

THE ADVANTAGES OF ADHERENCE TO THE WIPO COPYRIGHT TREATY (WCT)
AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

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GENERAL

Two treaties were concluded in 1996 at the World Intellectual Property Organization (WIPO) in Geneva. One, the WIPO Copyright Treaty (WCT), deals with protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photographs. The other, the WIPO Performances and Phonograms Treaty (WPPT), protects certain “related rights” (that is, rights related to copyright): in the WPPT, these are rights of performers and producers of phonograms.

Copyright law provides protection for literary and artistic works, giving creators the ability to control certain uses of their works. The law of related rights provides similar protection for the creative contributions of parties involved in presenting works to the public, such as performers, phonogram producers and broadcasters. Copyright and related rights are provided by national laws in individual countries. International treaties link various national laws and require the countries that join the treaties to grant certain rights specified on a nondiscriminatory basis.

The purpose of the two treaties is to update and supplement the major existing WIPO treaties on copyright and related rights, namely the Berne Convention for the Protection of Literary and Artistic Works (the Berne Convention) and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention), primarily in order to respond to developments in technology and in the marketplace. Since the Berne and Rome Conventions were adopted or lastly revised more than a quarter century ago, new types of works, new markets, and new methods of use and dissemination have evolved. Among other things, both the WCT and the WPPT address the challenges posed by today’s digital technologies, in particular the dissemination of protected material over digital networks such as the Internet. For this reason, they have sometimes been referred to as the “Internet treaties.”

The WCT and WPPT were adopted by consensus, by more than 100 countries. They therefore reflect a broad international agreement as to how copyright and related rights should be handled in today’s environment, including the context of digital technologies. This is because many compromises were made during the negotiation process between the demands of countries seeking stronger rights and those seeking greater protection for users and for intermediaries such as equipment and communications infrastructure providers. The ultimate result has been widely acknowledged as balanced and fair.

MAIN ELEMENTS OF THE TREATIES

Both treaties require countries to provide a framework of basic rights, allowing creators to control and/or be compensated for the various ways in which their creations are used and enjoyed by others. Most importantly, the treaties ensure that the owners of those rights will continue to be adequately and effectively protected when their works are disseminated through new technologies and communications systems such as the Internet. The treaties thus clarify that existing rights continue to apply in the digital environment. They also create new online rights. To maintain a fair balance of interests between the owners of rights and the general public, the treaties further clarify that countries have reasonable flexibility in establishing exceptions or limitations to rights in the digital environment. Countries may, in appropriate circumstances, grant exceptions for uses deemed to be in the public interest, such as for non-profit educational and research purposes.

The treaties also require countries to provide not only the rights themselves, but also two types of technological adjuncts to the rights. These are intended to ensure that rightholders can effectively use technology to protect their rights and to license their works online. The first, known as the “anti-circumvention” provision, tackles the problem of “hacking”: it requires countries to provide adequate legal protection and effective remedies against the circumvention of technological measures (such as encryption) used by rightholders to protect their rights. The second type of technological adjuncts safeguards the reliability and integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic “rights management information”: that is, information which accompanies any protected material, and which identifies the work, its creators, performer, or owner, and the terms and conditions for its use.

Other elements of the treaties, not specific to the digital environment, provide more complete and modern protection for authors, performers and producers of phonograms.

STATUS

Each treaty had to be ratified by 30 countries before their entry into force. The WCT entered into force on March 6, 2002, and the WPPT, on May 20, 2002. The countries which have adhered to the treaties come from all regions of the world, and include both developing and developed countries.

WIPO is committed to working towards the broadest possible adherence to the treaties around the world in order to safeguard global protection for creativity. This project is a key item on the WIPO Digital Agenda, approved by the Member States in September 1999.

Information on the current situation regarding the WCT and the WPPT can be obtained from the International Bureau of WIPO. It is also available on our Website at <http://www.wipo.int/treaties/ip/index.html>.

BENEFITS OF ADHERENCE

Adherence and implementation of the treaties offer a number of benefits for countries regardless of their stage of development. It provides important economic incentives to creative individuals and companies in the new digital environment. The treaties provide a substantial legal basis for healthy electronic commerce. They sustain the national copyright industries, attract investment, and protect local creativity.

