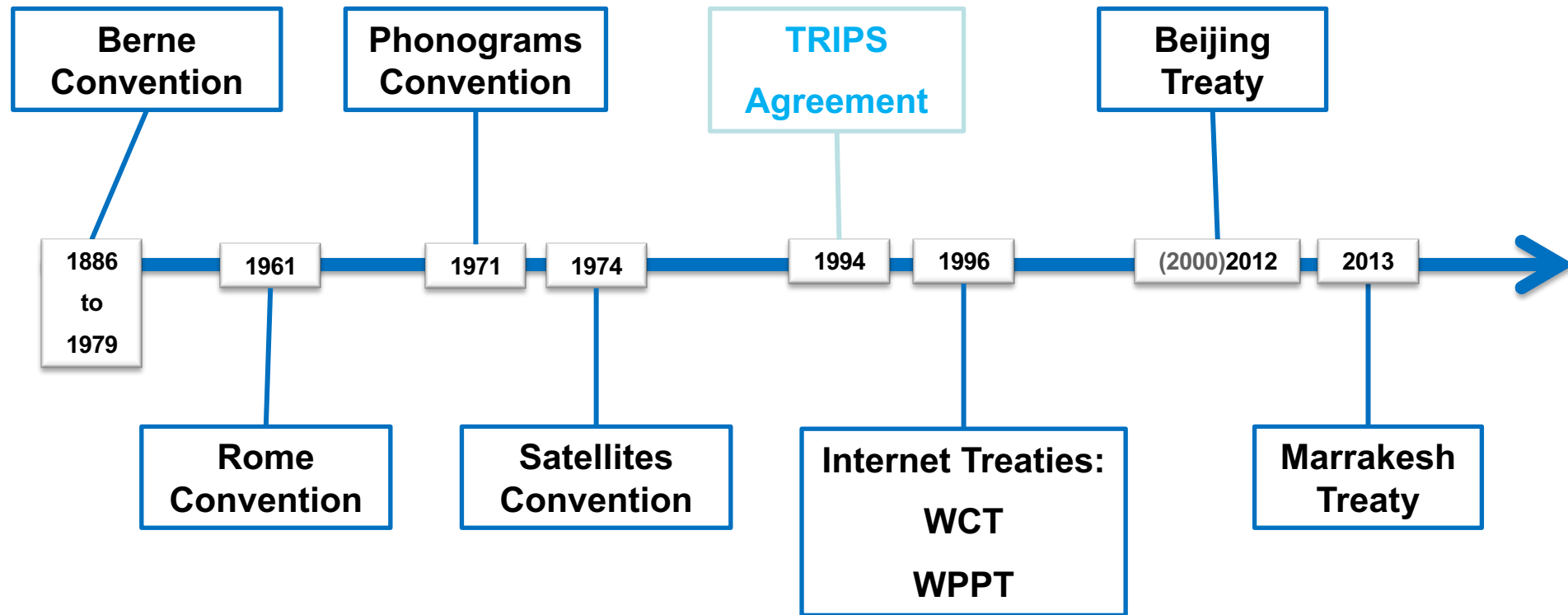


# INTRODUCTION TO THE WIPO INTERNET TREATIES

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Training Course  
London  
September 3, 2019

# International Copyright Framework





# Membership of Certain Copyright and Related Rights Treaties

- Berne Convention (1886):
  - 177/192 members
- Rome Convention (1961):
  - 94/192 members
- WIPO Copyright Treaty (1996):
  - 102/192 members
- WIPO Performances and Phonograms Treaty (1996):
  - 102/192 members
- Beijing Treaty on Audiovisual Performances (2012):
  - 26/192 members (not yet in force – 30 needed)
- Marrakesh Treaty (2013):
  - 57/192 members (covering 84 Member States)

