplomatic conference do not apply the principle of consensus but that they rather provide for the possibility of adopting a treaty by majority of votes, and the Rules of Procedure of the December 1996 Diplomatic Conference had made use of this option. It would be absurd if, under such rules of procedure, a diplomatic conference could adopt a treaty – or some provisions thereof – by majority vote, but it would not be allowed to do the same concerning an agreed statement related to the convention or to some provisions thereof.)

41. The validity of what is included in the second sentence of the agreed statements could hardly be questioned even if it had not been adopted by the required majority since it reflects the appropriate interpretation of Article 9 of the Berne Convention. We may even go further: if an agreed statement had been adopted that would have stated the opposite position -- namely that storage of works in an electronic memory is not a reproduction – it would not be valid and could not serve as a basis for interpretation of the treaties, since it would have been in conflict with the concept of "reproduction" in the two treaties (based on Article 9(1) of the Berne Convention).

42. It follows from what is discussed above that the legislation of a Contracting Party of the two treaties should rercognize that storage of works in an electronic memory is reproduction; and should provide that, unless an exception or limitation is applicable, the exclusive right of reproduction extends also to temporary storage or other temporary reproduction. At the same time, Contracting Parties may allow exceptions and limitations in respect of temporary storage or other temporary reproduction in certain special cases, provided that this does not conflict with any normal exploitation of works and objects of related rights and does not unreasonably prejudice the legitimate interests of owners of rights (being these the conditions set in the "three-step test"). For example, the numerous incidental temporary reproductions that are taking place during a digital transmission through the Internet and which – although they are technically indispensable – do not have any relevance from the viewpoint of the exploitation of the protected material and the legitimate interests of the owners of rights may -- and one may say: should -- be covered by an exception. (In certain countries, even no new legislative provision may be necessary for this; the exception may exist already on the basis of the fair use or fair dealing doctrine, the doctrine of implied licenses or the *de minimis* principle.)

43. This does not mean, however, that all kinds of temporary reproductions may be exempted. For example, in the case of making available a computer program on the basis of a single authorized copy in the internal system of a big company for temporary reproduction in a

number of terminals without authorization may not, of course, be covered by an exception since this would be in conflict with a normal exploitation of the program.

V. THE RIGHT OR RIGHTS APPLICABLE FOR INTERACTIVE TRANSMISSIONS; THE "UMBRELLA SOLUTION"

44. During the preparatory work, an agreement was reached in the WIPO committees that the transmission of works and objects of related rights on the Internet and in similar networks should be covered by an exclusive right of authorization of the owners of rights, with appropriate exceptions, of course. There was, however, no agreement on which one should be chosen of the two main candidates: the right of communication to the public and the right of distribution.

45. The need for the application of one or both of those rights 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 correspond to the extremely dynamic nature of Internet-type networks, and, furthermore, it alone would not offer a satisfactory and readily enforceable basis for the liability of those who make available to the public works and objects of related rights in such networks.

46. "Making available works and objects of related rights to the public in an interactive electronic network." This could have been more or less a precise description of the act - or series of acts - which would have been covered by appropriate rights. Thus, the idea might have emerged to simply recognize such a right to cover such acts.

47. It was clear, however, that there was no complete freedom in this respect. It would have been difficult to get rid of the existing categories, rights and exceptions included in existing treaties and laws. It would not have been possible to forget that well-established practices were based on the existing categories, rights and exceptions, that, on the basis of those, long term contractual relations had been formed, and so on.

48. 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 to apply existing norms to this new phenomenon. 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 a work or an object of related rights to the public. (It is another matter that the concept exists 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 is still another matter that some national laws provide for such broad rights.)

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

50. 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 which are embodied in an object of neighboring rights (that is, the actual "use")

by the members of the public differ in time. 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 and objects of neighboring rights are made available for direct - that is not "deferred" - use (perceiving, studying, watching, listening to) by the members of the public.

51. Interactive digital transmissions scramble the traditionally arranged, dogmatically duly characterized and justified picture of these two families of rights. They scramble it in two ways. 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 are 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, the member of the public who would like to get access to the material should give his subscription number or, in open systems, for example, his credit card number. Then he may study the menu of possible uses indicated on the "envelope." He may learn that at least to a certain extent, he does not have to pay anything for browsing 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 studying an on-line database, watching on-line moving images, listening to on-line music).

52. 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 also sufficient to refer to the fact that on-line uses in such digital systems do involve- as an indispensable step - obtaining temporary copies. 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.

53. 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 (both combined, however, with the application of the good old right of reproduction, where appropriate). The United States seemed to favor 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.