International protection of national rightholders

First and foremost, the treaties will require other countries to provide full protection within their territories to your own country's rightholders when their creations are exploited abroad, thereby protecting their interests and ensuring that local creators and enterprises enjoy the economic rewards from outside the country. These benefits are particularly important in the era of global digital networks, when the distinction between the domestic and foreign markets is blurring, if not disappearing, as the dissemination of works and other subject matter cannot be limited to within national borders.

The treaties benefit both developed and developing countries. They contain numerous provisions that protect local creators in both the traditional and the digital environment. To the extent that they clarify and strengthen rights in the digital environment, they may be more immediately critical to countries that already have extensive use of digital networks. But they will assist creators from all countries when their works and other subject matter are used in the digital form without their authorization—a danger for all creators, wherever they are located.

Implementation of the treaties could be beneficial for developing countries in particular in that it encourages outside investment and puts in place a legal framework that will enable competition on a level playing field once the threshold of initial access to digital networks is passed. Such a framework provides incentives for local creators, performers and producers, facilitating the capacity building and development of cultural expression. With the support of an adequate system of rights, creators of all varieties will be able to exploit safely their creations on the Internet, marketing them to consumers in countries around the world without the need for the costs of foreign intermediaries, transportation facilities or physical manufacturing infrastructure.

At this point in time, due to the current state of the Internet technology, the need for protection in the digital environment is greatest in the area of recorded music, text, computer programs, photos and graphic art. Unauthorized use of other types of works and subject matter, including audiovisual works, however, is growing rapidly as bandwidth and the quality of telecommunications systems improves. Unless dealt with soon, it would pose in the near future as serious problems as those faced by the music and information industries. The treaties provide a tool to discourage unauthorized copying and dissemination of works and other subject matter in the traditional form and on digital networks.

Finally, protection of foreign works and subject matter will allow domestic creators to compete on a fair level. The adverse effect of protecting only domestic works and not recognizing foreign copyright and related rights has been observed in multiple cases. When a domestic work is protected by copyright, license fees should be paid to the creators, unlike

unprotected foreign works which can be used freely without payment. Authors in the United States of America in the nineteenth century could not compete against British popular novels that were available at a lower price. A similar situation occurred in respect of the domestic motion picture industry in Malaysia. It is therefore not surprising that those domestic rightholders developed into the strongest advocates of extending protection for foreign rightholders.¹ Technologies have evolved, but the basic tenet remains unchanged.

Promotion of electronic commerce

The treaties will promote the development of electronic commerce, both within a country's borders and through international trade.

Digital technologies enable the transmission and use of all of the materials protected by copyright and related rights in digital form over interactive networks. While the transmission of text, sound, images and computer programs over the Internet is already commonplace, this will soon be true for transmission of audiovisual works such as feature films, as the technical constraints of narrow bandwidth begin to disappear. Materials protected by copyright and related rights, spanning the range of information and entertainment products, constitute much of the valuable subject matter of electronic commerce.

Given the capabilities and characteristics of digital network technologies, electronic commerce have a tremendous impact on the system of copyright and related rights, and the scope of copyright and related rights in turn has an effect on how electronic commerce will evolve. If legal rules are not set and applied appropriately, digital technology has the potential to undermine the basic principles of copyright and related rights. The Internet has been described as "the world's biggest copy machine." The older technologies of photocopying and taping allow mechanical copying by individual consumers, but in limited quantities, requiring considerable time, and of a lower quality than the original. Moreover, the copies are physically located in the same place as the person making the copy. On the Internet, in contrast, one can make an unlimited number of copies, virtually instantaneously, without degradation in quality. These copies in turn can be transmitted to locations around the world in a matter of minutes. The result could be the disruption of traditional markets for the sale of copies of computer programs, music, art, books and movies.

It is therefore critical to adjust the legal system to respond to the new technological environment in an effective and appropriate way both at national and international levels, as the Internet is a borderless medium; and to do so quickly, through adherence to, and implementation of, the treaties, because technologies and markets evolve increasingly rapidly. The legislative and political mechanisms necessary to engage in treaty ratification and implementation are by their nature relatively slow. One advantage of not waiting until the digital networks become a domestic reality is that the country will be prepared at the point in time when they do.

