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World Intellectual Property Organization Performances and Phonograms Treaty: An Overview

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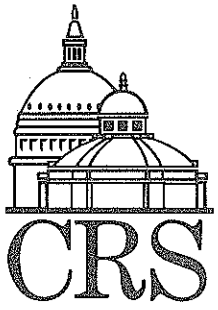

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ABSTRACT

The President has requested the advice and consent of the Senate to a new World Intellectual Property Organization ("WIPO") Performances and Phonograms Treaty. S. 2037 and H.R. 2281, as passed by the Senate and House of Representatives, respectively, implement the changes in United States law to make it compatible with the Treaty. Both bills have been amended to address broader issues of copyright policy in digital, electronic environments, including provisions dealing with online service provider liability, ephemeral copying, and fair use. The Treaty updates international protection for performers and producers of sound recordings. This report highlights the main features of the Treaty, summarizes the implementation bills, and notes possible implementation issues.

World Intellectual Property Organization Performances and Phonograms Treaty: An Overview

Summary

The President has requested the advice and consent of the Senate to ratification by the United States of a new multilateral treaty, the World Intellectual Property Organization (WIPO) Performances and Phonograms Treaty. This new treaty, which was adopted by the Geneva Diplomatic Conference in December 1996, creates new and enhanced international protection for performers and producers of phonograms (i.e., sound recordings). Its adoption culminates an effort that began as a "spin-off" in 1992 from the related proposals to modernize copyright protection through a "protocol" to the Berne Copyright Convention.

The Performances-Phonograms Treaty significantly increases the term of protection from the 20-year period of the 1961 Rome Neighboring Rights Convention to a minimum period of 50 years. The rights of reproduction, public distribution, commercial rental, and making available of phonograms to the public by interactive transmissions are recognized. Protection for phonograms expressly extends to digital, electronic environments such as the Internet and other computer networks. Limitations on rights are generally left to national law, subject to a general principle that the limitations not conflict with normal exploitation and not unreasonably harm legitimate interests of performers or producers.

A nonexclusive, single right to remuneration for traditional broadcasts and communications to the public is also recognized, but even this limited right is subject to a reservation. That is, adherents have the option of qualifying the right or may choose not to grant this remuneration right (which essentially applies to noninteractive public performances of sound recordings).

Performers are granted two additional rights — moral rights and rights in unfixed performances. Audiovisual performances are not covered.

S. 1121 and H.R. 2281, the original Clinton Administration bills, would have amended the Copyright Act to create new protection in two fields only: protection against circumvention of anti-copying technology, and protection to assure the integrity of copyright management information systems. Another bill, S. 1146, addressed additional issues, including online service provider liability, fair use, ephemeral copying, and distance learning. A fourth bill, H.R. 3048, was similar to S. 1146 but omitted the online service provider provisions and added provisions on first sale and shrink-wrap licensing. S. 2037, the successor to S. 1121, passed the Senate on May 14, 1998. H.R. 2281, as amended, passed the House of Representatives on August 4, 1998.

This report reviews the background of the WIPO Performances and Phonograms Treaty, summarizes the main provisions of the Treaty and of the implementation bills, and briefly discusses the main implementation issues, such as the liability of online service providers, moral rights of performers, and the economic rights of non-author performers. (A separate report has been prepared concerning a second new treaty — the WIPO Copyright Treaty.)

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World Intellectual Property Organization Performances and Phonograms Treaty: An Overview

Introduction

The World Intellectual Property Organization (WIPO)[1] convened a diplomatic conference from December 2-20, 1996 in Geneva, Switzerland to consider three draft treaties in the field of intellectual property. Delegates representing more than 125 countries participated in the conference, which ultimately adopted two new intellectual property treaties and postponed consideration of the third draft treaty.

One treaty — the WIPO Performances and Phonograms Treaty — covers protection for performers of audio works and producers of phonograms (i.e., sound recordings), usually under "related" or "neighboring rights" theories of legal protection.[2] A country like the United States, however, that protects sound

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[1]The World Intellectual Property Organization is a specialized agency of the United Nations which administers most of the international treaties in the field of intellectual property (patents, trademarks, and copyrights). WIPO administers the Berne Convention for the Protection of Literary and Artistic Works — the major copyright convention. WIPO shares with the International Labor Organization (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) the administrative responsibilities for existing "related" or "neighboring" rights treaties: the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (Rome, 1961) (hereafter the "1961 Rome Convention" or the "1961 Neighboring Rights Convention") and the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971) (hereafter the "Geneva Phonograms Convention"). New treaties in the intellectual property field are most commonly negotiated and developed under work programs established by WIPO members. Usually, following a series of governmental experts meetings, WIPO convenes a diplomatic conference of states to consider, debate, negotiate, and perhaps approve a new treaty. This process was followed in developing the new Performances-Phonograms Treaty reviewed in this report.

[2]The terms "related" or "neighboring" rights refer to systems of legal protection that are adjacent, similar, or related to protection of the rights of authors (i.e., "related" rights are similar to, but different from, copyright protection for authors). Related or neighboring rights is primarily a European concept, which is rooted in the belief that authors of literary and artistic works merit stronger protection than producers, performers, or broadcasters of such works. Under "related" rights theory, phonograph records, for example, are largely mechanical contrivances. The engineers and technicians, whose effort results in an "impersonal" technological product are not generally considered "authors." Performers are recognized as "artists" in Europe, but they merely interpret and render the works of authors;

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recordings under copyright law, may continue to use copyright law to satisfy the obligations of the Performances-Phonograms Treaty.

The second treaty — the WIPO Copyright Treaty[3] — covers copyright protection for computer programs, databases as intellectual works, and digital communications, including transmission of copyrighted works over the worldwide Internet and other computer networks.

Consideration of the third draft treaty — the Database Treaty — was postponed to another diplomatic conference both because there was insufficient time to examine this proposal at the December 1996 diplomatic conference and because many countries thought that the proposal had been given insufficient consideration during the preparatory work to enable them to make an informed decision. The draft Database Treaty would have established *sui generis* protection against misappropriation of databases created with substantial effort and investment, even if the database did not represent an intellectual work within the meaning of copyright law.

This report highlights the key provisions of the Performances-Phonograms Treaty, summarizes the proposed implementing legislation (S. 2037 and H.R. 2281)[4] and discusses the main implementation issues that have arisen, or may arise, during congressional consideration of the implementing bills and the Treaty.

Most Recent Developments

The President of the United States in July 1997 submitted the WIPO Performances and Phonograms Treaty to the Senate for its advice and consent to ratification of the Treaty by the United States, accompanied by recommendations for implementing legislation. Based on this request, S. 1121 and H.R. 2281 were introduced at the end of July 1997 to make the changes in United States law, which the Clinton Administration concluded were the minimal changes that must be made

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[2](...continued)
they do not create works of authorship as that concept is understood in most European countries. "Related rights" — the form of protection applied most commonly to sound recordings internationally — are considered subordinate to the rights of authors. Consequently, related rights are generally granted for a shorter period than the term for copyrights, and the rights granted are more likely to be qualified or subject to compulsory licensing.

[3]This report makes only brief references to the WIPO Copyright Treaty. For an overview of the copyright treaty, see the separate CRS Report No. 97-444 A by D. Schrader entitled World Intellectual Property Organization Copyright Treaty: An Overview. For a more detailed report on recent developments, *see,* D. Schrader, *WIPO Copyright Treaty Implementation Legislation: Recent Developments,* CRS Report No. 98-463 A.

[4]The pending bills are intended to implement both the WIPO Performances and Phonograms Treaty and the WIPO Copyright Treaty. The treaty articles that the bills are intended to implement (technological measures and integrity of copyright management information systems) are identical.

in U.S. law to comply with the new obligations of the Treaty. In his transmittal message to the Senate, the President has requested that the United States invoke a reservation permitted by Article 15(3) of the Performers and Phonograms Treaty with respect to the broadcasting right.

S. 1121 and H.R. 2281, as introduced, were virtually identical bills that were based on the interpretive position that existing U.S. law is consistent with the obligations of the Treaty except for two substantive matters and technical amendments (the latter concern primarily the definition of foreign-origin works and their eligibility for U.S. copyright protection). The bills proposed new legal protection i) against circumvention of anti-copying technology and ii) against knowing performance of prohibited acts relating to removal or alteration of copyright management information ("CMI").

