

Chapter II: Reports and Presentations

1. International Protection of Copyright and Related Rights
by Ms. Petya Totcharova 17
2. Law Supremacy against Piracy in the Field of Recording which Has
Become a Very Serious Problem in Indonesia
by Mr. Tantowi Yahya 21
3. Intellectual Property Rights and Book Publishing
by Ms. Caroline Morgan 27
4. Publishing and Copyright in Today's Digital Age
by Ms. DAIRAKU Mitsue 38
5. Enforcement and Promotion of Copyright; Japanese Experience
by Ms. DAIRAKU Mitsue 42
6. How to Educate People in Copyright Awareness
by Dr. Satrio Soemantri Brodjonegoro 47
7. ACCU Activities in Copyright
by Ms. SASAKI Mariko 48
8. Author Experience in Malaysia
by Mr. Karim Raslan 52

CHAPTER II

1. International Protection of Copyright and Related Rights

Ms. Petya Totcharova

Legal Advisor, Cultural Enterprise and Copyright Section, Division of Arts and Cultural Enterprise, Culture Sector, UNESCO

1. Introduction

Creations of the mind can be used at any place at any time and are clearly not confined to a country's boundaries. Yet, there is no such thing as universal copyright, but a bunch of single national copyright laws, each of which has no effect outside its respective territory. This is the so-called the rule of territoriality.

In principle, every country is free to design its laws on copyright and related rights according to its own needs, policy objectives, and legal traditions. Particularly, it is in the discretion of domestic lawmakers whether and to what extent they want to protect works of foreign nationals. In the early days, culture-importing countries tended to grant little protection to foreign works in order to secure cheap copies for their interior markets.

However, with the growing importance of international trade relations, from the middle of the 19th century onwards states increasingly started to conclude bilateral treaties for mutual protection of authors' rights. Today, a number of multilateral agreements provide a certain degree of harmonization for the protection of copyright and related rights in a wide range of countries.

International Protection of Copyright and Related Rights

- Bundle of national laws rather than universal copyright
- Harmonisation of national laws through international treaties
- Today, system of widely accepted multilateral conventions

The Most Important International Conventions

- The Berne Convention for the Protection of Literary and Artistic Works of 1886 (last revised in 1971)
- The Universal Copyright Convention of 1952 (last revised in 1971)
- The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations of 1961
- The TRIPs Agreement of 1994
- The WIPO Copyright Treaty of 1996
- The WIPO Performances and Phonograms Treaty of 1996

2. What are the origins of today's international protection system?

The first international copyright treaties were bilateral: that is, only two countries were involved. These agreements however failed to provide a reliable legal basis for the cross-border trade with protected works as they were limited in scope and varied widely. Therefore, countries gradually turned to multilateral conventions committing all parties to a single set of obligations, which eventually became the principal means for the international protection of copyright and related rights.

The origins of today's multilateral structure can be found in a universalist movement that evolved out of France about the middle of the 19th century, even before any bilateral copyright agreement was concluded. Authors and publishers called for a universal recognition of their copyright. A decisive step was the formation of the *Association Littéraire et Artistique Internationale* at the 1878 literary congress in Paris. Among its main protagonists were such prominent figures as the French poet *Victor Hugo*. In 1882, the *ALAI* held a congress in Rome to discuss copyright protection at the international level.

Following the proposal of the German Publishers' Association (*Boersenverein der deutschen Buchhändler*), between 1883 and 1886 four meetings took place in Berne to elaborate a text of an international treaty. The Convention for the Protection of Literary and Artistic Works was adopted on September 9, 1886 and signed by ten countries – Belgium, France, Germany, Haiti, Italy, Liberia, Spain, Switzerland, Tunisia and the UK. Today, the Berne Convention remains still of great importance as many of the recent treaties refer directly or indirectly to its provisions.

The Origins of Today's Multilateral Conventions

- 1878 Literary Congress in Paris, chaired by *Victor Hugo*
- Foundation of the *ALAI* and 1882 congress in Rome
- 1886: Berne Convention signed

3. How can international treaties afford protection of copyright and related rights?

CHAPTER II

International instruments do not usually constitute a directly applicable source of rights to private parties. An international treaty rather imposes obligations on the states, parties to the convention, to adapt their domestic legislation according to its provisions. In the field of copyright and related rights, the relevant conventions establish a certain level of protection in the contracting states through the principle of *national treatment* and the guaranteeing of a number of *minimum standards*.

According to the *national treatment* principle, works originating in a contracting state are protected in every other contracting state in the same manner as these states protect works originating in their own territory. For example, a textbook first published in *contracting State A* will be protected in *contracting State B* in the same manner as *State B* protects a school text originating in its own territory. The guaranteed *minimum standards* ensure that the protection provided by national laws of states parties ñ notably scope of rights, possible exceptions and limitations, as well as terms of protection ñ does not fall below the level agreed in the respective international instrument.