Trade in copyrighted works, performances and phonograms will become a major element of global electronic commerce, which will grow and thrive along with the value of the material that is traded. If rightholders are secure in their ability to sell and license their property over the Internet, they will exploit this market fully and make more and more

¹ Ralph Oman, "*Copyright – engine of development*," UNESCO Publishing 2000

valuable works available through this medium. Appropriate limitations and exceptions will continue to safeguard public interest uses. The result will be a benefit to consumers, a benefit to rightholders, a benefit to service providers, and a benefit to national economies.

Contribution to the national economy

The cultural and information industries, which produce and disseminate products and services of mind, depend for their sustenance on effective and well-enforced copyright legislation. For this reason these industries came to be known as copyright industries. Over the past few decades, copyright-based products increasingly have become responsible for driving the growth of national economies and the overall global economy. Copyright industries also create hundreds of thousands of jobs all over the world, not just for developed countries, but also for developing countries and for many related economic sectors that contribute to manufacturing, sales and service of these products.

The economic importance of copyright industries in developed market economies has been well documented. The Commission of the European Communities estimates that the market for copyright goods and services ranges Community-wide between 5 and 7% of the gross national product (GNP) of the European Communities Member States.² The United States of America's core copyright industries such as software, publishing, broadcasting, sound recording and audiovisual, accounted for 5.24% of the gross domestic product (GDP) in 2001.³ If one enlarges this to the total copyright industries, including other industries which distribute or depend upon copyrighted products (recording and listening device, for example), it accounted for approximately 7.75% of GDP. The core copyright industries grew at an estimated compound annual growth rate of 7.0% while the rest of the economy grew at an annual rate of 3.0%. Likewise, in Japan, the copyright industry reached an estimated scale of some 2.3% of the GDP in terms of value added in fiscal 1998, on par with or higher than the corresponding figures for other trunk industrial fields such as electrical power, steel and automobiles. The copyright industries grew at an average rate of 5.9% between 1994 and 1998 against the major trend.⁴

Few such studies have been undertaken in developing countries. It is pointed out, however, that copyright industries might possibly make significant contribution to the economies of developing countries. The knowledge-based service sector in developing countries is growing. According to a WIPO study undertaken in member countries of the Southern Common Market (MERCOSUR) and Chile, the value added by the copyright industries to the GDP in Argentina was 6.6% in 1993, 6.7% in Brazil in 1998, 6% in Uruguay in 1997, an average of 2% for Chile between 1990-1998, and an average of 1% for Paraguay between 1995-1999⁵.

² Commission of the European Communities, Follow-up to the Green Paper on Copyright and the Information Society (1996)

³ International Intellectual Property Alliance, *Copyright Industries in the U.S. Economy: The 2002 Report*, April 2002

⁴ Japan Copyright Institute, *Copyright White Paper*, March 2001

⁵ *WIPO Study on Economic Importance of Activities Protected by Copyright in Countries of MERCOSUR and Chile - Highlights*, 2002, WIPO Publication 889.1 at <http://www.wipo.int/freepublications/en/copyright/889/wipo_pub_889_1.pdf>

It is noteworthy to mention that, as a first step in clarifying the importance of, copyright and related rights as a tool for economic, social and cultural growth, WIPO has developed a Guide on Surveying the Economic Contribution of the Copyright-Based Industries. This Guide aims at assisting countries in quantifying the economic contribution of creative activities based on copyright protection, as an area of growing interest to policy makers and to industry where, as yet, little international cooperation has taken place⁶.

The future market of products and services protected by copyright and related rights will increasingly concern online sale and delivery of digitized contents. The legal adjustment through implementation of the treaties is crucial in providing full support to copyright industries. Failure to address these needs could have negative economic consequences.

Encouragement of investment

The treaties will encourage investment in the country, both domestic and foreign, by providing greater certainty to businesses that their property can be safely disseminated there.

An Organization for Economic Co-Operation and Development (OECD) study indicates that “the lack of intellectual property protection will be considered as a negative factor in investment decisions by nationals or foreigners.”⁷ According to another study of 14 developing countries, by the International Finance Corporation – a World Bank affiliate – “in relatively high-technology industries ... a country’s system of intellectual property protection often has a significant effect on the amount and kinds of technology transfer and direct investment to that country by Japanese and German, as well as U.S. firms.”⁸

The level of intellectual property protection and enforcement is very much a factor in industry’s decisions to invest in any particular country. Companies evaluate the likelihood that they will sell enough legitimate copies of the products—in light of local intellectual property protection. It does not make sense for investors to put money into a market where they will not recover their investment and generate a reasonable profit. For copyrighted products, this depends almost entirely on the level of copyright protection. Adherence to the treaties makes a strong statement of the country’s commitment to copyright protection and readiness to respond to technological change.

