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WORLDINTELLECTUAL
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**SECONDIINTERNATIONAL FORUMON
CREATIVITYANDINVEN TION –ABE TTERFUTUREFOR
HUMANITYINTHE21ST CENTURY**

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INTELLECTUALPR OPERTYINAKNOWLEDGE -BASEDSOCIETY:THEROLEOF
COPYRIGHTANDFUTURECHALLENGESTOCREATORS,INDUSTRY,
LEGISLATORSANDSOCIETYATLARGE;
INVENTORS'ANDCREATORS'RIGHTSASBASICHUMANRIGHTS

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I. INTELLECTUAL CREATIVITY AS A SOURCE OF WELFARE

1. From the beginning of time, mankind strove to know and exploit the riches offered by nature. During the time of the formation and expansion of sedentary societies, human ingenuity discovered techniques to multiply those natural riches, and thus, human communities scattered all over the world and were able to share physical resources which were always scarce to satisfy the needs of a growing population.

2. In the course of history, organized communities obtained sufficient welfare so as to devote their effort to reflection, investigation, education and the arts. Then there appeared the libraries, academies, educational institutions and debate centers. At the same time, talent found its way in applying accumulated knowledge to solving practical needs and into the resources made available to mankind and incorporated the compass or the breast chest of useful procedures, such as fabric spinning or constructing buildings with huge arches, etc. Meanwhile, poets, philosophers, sculptors, and musicians expressed their ideas and feelings in works which contributed to enriching the cultural environment of humankind.

3. But in times prior to that known in the Occident, as the Renaissance, the existence of intellectual creations did not lead to the birth of any legal system which either favored their originators or allowed nations to add to their national capital the economic value of these intangible goods. As there did not exist any legal protection, once an invention was disclosed it could be utilized by anyone in any part of the world where the said invention was known, and a work of art could be reproduced by anyone who had the necessary ability to do so. The only way of having exclusive rights in an intellectual creation was therefore to keep the invention secret or put in safekeeping the original work. Thus, the only benefited persons were a small number of powerful individuals capable of hiring inventors and authors, while the latter rarely obtained from their wealthy employers or patrons, a compensation proportional to the value of their creations.

II. INTELLECTUAL PROPERTY, A PRIORITY LEGAL TOOL FOR THE DEFENSE OF INTANGIBLE PROPERTY DERIVING FROM HUMAN CREATIVITY

4. The progress of the western society in the age of the great journeys, and the beginning of modern international commerce caused the existing legal relationship between the community and intellectual creators to reach a crisis point:

- on the one hand, the birth of industries and the mass production requirements gave value to the invention of new industrial products and new methods to manufacture them. A legislative policy was required to encourage the disclosing of inventions, so that innovative ideas should be incorporated into common accumulated knowledge and could be utilized to increase production;
- on the other hand, the invention of the printing press afforded the opportunity to transform books, maps, pictures and illustrations into goods, while the proliferation of the theater and opera companies caused living authors to double the production and spread new works. To avoid unfair competition against original creators, it was convenient to guarantee them an exclusivity right on their works which would allow them to negotiate with businessmen and obtain a compensation for their intellectual contribution.

5. The basic institutions of intellectual property were born:

- the “patent right” that ensures society the complete knowledge of the protected invention, and grants the inventor the exclusive right to benefit from the result of his/her inventiveness for a certain period of time;¹
- the “copyright” that recognizes that creators of works have the exclusive power to authorize their reproduction or communication to the public by cultural and show business industries, increasing the incentives so that the spiritual food nourishing society be multiplied.²

6. Thus a form of property different from that recognized in physical goods deriving from the utilization of natural resources was organized, namely “intellectual property,” which by reason of originating from the creative potencies of human ingenuity, has been fairly described as the “most sacred kind of property.”³

7. In the course of time, and with the progressive appreciation of intangible goods, to the two founder systems of intellectual property many others were added:

- the “trademark right” conferring on merchants the exclusive right to use distinctive signs to identify their goods or services, enabling consumers to distinguish them;
- the “right to the protection of industrial secrets” which organizes the legal protection of the information with commercial value that its owner keeps confidential;
- the “right of performer artists” granting them the intellectual property in their performances, allowing them to be benefited when such performances are reproduced or distributed to the public ;
- the “right to the protection of integrated circuits” which allows those who design them to hinder the copying thereof;
- the “right to the protection of databases” which authorizes their producer to object to the non -authorized extracting of their files ;
- the “right to the protection of vegetable varieties” which recognizes intellectual property in new varieties of plants.