54. It was not by chance why this or that country favoured this or that solution. The responses very much depended on the existing national laws - which rights, and to what extent were granted - on the practices established, the positions obtained on the basis of those laws, and, as a consequence, on the related national interests involved.

55. When it became clear that the international copyright community was faced with two basic options- the application of the right of reproduction along with the right of distribution, or the application of the right of reproduction along with a right to communication to the public, and, of course, also with the further possibility of combining these options somehow, it was soon recognized that the application 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.

56. 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 via 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 regarding the concept of communication to the public. First of all, it should be accepted and clarified that the concept extends not only to the acts that are carried out by the communicators, the transmitters themselves (that is, to the acts as a result of which a work or object of neighboring rights is actually made available to the public and the members of the public do not have to do more than, for example, switch on the equipment necessary for reception), but also to the acts which only consist of making the work or object of neighboring rights *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 of the notion of the "public," more precisely in respect to 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.

57. 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 for any of the above-mentioned solutions to work, the gaps in the international norms had to be eliminated; the coverage of the rights involved had to be completed.

58. 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, it was also recognized that there was quite general agreement on which acts should be covered by exclusive rights, and that the differences only related to the specific legal characterization of those acts.

59. 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 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 the legal characterization of the exclusive right - that is, in 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.

60. This solution was referred to as the "umbrella solution." 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 as provided for in Articles 10 and 14 of the WPPT, discussed below, might also be such an "other" right.

61. The validity of the above-quoted statement may not be questioned, 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 (the compatibility of which practice with the Beme Convention is considered obvious), namely that the legal characterization of a right - the choice of the applicable right - is frequently not the same under national laws as under the Convention.

62. 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 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. 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 for 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 also applied to 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."

63. 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. As mentioned above, under the Berne Convention, it is only in respect to 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 he 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.

64. Article 6(2) deals with the issue of the exhaustion of the right of distribution. It does not oblige Contracting States to choose national/regional exhaustion or international exhaustion - or to regulate at all the issue of exhaustion - of the right of distribution alter the first sale or other first transfer of ownership of the original or a copy of the work (with the authorization of the author). It goes without saying, however, that digital delivery of copies is not, and should not be, covered by any exhaustion of the right of distribution, since the ownership of the copy which is uploaded actually is not transferred; the distribution takes place by reproduction of new copies through transmission.

65. From the viewpoint of the application of the "umbrella solution," the agreed statement adopted by the Diplomatic Conference concerning Article 6 (on the right of distribution; see above) and Article 7 (on the right of rental; see below) may be considered relevant. The agreed statement reads as follows: "As used in these Articles, the expressions ‘copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects." The question may emerge whether or not this agreed statement is in conflict with the "umbrella solution," and, particularly, whether or not it excludes the application of the right of distribution for transmissions in digital networks. The answer to this question is obviously negative. The agreed statement determines only the minimum scope of application of the right of distribution; it does not create any obstacle for Contracting States to go beyond that minimum.

66. 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 for producers of phonograms.

67. The concept of "communication to the public" as defined in Article 2(g) of the WPPT does not extend to such "making available." The right of broadcasting and communication to the public (in Article 6 and 15) and the right of distribution (in Articles 8 and 12, in a way similar to Article 6 of the WCT) are provided for separately. The freedom of Contracting States in respect to the legal characterization of the acts covered and the choice of the right(s) actually applied seems, however, the same as under the WCT.

VI. THE "DIGITAL AGENDA": LIMITATIONS AND EXCEPTIONS

68. 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.

69. 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.

70. 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.

71. 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".

72. 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."

73. 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

74. 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.

VII. THE "DIGITAL AGENDA": OBLIGATIONS CONCERNING TECHNOLOGICAL PROTECTION MEASURES AND ELECTRONIC RIGHTS MANAGEMENT INFORMATION

75. The truly and completely new provisions of the two treaties are those which relate to technological protection measures and rights management information. It was recognized during the preparatory work and at the 1996 diplomatic conference that, in the context of the global digital network, it is not sufficient to grant appropriate rights; copyright and related rights cannot be effectively protected and exercised without the support of technological measures (such as encryption of the protected material) and electronic rights management information (identifying the protected material, the owners of rights, the licensing conditions, etc.). The two WIPO treaties do not include any provision on the question of what kind of such measures and such information should or may be applied. What they only do is that they oblige the Contracting Parties to provide adequate legal protection and effective legal remedies against the circumvention of technological measures and against those who, knowing the relevant circumstances and consequences, remove or alter electronic rights management information without authority or use in certain manners, without authority, works or objects of related rights or copies thereof knowing that such information has been removed or altered without authority (Articles 11 and 12 of the WCT and Articles 17 and 18 of the WPPT).