Protection of local creativity and folklore

Implementation of the treaties will provide stronger incentives to creators to produce new creations, and will promote the development of expressions of local culture.

While some argue that the high level of copyright protection would only result in outflow of revenues to foreign right owners, strong local taste is observed in consumption of cultural products. Taking music as an example, local language music has a large domestic

⁶ WIPO publication No. 893 (E), 2003

⁷ Organization for Economic Co-Operation and Development (OECD), *Economic Arguments for Protecting Intellectual Property Rights Effectively*, 1989

⁸ Edwin Mansfield, *Intellectual Property Protection, Direct Investment, and Technology Transfer, Germany, Japan, and the United States*, International Finance Corporation of the World Bank Discussion Paper 27, 1995

market share in many parts of the world. “World music” or music originating in various parts of the world with specific style, still does not represent a very large share in the international sound recording market. The share of this category of music, however, including juju from Nigeria, gamelan from Indonesia, and salsa or tango from Latin America, could be the next trend.⁹ International legal protection as provided by the WCT and the WPPT is one important element in encouraging the local creators and industries to benefit from domestic as well as foreign markets.

As to folklore, which has recently been the subject of examination in various WIPO fora, there may be some overlap, in the sense that certain creators and performers of folklore are protected under the WCT and WPPT. Indeed, the definition of “performers” in the WPPT explicitly includes “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform . . . *expressions of folklore*” (emphasis added).

IMPLEMENTATION REQUIREMENTS

For most countries, particularly those already in compliance with existing treaties, including the Berne Convention and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), implementation of the WCT and WPPT obligations does not require a major overhaul of the law on copyright and related rights. The treaties do not change the fundamental policy or structure of these legal systems. Typically, a country may need to clarify the scope of existing rights to assure that the right of “making available” on demand is included. Because the scope of related rights has traditionally been more limited, additional rights may need to be added to protect performers or record producers. The treaties do not necessarily require any change to limitations and exceptions to rights, although a country may choose to make some updates or adjustments. Finally, the technological adjuncts to rights must be added, providing adequate and effective legal remedies against the circumvention of technical protection measures, and the deliberate deletion or alteration of rights management information. These constitute new elements established by the treaties that did not previously exist in most countries’ laws.

In countries that have implemented the treaties so far, most of these changes have not been politically controversial or technically difficult to make. The notable exception has been the anti-circumvention provision, which is phrased very generally in the treaties, leaving great flexibility to national legislators. Issues have been raised about the scope of the acts that should be covered, and how to avoid negative consequences from over-breadth.

By now, several countries have developed specific statutory language to implement the obligation, and their experience can be drawn on and adapted as appropriate. Some examples are listed below:

The United States legislation¹⁰ addresses technological measures relating to access control and copy control devices which operate with certain kinds of prohibited acts: the

⁹ Idris, Kamil, *Intellectual Property: A power tool for economic growth*, WIPO Publication 888, 2003

¹⁰ Section 1201 of the Digital Millennium Copyright Act (DMCA) of 1998.

circumvention of the technological protection measure itself and preparatory acts to circumvention, that is to say, trafficking in technologies that defeat access or copy control devices. Prohibitions on circumvention are subject to certain exemptions in favor of non-profit libraries, archives and educational institutions, as well as developers of technology, while exemptions regarding prohibitions on trafficking are granted for certain entities when acting for the government, in cases of reverse engineering, development of encryption technologies and security testing. But, the broadest of these exemptions is established through an on-going administrative rulemaking proceeding in the Copyright Office of the Library of Congress to evaluate the impact of the prohibition on non-infringing uses of a particular class of works. The Librarian is responsible for issuing a regulation that establishes certain exemptions covering a three-year period.