On September 3, 1997, Senator Ashcroft introduced an alternative WIPO treaties implementation bill (S. 1146), which, in addition to proposing different statutory texts concerning anti-circumvention and CMI protection, addresses Internet copyright issues such as online service provider liability, fair use, distance learning, and ephemeral reproduction of copies. Another bill, H.R. 3048, contained provisions similar to S. 1146, except for the omission of provisions dealing with OSP copyright liability and the inclusion of provisions dealing with the first sale doctrine and "shrink-wrap" licensing. A separate bill, H.R. 2180, dealt only with OSP liability. (H.R. 2180 was later replaced by H.R. 3209.)

The Senate Judiciary Committee held hearings on S. 1146 on September 4, 1997.[5] The House Subcommittee on Courts and Intellectual Property held hearings on H.R. 2281 and H.R. 2180 on September 16 and 17, 1997. The House Judiciary Committee approved an amended version of H.R. 2281 on April 1, 1998, which included the core elements of a private sector consensus agreement on OSP liability.[6] The Senate Judiciary Committee favorably reported S. 2037 on May 11, 1998 as a successor to S. 1121.[7]

The substitute bill, known as the "Digital Millennium Copyright Act of 1998" embodies the private sector agreement on OSP liability and several additional amendments. These amendments: declare that nothing in the anti-circumvention provisions enlarges or diminishes the existing doctrines of vicarious or contributory infringement or affects existing defenses such as fair use; clarify that electronics manufacturers have no obligation to design consumer products to achieve protection against circumvention; expand the exemption of 17 U.S.C. 112 for ephemeral copying by broadcasting organizations to apply in digital contexts and to override the anti-circumvention measures of the copyright owner under certain conditions; expand the exemption of 17 U.S.C. 108 for libraries and archives for preservation activities;

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[5]The Senate Foreign Relations Committee has primary jurisdiction over the consideration of the treaty itself. The Senate and House Judiciary Committees have primary jurisdiction over amendments to U.S. intellectual property laws to implement the treaty.

[6]H.R. REP. 105-551 (Part I), 105th Cong. 2d Sess. (1998).

[7]S REP. 105-190, 105th Cong. 2d Sess. (1998).

protect personal privacy interests on the Internet; provide exceptions from the anti-circumvention provisions (i) for computer interoperability, (ii) for libraries and nonprofit educational institutions in making purchasing decisions, and (iii) with respect to the right to control minors' access to material on the Internet; except law enforcement and intelligence activities from the anti-circumvention and CMI provisions; and direct the Copyright Office to study and report on distance learning and the liability of nonprofit educational institutions and libraries when they provide online service to patrons.

The Senate passed S. 2037 by unanimous voice vote on May 14, 1998.

H.R. 2281, bearing the short title: "WIPO Copyright Treaties Implementation Act," was subject to sequential referral to the House Commerce Committee. The Subcommittee on Telecommunications, Trade, and Consumer Protection held a hearing on the bill on June 5, 1998. The full Commerce Committee made several amendments to H.R. 2281 and reported the bill as the "Digital Millennium Copyright Act of 1998" on July 22, 1998.[8] The Commerce Committee version of H.R. 2281 generally included the amendments already embodied in S. 2037 as passed by the Senate. The House bill included additional amendments especially concerning the issues of circumvention of technological measures, fair use, and encryption research. The House of Representatives passed H.R. 2281 with further amendments on August 4, 1998.

S. 2037 and H.R. 2281 have many common provisions, but the bills also differ significantly. Most notably, perhaps, H.R. 2281 contains two new forms of intellectual property protection not included in earlier WIPO implementation bills. Title V would enact protection for noncopyrightable databases under a misappropriation-type regime (the "Collections of Information Antipiracy Act"). Title VI would enact protection for the overall shape or design of vessel hulls larger than a rowboat but smaller than 201 feet (the "Vessel Hull Design Protection Act").

Background

The WIPO Performances and Phonograms Treaty was developed as a by-product of a WIPO work program to modernize the major international copyright treaty, the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). The original purpose of the so-called "Berne Protocol" process was to make explicit the international copyright protection for computer programs and databases, and generally to update the Berne Convention concerning use of copyrighted works in digital, electronic environments.

Initially, the United States sought to include updated protection for sound recordings in the "Berne Protocol" process. The European Union and many other countries strenuously resisted inclusion of sound recording protection in the copyright treaty since sound recordings are not copyright subject matter under their laws or, they insisted, under the Berne Convention.

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[8]H.R. REP. 105-551 (Part II), 105th Cong., 2d Sess. (1998).

A majority of industrialized countries protect sound recordings under "related" or "neighboring" rights laws. The principal neighboring rights convention is the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (known as the "1961 Rome Convention" or "Neighboring Rights Convention"). The United States is not a member of this convention.[9]

As the Berne Protocol process developed, the viewpoint of the European Union prevailed. Sound recording protection is not covered internationally by the Berne Convention. Thus, an updated version of the Berne Convention could not be the vehicle for improved international protection for sound recordings.

In 1992, a decision was taken to split the Berne Protocol process into two phases: an update of copyright provisions, and preparation of a possible "new instrument" (i.e., a separate treaty) on the protection of the rights of performers and producers of phonograms.[10] The issues relating to the "new instrument" were considered by six Committees of Experts. This dual work program (copyright update and "new instrument") culminated in the adoption of two new treaties at the WIPO Diplomatic Conference which met in Geneva, Switzerland from December 2-20, 1996.

The major policy issue involving the Performances-Phonograms Treaty was the inclusion or exclusion of protection for audiovisual performances and performers (e.g., actors/actresses in motion pictures). This issue was resolved by the exclusion of audiovisual performances from the Treaty. The possibility of extending new rights to audiovisual performances will be pursued in future meetings within the WIPO.

In the fields of copyright and related rights, multilateral treaties or conventions generally establish a few basic principles concerning the scope of protection, eligibility of foreigners to enjoy protection, permissible range of limitations and exceptions to the rights granted, and duration of protection. Intellectual property treaties, like the Berne Convention and the 1961 Rome Convention, do not govern protection for a country's own **nationals**, do not govern **who** is liable for any infringement of rights, and do not regulate the enforcement of rights in any detail.

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[9]The United States adheres to a more narrow sound recording treaty — the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (Geneva, 1971) (the "Geneva Phonograms Convention"). As the title suggests, the Geneva Phonograms Convention protects record producers against unauthorized duplication by commercial pirates. Members can opt for copyright, related rights, unfair competition, criminal law, or a sui generis form of protection.

[10]"Phonograms" is the international term commonly used to refer to sound recordings. Technically under United States law, sound recordings are works of authorship, which may be embodied in a variety of material objects (records, cassettes, compact disks, etc.) Called "phonorecords." The international term "phonograms" refers both to material objects embodying recorded sounds and to the content that is the object of legal protection. Throughout this report, the terms "phonograms" and "sound recordings" will be used interchangeably to mean the intellectual creation that is the object of protection under the Treaty.

An intellectual property treaty generally establishes its basic principles in language that is less explicit than statutory language. This level of generality and flexibility of language is ordinarily essential in order to achieve an international consensus among so many countries with widely differing national legal systems. The details of intellectual property policy are left to national legislatures. There is usually some flexibility in carrying out even relatively explicit treaty obligations. Very commonly, the treaty will specifically provide that certain issues are left entirely to national legislation. If, however, implementing legislation is not adopted, the treaty obligation may be interpreted by the courts of a country, depending upon that country's system of jurisprudence.

An intellectual property treaty like the new WIPO Performances and Phonograms Treaty establishes general principles or a framework within which national copyright or related rights laws, for example, are enacted and enforced. The treaty operates primarily to harmonize national laws concerning minimum rights and duration of rights. National copyright or related rights laws do not have extraterritorial effect.

Suits for copyright or related rights violations are ordinarily brought in the place where the infringement occurs. The court of the country where suit is filed applies its own law, which includes both national copyright or related rights laws and any relevant treaty to which the country adheres.[11] Choice-of-law issues are resolved under the national law, subject in the case of the new WIPO Copyright and Performances-Phonograms[12] treaties to the principle of "national treatment," that is, the foreigner enjoys the same rights as a national of the country.

Treaty Ratification and Implementation

United States adherence to one or both of the new WIPO treaties requires Senate consent to ratification of the treaty by a two-thirds vote.[13] In general,

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[11]Suits alleging infringement of treaty rights by private persons are not brought before any international forum such as WIPO or the International Court of Justice. Under Article 30 of the 1961 Rome Convention, disputes about treaty interpretation or application between two or more member countries may be brought before the International Court of Justice at the request of any one of the disputants. That one party can bring the case to the International Court is unusual. Article 33 of the Berne Convention represents the more common formulation concerning recourse to the International Court: the suit cannot be brought if one of the parties has declared itself not bound by Article 33(1) of Berne.