# The Internet Treaties



# WIPO Internet Treaties – Overview

- General updates to rights from Berne and Rome Conventions:
  - copyright for software and databases
  - distribution and rental rights
  - economic and moral rights for performers (but not audiovisual performers – see Beijing Treaty)
  - economic rights for producers of phonograms
  - provisions for photographs
- Broadcasting is not updated – left for a separate negotiation

# WIPO Copyright Treaty (WCT)

- Special agreement under the Berne Convention that deals with the digital environment
- Contracting Parties must comply with the substantive provisions of the 1971 (Paris) Act of Berne (broader than TRIPS because includes *6bis* on moral rights)
- New subject matter protected by copyright: **(i)** computer programs; and **(ii)** compilations of data or other material ("databases"), in any form, which constitute intellectual creations
- New rights granted to authors are: **(i)** the right of distribution; **(ii)** the right of rental; and **(iii)** a broader right of communication to the public/making available

# WCT (cont.)

WCT substantive provisions:

- Computer Programs (4)
- Databases (5)
- Right of Distribution (6)
- Right of Rental (7)
- Right of Communication to the Public/Making Available (8)
- Duration of Protection for Photographic Works (9)
- Limitations and Exceptions (10)
- Technological Protection Measures (11)
- Rights Management Information (12)
- Enforcement Provisions (14)

# WIPO Performances and Phonograms Treaty:

## Treaty:

- Two kinds of beneficiaries, particularly in the digital environment: (i) performers (actors, singers, musicians, etc.); and (ii) producers of phonograms (persons or legal entities that take the initiative and have the responsibility for the fixation of sounds from musical works)
- Treaty grants performers economic rights in their performances fixed in phonograms (not in audiovisual fixations, such as motion pictures – that is covered in Beijing)
- Treaty grants (i) the right of reproduction; (ii) the right of distribution; (iii) the right of rental; and (iv) the right of making available
- What is not covered? Broadcasting organizations

# WPPT (cont.)

## WPPT Substantive Provisions:

- Economic Rights of Performers (unfixed) (6)
- Right of Reproduction (7/11) (performers/phonogram producers)
- Right of Distribution (8/12)
- Right of Rental (9/13)
- Right of Making Available (10/14)
- Right to Remuneration (15)
- Limitations and Exceptions (16)
- Term of Protection (17)
- Technological Protection Measures (18)
- Rights Management Information (19)
- Enforcement Provisions (23)

# Right of Reproduction = Storage of works in digital form in electronic medium

*The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention. (Agreed statement to Article 1(4) incorporating Articles 1-21 of Berne)*



# Right of Reproduction

Agreed Statement providing that Article 9 of Berne fully applies in the digital environment. Substantive impact:

- Art. 9(1) - Reproduction in 'any manner or form' irrespective of duration; including of a temporary nature
- Art. 9(2) - Justified exceptions, such as for transient and incidental copies, provided they comply with the three-step test

*(Reference : WCT [Article 1(4)] & WPPT [Articles 7 & 11])*

# Right of Making Available

- Interactive transmission of content on the Internet
- International Consensus: exclusive right
- Different views on legal characterization
- “Umbrella Solution”
- Neutral description of the act of transmission over interactive network

## Right of Making Available (cont.)

Authors of literary and artistic works given exclusive **right “of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access from a place and time individually chosen by them.”** (Article 8, WCT)

*(Similar provision for performers and phonogram producers in Articles 10 & 14, WPPT)*

# Right of Making Available (cont.)

- 2 possible existing rights were identified:
  - Communication to the public
  - Distribution
- These Berne Convention rights do not offer full coverage. The former does not extend to certain categories of works while the latter expressly covers only cinematographic works. The WCT extended both rights to all kind of works.
- National laws also differed greatly in this respect; difficult to arrive at a consensus.