¹ The first patent of the world was granted in 1421 by the *Signoriade Firenze* to Filippo Brunelleschi, who was given exclusive rights for three years to exploit the design of a barge for the fluvial transportation of big loads, invented by him.

² The modern copyright system (including its Latin Civil Law version) was born in 1710 when the British Queen passed the law known as “the Statute of Queen Anne,” granting authors a monopoly right in their works for a limited period of time.

³ Report of the delegate “Le Chapelier to the French Constitutional Convention of 1791,” designating the right of authors in their works as “ la plus sacrée, la plus inattaquable et la plus personnelle de toutes les propriétés.”

8. In the vicinity of intellectual property, legal systems for the protection of intangible property were developed which made use of part of the principles and remedies of the main institution, such as the right to one's "personal image" or which were transformed into part of the matter as both kinds of property have similar problems and characteristics, such as the right to the protection of "personal data."

9. The legal combination of intellectual property and "neighboring" intangible property shares a rich interaction between tools, amongst which are the big family of "license agreements" and a number of "procedural remedies" and means which afford specific security and expediency to the defense against the infringements of this type of rights.

III. THE ROLE OF *DROIT D'AUTEUR* /COPYRIGHT

10. Whereas the "patent right" is intended for legally protecting the ideological substance of human ingenuity products, the purpose of the "*droit d'auteur* /copyright" is to protect the expressive form of such products.

11. Using the languages of so diverse arts, such as writing, painting, music, computer programming, photography or architecture, amongst many others, human beings are capable of giving their own and different expression to ideas or feelings which may come from their own perception or elaboration, or eventually being inspired by ideas or feelings previously expressed by other authors employing their personal expressive form. As regards the "*droit d'auteur* /copyright" (hereinafter occasionally referred to as "©"), the requirement for the protection is not the "novelty" but the "originality" that is to say, the condition of being a product originating in the intellectual activity of the author and the protected value is the expressive form (a certain combination of words, notes, colors, etc.), and not the substance of what is expressed. This is what distinguishes works as "intellectual creations of form" from inventions which constitute "intellectual creations of substance."

12. Since the existence of visual, sound and audiovisual recordings, the bodily performance of performing artists can be fixed on permanent bases which enable its economic exploitation by means of the reproduction of copies, communication of programs to the public, etc. This gave rise to the creation of a legal protection system for this kind of intellectual property, named "Performers Artist's Right" which on account of their relatedness with the "*droit d'auteur* /copyright" conforms in general to the rules applicable to the "intellectual creations of form."

13. The "intellectual creations of form" have acquired in time considerable economic value given that they are constantly used in the everyday life of the societies based on knowledge:

- written works, with substance intended for education, information or entertainment, come into the hands of all readers throughout the planet;
- audiovisual productions appear on the television screens of homes and public places;
- music reaches us wherever we go and accompany us in our movements;

- computer programs underlie almost all the devices which we avail ourselves of;
- architecture surrounds us with buildings in which functionality combines with aesthetics;
- designed or photographed images are displayed everywhere.

14. We can say that never in history has the mankind been so enriched by the availability and enjoyment of so many “intellectual creations of form” and that therefore, the production of authors and performer artists has never meant such an important contribution to the national and world increase of wealth, nor has the protection thereof required such a high degree of perfection.

IV. CULTURAL INDUSTRIES

15. The conditions under which the current production of works and performances develops, require the contribution of numerous teams of intellectual creators: it happens so with all the forms of journalism, the diverse manifestations of audiovisual art, cartoons, with a considerable part of architecture, etc. The development of companies engaging in the generation of intellectual products is therefore one of the requirements of modern societies.

16. Equally irreplaceable is the participation of business organizations in the field of reproduction and distribution of cultural products. Except as regards certain authorial professions whose mode of communication with the public makes possible the person-to-person relationship (certain painters or architects, for example), the involvement and participation of cultural companies is required for the successful economic exploitation of intellectual creations. Printing houses and publishers, record companies, broadcasting and television companies, distributors of materials intended for education, information and entertainment, are indispensable to transform the assets created by intelligence into articles of domestic and foreign trade.