[12]As will be discussed later, the WIPO Performances and Phonograms Treaty does permit a reservation concerning national treatment in the case of the broadcasting remuneration right and communications to the public. Article 15(3) of the Performances-Phonograms Treaty. The President, in his treaty transmittal message to the Senate, has requested that the United States invoke this reservation.

[13]The WIPO Performances and Phonograms Treaty will not come into force for any country until 3 months after the 30th country to accede or ratify has deposited its instruments of accession or ratification with the Director General of WIPO. Each country follows its own

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ratification of intellectual property treaties requires implementing legislation to conform United States domestic law to the treaty obligations. For this reason, the Senate's consent to treaty ratification usually occurs after, or concurrently with, enactment of any necessary implementing legislation.

Unless the existing United States law is consistent with the obligations of an intellectual property treaty, implementing legislation is necessary to avoid a situation in which the United States would fail to meet its commitments to international law. Intellectual property ("IP") law treaties have not been considered self-executing under U.S. law, even though the Supremacy Clause of the U.S. Constitution makes a ratified treaty the "law of the land" if it is later in time than a statute.

IP treaties have not been considered self-executing primarily because they represent private international law rather than public international law. A copyright treaty, for example, creates personal property rights in authors (and perhaps other persons) and fixes civil liability (at least) for persons who infringe those property rights.[14] The property rights and the specific acts that give rise to liability are ordinarily detailed in national laws. Any inconsistencies between the provisions of the treaty and the existing national laws are ordinarily resolved by the time the treaty is ratified in order to satisfy United States international treaty obligations and to make clear the rights of IP owners and the potential liability of IP users.

The exact content of the implementing legislation is subject to public debate and legislative consideration. This legislative process ordinarily involves an assessment of the minimum obligations of the treaty; analysis of, and some consensus on, the settled interpretations of existing U.S. law; and the impact of the treaty and any changes in U.S. law on various groups in this country. The Congress also may decide to specify certain policies in statutory form, and leave certain details to administrative regulation or to the case-by-case decisions of the courts.

The WIPO Performances and Phonograms Treaty has now been forwarded to the Senate for its advice and consent, and bills introduced to implement the changes in United States law deemed necessary by the Administration.[15] The original bills have now been replaced by amended and successor bills (S. 2037 and H.R. 2281), known as the "Digital Millennium Copyright Act of 1998" ("DMCA").

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[13](...continued)
treaty approval process in accordance with national law.

[14]As noted earlier, international IP treaties to date have not specified who is liable, but they fix the major parameters for assessing liability by specifying rights and permissible limitations on rights.

[15]In introducing S. 1121, Senator Hatch, Chairman of the Senate Judiciary Committee, expressed the view that the United States "must act promptly to ratify and implement the WIPO treaties in order to demonstrate leadership on international copyright protection, so that the WIPO treaties can be implemented globally and so that further theft of our nation's most valuable creative products may be prevented." 143 CONG. REC. (Daily sheets) at S8582 (July 31, 1997).

As passed by the Senate and House of Representatives, the different versions of the DMCA address broader copyright policy issues in the digital environment than originally proposed by the Administration for the WIPO implementation bills. This outcome (thus far) is the result of efforts by groups, such as the Digital Future Coalition (representing the electronics industry, library and educational groups, and certain technology companies), the online service providers, telephone companies, and other communications entities . These groups have successfully urged Congress to clarify their liability for Internet uses of copyrighted works, in conjunction with any ratification of the WIPO treaties.[16]

Content owners and many large computer software companies originally urged early congressional action on both WIPO treaties and on the implementing legislation By adoption of the "minimalist" approach of S. 1121 and H.R. 2281,[17] as originally introduced. They initially argued that online service and access provider liability and other intellectual property policy issues could be addressed, if necessary, in separate legislation, apart from the WIPO treaties implementation bills.

The versions of the DMCA passed by the Senate and house of Representatives, however, generally embody consensus, compromise agreements on formerly contentious issues that apparently enjoy the support of both users and owners of copyrighted material, except with respect to Titles V and VI of H.R. 2281.[18]

WIPO Performances and Phonograms Treaty: Summary

Nature of Legal Instrument

The WIPO Performances and Phonograms Treaty is a new treaty, which has a few "links" to the existing 1961 Rome Convention. In contrast, however, to the

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[16]"Leading Internet Industry Coalition Says Clarifying Legislation Must Accompany Pending Copyright Treaties 'Balanced' Solution Needed or Internet at Risk," PR Newswire, February 26, 1997; "Recording, Telco Interests Spar Over Copyright Law," National Journal's Congress Daily, April 30, 1997; D. Braun, Copyright Laws Choke Tech Development, Group Warns, TechWire, August 18, 1997.

[17]Senator Hatch, in introducing S. 1121, confirmed that the bill takes a "minimalist" approach and is based on the assumption that "the substantive protections in U.S. copyright law already meet the standards of the new WIPO treaties, and therefore very few changes to U.S. law are necessary in order to implement the treaties." 143 CONG. REC. (Daily sheets) at S8582 (July 31, 1997).

[18]Adam Eisgrau, representing the Digital Future Coalition, has confirmed that his organization has agreed not to oppose the House Commerce Committee's compromise bill provided that the bill is not encumbered by "unrelated" copyright proposals such as copyright term extension or database protection. As passed by the house, Title V of H.R. 2281 embodies the database proposal (which was also passed separately as H.R. 2652). Title VI embodies a boat design protection proposal (which was also passed separately as H.R. 2696). *Legislation: Commerce Panel Clears Digital Copyright Bill With Further Concessions on on Fair Use,* 56 BNA PTC JOUR. 326 (July 23, 1998).

approach taken in the WIPO Copyright Treaty (where adherents must apply the substantive articles of the 1971 Paris Act of the Berne Convention), adherents to the Performances-Phonograms Treaty are not required to apply the 1961 Rome Convention, unless they are already members of that convention.[19]

Adherents to the Performances-Phonograms Treaty are required to promise that its provisions "shall in no way affect the protection of copyright in literary and artistic works,"[20] nor have any connection with or prejudice any rights and obligations under any other treaties.[21]

The Diplomatic Conference also adopted an agreed interpretation with reference to Article 1 concerning the relationship between rights in phonograms under the Treaty and copyright in works embodied in the phonograms.[22] The States agreed that where permission to use a phonogram is needed from both the author of a work embodied therein and a performer or producer, the need to obtain the author's permission does not cease to exist because permission is also required from the performer/producer, and vice-versa. This interpretative understanding merely confirms that copyright rights and related rights are separate and may be held by different rightsholders. Where there are different rightsholders, permission from one is not sufficient to authorize use of the phonogram.[23]

Form of Legal Protection

The Performances-Phonograms Treaty creates new rights for performers and producers of sound recordings without specifying the theory of law under which the rights are enjoyed. That is, a country may provide the protection specified in the

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[19]This difference in the approach of the copyright and related rights treaties is primarily a concession to the United States, which is not a member of the 1961 Rome Convention and would have great difficulty in applying some of its provisions. In fact, a primary reason for development of the new Performances-Phonograms Treaty is the wish of the United States to improve international protection for sound recordings without updating the 1961 Rome Convention as the vehicle for that improved protection.

[20]Art. 1(2). This provision reflects the European viewpoint that related or neighboring rights protection must always be subordinate to copyright protection for authors. (Hereafter, all references to a treaty article refer to articles in the WIPO Performances and Phonograms Treaty, unless the context makes clear that another treaty is referenced.)

[21]Art. 1(3). This provision clarifies that the Performances-Phonograms Treaty does not supersede or replace other intellectual property treaties such as the Geneva Phonograms Convention, the Universal Copyright Convention, or the Berne Convention. Article 1(1) of the Treaty expressly provides that nothing in the Performances- Phonograms Treaty shall derogate from the 1961 Rome Convention.

[22]"Phonogram" is defined in Article 2(b) to mean "the fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work."

[23]The States also agreed that nothing in Article 1(2) precludes a party to the Treaty from providing exclusive rights to performers or producers of phonograms in excess of those provided by the Treaty.

Treaty under "related" or "neighboring" rights, under copyright, or a *sui generis* law.

If existing patterns of protection for sound recordings are maintained, the majority of the countries will extend protection through related rights laws. The United States presumably will continue to rely upon copyright law as the primary vehicle for sound recording protection, supplemented by criminal penalties for knowing infringements for purposes of commercial gain.[24] In addition to federal law, the United States may rely in part on state statutory and common law protection to satisfy some treaty obligations.[25]

National Treatment

Article 4 of the Treaty obliges a Party to accord the same treatment to foreigners that the Party accords to its own nationals with regard to the exclusive rights specifically granted and the right to equitable remuneration provided by Article 15, except where a reservation is made concerning the remuneration right of Article 15. In that case, other countries are not bound to grant a right of equitable remuneration for the broadcast or communication to the public of phonograms (in essence, the public performance of sound recordings) to the nationals of the country invoking the reservation. Other than in the case of this exception, foreigners must be granted the same rights as citizens (nationals).