# Right of Making Available (cont.)

## ■ ‘Umbrella’ Solution:

- More countries preferred the option of using the right of communication to the public:

- WCT extends applicability of right of communication to public to **all** categories of works

- Clarifies that the right also covers transmission in interactive systems

- However, Parties free to implement this obligation (of making available to the public) through a right other than the right of communication to the public, such as distribution right or a specific new right

# Limitations and Exceptions

## Three-Step Test (3ST or TST) as a common rule:

- Article 9(2) Berne Convention, Article 13 TRIPS Agreement, Articles 10(2) WCT and 16(2) WPPT:
  - certain special cases
  - do not conflict with normal exploitation
  - do not prejudice the legitimate interests of right holders

### WCT

- Article 1 to 21 Berne Convention. Article 1(4) and agreed statement (reproduction in the digital environment)
- General exception: three-step test. Article 10(1) and agreed statement: Existing exceptions can be kept or extended to the digital environment. New exceptions can be devised

### WPPT

- Exceptions to the rights granted under WPPT must follow three-step test, Article 16(2)
- Any other copyright exception that exists for copyright, Article 16(1)

# Limitations and Exceptions (cont.)

Examples of new limitations and exceptions:

- Temporary electronic copies which occur as part of the technical process of making Internet transmission
- Caching and browsing: temporary reproduction which occurs at the point of reception to enable the view of the accessed material
- Making available of content in the premises of a cultural institution

# Digital Rights Management

DRM is a system of IT components and services along with corresponding law, policies and business models which strive to distribute and control intellectual property and its rights.

**TPM + RMI = DRM**

**“The answer to the machine is in the machine”**

© Clark Charles



**Digital Rights Management**



# Digital Rights Management

- **Technological Protection Measures (TPM):** “any technology, device or component that, in the normal course of its operation, is designed to prevent or restrict acts in respect of works or objects of related rights, which are not authorized by the owner of rights or by the law.”
- **Rights Management Information (RMI):** “information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.”



# Technological Protection Measures Rights Management Information

Obligation to provide adequate legal protection and remedies against:

- circumvention of technological measures that restrict unauthorized acts
- removal/alteration of electronic rights management information

*(Ref : WCT Articles 11 & 12, WPPT Articles 18 & 19)*

# Internet Intermediaries in the Internet Treaties

## **Agreed Statement on Article 8 WCT:**

*It is understood that the mere provision of physical facilities for enabling or making communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention.*

(Liability of Access and Service Providers)

# Internet Intermediaries in the WIPO Treaties (cont.)

## Article 14 WCT Provisions on Enforcement

*“(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.*

*(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”*

(Paragraph (1) = Articles 36 Berne; 26 Rome; 23 WPPT; Paragraph (2) = 23 WPPT)

# WCT/WPPT Membership and Obligations

- Regional disparities in adherence
- Obligations and legal provisions apply in more countries than the number that are members:
  - Trade agreements: regional and bilateral FTAs
  - Implementation measures by current non-members
- But some countries that are members and have implementing legislation do not use or enforce the provisions

# Beijing Treaty on Audiovisual Performances



# The BTAP was adopted in Beijing in June 2012





# Benefits of the BTAP

- Economic development  
International protection  
of national performers;  
consolidation of AV  
industry; increased  
foreign investment;  
effective and secure  
distribution of AV content  
online





# Benefits of the BTAP

- Improving the status of audiovisual performers  
Provide incentives and compensation for international use of AV performances;  
consolidation of performer organizations



# Benefits of the BTAP

- Protection of culture, folklore and cultural diversity  
AV as vehicle for other expressions of creativity and cultural identity; protection of performances of folklore

## Namatan Short Film Festival final tonight

Posted on June 4, 2012 - 11:43am | Category: Local News

After six days of screenings to over 1000 people in communities around Efate and Santo, tonight the winners of the first ever Namatan Short Film Festival will be announced at a final screening and awards night at Seafront Stage.

Namatan Short Film Festival is a co-organised event created and developed by VBTC and the Australian High Commission. The idea came about to give an opportunity to everyone in

Vanuatu to express their ideas and identities through the popular and modern medium of film. The competition started six weeks ago and despite the short time frame, the quality of entries has impressed both judges and the community audiences alike.