17. These cultural industries of the “*droit d’auteur* /copyright” sector⁴ (hereinafter referred to as “sector © industries”) significantly contribute to the gross national product (GNP) of countries which is corroborated by taking into account the following examples:

⁴ The study titled *Copyright Industries in the U.S. Economy - The 2002 Report*, by Stephen E. Siwek from Economists Incorporated, prepared for International Intellectual Property Alliance®, recognizes two categories of the cultural industries of the *droit d’auteur* /Copyright Sector:

a) The “core” copyright industries encompass those industries that create copyrighted materials as their primary product. These industries include the motion picture industry (television, theatrical, and home video), the recording industry (records, tapes and CDs), the music publishing industry, the book, journal and newspaper publishing industry, the computer software industry (including data processing, business applications and interactive entertainment software on all platforms), legitimate theater, advertising, and the radio, television and cable broadcasting industries (which in this paper are named “cultural industries of the © sector);

b) The “total” copyright industries encompass the “core” industries and portions of many other industries which either create, distribute, or depend upon copyrighted materials. Examples include retail trade (a portion of which is sales of video, audio, software, and books, for example), the doll and toy industry, and computer manufacturing.

- during 2001, industries in the United States of America of the © sector contributed 5.24 percent of the GNP, such a contribution having risen during the last quarter of the century by more than twice as much as the increase rate of the rest of the economy of that country, and employment having increased within the sector more than three times as much as in the rest of the economy in the same period;
- in 1977, the contribution of cultural industries of the © sector of the United Kingdom was 5 percent of the GNP, 3.1 percent in Canada, 3.4 percent in Spain and 4 percent in Colombia;
- sixty percent of Americans of more than six years of age (145 million persons) use computer or video games, of which, in 2001, 225.1 million units were sold for US\$6.35 billion. In comparison, US\$25.35 billion worth of books were sold in the same year.

18. Indeed, cultural goods form an important part of international trade:

- the total goods supporting cultural products traded throughout the world during 1998 (excluding “services,” such as intangible goods traded online or license royalties) is slightly lower than the international total of the tourism industry and higher than the international total of the pharmaceutical industry (which is also part of the intellectual property industry);
- after approximately 40 years of providing incentives to the cultural industries of the © sector, Brazil was ranked sixth in the international music market;
- during 2001, the US industry of the © sector sold cultural goods to the international market for US\$88.97 billion, surpassing industries such as chemistry and derivatives, motor vehicles, industrial equipment and its spare parts, civil and military aeronautics, and agriculture.

V. NEW TECHNOLOGIES AND CULTURAL GOODS

19. As a contribution to the “Beijing International High -Tech Industries Week” which provides the setting for this Forum, let me devote a few minutes to ponder the close relationship existing between the new technologies and the production and distribution of cultural products within the context of the current society, based on knowledge and avid for intangible goods.

20. It does not appear to be questionable that one of the characteristics of the industrial society was the increase in the production and offer of cultural products. This occurred under the sign of two tendencies:

- the enhancement and multiplication of techniques gave rise to an increasing number of new artistic languages. A greater number of creators were able to express their talent, but in many cases (for example, the motion picture) artistic language required the use of technological means and business organization neither normally accessible to an ordinary person nor available to the inhabitants of all the regions of the globe;
- a considerable part of the cultural products appeared to be almost indissolubly linked to their supporting media. The exploitation of a great number of cultural products required the involvement and participation of businessmen who provided the industrial and commercial capacity necessary to reproduce them in multiple copies and distribute them to the market through those copies. With few exceptions, it can be said that intellectual creators were not the main beneficiaries of the trade of those commodities.

21. At the present state of society, the “new technologies” (that is to say, the technologies based on information and communications, including interactive multimedia digital technology, characteristic of the online environment) make possible the following:

- the production by the individual creators or relatively small teams of intellectual creators of works capable of competing with those produced by major entrepreneurial organizations, using computer tools readily accessible and available;
- operation by the industries of the © sector under privileged technical and economic conditions as regards the generation of new products and the “digital recycling” of preexisting products;
- the online distribution of cultural products on a digital medium by both the industries of the © sector and the individual creators at a very low additional cost to the production cost, and with a reduced added cost of distribution.