The national treatment article represents an enhanced level of international protection for sound recordings since the 1961 Rome Convention permitted several reservations rather than just one reservation.[26]

Beneficiaries of Protection

Performers and producers of phonograms who are nationals of other Parties to the Treaty must be accorded the protection granted by the Treaty.[27]

The term "national" means those phonogram performers/producers who meet the eligibility criteria of the 1961 Rome Convention based on the legal fiction that all

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[24]The first federal legislation protecting the rights of performers (who are not also authors) was passed in 1994 as part of the fast-track legislation implementing the 1994 General Agreement on Tariffs and Trade (GATT). Pub. L. 103-465, SECS. 512 and 513, Act of December 8, 1994. The law, known as the federal anti-bootlegging statute, created civil and criminal penalties for unauthorized fixation and trafficking in audio recordings of live musical performances. The civil penalties are codified at Chapter 11 of title 17 of the U.S. Code (the Copyright Act). The criminal penalties are codified in title 18 of the U.S. Code, §2319A.

[25]State law may be relied upon, for example, to provide the moral rights protection for performers required by Article 5 of the Treaty.

[26]As discussed under the next point, however, the Performances-Phonograms Treaty applies the eligibility criteria of the 1961 Rome Convention, including its possible reservations concerning the criteria of publication and fixation.

[27]Art. 3(1).

members of the Performances-Phonograms Treaty are also members of the 1961 Rome convention.[28] If a reservation has been made concerning under Rome Article 5(3) that a State will not apply either the criterion of publication or the criterion of fixation to establish eligibility of a producer, then Article 3(3) of the Performances and Phonograms Treaty permits a similar declaration for purposes of this Treaty.

"'Performers' are 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."[29]

"'Producer of a phonogram' means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representation of sounds."[30]

Term of Protection

The rights of performers and producers of phonograms must be protected generally for a minimum of 50 years computed from first fixation of the sounds in a phonogram.[31]

The fixation criterion always applies in computing the term for performers (because a primary right of a performer is to authorize the first fixation of the performance in a phonogram).

In the case of producers, the 50-year term is computed from the year of publication, if the phonogram is published. If the phonogram is not published, the 50-year term for producers is computed from first fixation.

Exclusive Rights

Performers and producers of phonograms generally enjoy the same exclusive rights under the Performances-Phonograms Treaty except that i) performers are granted moral rights and rights in unfixed performances but producers are not, and

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[28]Art. 3(2). The Rome Convention's eligibility criteria for performers are found in Article 4 of that Convention. The criteria are: (a) a live performance takes place in another Contracting State; (b) the performance is fixed in a phonogram which is protected under Rome Article 5; or (c) a live performance is transmitted via a broadcast protected by Rome Article 5. These eligibility criteria are thus not based on "nationality" in the same sense as the Berne Copyright Convention. The first criterion is territorial; the last two depend upon protection for either the phonogram producer or the broadcaster. Then, concerning the eligibility criteria for producers, Rome Article 5 establishes three possibilities: (a) the nationality of the producer (if a national of another Contracting State); (b) first fixation in another Contracting State; or (c) first publication in another Contracting State. Reservations are possible regarding the publication and fixation criteria.

[29]Art. 2(a) (definition).

[30]Art. 2(d) (definition).

[31]Art. 17.

ii) technically speaking, performers are granted rights in their performances and producers are granted rights in their phonogram, that is, in the fixation of the sounds.

For clarity's sake, the Treaty sets forth the performer's moral right, the right in unfixed performances, and their rights of reproduction, public distribution, commercial rental, and making available to the public of fixed performances by wire or wireless means, in a separate Chapter II of the Treaty (comprising Articles 5 through 10 inclusive).

Producers are not granted moral rights or rights in unfixed performances. Their rights of reproduction, public distribution, commercial rental, and making available to the public of a phonogram by wire or wireless means, are set forth in a separate Chapter III of the Treaty (comprising Articles 11 through 14 inclusive).

These above-mentioned rights may be exercised separately by performers and producers. Permission from both the performer and the producer must be obtained for a third-party to reproduce, distribute, rent, or make available a phonogram (subject of course to any limitations on these rights legislated pursuant to Article 16).

Moral Rights of Performers. Independent of their economic rights, performers must be accorded the "moral rights" generally to be named as the performer and to object to any distortion or other modification of the performance that prejudices the performer's reputation.[32]

The moral right applies both to live performances and to performances fixed in a phonogram.

After the death of the performer, the moral right must generally be maintained at least until expiration of the performer's economic rights. The post mortem moral rights can be exercised by persons or institutions authorized by the national law of the country where protection is claimed. As an exception, however, those States, whose law at the time of ratification or accession to the Treaty does not maintain all of the moral rights after the death of the performer, are permitted to terminate some of the rights on the death of the performer.[33]

The details of moral rights protection are left to the national law of the country where protection is claimed.[34]

Performer's Right in Unfixed Performances. Performers, but not producers, are granted rights under the Treaty in "unfixed performances." This economic right basically means that performers have the right to authorize the first fixation of their

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[32]Art. 5.

[33]Art. 5(2).

[34]Art. 5(3). This deference to national law may allow the United States to rely upon a patchwork of existing state laws and the federal trademark law as the legal basis for satisfying the Treaty obligation, without enacting new federal legislation.

performances. They also have the right to authorize the first broadcast or communication to the public of their unfixed performances.[35]

This right is in addition to the qualified remuneration right of Article 15 to share in payments for the broadcast or public communication of commercially **published** phonograms.

The remaining exclusive rights apply to performances **fixed** in phonograms.

Performers and producers have separate rights of reproduction, public distribution, commercial rental, and making available to the public by wire or wireless means.

Reproduction Right. The reproduction right applies to direct or indirect reproduction in any manner or form of the fixed performance or the phonogram.[36]

The Diplomatic Conference adopted an agreed interpretation of the reproduction right in Article 7 (performer's right) and Article 11 (producer's right), and the limitations permitted by Article 16. The statement says that the Treaty's reproduction rights "fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."[37]

Public Distribution Right. Performers and producers enjoy the exclusive right of authorizing the making available to the public of copies.[38] Like the WIPO Copyright Treaty, the Performances-Phonograms Treaty permits, but does not

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[35]Art. 6.

[36]Arts. 7 and 11. These articles, which grant a reproduction right but do not address reproduction in computers explicitly, were accepted in the Performances-Phonograms Treaty apparently because of their narrow application to phonograms. Online service providers, who successfully insisted upon deletion of the reproduction right article from the WIPO Copyright Treaty, perhaps did not perceive the same risk of liability concerning reproduction of phonograms as they did in the case of reproduction of other copyrighted works, or, if they sought deletion of the express reproduction right, were not successful.

[37]Agreed Statement Concerning Articles 7, 11, and 16. Diplomatic Conference document CRNR/DC/97 (December 23, 1997). The "agreed statement" interpretive device adopted by the 1996 Diplomatic Conference is unusual in international intellectual property treaties. The weight, as well as the meaning, of some of the statements — such as the statement interpreting the reproduction right — will be debated in legislative fora and argued in the courts. The debate will likely focus on the meaning of "storage" in digital, electronic media. Some will argue that the statement means any storage beyond a few nanoseconds. Others will argue that the statement allows considerable room for limiting "storage" to instances of more permanent retention of the phonogram, and perhaps for purposes of further distribution for commercial purposes.

[38]Arts. 8(1) and 12(1).

require, the States to limit the distribution right by the "first sale" or "exhaustion of right" doctrines.[39]

The Diplomatic Conference adopted an agreed interpretation concerning the word "copies" and the phrase "original and copies" where they appear in Articles 2(e) (definition of "publication"); Articles 8 and 12 (distribution rights); and Articles 9 and 13 (rental rights). "As used in these Articles, the expressions `copies' and `original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible copies."[40]

Commercial Rental Right. Performers and producers enjoy a generally exclusive right of authorizing the commercial rental of phonograms.[41] This right, however, is subject to qualification as a mere right of remuneration if on April 15, 1994[42] a country granted only a remuneration right for phonogram rentals.[43]

The possibility of a mere remuneration right for rentals is a concession to Japan, primarily, since their national law provides only a right of remuneration for rental of phonograms. The Treaty contains the further condition that such a country may maintain the remuneration right provided there is no "material impairment" of the reproduction right.