# Beneficiaries – Performers

- Actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore (Art. 9 Rome, Art. 2(a) WPPT).



# Rome Convention Background (Article 7)

Performers have “(..) *the possibility of preventing:*

- *the broadcasting and the communication to the public, without their consent, of their “live” performance;*
- *the fixation, without their consent, of their unfixed performance;*
- *the reproduction, without their consent, of a fixation of their performance:*
  - (i) *if the original fixation itself was made without their consent;*
  - (ii) *if the reproduction is made for purposes different from those for which the performers gave their consent;*
  - (iii) *if the original fixation was made in accordance with the provisions of [Article 15](#), and the reproduction is made for purposes different from those referred to in those provisions. (..)*

# Rome Convention (Article 19)

## *cut-off provision*

*“Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, [Article 7](#) shall have no further application.”*



# Diplomatic Conference for the Protection of Audiovisual Performances – Geneva, 2000



# Diplomatic Conference on the Protection of Audiovisual Performances 2000

- Provisional agreement on 19 articles
- Outstanding issue was the “transfer of right” (Article 12)
- Many other debated issues (e.g. definition of audiovisual fixation, moral rights, national treatment (no collection without distribution), application in time)
- Not concluded; left open for the future

# Diplomatic Conference on the Protection of Audiovisual Performances 2012

- Until June 2011 maintained on the Agenda of the WIPO General Assembly
- In September 2011 the GA gave the mandate to “reconvene” the Diplomatic Conference (Beijing, June 20-26, 2012)
- Reconvened after 12 years
- The results of the 2000 Diplomatic Conference were the starting point



# Narrow 2012 Diplomatic Conference

## Mandate

Adopt:

- The 19 articles provisionally adopted at the 2000 Dip. Conf.
- The new Article 12 agreed by consensus at session SCCR/22

Negotiate:

- Three additional Agreed Statements to be drafted in relation to Articles 1, 2, and 15, respectively, to address specific concerns raised by Member States
- One additional clause in the Preamble recognizing the importance of the Development Agenda
- The administrative and final provisions

# Agreed Statement Topics

- Three new Agreed Statements intended to:
  - Reaffirm the Member States' commitments to the principles, objectives, and competition policy of the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) (Article 1)
  - Clarify the relationship between the WIPO Performances and Phonograms Treaty (WPPT) and the Treaty (Article 1)
  - Describe better those performers protected under the Treaty (Article 2)
  - Clarify the relationship between Articles 13 and 15 (Article 15).

# Characteristics of the BTAP

Diplomatic Conference  
on the Protection  
of Audiovisual Performances

June 20 to 26, 2012  
Beijing, China

保护音像表演外交会议  
2012年6月20日至26日  
中国北京

Organized by  
the World Intellectual Property Organization (WIPO)

Hosted by  
the National Copyright Administration of China  
and the People's Government of Beijing Municipality  
the People's Republic of China

举办方：世界知识产权组织

承办方：中华人民共和国国家版权局  
中华人民共和国北京市人民政府



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# The Beijing Treaty on Audiovisual Performances (BTAP)

Follows the WPPT model for substantive provisions:

- Right of Reproduction (7)
- Right of Distribution (8)
- Right of Rental (9) (more similar to TRIPS model)
- Right of Making Available (10)
- Limitations and Exceptions (13)
- Term of Protection (14)
- Technological Protection Measures (15)
- Rights Management Information (16)
- Enforcement Provisions (20)

# Performers' Rights Under BTAP:

## ■ Economic Rights in Unfixed Performances (Article 6)

## ■ Fixed Performances:

- Right of Reproduction (Article 7)
- Right of Distribution (Article 8)
- Right of Rental (Article 9)
- Right of Making Available (Article 10)
- Right of Broadcasting and Communication to the Public (Article 11)

