The WIPO Internet Treaties, Facing the Challenges of the Digital Economy*

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Paper discusses some important parallel provisions of the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. The key provisions peculiar to each treaty are considered.

We are in the midst of a technological revolution. We are in the Information Age. We are heading towards a wired world. The rapid changes in technology is changing the way we live, study, work, do business, communicate with each other and entertain ourselves. The changes are pervasive. Some of the technological changes have greatly affected the manner in which works can be created, used and disseminated. Some examples of these changes are: satellite broadcasting, cable television, the widespread use of computer programs, databases, and digital transmission systems such as the Internet.

The reach of the technology is across borders. Take the simple example of Amazon.com—the web site of the popular American bookstore. In a wired world a single bookstore has the potential to reach 180 countries. In addition, it can also be reached from 180 different countries.

One of the areas which is understanding changes as a result of the technological advances is commerce. A new term has been coined; this is e-commerce. Amazon.com is a vivid example of the way commerce in books will change. With the advent of online books the changes will be greater.

The digital age is giving rise to the growth of knowledge-based economies. In such economies the key driving force fuelling the economy would be knowledge-based industries.

With the advent of the digital age it became clear that existing international copyright norms needed to be adapted and new norms

* The views in this paper are those of the author.
had to be developed for the purpose of the new technological environment.

**International Copyright Standards for the Digital Age—the WIPO Internet Treaties**

On 20 December 1996, delegates from more than 120 countries, at a WIPO Diplomatic Conference in Geneva adopted two new treaties in the field of copyright and neighbouring rights. These were the 1996 WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT). The two treaties dealt with a variety of changes in the copyright area for the new online environment. In this paper some of the more important parallel provisions of the two treaties will be first discussed following which the key provisions peculiar to each treaty will be considered.

**The Parallel Provisions**

(a) Absence of formalities

The right may be acquired, under both treaties, without the requirement for any formalities. Under the WIPO Copyright Treaty this can be seen from Article 3 which incorporates, *inter alia*, Article 5 of the Berne Convention, *mutatis mutandis*. Article 20 of the WIPO Performances and Phonograms Treaty states the same rule in explicit terms for performers’ rights and phonograms producer’s rights.

(b) National treatment

One of the basic principles of intellectual property conventions is the national treatment obligation. It is contained both in the Berne and the Rome Conventions; it is also found in the TRIPS Agreement.

There is no explicit rule on national treatment in the WCT. The ambit of the national treatment obligation is indicated by Article 3 of the Treaty. Article 3 applies Article 5 of the Berne Convention, *mutatis mutandis*, by incorporation. The effect of this is that countries which are parties to the WCT have to grant each other’s authors national treatment in respect of the rights specially granted by the WCT and further rights which their laws do now or may hereafter grant to their national.

Article 4 of the WPPT provides explicitly for national treatment. The provision is modelled after the Rome Convention and the TRIPS Agreement text. It provides for national treatment with regard to the rights specifically granted in the WPPT. The provision proved controversial and had to be voted upon. It was supported by a large majority of votes.

(c) Attachement points

Both the WCT and WPPT refer to the criteria of eligibility for protection under the Berne and Rome Conventions respectively. They do not prescribe independent criteria of their own. Article 3 of the WCT requires parties to it to apply, *mutatis mutandis*, Articles 3 and 4 of the Berne Convention which deal with the criteria of eligibility. Article 3 of the WPPT lays down that the criteria of eligibility under Articles 4 and 5 of the Rome Convention. Apart from nationals persons with habitual residence, both treaties would apply the criteria of first publication.

(d) The reproduction right

There is no specific provision on the right of reproduction in the WCT. Article 1 of the WCT instead requires compliance with the right of reproduction provision of the Berne Convention, i.e. Article 9.

Unlike the WCT, Article 7 of the WPPT contains an explicit right of reproduction for performers and phonogram producers. The
provision is modelled after Article 9 (1) of the Berne Convention. The treatment of electronic reproductions was one of the most controversial issues at the Diplomatic Conference. In spite of tremendous efforts, agreement could not be reached on treaty language concerning electronic reproductions and exceptions thereto. As a result the provision on the reproduction right in the WCT was deleted; instead the Diplomatic Conference adopted a statement which provided that Article 9 of the Berne Convention continues to apply in the digital environment. In the WPPT the provision on the right of reproduction was reduced to a general text without any reference to electronic copies or exceptions.

(c) The right of distribution

Both the WCT (in Article 6) and the WPPT (in Articles 8 and 12) texts, as supplemented by the Agreed Statements of the Conference, contain a right of distribution. It is the right to authorize the distribution of fixed copies as tangible objects.

The right of distribution is a new right. It was not recognized before in any international convention. A generally applicable distribution right does not appear in either the Berne Convention, the Rome Convention or the TRIPS Agreement.

There was a strong push to include a right of importation and a rule allowing or disallowing the international exhaustion of the distribution right. Both of these were strongly opposed and hence no agreement could be reached in relation to them.

(f) Right of rental

The provision on the right of rental in both the WCT and the WPPT are along the lines of the corresponding provision in the TRIPS Agreement. In the case of the WCT authors will have the exclusive right of authorizing the commercial rental to the public of the originals or copies of their works. Performers and producers of phonograms will enjoy a similar right.

(g) Right of communication to the public/Right of making available

The first part of Article 8 of the WCT contains a broad exclusive right of communication to the public; the second part a right to authorize on-line transmission. The later right is observed by the words "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". They refer to an interactive situation.

In the WPPT a similar right is provided but spelt out in three different provisions: Articles 10,14 and 15. The reason for the different arrangement is that in the WPPT the on-line transmission right is an exclusive right but the right of communication is a remuneration right.

Article 8 of the WCT and Articles 10 and 14 were important outcomes of the Diplomatic Conference. They ensured an exclusive right in relation to on-demand transmissions.

(h) Limitation and exceptions

Limitations and exceptions are dealt with as general principles in both the WCT and the WPPT. Article 10 of the WCT and Article 16 of the WPPT deal with the matter. They provide that: Contracting parties may, in their national legislation, provide for limitations and exceptions to the rights granted under the treaties in certain special cases that do no conflict with a normal exploitation of the work and do no unreasonably prejudice the legitimate interests of the rightholders in question.
(i) Technological measures/Rights management information

Contracting parties to the two treaties are to provide protection and remedies against circumvention of technological measures. With necessary variations, the provisions in the WCT (Article 11) and the WPPT (Article 18) are almost identical in regards to this issue. These are new provisions not found in any international copyright treaty before.

Article 12 of the WCT and Article 19 of the WPPT require contracting parties to provide adequate legal remedies against the removal or alteration of electronic rights management information.

(ii) Enforcement

The issue of enforcement of the rights of authors, performers and phonogram producers is dealt with in article 14 of the WCT and Article 23 of the WPPT. The provisions are in similar language. They require contracting parties to adopt, in accordance with their legal systems, the measures necessary to ensure the application of the treaties. They are also to ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of right conferred by the treaties, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Specific Provisions under the WCT

Articles 4 and 5 of the WCT are in language which confirms that computer programs are protected as literary works and that databases can be protected as copyright works.

Article 9 of the WCT extends the minimum period of protection of photographic works to 50 years.

Specific Issues under the WPPT

The use of definitions in the WPPT follows the model of the Rome Convention. Article 3 of the Rome Convention was largely used as the basis.

The WPPT confers moral rights on performers, i.e. the right to be identified and the right of integrity of the performance. This is the first occasion when moral rights have been conferred on performers at the international level.