Making Available Right. Performers and producers enjoy the exclusive right of authorizing "the making available to the public" of phonograms "by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them."[44]

This "public availability" right is in essence an interactive, on-demand public transmission right. It will apply to interactive and subscription methods of transmitting phonograms to the public, including dissemination via computer

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[39]Art. 8(2). These doctrines are applied usually to limit the public distribution right to the first sale authorized by the rightsholder. That is, the purchaser of a copy of a phonogram may resell or otherwise redistribute the phonogram without obtaining permission from the rightsholder. See, for example, section 109 of the U.S. Copyright Act, title 17 U.S.C. In recent years, commercial rental rights have been granted to copyright owners of computer programs and sound recordings by qualifying the application of the first sale doctrine to these works. At the international level, a major issue exists concerning national, regional, or international "exhaustion" of the public distribution right. That is, assuming the exhaustion doctrine is legislated, does the first sale in a given country exhaust the distribution right only in the country of origin, or does exhaustion also occur throughout a given region of affiliated States and/or worldwide? The Treaty takes no position on this unresolved issue.

[40]Agreed Statement Concerning Articles 2(e), 8, 9, 12, and 13.

[41]Arts. 9(1) and 13(1).

[42]This is the date the Uruguay Round Agreements under the 1994 General Agreement on Tariffs and Trade (GATT) were adopted.

[43]Art. 9(2).

[44]Arts. 10 and 14.

networks and other electronic means. A principal difference between the Articles 10 and 14 "public availability" right and the Articles 8 and 12 "public distribution" right is that the latter applies to distribution of **copies** of phonograms; the former applies to transmissions.

The existence of these separate articles, together with the somewhat ambiguous statement of the reproduction right, is arguably consistent with a view that, at the international level, public **transmission** of phonograms via computer networks does not amount to a public **distribution** of the phonograms. The validity of this viewpoint will be tested by the consensus that may develop on the meaning and legal force of the agreed statement concerning the reproduction right of Articles 7 and 11. In its domestic copyright proposals relating to the transmission of copyrighted works on computer networks, the Clinton Administration has taken the position that United States copyright law should be amended to equate public transmission with public distribution.[45]

Remuneration Right for Broadcasts and Communications to the Public

Two other Treaty rights are set forth in Chapter IV of the Performances-Phonograms Treaty, which is denominated "common provisions." These are the rights of broadcasting and communication to the public for the direct or indirect use of phonograms published commercially. These rights are not strictly "exclusive" rights since they are subject to a mere right of equitable remuneration.[46] That is, the rightsholders cannot prohibit the use; the rightsholders are at best entitled to compensation. Moreover, unlike the exclusive rights, these rights are subject to a **single** payment. The performers and producers share in the single payment, but have no separate rights to payment.

"Broadcasting" is defined as the wireless transmission for public reception of sounds or images and sounds, including transmission by satellite. The term also includes transmission of encrypted signals where the broadcasting organization provides, or consents to the provision of, decryption devices to the public.[47]

"Communication to the public" means transmission to the public of sounds by any medium other than broadcasting.[48]

National law may provide that either the performer, the producer, or both may claim the payment. In the absence of a contractual agreement between the performers

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[45]INFORMATION INFRASTRUCTURE TASK FORCE ON INTELLECTUAL PROPERTY AND THE NATIONAL INFORMATION INFRASTRUCTURE (NII), REPORT OF THE WORKING GROUP ON INTELLECTUAL PROPERTY RIGHTS 213-214 (1995).

[46]Article 15(1).

[47]Art. 2(f) (definition of "broadcasting"). This definition applies both to television and radio broadcasts.

[48]Art. 2(g) (definition of "communication to the public").

and the producers, the national law may regulate the terms for sharing the single payment.[49]

Also, in a provision that amounts to a reservation on broadcasting-public communication rights, the Treaty permits a party to declare by notification to the Director General of WIPO that it will extend these rights i) "only in respect of certain uses," ii) "that it will limit their application in some other way," or iii) "that it will not apply these provisions at all."[50] If this reservation is invoked, the member State has the freedom to apply these rights to narrowly defined uses, to establish a compulsory licensing mechanism, or not grant *any* rights concerning broadcasts and communications to the public of phonograms.

The Treaty specifies that where phonograms are made available to the public by wire or wireless means in a way that permits individual access, those phonograms "shall be considered as if they had been published for commercial purposes."[51]

Although a reservation is possible on the broadcasting-public communication rights, no reservation is possible on the "public availability" right of Articles 10 and 14. This means member States must provide exclusive rights where the transmission is made available on an interactive or on-demand basis. The States can elect, however, not to extend any rights to traditional broadcasts or to non-interactive public performances of phonograms (subject to the right of the **performer** under Article 6 to authorize the broadcast or public communication of **unfixed** performances). That is, the Treaty requires protection of performers against unauthorized broadcast of a live performance, but does not require protection for performers or producers against non-interactive broadcasts of phonograms (sound recordings).[52]

The Diplomatic Conference adopted two agreed statements concerning Article 15. One statement simply recognizes the reality that the delegations to the Conference "were unable to achieve consensus on differing proposals...without the possibility of reservations, and have therefore left the issue to future resolution." The second statement expresses an understanding that, even though Article 15 ordinarily applies only to commercially published phonograms, member States are not prevented from granting broadcasting-public communication rights in recordings of folklore where the phonograms have not been published for commercial gain.

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[49]Art. 15(2).

[50]Art. 15(3). In his Transmittal Message to the Senate, the President has requested that the Senate give its consent to United States ratification of the WIPO Performances and Phonograms Treaty, while invoking the permissible reservation to the broadcasting right.

[51]Art. 15(4).

[52]This distinction between the requirement of an exclusive right for interactive transmissions of sound recordings, and possible compulsory licensing for other broadcasts of sound recordings, is consistent with the digital audio transmission right of United States law. Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, Act of November 1, 1995, which amended the Copyright Act, title 17 U.S.C. to create a public performance right for the first time in certain uses of sound recordings.

Limitations on Rights

The Performances-Phonograms Treaty permits limitations to the rights granted on the same basis as the WIPO Copyright Treaty. Any limitations or exceptions applied to copyright owners of literary and artistic works may be applied to performers and producers of phonograms.[53]

Member States may also legislate limitations or exceptions to the Treaty rights in "certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms."[54]

The Diplomatic Conference also adopted an agreed statement to Article 16 that incorporates the Copyright Treaty's agreed statement interpreting its Article 10. This is done by stating that Article 10 of the Copyright Treaty applies *mutatis mutandis* (that is, in the same way) also to Article 16 of the Performances-Phonograms Treaty. The statement has three main points: i) Member States may extend into the digital environment any existing limitations and exceptions that have been considered acceptable under the Berne Copyright Convention; ii) the States may also devise new exceptions and limitations appropriate to the digital network environment; and iii) Article 10(2) of the Copyright Treaty neither reduces nor extends the scope of limitations permitted by the Berne Copyright Convention.

Enforcement of Rights

The international copyright and related rights conventions have not traditionally included detailed provisions regarding enforcement of rights. The 1996 Diplomatic Conference considered proposals to include detailed enforcement provisions in the WIPO Copyright and Performances-Phonongrams treaties, either as an Annex or by reference to the enforcement articles of the 1994 GATT Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS Agreement").[55]

In the end, the Diplomatic Conference rejected both of the detailed proposals in favor of a brief enforcement article that makes no reference to the TRIPS enforcement provisions.[56]

Article 23 requires Treaty adherents to ensure that enforcement procedures exist under domestic law to permit "effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies" to deter future infringements.[57] Paragraph (1) of Article 23 expresses the general obligation "to undertake to adopt...the measures necessary to ensure the application of this Treaty."

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[53]Art. 16(1).

[54]Art. 16(2).

[55]Articles 41 to 61 of the TRIPS Agreement.

[56]The same solution was adopted in the case of the WIPO Copyright Treaty at Article 14.

[57]Art. 23(2).

Retroactive Application

Adherents to the Performances-Phonograms Treaty are bound to apply Article 18 of the Berne Convention, *mutatis mutandis*, to extend retroactive protection to the rights of performers and producers of phonograms,[58] except that a Member State can elect not to extend retroactive protection to the moral rights of performers for performances which occur before the State becomes bound by the Treaty.[59]

This incorporation by reference of Berne Article 18 means, in essence, that Member States must provide some form of retroactive protection for performances and phonograms that were unprotected by the new Member before it joined the Treaty, but remain under protection in the country of origin.

