



# INTERNATIONAL PROTECTION ON COPYRIGHT AND RELATED RIGHTS

## Why is it needed?

Because national laws on Copyright and Related Rights

- are traditionally based on territoriality,
- tend to discriminate against
  - foreign creators
  - foreign creations.
- in substance, do not necessarily grant protection at comparable/equivalent levels.



# MAIN INTERNATIONAL INSTRUMENTS

- Copyright:
  - Berne Convention.
  - WIPO Copyright Treaty.
  - Trips Agreement
- Related Rights:
  - Rome Convention.
  - WIPO Performances and Phonograms Treaty.



## BERNE CONVENTION

- First multilateral convention for protection of authors of works, 1886, last revised in Paris 1971, 163 States.
- Ensures protection in all Contracting States other than the country of origin of work.



# BERNE CONVENTION

## Scope of international protection

- Protected are works
    - whose authors are nationals or residents of a Contracting State, or
    - which were first published in a Contracting State
- Article 3 -

(special rules for cinematographic works and works of architecture in Article 4)





# BERNE CONVENTION

## Principles of protection

- Automatic protection as from creation, free from formalities.
- Harmonized minimum level of protection, as regards:
  - works protected,
  - rights of authors granted - and limitations of, and exceptions from, those rights
  - duration of protection.
- National treatment (non-discrimination of foreign authors).



# **BERNE CONVENTION**

## **- Minimum Protection**

- I. Subject matter of protection - Article 2 -
- “Literary and artistic works”  
= any original production in the literary, scientific or artistic domain.
  - whatever the mode or form of its expression.



# **BERNE CONVENTION**

## **- Minimum Protection**

- I. Subject matter of protection - Article 2 -
- fixation of the work:  
national law may require that as a condition for protection
  - Derivative works:  
translations, adaptations and arrangements of preexisting works
  - Collections of works



# **BERNE CONVENTION**

## **- Minimum Protection**

### II. Rights

#### 1. - Economic rights

Translation; reproduction; public performance of dramatic, dramatico-musical and musical works; broadcasting and communication to the public by wire (of the broadcast work); public recitation; adaptation, arrangement and other alteration.



# BERNE CONVENTION

## - Minimum Protection

### 2 - Moral Rights - Article 6 bis -

Right to paternity: right to be named as author, right to claim authorship

Right of integrity: right to object to any distortion, mutilation or other modification of the work, prejudicial to author's honor or reputation.



## LIMITATIONS or EXCEPTIONS from rights

- Free uses - example: *Article 10 (1)* on quotation  
*Article 9 (2)* on reproduction
- Non-voluntary = compulsory licenses
  - broadcasting, *Article 11 bis (2)*
  - mechanical reproduction of musical works, Article  
13
- Annex to the Convention:  
Compulsory licenses to translate and reproduce,  
reserved to Developing Countries



## TERM OF PROTECTION

- Principle: lifetime of author + 50 years
- Special:
  - Cinematographic works
  - Anonymous/pseudonymous works 50 years after making available to the public
- Where national law grants longer period, no obligation to grant it for more than given in country of origin.



# WIPO Copyright Treaty, 1996

## 64 States

- Basis: substantive protection and scope of application = Berne Convention
- Additional elements
  - subject matter: computer programs as literary works
  - rights:
    - 1) distribution and compilations of (databases)
    - 2) rental of computer programs, cinematographic works and works embodied in phonograms
    - 3) reproduction in digital environment
    - 4) communication to the public (interactive internet communication)
  - general on the range limitations and exceptions in national law





## WIPO Copyright Treaty, 1996

- Further new elements of protection
  - Legal protection for technological measures taken by right holders
  - Legal protection for electronic rights management information used by right holders



## Background

- **New factors**
- 1) Globalization
- 2) Increasing economic importance of intellectual property law
- 3) Increasing importance of IP law in international trade
- 4) Technological developments



## Background (2)

- Insufficient legal framework
- 1) The Berne Convention, last updated in 1971
- 2) The Rome Convention, never updated since its adoption in 1961
- 3) The TRIPS Agreement within WTO, based on conceptions in early 1990s