# Preamble

## Clause II

*“Recalling the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly of the Convention Establishing the World Intellectual Property Organization (WIPO), which aim to ensure that development considerations form an integral part of the Organization’s work, (..)”*

# Relation with other Treaties (Article 1(3))

*This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.*

# Article 1 Relations with other Treaties

*“Agreed statement concerning Article 1(3): It is understood that Contracting Parties who are members of the World Trade Organization (WTO) acknowledge all the principles and objectives of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and understand that nothing in this Treaty affects the provisions of the TRIPS Agreement, including, but not limited to, the provisions relating to anti-competitive practices”.*

**\*TRIPS Agreement – Art. 8.2:** *“..adopt appropriate measures to prevent the abuse of intellectual property rights by rights holders or the resort by them to practices that unreasonably restrain trade or adversely affect the international transfer of technology.”*



# Article 2 Agreed Statement

*“It is understood that the definition of “performers” includes those who perform a literary or artistic work that is created or first fixed in the course of a performance.”*

# Definition of Audiovisual Fixation (Article 2(b))

*“audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;*

*Agreed statement: It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT.*

# Moral Rights (Article 5)

- Paternity/attribution
  - Integrity
  - Prejudice to reputation (does not mention honor)
- 
- Taking due account of the nature of AV fixation (text)
  - Exempting modifications in the normal course of exploitation, e.g. editing, compression, dubbing, formatting (agreed statement)

# Transfer of Rights



# Transfer of Rights (Article 12)

(1) “A Contracting Party **may** provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be **owned or exercised by or transferred to the producer** of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.”

# Article 12 (cont.)

(2) “A Contracting Party **may** require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties. . . .

(3) Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements **may** provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.”

# Limitations and Exceptions (Article 13)

- Scope: May provide same kinds of limitations or exceptions as provided in national legislation in connection with copyright protection.
- Application of three-step test: *“Contracting Parties shall confine any limitation of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.”*

# Term of Protection (Article 14)

Article 14: “The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed.”



# Article 15 Agreed Statement on Technological Protection Measures

*“Agreed statement concerning Article 15 as it relates to Article 13: It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party’s national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party’s national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.”*

# Application in time (Article 19)

- General rule is “retrospective protection” applicable to all protected subject matter, not already in the public domain
- A reservation is possible to grant protection (economic rights Articles from 7 to 11) only to performances not yet fixed at the time of the entry into force of the Treaty



# Administrative Provisions and final clauses

- Article 26: entry into force three months after 30 eligible parties have deposited their instruments of ratification or accession

- Article 23: Eligibility for Becoming Party

- “(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.*
  - (3) The European Union, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.”*

# Beijing Treaty – Review Questions

- Why did performers need this treaty when the WPPT covers performers?
- What are the advantages and disadvantages of the solution agreed to the transfer of rights question?

# Diplomatic Conference on Protection of Audiovisual Performances – Beijing, 2012



## Diplomatic Conference on the Protection of Audiovisual Performances

June 20 to 26, 2012 - Beijing, China



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# List of Countries that Signed the Beijing Treaty

Austria, Belgium, Botswana, Bulgaria, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Djibouti, El Salvador, Estonia, European Union, Finland, France, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Haiti, Honduras, Hungary, Indonesia, Ireland, Italy, Jamaica, Jordan, Kenya, Luxembourg, Madagascar, Mali, Mauritania, Mauritius, Mexico, Mongolia, Montenegro, Morocco, Namibia, Netherlands, Nicaragua, Peru, Poland, Qatar, Republic of Moldova, Romania, Sao Tome and Principe, Senegal, Seychelles, Sierra Leone, Slovenia, Spain, Sudan, Sweden, Switzerland, Syrian Arab Republic, Togo, Tunisia, Uganda, United Kingdom, United States of America, Zambia, Zimbabwe (74).



Thank you!



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