Formalities Prohibited

Article 20 requires that the "enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality." This means that no conditions such as publication in a certain country, use of a notice to claim rights, or similar requirements may be imposed in order to enjoy or exercise the rights granted by the Treaty.[60]

Technological Measures

The Performances-Phonograms Treaty in Article 18 establishes a new kind of legal protection for performers and producers of phonograms. Treaty adherents shall provide "adequate and effective legal protection and effective legal remedies against the circumvention of effective technological measures" (that is, protection against devices or services that defeat anti-copying technologies).

The obligation is expressed in general language and leaves the details of protection to national law. Strong opposition had been expressed domestically to a related copyright proposal in S. 1284 and H.R. 4221 of the 104th Congress (the bills that would have amended the copyright law concerning use of copyrighted works on the Internet and other computer networks). The electronics industry objected to civil liability for devices whose "primary purpose or effect" was to circumvent anti-copying systems. The Performances-Phonograms Treaty does not contain the language objected to by the electronics industry.

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[58]Art. 22(1).

[59]Art. 22(2).

[60]Technically, this prohibition on formalities applies to the rights of foreigners. A State could impose formalities on its own nationals. The reference to "enjoyment and exercise of rights" is borrowed from Article 5 of the Berne Copyright Convention. Arguably, the interpretive tradition of the Berne Convention may be invoked in any disputes about the meaning of this prohibition on formalities.

Rights Management Information

Pursuant to Article 19, Treaty adherents must provide "adequate and effective legal remedies against any person knowingly performing" prohibited acts relating to the removal or alteration of electronic rights management information.

This obligation extends only to rights management information in electronic form. By implication, the remedies could be criminal or civil. In the case of civil remedies, protection should apply against someone who has reasonable grounds to know that he or she has engaged in a prohibited act.

"Rights management information" (RMI) means information that identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or discloses the terms and conditions of use. The intent is to facilitate widespread dissemination of this information by rightsholders in order to make licensing of performers' or producers' rights more readily available to the public.

In another incorporation by reference from the WIPO Copyright Treaty, the Diplomatic Conference adopted the Copyright Treaty's agreed statement concerning its rights management article. That is, the agreed statement concerning Article 12 of the Copyright Treaty applies *mutatis mutandis* also to Article 19 of the Performances-Phonograms Treaty. The agreed statement includes two understandings. First, the reference to "infringement of any right covered by this Treaty" encompasses both exclusive rights and rights of remuneration. Second, the Member States will not use Article 19 to devise or implement RMI systems that would have the effect of imposing formalities, prohibiting the free movement of goods, or impeding the enjoyment of Treaty rights.

Audiovisual Performances Excluded

The major policy controversy concerning the Performances-Phonograms Treaty at the 1996 Diplomatic Conference was whether or not to extend rights to performances in audiovisual works such as motion pictures. The United States argued strongly against coverage of audiovisual performances, and this viewpoint prevailed at this time.

WIPO will convene a new series of meetings to explore protection of audiovisual performances. In order to create a treaty obligation in respect of audiovisual performances, a new diplomatic conference would have to be convened. The 1996 Diplomatic Conference adopted a Resolution Concerning Audiovisual Performances which recommends development of a Protocol to the WIPO Performances-Phonograms Treaty concerning audiovisual performances, with a view to adoption of a Protocol by the end of 1998.[61]

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[61]Resolution Concerning Audiovisual Performances, adopted December 20, 1996 (CRNR/DC/99; December 23, 1996).

The definition of "phonogram" embodies the decision to exclude audiovisual performances. "Phonogram" means the fixation of sounds (or a representation of sounds) other than in the form of a fixation incorporated in a cinematographic or other audiovisual work.[62]

An agreed statement of the Diplomatic Conference clarifies that rights in a protected phonogram (a fixation of sounds) are not affected in any way, however, by incorporation of that phonogram in the soundtrack of a motion picture or other audiovisual work.[63] That is, if a pre-existing sound recording is re-recorded on the soundtrack of a motion picture, the rights of the performers and producers of the sound recording (phonogram) remain protected by the Treaty, even though the Treaty otherwise excludes protection for performances in audiovisual works.

Administrative Provisions

Any member State of the World Intellectual Property Organization may become a party to the WIPO Performances and Phonograms Treaty.[64] The Treaty enters into force three months after 30 States ratify or accede to it.[65] No reservations are permitted, except for a reservation concerning the remuneration right for broadcasting and public communications.[66] Subject to this one exception, a country must accept the obligations of the entire Treaty and cannot decline to be bound by certain provisions.[67]

Article 24 establishes an "Assembly" of the member States in order to provide some organizational structure for dealing with future questions about maintenance, development, or revision of the Treaty.[68] The Assembly meets in regular session once every 2 years, upon convocation by the Director General of WIPO.[69]

The International Bureau of WIPO performs any administrative tasks concerning the Treaty.[70]

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[62]Art. 2(b) (definition of "phonogram").

[63]Agreed Statement concerning Article 2(b).

[64]Art. 26(1).

[65]Art. 29.

[66]Art. 21. In addition to the Article 15(3) reservation, however, the possible reservations concerning the publication and fixation eligibility criteria of the 1961 Rome Convention are carried over into the Performances-Phonograms Treaty pursuant to Article 3(3).

[67]Art. 27.

[68]Revision of the Treaty would entail convocation of another diplomatic conference. Art. 24(2)(c).

[69]Art. 24(4).

[70]Art. 35.

Treaty Implementation Issues

General Observations

In general, the decision whether or not to submit implementing legislation, and the form of that legislation, depends upon interpretation of existing United States law. The Clinton Administration and most rightsholders initially took the position that United States law — including state laws and other federal laws in addition to the copyright law — is now consistent with the obligations of the Treaty, except for protection against circumvention of anti-copying systems and protection against removal or alteration of rights management information, and technical amendments concerning eligibility of foreign-origin works to claim U.S. copyright protection.

Those who held this viewpoint argued that the Treaty mainly clarifies certain rights and subject matter issues, and that, to the extent the Treaty grants new rights, it tracks recent changes in United States copyright law — most notably, the federal anti-bootlegging statute which prohibits unauthorized fixation and trafficking in live musical performances,[71] and the Digital Performance Right in Sound Recordings Act of 1995, which created a narrow public performance right in digital audio transmissions of sound recordings.[72] Also, some have argued that the courts could deal with the few, if any, remaining issues concerning the consistency of U.S. law with the Treaty, that were not covered by the original implementation bills.

The opposing viewpoint is that United States law relating to use of copyrighted works (including sound recordings) on the Internet and other electronic or computer networks is not settled. Some argued that existing U.S. law is inconsistent with certain Treaty obligations. Others argued that, at a minimum, legislation would be needed to achieve a higher degree of certainty about minimum Treaty rights. Judicial resolution of these issues, under this view, takes too long, is too fraught with uncertainty for conducting Internet business, and seldom provides clear, national interpretations of the law. S. 1146, H.R. 3048, H.R. 2180, and H.R. 3209 essentially responded to the concerns of those who seek legislative clarification of U.S. law about copyright liability in digital, electronic environments.[73]

Finally, it was argued that, if the Treaty were ratified without amending U.S. law on issues such as the scope of rights and limitations on the rights, the Treaty language might be cited in court to determine the outcome of cases and in future legislative fora as an obstacle to enactment of certain legislation. The Treaty would thus shape the interpretation of U.S. law and future legislative debates. Certain positions and interpretations will arguably be foreclosed if the Treaty is ratified, unless the Treaty content is shaped by U.S. implementing legislation before, or simultaneous with, ratification.

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[71] SECS. 512 and 513 of Pub. L. 103-465, 108 Stat. 4974 (Act of December 8, 1994) (the Uruguay Round Agreements Act).

[72] Pub. L. 104-39, Act of November 1, 1995, amending title 17 of the United States Code.

[73] S. 1146 does not, however, address the possible issues relating to moral rights protection for performers or protection for the economic rights of non-author performers.

In debating the Treaty and the implementing legislation, in addition to the provisions included in S. 1121 and H.R. 2281, the following issues have received consideration: online service provider liability for contributory or vicarious infringements; the scope of the anti-circumvention and CMI provisions; and limitations on the scope of exclusive rights (such as ephemeral copying, fair use, the first sale doctrine, and distance learning.) Questions may be raised about the obligations to protect performers' rights, including: the moral rights of performers (at least after death of the performer); rights of performers in unfixed broadcasts or public communications; economic rights of non-author performers; remuneration right for analog broadcasts or public communications; term of protection for performers; the criteria for eligibility to claim protection; and retroactive application.