22. Since they tend to the multiplication of the offer and the expansion of the demand, these technologies should operate as an incentive to creation, access and the enjoyment of cultural products throughout the world, thus expanding the market for those products and extending the opportunities so that companies of any kind (including small and medium-sized businesses) join the chain of exploitation of the products generated by intellectual creators.

23. But the relationship between the new technologies and the production and distribution of cultural products has also its critical side caused by the huge advantage that said technologies provide to those who wish to access, enjoy and even exploit commercially the intangible products of the industries of the © sector against the will of their legitimate owners and competing with the latter in the domestic and global market. Because of its non-material nature, the legal protection is a basic and indispensable element for intangible goods to represent an economic value, since unlike the physical assets (which are passing to be under the owner's custody, are placed under the care of carriers, customs, resellers, etc.), intangible products of the industries of the © sector are easily appropriable by unscrupulous third parties and particularly vulnerable to the organized crime operations, and piracy. Ensuring conditions for the sound development of the industries of the © sector within the

context of the current society requires therefore a considerable strengthening of the legal protection on a national and international level.⁵

VI. THE INTERNATIONAL PROTECTION OF *DROIT D'AUTEUR* /COPYRIGHT

24. The worldwide commerce of cultural products demands the existence of an effective legal protection for works and artistic performances throughout the world. In the case of “intellectual creations of form” this implies the certainty that the copyright holders may resort to the authorities of any country to demand that the copying of their expressions be prevented or forbidden, the copies made be withdrawn from trade, the unauthorized transmissions or distributions to the public be suspended, and that the persons responsible for such acts be compelled to compensate for the damage suffered.

25. Luckily for the authors and for those who organize cultural companies, this protection began to be organized when more than one century ago, the Berne Convention⁶ was signed, and presently it has reached a notable state of expansion and perfection, above all since the new “Internet” treaties of WIPO updated it of fit in with the “information society”⁷ environment. Thanks to the application of the principles of the Berne Convention, the original authors of the member countries of the treaty – practically all the countries of the world – may claim “national treatment” at the justice courts of any other member country where they seek protection. As the Berne Convention imposes upon its member countries the adoption of certain minimum parameters, the result is that works are currently protected all over the globe by application of highly harmonized principles. In the last few years this harmonization has been accentuated, due to the almost unanimous adherence of the countries to the World Trade Organization (WTO) with which practically all the nations of the world are currently members of the TRIPS Agreement⁸ and therefore, they must observe the substantial provisions of the Berne Convention even in the (exceptional) case that they are not member thereof.

26. Surely, the imperatives of the digital world shall force countries to agree on a new and deeper harmonization for the effective national and international legal protection of “intellectual creations of form,” so that there should be really effective remedies and means to eliminate piracy, and the owners of cultural products be quite sure of receiving an economic compensation for their efforts. It becomes clear that for the owners of rights in immaterial goods to feel encouraged to distribute cultural products in the online digital environment, they shall have to sense that the environment is safe. This includes the security of receiving compensation from legitimate users, and sufficient protection against those who intend to have access to the products by illegitimate means. The adoption of technical security measures, and the organization of a compensation collection and administration system

⁵ To give an idea of the damage caused by piracy, it is valid to refer to the impact it has on employment. According to a Price Waterhouse report for the year 2000, the market reduction caused by piracy resulted in 693,912 jobs being lost worldwide; 95,214 of those positions were lost in the People’s Republic of China.

⁶ Berne Convention for the Protection of Literary and Artistic Works
<http://www.wipo.int/treaties/ip/berne/index.html>.