Often there are several possible ways for national legislations to comply with international prescriptions. In order to find out how copyright and related rights are protected abroad, one has therefore always to consult the laws of the respective country in which protection is sought.

International Treaties on Copyright and Related Rights

- Obligations on contracting states to adapt domestic laws
- Principle of *national treatment*
- Guaranteeing of *minimum standards*

4. How does the Berne Convention work?

After the adoption of the Berne Convention in 1886, several revisions have taken place, the last in 1971 usually referred to as 'the Paris Act'. By 2005, 160 countries adhered to the Berne Paris Act. The signatory states to the Berne Convention are united in the *Union for the protection of the rights of authors over their literary and artistic works*. This body exists independently from any particular act of the convention, which underlines its intended permanence and universality. Since 1967, a specialized UN-agency, the World Intellectual Property Organization (WIPO), serves as the Berne Union's International Office. Since more recent conventions, such as the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the 1996 WIPO Treaties, directly or indirectly refer to the Berne Convention's

provisions, it can be considered as the basis of today's international protection system of copyright and related rights.

The Berne Convention is based on the principle of national treatment and guarantees certain minimum standards. It enshrined internationally for the first time the common principle of today that the enjoyment and the exercise of copyright shall not be subject to any formality. The question whether copyright protection requires a work's fixation in tangible form is referred to national legislation. The convention spells out minimum standards for both economic and, since 1928, moral rights. The means of redress for safeguarding the latter are subject to national legislation and may also be found outside of copyright law, for instance under tort and contract law. The Convention provides for a general minimum term of protection of fifty years after the death of the author. Member States are permitted to carve out exceptions from protection in certain cases, such as for educational and press purposes, and to substitute exclusive rights with equitable remuneration, in others. The only mandatory exemption concerns quotations from already published works.

Finally, the 1971 Paris Act has introduced Art. 21 and an Appendix containing specific provisions that allow for limited compulsory licences in developing countries, in order to facilitate the knowledge transfer in those countries.

The Berne Convention for the Protection of Literary and Artistic Works (1886)

- Several revisions, last revised in 1971 (Paris Act)
- Creation of the *Union for the protection of the rights of authors over their literary and artistic works*, administered by WIPO.
- Referred to in later treaties (eg. TRIPs and 1996 WIPO Treaties)
- Minimum standards concerning economic and moral rights, exceptions/limitations and terms of protection

5. What is the Universal Copyright Convention about?

The Universal Copyright Convention was adopted at the 1952 diplomatic conference convened by UNESCO in Geneva. A revision took place in 1971 in Paris. Today the 1952 text of UCC counts 99 signatory states, and the 1971 one ñ 64 states.

In line with endeavours that go back to the time of the League of Nations, the central objective of the UCC was to secure multilateral copyright relations between the countries of the Berne Union and those

countries outside it, which found the Berne Convention's standards incompatible with their own legal traditions. By the time the UCC was adopted, the list included most of the nations of the American continent, as well as the former Soviet Union. In order to accommodate these countries, the UCC allowed in particular for imposing formalities as a condition of protection, such as notice, registration, and deposit. Berne-members on the other hand were satisfied by the introduction of a simple prescribed form of copyright notice that would suffice for foreign works to comply with all domestic formalities: The famous © symbol.

Like the Berne Convention, the UCC obligates contracting states to national treatment and certain minimum standards. However designed as a transitory instrument preceding a country's eventual accession to the Berne Convention, the UCC provides for a generally lower level of protection than the former. Given the increasing number of countries that have joined the Berne Union since, the UCC has therefore gradually lost some of its importance.

The Universal Copyright Convention (1952)

- Revised in 1971 (Paris Act)
- Intended to serve as a bridge toward the *Berne Union*

6. What provisions does the Rome Convention contain?

The question concerning international protection for neighbouring rights was first formally addressed at the 1928 Rome Conference to revise the Berne Convention. In 1949, three international organisations – the BIRPI (the predecessor to WIPO), UNESCO, and the International Labour Organisation, took up this topic. Their joint efforts led to the adoption of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations at the Diplomatic Conference in Rome in 1961 (therefore usually referred to as the 'Rome Convention'). The treaty was signed by 40 states and came into force on May 18, 1964.

The Rome Convention addresses performing artists (performers), record producers (producers of phonograms), and broadcasting organisations. It provides for a constrained version of national treatment which only applies with regard to the rights specifically granted in the treaty. While the producers and broadcasters are granted exclusive rights concerning reproduction, distribution and communication to the public modelled on authors' rights, performers have only the possibility of preventing various specified acts. This distinction

was intended to allow certain countries, mainly of the Anglo-Saxon tradition, to continue to protect performers on a different legal basis, such as criminal law. The Convention guarantees a general minimum term of protection of 20 years, counted from the end of the year when the performance, respectively the fixation or the broadcast took place. Member states are allowed to establish certain exceptions for such purposes as private use or news reporting.

The Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organisations (1961)

- Jointly administered by WIPO, UNESCO and ILO
- First international instrument to address neighbouring rights

7. What has the TRIPs Agreement brought about?

The Agreement on Trade-Related Aspects of Intellectual Property Rights was signed at Marrakesh, Morocco, on April 15, 1994. As a result of the Uruguay round of multilateral trade negotiations, it forms part of the legal obligations of the World Trade Organisation (WTO), which succeeded the former General Agreement on Tariffs and Trade (GATT) of 1947. The TRIPs Agreement thus links the protection of Intellectual Property to trade issues, in particular by making available the WTO's dispute settlement process, which can impose trade sanctions on members violating the agreement.

With regard to copyright, the TRIPs agreement obligates WTO members to comply with the substantive provisions of the Berne Convention, which are, however, complemented in several respects. The TRIPs Agreement notably extends protection to computer programs and compilations of data, introduces an exclusive right to authorize or prohibit the commercial rental of computer programs and cinematographic works, and the applicability of the general fifty-year term of protection has been broadened. However, taking into account the objections of common law countries, such as the USA, the Agreement expressly excludes the Berne Convention's moral rights obligations.

In the sphere of neighbouring rights, there is no equivalent incorporation of an existing treaty, such as the Rome Convention. Instead, the TRIPs Agreement has set up its own provisions on the rights of performers, producers of phonograms (sound recordings), and broadcasters. As compared to the Rome Convention, these standards have brought about in particular an exclusive rental right for performing artists and phonogram producers under certain conditions, as well as a minimum term of

CHAPTER II

protection of 50 years for these two groups of right holders.

The TRIPs agreement has moreover established an additional safeguard in order to calibrate the limitations that contracting countries may impose on exclusive rights, which has been borrowed from the formula in the Berne Convention (now commonly referred to as the "Three-Step Test"). In order to permit effective action against any act of infringement of intellectual property, member states are required to provide for specified enforcement procedures including remedies which constitute a deterrent to future infringement.

Finally, developing and least developed countries are accorded a transition period of an extra four years and ten years leeway respectively, to bring their intellectual property laws into compliance with TRIPs standards.

The Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)

- Links Intellectual Property with trade issues within the World Trade Organisation
- Berne / Rome *plus* standard of protection (without moral rights)
- Specific obligations on states to introduce effective enforcement procedures
- Transitory period in favour of developing and least developed countries

8. What is the role of the 1996 WIPO treaties?

On December 20, 1996, representatives of approximately 120 countries adopted the WIPO Copyright Treaty (WCT) together with the WIPO Performances and Phonograms Treaty (WPPT) at a Diplomatic Conference on Certain Copyright and Neighbouring Rights. The treaties were designed to address questions left open since the last revision of the Berne Convention and the Rome Convention, notably concerning the impact of the new digital technologies on copyright and related rights. For the groups of right holders they cover, the WCT and the WPPT incorporate and update all achievements of Berne, Rome, and the TRIPs Agreement.

The WCT obligates the contracting states to comply with the substantial provisions of the Paris Act of the Berne Convention. Like the TRIPS Agreement, protection is extended to computer programs and databases. Apart from a qualified commercial rental right, the WCT notably introduces a new right of making available to the public which encompasses interactive transmission of works on demand, for instance via the Internet.

The WPPT draws on elements of the Rome Convention by spelling out minimal standards for the protection of performers and record producers (producers of phonograms), but also introduces significant improvements, in particular for performers. Apart from acquiring exclusive economic rights instead of the mere possibility to prevent unauthorized uses, performers are also to have rights of attribution and integrity. This is the first time moral rights have been prescribed for performers in an international agreement. Moreover, a qualified rental right, as well as the new right of making available to the public have been introduced for both performers and record producers. By comparison to the Rome Convention the minimum term of protection has been extended to 50 years.

Both WIPO Treaties have furthermore included the Three-Step-Test as established by the TRIPs Agreement and oblige parties to provide for effective remedies to enforce the rights under the Treaty. A key element in this context is the obligation to prevent the circumvention of encryption technologies and the interference with electronic rights management information, which has been unprecedented in the field of copyright and related rights.

The WIPO Copyright Treaty (1996) The WIPO Performances and Phonograms Treaty (1996)

- Designed to address new technologies and means of communication
- Introduction of new right of making available to the public
- Obligation to prohibit circumvention of technical protection measures
- Moral rights for performers