Summary of S. 2037 and H.R. 2281

General Scope of the Bills. The implementation bills recommended originally by the Clinton Administration and supported by most rightsholders/content providers assumed that existing United States law is already in compliance with the minimum obligations of the WIPO Performances and Phonograms Treaty, except for two articles which require:

> i) legal protection against circumvention of anti-copying technology [Article 18]; and
>
> ii) legal remedies against knowing performance of prohibited acts relating to removal or alteration of electronic rights management information [Article 19].[74]

The only other amendments proposed in the original implementation bills were technical in nature and related primarily to consequential adjustments to those definitions of the Copyright Act that affect treaty relationships and the eligibility of foreigners to claim copyright in the United States. Technical amendments are proposed for the same reasons in three substantive sections of the Copyright Act: section 104, which governs eligibility of foreign authors to claim copyright under United States law; section 104A, which concerns restoration of copyright in certain foreign-origin works; and section 411, which makes copyright registration in the United States Copyright Office a jurisdictional prerequisite to a suit for copyright infringement, except for certain works of foreign-origin.

The versions of the Digital Millennium Copyright Act passed by the Senate and House of Representatives (S. 2037 and H.R. 2281) address many copyright policy issues concerning use of copyrighted works in digital, electronic environments beyond the anti-circumvention of copy-protection technologies and CMI provisions of the original implementation bills. The Digital Millennium Copyright Act does not, however, address issues relating to the economic and moral rights of performers of sound recordings.

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[74]Statement of Senator Hatch accompanying the introduction of S. 1121. 143 CONG. REC. (Daily sheets) at S8582 (July 31, 1997).

Circumvention of Anti-copying Systems. The implementation bills would add a new chapter 12 to the Copyright Act, title 17 U.S.C., creating civil and criminal liability for circumvention of anti-copying systems.

The proposed section 1201 would prohibit the manufacture, importation, offering to the public, or other trafficking in any technology, product, service, device, **component or part** thereof that is **primarily designed or produced** to circumvent an anti-copying system.

Proposed civil penalties include: injunctions, impoundment of infringing material or equipment, actual damages or statutory damages ranging from $200-$2500 per act of circumvention, product, or performance of service or, at the plaintiff's option, a total award between $2500-$25,000. For repeated violations within 3 years, the court may triple the damages. The court also has the discretion to reduce or remit damages if the violator proves, and the court finds, he, she, or it was not aware and had no reason to believe that the law was violated.

Criminal penalties would apply to willful violation of section 1201 for purposes of commercial advantage or private financial gain.[75] First offenders could be fined up to $500,000 or imprisoned up to 5 years or both. The maximum fine and prison time could be doubled for subsequent offenses.[76]

The original implementation bills were criticized by the electronics industry and others on the ground the new protection was too broad and exceeds the Treaty obligation. Criticism was expressed about the "primarily designed or produced" language, and about extension of protection to "parts" of a technology or product. Also, the WIPO Treaty does not require (although it permits) criminal penalties.

As passed by the Senate and House of Representatives, S. 2037 and H.R. 2281 have been amended to clarify and narrow the scope of the anti-circumvention requirements. These amendments: 1) exempt nonprofit libraries, archives, and educational institutions from liability to the extent they merely access a copyrighted work for the sole purpose of making a purchase decision or to engage in conduct otherwise permitted under the Act (such as faire use of the work); exempt lawfully authorized law enforcement and intelligence activities; 3) permit the circumvention of access control technologies for the sole purpose of achieving computer software interoperability (reverse engineering); 4) permit circumvention if necessary to make a recording as authorized by the ephemeral recording exemption of 17 U.S.C. 112; 6) exempt any nonprofit library, archives, or educational institution from criminal liability; 7) in civil cases, remit any monetary damages against a nonprofit library, archives, or educational institution that proves it was no aware and had no reason to believe its acts violates the anti-circumvention provisions; 8) declare that nothing in the anti-circumvention provisions enlarges or diminishes the existing doctrines of

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[75]Since the bills do not contain any definition of "commercial advantage" or "private financial gain," it seems likely that the mens rea standard of existing copyright law, as developed by court decisions, would apply.

[76]The same proposals in the implementation bills would implement Article 18 of the Performances-Phonograms Treaty and Article 11 of the Copyright Treaty.

vicarious or contributory infringement or affects existing defenses such as fair use; and 9) clarify that electronics manufacturers have no obligation to design consumer products to achieve protection against circumvention.

H.R. 2281 has been further amended to: 1) delay for two years the implementation of the anti-circumvention provisions and require an initial regulatory review by the Secretary of Commerce, followed by periodic three year reviews, of the impact of any technology-protection measures on the application of fair use; 2) exempt certain encryption research activities; 3) clarify that the bill neither enlarges nor diminishes constitutional protection for freedom of speech and press; and 4) mandate two agency reports — the first on the impact of the bill on electronic commerce, and the second on the impact of anti-circumvention technology on research and development, including the effect on reverse engineering.

Integrity of Copyright Management Systems. The WIPO Performances and Phonograms Treaty implementation bills would add a new section 1202 to the Copyright Act prohibiting the knowing provision of false copyright management information ("CMI").[77] Specifically, the bills would prohibit the knowing distribution or importation of false CMI with the intend to induce, enable, facilitate, or conceal a copyright infringement. The intentional removal or alteration of CMI would also be prohibited.

The purpose of these provisions would be to facilitate widespread use of CMI by rightsholders in order to make licensing of works (or permission to use works) more readily available to the public. Consistent with the Treaty, the provisions cannot be legislated as a formality (i.e., a condition of the exercise or enjoyment of the right) or prohibit the free movement of goods.

The implementation bills propose both civil and criminal remedies, which are the same as those described above for violations of the anti-circumvention provisions.[78]

These new rights to protect the integrity of CMI systems would apply both to analog and digital formats. In this respect, the bills apparently exceed the minimum treaty obligation since the WIPO Performances and Phonograms Treaty requires protection only for **electronic** rights management information.

As passed by the Senate and House of Representatives, both bills: 1) exempt lawfully authorized law enforcement and intelligence activities from the CMI requirements; 2) exempt nonprofit libraries, archives, and educational institutions from criminal liability; 3) exempt the same nonprofit entities from civil liability if they prove they had no awareness of a CMI violation or reason to believe they committed a violation; and 4) limit the liability of broadcasters, cable systems, and other

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[77]This new right would implement Article 19 of the Performances-Phonograms Treaty and Article 12 of the Copyright Treaty. The treaties, however, use the terminology "rights management information," apparently in recognition of the fact that rights other than "copyright" may be implicated by these articles.

[78]The civil remedies would be codified as 17 U.S.C. §1203. The criminal remedies would be codified as 17 U.S.C. §1204.

transmitting organizations depending upon whether CMI compliance is technically feasible or would create an undue financial hardship in the case of analog transmissions, and depending in general upon the existence of industry standards in the case of digital transmissions.

Online Service Provider Liability — Title II. The Administration's original implementation bills (S. 1121 and H.R. 2281) did not address the issue of **who** is liable for infringement of copyrighted works, including sound recordings, as a result of actions by customers and users of online service and access providers (OSPs).[79]

The Ad Hoc Copyright Coalition, consisting of telecommunications companies and online service providers urged enactment of legislation clarifying their copyright liability in conjunction with any ratification of either the WIPO Copyright or Performances-Phonograms Treaty. The Digital Future Coalition (which includes the electronics industry, and library, educational, and telecommunications groups) also urged enactment of domestic legislation to clarify OSP liability in any legislation to implement the WIPO treaties.[80]

Although the WIPO treaties could be implemented without clarifying OSP liability, that outcome would leave to the courts decisions about OSP liability. At least one court decision suggests that OSPs may be liable as contributory infringers for the copyright violations of their customers.[81]

S. 2037 and H.R. 2281, as passed by the Senate and House of Representatives, respectively, basically absolve OSPs who transfer information via the Internet, without having any control of the content, from either direct, vicarious, or contributory copyright infringement. Upon receiving a notice of infringement that complies with statutory requirements,[82] an OSP is expected expeditiously to remove, disable or block access to the extent blocking is technologically feasible and economically reasonable. Upon receipt of a counter-notice by a provider of the blocked site, the OSP shall retain the block for 10-14 days but no longer, unless the copyright owner files suit for copyright infringement. The exemptions from liability apply both to network service transmissions and to private and real-time communications services.

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[79] This Report uses "OSP" as short-hand for persons or entities who transmit, route, provide connections, or otherwise facilitate computer network service and access for clients without initiating or altering the content of the transmission. Although OSPs are the main beneficiaries of the copyright liability proposals in Title II of the bills, entities other than OSPs can claim the exemption if they meet the statutory conditions.