⁷ WIPO Copyright Treaty (WCT) <http://www.wipo.int/treaties/ip/wct/index.html> and WIPO Performances and Phonograms Treaty (WPPT) <http://www.wipo.int/treaties/ip/wppt/index.html>

⁸ Agreement on Trade-Related Aspects of Intellectual Property Rights
http://www.wto.org/english/docs_e/legal_e/final_e.htm

requires universal agreement on appropriate standards, both from the technical and legal viewpoint. But the harmonization of those legal standards shall not lead to a utilizable result without a normalization of those technical resources. Electronic commerce of intangible products of the © sector in industries could only be carried out successfully if piracy and non-licensed use are suppressed, and if resources become available for the automatic online administration of intellectual property. But it is really impossible to react effectively against infringements or automatically administer the copyrights and/or performing artists' rights at the distance, if by the application of the "national treatment" in "the country in which the protection is sought" national legal rules may change the identity of the holder, the extension of authorial powers, the term of protection, etc. The global electronic commerce asks for a degree of legal harmonization and technical standardization higher than no one could ever imagine in the "analogical" context.

VII. THE CHALLENGES OF THE FUTURE

27. In the "analogical" world of which the knowledge-based society takes its leave, a structure of contracts and business practices uniformly established caused that the rights of authors and performer artists become, in practice – on the basis of assignments and licenses – the rights of the distributing entrepreneurs and thus concurrently the strengthening of the protection deriving from the fulfillment of covenants and mutual respect within the national and international professional environments. In the "digital" world, in which a greater immediacy between the intellectual creator and the public is feasible, the legal powers recognized to intellectual creators shall be exercised directly by them, emerging from the protected environment of the relationship between professionals.

28. I consider it probable that as a consequence of that immediacy between the offer and demand of cultural products, the legal framework shall shift from the area of contracts (that is to say, from the rules agreed by private individuals) towards the area of general legislation, and consequently, the need for the legislators' involvement and participation seeking the harmonization of legal principles on the rights of authors and performer artists in domestic laws and international treaties shall consequently grow. One of the essential requisites for cultural products to be offered by any creator in the world and demanded by any consumer in the world is that fair and uniform legislations should make possible in practice the exploitation of the resources characteristic of the state-of-the-art so that the global distribution of works may be organized.

29. On the other hand, cultural products, as the object or matter of electronic commerce, can not be isolated from the influence of the provisions that all the countries and regional organizations are currently producing to legally organize that branch of the commerce. It is foreseeable that the exploitation of the intellectual property rights in general and of the intangible products of the © sector in industries, in particular, should be strongly influenced by the business practices and the legal rules characteristic of electronic commerce. Since at present there are an extended movement to achieve a world framework for the online environment "commercial law," it would be natural that it should strengthen globally the tendency towards the harmonization of the institutions of the droit d'auteur/copyright. Nations interested in encouraging the development of a powerful force of intellectual creators, and of a booming segment of industries of the © sector, should get firmly involved in the progress of international legal instruments relative to electronic commerce and particularly to the electronic commerce of "contents."

VIII. THE UNIVERSAL LEGITIMACY BASIS OF THE *DROIT D'AUTEUR*/COPYRIGHT

30. It is worth remembering that the harmonization process of the legislation that protects “intellectual creations of form,” including the symbiosis between Latin -tradition *droit d'auteur* and Anglo -Saxon Common Law Copyright is grounded on and driven by supra - constitutional bases which prevail over the national rights of any legal tradition, since they must fulfill the purpose established by the “Universal Declaration of Human Rights”⁹ asset forth by Article 27 thereof:

“1. Any person is entitled to take part freely in the cultural life of the community, enjoy the arts and participate in the scientific progress and in the benefits resulting therefrom;

“2. Any person has a right to the protection of the moral and material interests to which he/her is entitled by reason of the scientific, literary or artistic productions she/he may own.

31. In compliance with these principles, which are authentically essential and not at all theoretical (in addition to being common to the whole of mankind, and not merely to a culture or a legal tradition) all the countries should actively work to procure that the magnificent opportunity offered by technology to developing the production and distribution of cultural products is not thwarted due to the lack of legal support to the requirements characteristic of the present technological stage. Overcoming the existence of local legal peculiarities which could hinder the effective enforcement of the basic rights recognized as belonging to the users and producers of cultural products, the international community should promptly move towards the ensuring of a high degree of harmonization and the effective application of laws that makes it possible to distribute universally the products of the industries of the © sector being completely sure about the level of protection to receive in any place of the world, and being absolutely certain that the means for the automatic administration of intellectual property shall operate with the same effectiveness in any territory in which a demander of cultural products accepts the offer from any distributor thereof.

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⁹ <http://www.unesco.org/general/eng/legal/human-rights.shtml>