76. The implementation of the provisions on rights management information, in general, so far has not raised any serious problems in the stage of implementation. They involve the obligation to grant protection against the unauthorized removal or alteration of such information, a kind of falsification, and it would be hard to find any reasonable argument why it would not be justified to offer efficient protection against such acts. Furthermore, the provisions of the two treaties (Article 12 of the WCT and Article 18 of the WPPT) are sufficiently detailed, and may be implemented by including them nearly word by word into national laws. The implementation of the obligations on technological protection measures is, however, a more complex task.

77. In the debates about, and during the preparatory work of, the implementation of the obligations under the two WIPO treaties, it was duly taken into account that, in general, the acts of circumvention of technical protection measures will be carried out by individuals in private homes or offices, where enforcement will be very much difficult. Thus, if legislation only covers the very acts of circumvention, it cannot provide adequate legal protection and effective legal remedies against such acts, which, thus, in spite of the treaty obligations, would continue uncontrolled. It has been recognized, however, that it is still possible to

provide such protection and remedies. Considering the complexity of the technologies involved, in most cases, such acts may only be performed after the acquisition of the necessary circumvention device or service. This acquisition takes place outside the private sphere in the special market place of these kinds of devices and services. Thus, there is a possible way for granting protection and providing for remedies in accordance with the treaty obligations: stopping unauthorized acts of circumvention by cutting the supply line of illicit circumvention devices and services through prohibiting the manufacture, importation and distribution of such devices and the offering of such services.

78. Thus it has been found that Contracting Parties may only duly fulfil their obligations under Article 11 of the WCT and Article 17 of the WPPT, if they provide the required protection and remedies

-- against both unauthorized acts of circumvention and the so-called 'preparatory activities' rendering such acts possible (that is against the manufacture, importation and distribution of circumvention tools and the offering services for circumvention);

-- against all such acts in respect of both technological measures used for 'access control' and those used for the control of exercise of rights, such as 'copy-control' devices (it should be noted that access control may have double effect;

-- in respect of circumvention devices, not only against those devices whose only – sole -- purpose is circumvention but also against those which are primarily designed and produced for such purposes, which only have limited
commercially significant objective or use other than circumvention, or about which its is obvious that they are meant for circumvention since they are marketed (advertised, etc,) as such.

-- also in respect of circumvention devices, not only against a given device which is of the nature described in the preceding paragraph but also against individual components or built in special functions that correspond to the criteria mentioned in the preceding paragraph.

79. It has also been recognized that, although much depends on the specific traditions and principles of the legal systems of the Contracting Parties concerning the question of in which way they may guarantee "effective legal remedies" against circumvention of technological protection measures and against "preparatory activities", in general, civil remedies are indispensable (provided in a way that any injured party may invoke them). Furthermore, criminal penalties are also needed since the manufacture, importation and distribution of illicit circumvention devices is a kind of piratical activity. Due to this nature of the so-called "preparatory activities", it seems also justified to extend to them the applicability of those kinds of provisional measures and border measures which are provided for in Articles 50 to 60 of the TRIPS Agreement.

80. At the same time, in the countries where the issues of implementation have been so far addressed, it has been found necessary to build into the legislation specific norms to guarantee to prevent situations where the extensive use of technological protection measures might emerge as an obstacle to the application of certain socially indispensable exceptions to copyright and related rights. Some national laws provide for an administrative review and regulation system for this purpose, while others foresee legislative intervention in cases where this may become necessary.

VIII. RELATIONSHIP OF THE WCT AND THE WPPT WITH THE BERNE AND ROME CONVENTIONS AND THE TRIPS AGREEMENT

81. The WCT is a “special agreement” (that is, an independent instrument and not a revision under Article 20 of the Berne Convention, which allow member countries of the Berne Union to conclude such agreements between them – as well as both between them and other countries – provided such agreements “grant authors more extensive rights than those granted under by the Convention, or contain other provisions not contrary to [the] Convention”). Following from this status, there is no administrative relationship between the WCT and the Berne Convention. Membership in the Berne Union is not a condition of being eligible to accede to the WCT.

82. The substantive relationship between the WCT and the Berne Convention is of the same nature as the relationship between the TRIPS Agreement and the Berne Convention, just it is even closer. Article 1(4) of the WCT applies the same legal technique as Article 9.1 of the TRIPS Agreement in the sense that it obliges Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Convention (the difference is that it does not exclude from this the provisions on moral rights). Similarly to Article 2.3 of the TRIPS Agreement, Article 3 of the WCT refers to the criteria of eligibility for protection fixed in the Berne Convention. Furthermore, Article 1(2) of the WCT also contains a safeguard clause in favour of the Berne Convention for the relationships between the members of the Berne Union.

