

Copyright documentation and infrastructure

Copyright Infrastructure and access to protected
and public domain works

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Formalities

Berne and formalities

1908. The Berne Convention for the Protection of Literary and Artistic Works was revised at Berlin on November 13, 1908. Among other things, the Berne Convention was amended to add the prohibition to the use of formalities as a condition to acquire, exercise and enjoy rights. (1908 Berlin Text, Article 4(2).) The revisions also introduced a minimum term of life plus 50 years.

1979 Berne text:

Article 5 Rights Guaranteed: 1. and 2. Outside the country of origin; 3. In the country of origin; 4. “Country of origin”

(1) Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention.

(2) **The enjoyment and the exercise of these rights shall not be subject to any formality;** such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. Consequently, apart from the provisions of this Convention, the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country where protection is claimed.

Registration, formalities and the Appendix to the Berne Convention

- **Article IV**

- Provisions Common to Licenses Under Articles II and III: 1. and 2. Procedure; 3. Indication of author and title of work; 4. Exportation of copies; 5. Notice; 6. Compensation

(1) A license under Article II or Article III may be granted only if the applicant, in accordance with the procedure of the country concerned, establishes either that he has requested, and has been denied, authorization by the owner of the right to make and publish the translation or to reproduce and publish the edition, as the case may be, or that, after due diligence on his part, he was unable to find the owner of the right. At the same time as making the request, the applicant shall inform any national or international information center referred to in paragraph (2).

- (2) If the owner of the right cannot be found, the applicant for a license shall send, by registered airmail, copies of his application, submitted to the authority competent to grant the license, to the publisher whose name appears on the work and to any national or international information center which may have been designated, in a notification to that effect deposited with the Director General, by the Government of the country in which the publisher is believed to have his principal place of business.

Formalities in WCT

- **Article 12. Obligations concerning Rights Management Information.**

fn. 10. Agreed statement concerning Article 12: It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties **will not rely on this Article** to devise or implement rights management systems **that would have the effect of imposing formalities** which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

Formalities in Rome Convention

- In contrast to the Berne Convention, the Rome Convention permits formalities.
- One article of the Rome deals with formalities for phonograms.

Article 11 [Formalities for Phonograms]

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram or their containers bear a notice consisting of the symbol (P), accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the country in which the fixation was effected, owns the rights of such performers.

Formalities in WPPT

- Article 20 - Formalities. The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

TRIPS and Berne

- The TRIPS requires compliance with most articles in the Berne Convention

Article 9 Relation to the Berne Convention

1. Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article *6bis* of that Convention or of the rights derived therefrom.

- As a consequence of joining the WTO, a member will have the benefits of Berne Convention even if they do not join the Convention.
- The TRIPS agreement can be seen as modifying the Berne, but how?

The TRIPS 3-Step test

- Article 13

Limitations and Exceptions

Members shall confine limitations or exceptions to **exclusive rights** to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.

TRIPS flexibilities and Berne

- Countries have broad discretion to recognize the exhaustion of copyrights rights under TRIPS Article 6
- Article 1, 6 and 7 of TRIPS provide important flexibility
 - Article 1: Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.
 - Article 7, Objectives: The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.
 - Article 8 - Principles
 1. Members may, in formulating or amending their laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.
 2. Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

TRIPS flexibilities

- SECTION 8: CONTROL OF ANTI-COMPETITIVE PRACTICES IN CONTRACTUAL LICENCES

40.1. Members agree that some licensing practices or conditions pertaining to intellectual property rights which restrain competition may have adverse effects on trade and may impede the transfer and dissemination of technology.

40.2. Nothing in this Agreement shall prevent Members from specifying in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market. As provided above, a Member may adopt, consistently with the other provisions of this Agreement, appropriate measures to prevent or control such practices . . .

Strategy on formalities

- At least under TRIPS, registration can be required for terms that exceed the TRIPS minimums.
 - 20 years for photos (shorter than the 50 under the WCT).
 - 50 years for some works, life plus 50 for others.
- The Berne Convention is fairly silent on remedies. So it is possible to condition some remedies to registration of works, or other formalities, as in practice, many countries do now.

TRIPS provisions on damages

- **Notes:**

- For older works, where it is not reasonably known if the work is in the public domain or not, damages for knowing infringement could be limited to works that were registered.
- For the more general case of orphaned works, which may include newer works with poor meta data available, or poor documentation of legal rights, damages would also be limited in cases where registration does not provide sufficient information about ownerships.

- **TRIPS Article 45 Damages**

1. The judicial authorities **shall** have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's intellectual property right **by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.**

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, **Members may authorize** the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

TRIPS rules on injunctions

- **44.2.** Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, **Members may limit the remedies available against such use to payment of remuneration** in accordance with subparagraph (h) of Article 31. **In other cases**, the remedies under this Part shall apply or, **where these remedies are inconsistent with a Member's law, declaratory judgments and adequate compensation shall be available.**

Author rights to share

- The GNU Public License is an extremely successful model of software licensing that creates reach through obligations to share.
- Creative common and other open content license are rapidly growing in use.
- Major Donors and Universities are pushing for open content licenses.
- Authors should be able to centrally register and provide individual or blanket licenses to use works, under various licensing strategies, subject to the right of others to annotate the database with third party rights in the same works.
 - Once the author had registered with such a database, and received a unique ID, they could share the ID with publishers, to annotate any third party rights the publisher wanted to register.
 - People could consider the practical issues and benefits and costs of making such a sharing registry retroactive.
- If an author declares a blanket license to share, third parties claiming additional rights should have a burden of establishing the legality of those claims.

Reader rights

- Right management systems should be implemented in ways that are least damaging to privacy
- TRIPS Article 40 on the “*Control Of Anti-Competitive Practices In Contractual Licences*,” permits governments to modify or refuse to enforce non-negotiated licensing terms
- Enforcement mechanisms have obligations to provide fair and equitable procedures
 - TRIPS Article 42: Fair and Equitable Procedures

Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Matching Funds

- **Proposal**

Create a mechanism to acquire global perpetual licenses for public access to electronic versions of works.

- Allow interested persons or organizations to propose as sellers or buyers the purchase of a global public license.
- Intermediary accepts matching fund pledges to finance the acquisition. The pledges are refundable if there is not sufficient matching contributions to acquire the rights. But if enough money is pledged, the license is purchased.

Library and education Open Access Fund set-sides

■ Proposal

- Appropriations and grants to fund libraries and educational institutions should set-aside a percent of the budget for the acquisition of copyrighted works. For example, 1 to 3 percent of new acquisition costs.
- The money set aside would be placed into an open access fund (OAF). The OAF could only be spent to support the development of open textbooks, open databases, open academic journals, and global public licenses for ebooks.
 - There could be requirements that institutions co-fund purchases with other institutions.

WTO Agreement for Supply of Public Goods

- Discussion within WTO over a proposed agreement on the supply of public goods
 - Governments would make voluntary commitments to support the production or acquisition of knowledge as a public good.
 - Once the commitments were listed on a WTO schedule, they would be enforceable under the WTO Dispute Settlement Understanding (DSU), or modified rules