## Background (3)

- Impact of new technologies/digitization
- 1) Makes possible the storing of enormous quantities of information/works/pictures
- 2) Manipulation of the material stored
- 3) Copying rapidly, correctly and speedily
- 4) Transmission over great distances to all corners of the world over the internet



## Background (4)

- Political choice:
- 1) to revise the Berne Convention: not feasible because of consensus requirement
- 2) special agreement under Article 20 of the Berne Convention (possible if granting more extensive rights or otherwise not contrary to the Convention)
- Later solution chosen



## Background (5)

- Political choice:
- The WCT deals with copyright issues related to digital technology for all works
- The WPPT deals only with performers in sound recordings and with producers of sound recordings and
- - not with performers in audiovisual recordings and
- - not with broadcasters rights.



## Communication to the public (1)

- One effect of new ways of communication to the public: quick and safe access to information contained in databases by on-demand services
- = when members of the public can access such information at a time and from a place individually chosen by them.



## Communication to the public (2)

- Legal measures in the WCT and WPPT
- 1) For authors: an exclusive right to all forms of communication to the public including a making available right
- 2) For performers in sound recordings + phonogram producers: an exclusive right to making available + facultative right to remuneration for communication to the public.





## Communication to the public (7)

- Agreed Statement: “ ..the mere provision of physical facilities for enabling or making a communication does not itself amount to communication within the meaning of this treaty or the Berne Convention.”
- Also: “ ..nothing in Article 8 precludes applying Article 11bis(2) (allowing e.g. compulsory licenses).”



## Communication to the public (8)

- Performers for performances fixed in phonograms + phonogram producers (Articles 10 and 14 of WPPT):
- *“exclusive right of authorizing the making available, by wire or 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.”*



## Communication to the public (9)

- Performers and phonogram producers: remuneration (Articles 15 of WPPT):
- 1) “...shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting and any communication to the public.”



## Communication to the public (3)

- Authors: Article 8 of WCT
- “Without prejudice to the provisions of Articles 11(1)(ii), 11bis(1)(i) and (ii), 11ter(1)(ii), 14(1)(ii) and 14bis(1) of the Berne Convention,



## Communication to the public (4)

- *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,*



## Communication to the public (5)

- *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.”*



## Communication to the public (6)

- Such a comprehensive right of communication to the public did not exist in the Berne Convention (only about public performance of certain types of works, about broadcasting etc. and about recitation of literary works).  
No provisions about transmissions of literary works or images or databases.



## **Communication to the public (10)**

- 2) *“Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both..”*





## Communication to the public (11)

- 2) “ ... Contracting Parties may enact legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.”



## Communication to the public (12)

- 2) “3) Any Contracting Parties may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions in Paragraph 1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.”



## **Rationale for the new provisions**

- 1) The fact that new technologies have made possible new ways of making available.
- 2) The provisions on public performance in the Berne Convention covered only certain categories of works.
- 3) The interpretation of those provisions differed.



## The Making Available Right

- The relevant act is the providing access in the sense of making it available.
- Not the mere provision of server space or connections or carriage facilities.
- Irrelevant whether copies are made for the user or whether it is simply made perceptible for the user.



## **Public Communication/ Individual Choice**

- Private communications, e.g. E-mail excluded.
- Making-available right: requirement of individual choice excludes broadcasting.



## Grey Areas

- Near-on-demand services; multi-channel transmissions (continuous making available 24 hrs./day; almost instant access to material)
- Certain subscription services
- Borderlines not clear



## Act of Communication

- Comprises all acts of communication to the public by wire or wireless means, including broadcasting and cable transmission, other than distributing copies.
- Covers all transmission to a public not present at the place where communication originates.
- Analogue, digital, optical beams, etc.



## Temporary Storage

- Always temporary storage in the course of communication to the public.
- No specific provisions in the treaties on exemption from liability for certain acts of temporary storage.
- Court interpretation or provisions in national laws and in the European Union Directive, etc.