83. Article 4 of the WCT may be regarded as a kind of interpretation of the Berne Convention the same way as in the case of Article 9.1 of the TRIPS Agreement, although its wording somewhat differs from the TRIPS text: “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of expression.” This is further confirmed by an agreed statement concerning Article 4 of the Treaty. Other agreed statements adopted by the 1996 diplomatic conference may also be also as indirect interpretations of the Berne Convention. The agreed statement added to Article 5 on “Compilations of Data (Databases)” declares that it is consistent with Article 2 of the Berne Convention, and a similar declaration is included in one of the agreed statements regarding Article 10(2) of the Treaty on exceptions and limitations concerning its coverage as compared with the provisions of the Berne Convention on the same subject-matter. Finally, the agreed statement concerning Article 1(4) of the WCT offers a valuable interpretation on the application of Article 9 of the Berne Convention on the right of reproduction in the digital environment.

84. As discussed in the comments to Article 1 of the WPPT, in the Guide to the WPPT, below, although this is not stated separately, the WPPT is to be regarded a “special agreement” under Article 22 of the Rome Convention. Article 1(1) of the Treaty also contains a safeguard clause protecting the applicability of the Rome Convention between countries party to it.

85. It is important to note that there is no administrative relationship between the WPPT and the WCT (or the Berne Convention or the UCC) similar to the relationship between the Rome Convention, on the one hand, and the Berne Convention and the UCC, on the other hand, as mentioned in paragraph 35. That is, it is possible to accede to the WPPT without acceding to the WCT, and the membership in the Berne Union or adherence to the UCC is not a condition either.

86. Article 3 of the WPPT – similarly to Article 1.3 of the TRIPS Agreement – refers to the criteria of eligibility for the protection provided for in the Rome Convention, and extends their application to the Treaty.

87. Turning now to the relationship between the WCT and the WPPT, on the one hand, and the TRIPS Agreement, on the other, it is to be noted that, by the time the preparatory work of the WCT and the WPPT reached the decisive, finale stage, the TRIPS Agreement already had been adopted and entered into force. This had a positive impact on the preparatory work in respect of certain issues which were more or less pending in the WIPO Committees before, but had been solved in this or that way in the TRIPS Agreement, such as the issues of the protection of computer programs and databases, the right of rental and the term of protection of the rights in performances and in phonograms. This positive impact consisted in the fact that there was no need for further negotiations about these issues; it was possible to simply include the relevant TRIPS norms into the two treaties as parts of the new, up-to-date international standards.

88. However, the recent settlement of certain issues in the TRIPS context also had set a limit to the scope and level of protection to be granted under the new treaties. The delegations of certain countries stated repeatedly that they were not ready to “reopen” negotiations on such issues with the possible consequence of extending the scope of protection or raising its level. This does not mean that the wording of the relevant provisions were necessarily the same in the two WIPO treaties as in the TRIPS Agreement; the TRIPS provisions were not included by reference but rather through the reproduction of their contents in the new treaties, sometimes with some wording differences.

89. In the case of several of these provisions taken over from the TRIPS Agreement, the 1996 diplomatic conference adopted some agreed statements clarifying that these provisions in the WIPO treaties were supposed to mean the same as the corresponding provisions in the TRIPS Agreement. However, the legal nature and impact of these agreed statements differ to a certain extent.

90. The agreed statements concerning the relationship between Articles 4 and 5 of the WCT and the corresponding provisions of the TRIPS Agreement are similar; in fact, in a *mutatis mutandis* manner, practically the same:

Agreed statement concerning Article 4: “The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.”

Agreed statement concerning Article 5: “The scope of protection for compilations of data (databases) under Article 5 of this Treaty, is consistent with Article 2 of the Berne Convention and on par with the relevant provisions of the TRIPS Agreement.”

91. This may be regarded a kind of interpretation of the TRIPS Agreement, in the sense that, although the language of the provisions of Articles 4 and 5 of the WCT seems to be more general than that of Article 10.1. and 2. of the TRIPS Agreement, the agreed statements indicate that these provisions of the WCT are regarded to be “on a par with the relevant provisions of the TRIPS Agreement”. This, however, does not have a truly substantive importance since, in the case of the provisions on computer programs and databases, diverging interpretations may hardly emerge depending on whether the Berne, TRIPS or WCT provisions are taken as a basis.