In Australia,¹¹ the law does not make any difference between access and copy control measures. Also, it does not prohibit the act of circumventing a technological measure, and focuses only on the commercial activities involving the manufacturing and trafficking in circumvention devices and services. The Law also provides certain exceptions to this prohibition where the circumvention device or service is used for a permitted purpose, such as reproducing computer programs for security testing, copying by libraries and archives for users or for other libraries and archives, among others.

In Japan,¹² the system of protection of technological measures of protection is twofold: the Copyright Law and the Unfair Competition Law. Anti-circumvention of technical measures protecting copyright laid down in the copyright legislation, while anti-circumvention of access controls is regulated under unfair competition law. The latter provides for an exception to the general prohibition which makes lawful to distribute devices used for testing or searching on technological measures of protection in order to foster the development of better ones.

The European Copyright Directive¹³ prohibits both the act of circumvention as well as the traffic in circumventing technologies. One particularity of this Directive is that if circumvention acts are accomplished by a person, without knowledge or without reasonable grounds to know, that he or she is pursuing the objective of circumventing, do not entail any legal sanction. In addition, the Directive obliges to take appropriate measures to ensure that rightholders make available to the beneficiary of an exception or limitation provided for in national laws. Measures protecting the access are regulated through another Directive in the European Union member States.¹⁴

As part of its mission, WIPO offers advice and assistance in implementing the provisions of the WCT and WPPT.

¹¹ Subsection 10(1) and Section 116A of the Copyright Amendment (Digital Agenda) Act of 2000
¹² Articles 2 (xx), 119, 120*bis* and 124 of the Japanese Copyright Law as amended by Law No. 72, of June 19, 2002; and Articles 2(1)(10)(x) and (xi), 2(5), and 11(1)(7) of the Unfair Competition Prevention Law as amended by Law No. 81 of June 2001.

¹³ Article 6 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

¹⁴ Directive 98/84/ec of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access

RELATIONSHIP WITH THE TRIPS AGREEMENT

The WCT and WPPT each contain several provisions that impose obligations derived from, and similar to, those in the TRIPS Agreement. Accordingly, countries whose laws are already in compliance with TRIPS would not need to make any amendments in order to satisfy these provisions of the two new treaties.

The WCT and WPPT are not subject to the WTO dispute resolution. It is possible that they could be incorporated by reference in the TRIPS Agreement in the future, and therefore become subject to such dispute resolution. It is not clear, however, if or when this will happen, as it would require the agreement of all WTO member States.

Irrespective of future developments of the TRIPS Agreement, there are important reasons why it is recommended to adhere to the two treaties. The TRIPS provisions have already become somewhat outdated due to the rapid development of the Internet in the 1990s. The WCT and WPPT serve to update the TRIPS obligations, creating a modern and comprehensive framework of rights for the digital age. Implementation of both TRIPS and the two WIPO treaties should therefore help to minimize the gap between digital haves and have-nots.

COST OF ADHERENCE

As far as the cost of adherence to the treaties is concerned, the Governing Bodies of WIPO and the Unions administered by WIPO adopted, in September 1993, a unitary contribution system. Under that system, a State pays the same contribution irrespective of the number of treaties to which it is a party. Consequently, a State that is a member of WIPO and/or party to any treaty administered by WIPO, would not have to pay any additional contribution when it accedes to the WCT and the WPPT.

[Annexes I and II follow]

Annex I

Model

INSTRUMENT OF ACCESSION TO
THE WIPO COPYRIGHT TREATY

(To be deposited with the Director General of WIPO at Geneva)

The Government of [name of State], hereby declares that [name of State] accedes to the
WIPO Copyright Treaty adopted at Geneva on December 20, 1996.

Done at....., on, 200..

(Signature)*
(Title)

[Annex II follows]

* The Instrument should be signed by the Head of State, or the Head of Government or
the Minister for Foreign Affairs.

Annex II

Model

INSTRUMENT OF ACCESSION TO
THE WIPO PERFORMANCES AND PHONOGRAMS TREATY

(To be deposited with the Director General of WIPO at Geneva)

The Government of [name of State], hereby declares that [name of State] accedes to the WIPO Performances and Phonograms Treaty adopted at Geneva on December 20, 1996.

Done at....., on, 200..

(Signature)*
(Title)

[End of document]

* The Instrument should be signed by the Head of State, or the Head of Government or the Minister for Foreign Affairs.