## Notion of Public

- The notion of public is not defined in the treaties but left to the national level.
- Conclusion at the Diplomatic Conference: the notion to be interpreted in a wide way.



## National Implementation

- Treaties do not specify in which way the obligations would be implemented nationally as long as the acts described in connection with the respective rights were covered.
- Examples: the Digital Millennium Copyright Act of the US; The European Union Directive on Copyright, etc. in the Information Society (implemented December 2002).



## RELATED RIGHTS

- Rome Convention =  
International Convention for the Protection of  
Performers, Producers of Phonograms and Broadcasting  
Organizations, 1961  
= 86 Contracting States,  
mainly in Europe and Latin America



## RELATED RIGHTS

- WIPO Performances and Phonograms Treaty, 1996 (WPPT)

Right holders: - Performers

- Producers of Phonograms

*62 Contracting States*

- TRIPS Agreement, 1994

Same three groups of right holders as in Rome Convention

*Binding for 157 WTO Member States ( 1st January 2008)*



## ROME, WPPT and TRIPS

Scope of international protection

- Producers of phonograms:
  - a) nationals of another Contracting State, or
  - b) whose phonograms was first fixed in another Contracting State, or
  - c) whose phonogram was first published in another Contracting State
- Contracting States can exclude either b) or c) -



## ROME AND TRIPS, not WPPT

- Broadcasters:
  - Article 6 -
    - a) the headquarters of which is situated in another Contracting State, or
    - b) the broadcast of which is transmitted from the territory of another Contracting State
  - Contracting States can choose to apply only either
    - a) or b) -



## ROME, WPPT AND TRIPS

Scope of international protection

- Performers for performances
  - a) taking place live in another Contracting State, or
  - b) incorporated in a phonogram protected under the Convention, or
  - c) part of a broadcast protected under the Convention
- c) not applicable in the WPPT (?)



# ROME: Minimum Rights for Performers

## I. Live performances

- to prevent
  - a) broadcasting and communication to the public
  - b) fixation

## II. Fixation performances

- to prevent reproduction
  - if original fixation made without performer's consent;
  - if reproduction is for purposes different from those consented;
  - if original fixation made on the basis of an authorized exception, and reproduction made for another purpose.





## Extended Minimum Rights for Performers

TRIPS: Right to prevent any reproduction of their performance fixed in phonogram

WPPT: 1. Same, including digital

2. Distribution

3. Rental of phonograms

4. Interactive dissemination

WPPT: Moral rights



## Minimum Rights of Phonogram Producers

### 1 - ROME = TRIPS = WPPT

Right to authorize or prohibit direct or indirect  
reproduction (WPPT: including digital)

### 2 - TRIPS, WPPT

Right to authorize or prohibit the commercial rental to  
the public



# Minimum Rights of Phonogram Producers *(continued)*

3 - WPPT

Right of distribution

Right to control interactive dissemination



## **Common aspects performers/ phonogram producers**

- I. ROME and WPPT: right to a single equitable remuneration in case of broadcasting or public communication of commercial phonograms Subject to reservation, expressly permitted
- II. TRIPS and WPPT: duration of protection: 50 years
- III. WPPT:
  - prohibition of formalities as a requirement for protection
  - limitations and exceptions in national law subject to “three-step-test”
  - legal protection of technological measures and electronic rights management information



## **ROME Minimum Rights of Broadcasters**

Right to authorize or prohibit, with respect to their broadcasts

- a) rebroadcasting
- b) fixation
- c) reproduction of fixations
  - made without their consent, or
  - made under an exception, if reproductions are made for other purposes
- d) communication to the public of television broadcasts, if communication is made against payment of an entrance fee

*(right under d) subject to reservation)*



## **TRIPS Minimum Rights of Broadcasters**

Right to prohibit, with respect to their broadcasts

- fixation
- reproduction of fixation
- rebroadcasting
- communication to the public of television broadcasts

However:

*WTO Members are exempt from granting these rights if they provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention.*