92. There are, however, two provisions of the TRIPS Agreement about the interpretation of which there had been debates, and, in respect of which – when "reproduced" in the WCT – agreed statements were adopted. These agreed statements reflect certain positions which were expressed during the debates, and, consequently, reject some others also discussed. By this, these agreed statements, in a way, "interfere" with the debates and pretend to decide them outside the TRIPS context, but practically in relation to the same kinds of provisions as in the TRIPS Agreement. All this may raise quite complex questions also concerning the interpretation of the relevant TRIPS norms.

93. One of these provisions and agreed statements concerns the provision of Article 7(1) of the WCT on the right of rental in respect of phonograms. As discussed in the Guide to the WCT, below, the text of this provision does not – since, due to the different context, it cannot – repeat the relevant provision (Article 14.4) of the TRIPS Agreement word by word. Nevertheless, the following agreed statement has been adopted concerning this provision of the WCT: "It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under the Contracting Party's law, are not granted rights in respect of phonograms. *It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement*" [emphasis added].

94. The most important special feature of this agreed statement is not just that it states that a provision worded not exactly in the same way as Article 14. of the TRIPS Agreement is, nevertheless, consistent with it, although this in itself would be quite an interesting case of "cross-interpretation". It rather consists in the fact that it interprets Article 7(1) in substance, and it suggests that the obligation according to that interpretation is also consistent with this provision of the TRIPS Agreement. The special nature of the agreed statement becomes even more emphatic if it is taken into account that, as discussed in the Guide to the WCT, it reflects only one of the possible interpretations about which there were – and there may still be– differences of opinion.

95. As also discussed in the Guide to the WPPT, below, although, in principle, this agreed statement was adopted concerning Article 7(1) of the WCT alone, it has similar consequences for Article 9(1) of the WPPT on the right of rental of performers.

96. In the case of another provision taken over from the TRIPS Agreement, one of the questions is just whether or not it is a *plus* element in comparison with the Berne Convention. This provision is Article 10(2) of the WCT which reads as follows: "Contracting Parties shall, when applying the Berne Convention confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author." Article 13 of the TRIPS Agreement does not seem to refer to the Berne Convention, since it reads as follows: "Members shall confine any limitations exceptions to exclusive rights to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder." Since, however, the exclusive rights to which this provision refers are, *inter alia* (and, in fact, in the majority of cases) those which are provided for in the Berne Convention (and which must be applied also under the TRIPS Agreement in accordance with Article 9.1. thereof), from the viewpoint of the application of exceptions and limitations in the context of the Berne Convention, the two provisions say the same.

97. This is the reason for which the second sentence of the agreed statement concerning Article 10(2) of the WCT may also be regarded another case of "cross-interpretation" between

the WCT and the TRIPS Agreement. The sentence reads as follows: “It is… understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.” As discussed in the Guide to the WCT, below, there is no complete agreement about this kind of “equalising” interpretation of Article 13 of the TRIPS Agreement (although it seems that it is truly the correct one).

98. The question is whether or not these “cross-interpreting” agreed statements, along with the texts taken over from the TRIPS Agreement but not always with the same wording, may have any impact on the interpretation and application of the corresponding provisions of the TRIPS Agreement. One thing seems quite sure: statements adopted outside the WTO-TRIPS context concerning the TRIPS Agreement do not – or, at least, do not automatically-- bind the WTO-TRIPS bodies, such as the TRIPS Council or the Dispute Settlement Body. This might only be the case if these agreed statements could be regarded a “subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions” under Article 31.3. of the Vienna Convention on the Law of Treaties. It is obvious, however, that – although a great number of countries having adopted the treaties and the related agreed statements were the same as the Members of WTO – there was not a sufficiently complete overlap between the membership of the WTO and the said countries; thus, it would be difficult to speak about such a subsequent agreement between all the Members of the WTO. At the same time, it would be also difficult for any competent TRIPS body to completely neglect that a great number of WTO member countries participated in the adoption of these agreed statements. Certainly, such “cross-interpretation”, as a minimum, will have to be taken into account – irrespective of whether or not it is found decisive eventually -- also in the TRIPS context.

IX. CONCLUSIONS

99. 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.

100. 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 promising way. For the entry into force of each of the treaties, 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). The recognition of the well-balanced nature of the treaties is also reflected in the fact that, among the 41 Contracting Parties (in fact 40+1+1, since while the Contracting Parties are in general the same, there is one country which has only acceded to the WCT (Indonesia), and one country which has only acceded to the WPPT (Albania)), there are only two industrialized countries: the United States of America and Japan; the others are developing countries and so-called “transition countries”.

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