[80] D. Braun, Copyright Laws Choke Tech Development, Group Warns, TechWire, August 18, 1997.

[81] Religious Technology Center v. Netcom, 907 F. Supp. 1361 (N.D. Cal. 1995).

[82] Among other requirements, the notice must be in writing; describe the infringing material; give information about its location on the network; contain a sworn statement that the notice of infringement is accurate; and be signed physically or electronically by an authorized person.

The bills implement a recent consensus agreement on OSP copyright liability reached by the private sector interests most directly affected by this legislation — copyright owners, publishers and other disseminators of copyrighted works, online service providers, telecommunications interests, the electronics industry, and libraries and educational institutions.

The bills also contain provisions that would: i) absolve OSPs from liability to the person whose material is blocked or removed from the Internet when the OSP acts in reliance on a statutory notice of infringement; and ii) establish the principle that traditional copyright defenses (such as fair use) are unaffected by an OSPs blockage of, or failure to block, access to alleged infringing material.

Computer Maintenance or Repair Exemption — Title III. Both bills incorporate the free-standing bill (H.R. 72) which overturns a Ninth Circuit decision[83]holding that a computer service/repair company infringes the copyright in a computer program by activating the machine. Under the bills, the loading of the computer program into a computer's RAM for service or repair purposes would be noninfringing, even though this act reproduces a copyright of the program.

Miscellaneous Internet Copyright Provisions — Title IV. The bills also propose several amendments that would update the limitations on the rights of copyright owners in the context of digital, electronic uses of copyrighted works. Although the bills contain some common provisions, other provisions are not common to both bills.

Library Preservation Copying. The library exemption of 17 U.S.C. §108 would be expanded by permitting library reproduction of three copies or phonorecords rather than the one copy of existing law , by deleting the references of existing law to reproduction only in "facsimile form," and by adding as a new justification for library reproduction the factor that the work is stored in an obsolete format.

Distance Learning. The Copyright Office would be directed to study and report back to the Congress concerning proposals to expand the existing instructional broadcasting exemption of 17 U.S.C. §110(2) to exempt "distance learning" — that is, performances, displays, or distributions of works by analog or digital transmission to remote sites for reception of systematic instructional material by students officially enrolled in the course and by government employees as part of their official duties.

Ephemeral Recordings. Section 112 of the Copyright Act, which deals with ephemeral recordings of works by primary transmitting organizations (such as broadcasters) would be expanded in two ways. First, the exemption would apply to nonsubscription broadcasts of sound recordings in digital formats.

A second amendment of Section 112 relates to the new protection against circumvention of anti-copying technology. Both bills require that the copyright owner must make available to the broadcaster the necessary means to make an ephemeral

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[83] *MAI Systems Corp. V. Advanced Computer Systems of Michigan, Inc.*, 992 F. 2d 511 (9th Cir. 1993).

recording of a technology-protected program, if it is technologically feasible and economically reasonable to do so. If the copyright owner fails to provide copying access in a timely manner in accordance with reasonable business requirements, the broadcaster is not liable for circumventing the anti-copying measures.

Under Secretary of Commerce for intellectual Property Policy (H.R. 2281 only). SEC. 401 of H.R. 2281 would create a new position in the Department of Commerce for an Under Secretary of Commerce for Intellectual Property Policy. This Under Secretary would be authorized to advise the President on national and certain international issues relating to patent, trademark, and copyright policy. The Office would be funded by patent and trademark fees, up to 2 percent of the annual revenues of the Patent and Trademark Office. SEC. 402 seeks to clarify the authority of this new Office in relation to the duties of the United States Trade Representative, the Secretary of State, and the Register of Copyrights.

Assumption of Motion Picture Collective Bargaining Contracts (H.R. 2281 only). With the exception of collective bargaining agreements limited to the public performance rights, SEC. 416 of H.R. 2281 requires that the transfer of motion picture rights shall be deemed to incorporate the collective bargaining agreements negotiated after enactment of the bill, if the transferee knew or had reason to know about the agreements, or, if there is an existing court order against the transferor which the latter is not able to satisfy within 90 days after the order is issued. If the transferor of motion picture rights fails to notify the transferee of the contractual obligations and the transferee becomes bound by a court order to make payments under the collective bargaining agreement, the transferor is liable to a damages claim by the transferee.

Fair Use and First Sale Doctrine Clarifications (H.R. 2281 only). SEC. 414 of H.R. 2281 would amend the fair use doctrine of 17 U.S.C. 107 to clarify its continued application in digital contexts. SEC. 417 of H.R. 2281 would amend the first sale doctrine of 17 U.S.C. 109 similarly to clarify its continued application in digital contexts.

Collections of Information Antipiracy Act — Title V of H.R. 2281. The WIPO Treaties and both implementing bills, S. 2037 and H.R. 2281, would clarify and perhaps expand protection for databases that are intellectual creations and qualify for protection as works of authorship under the Copyright Act. Database producers, however, also seek protection for collections of information that no longer qualify as copyright subject matter.

Under the decision of the Supreme Court in *Feist Publications v. Rural Telephone,*[84] databases that lack at least a modest amount of creative expression are not constitutionally eligible for copyright protection. Database producers are concerned about the lack of protection for noncreative databases. The European Union has issued a directive mandating a new form of protection for noncreative databases known as an "extraction right." American database producers will be able

[84]499 U.S. 340 (1991).

to enjoy this new form of protection only if the United States enacts reciprocal legislation that protections European Union-origin noncreative databases.

Title V of H.R. 2281 responds to the petition of database producers for protection of noncreative collections of information. Essentially, collections of information that result from substantial investments of time, money, or resources would enjoy a misappropriation-style of protection against piracy for 15 years. This proposal passed the House of Representatives as a separate bill (H.R. 2652) over the objections of many persons in the library, educational,, and scientific communities in the United States.

Vessel Hull Design Protection Act — Title VI of H.R. 2281. The House-passed bill incorporates another new form of intellectual property protection not included in S. 2037 — Title VI of H.R. 2281, which embodies the Vessel Hull Design Protection Act. This Title creates a new, 10 year form of design protection for boat hulls, which essentially fills a perceived gap between the design patent and copyright laws. The overall shape of a boat larger than a rowboat and smaller than 201 feet in length could be protected against copying. Like the database proposal, the boat design proposal passed the House of Representatives as a separate bill (H.R. 2696). The proposal also essentially responds to a decision of the Supreme Court in *Bonito Boats v. Thunder Craft Boats,*[85] holding that state law protection of boat designs was an unconstitutional interference with the federal patent and copyright laws.

The boat design title would enact a design protection proposal that has been presented to the Congress over several decades and rejected for various reasons when the proposal extended to designs of useful articles in general. The pending proposal is restricted to boat designs simply by a few definitions (e.g., the definition of useful article). One of the objections to the legislation may be that this is the first unwelcome (for some) step toward enactment of general design legislation, which has been controversial in the past.

Again, like database protection, design protection is the subject of a European Union harmonization project. For American designers to obtain design protection in Europe, the United States would have to enact new design legislation.

When design protection was considered by earlier Congresses, objections from the insurance industry, consumers, retailers, and others concerned about the alleged anti-competitive effect of design protection led to the rejection of the design bill.

Additional Possible Implementation Issues

Moral Rights of Performers. As noted earlier, the Administration's original implementation bills did not propose any amendments to United States law concerning existing rights of sound recording copyright owners, the economic or moral rights of performers, or any limitations on rights. S. 1146, H.R. 3048, H.R. 2180, and H.R. 3209 proposed amendments affecting the rights and limitations on the rights of sound

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[85]489 U.S. 141 (1989).

recording copyright owners.[86] Like the Administration bills, however, these alternative implementation bills did not address the moral rights of performers or the economic rights of non-author performers of sound recordings. The same is true of S. 2037 and H.R. 2281, as passed by the Senate and House of Representatives, respectively.

SEC. 416 of H.R. 2281 does extend new contractual rights to performers of motion pictures, with respect to assumption of collective bargaining agreements. This provision does not, however, apply to performers of sound recordings, apparently.

The United States copyright law does not extend moral rights protection to performers of live aural performances or performances fixed in phonograms, which rights apparently must be protected under the Performances-Phonograms Treaty.[87] Arguments may be made that a combination of state laws and Section 43 of the Lanham Act may provide the minimum moral rights protection required by Article 5 of the Treaty. Some performers may challenge the adequacy of U.S. moral rights protection.

If the United States intends to limit protection of performers' moral rights after the death of the performer, those limits must be established in U.S. law at the time of ratification.[88]

Performers' Rights in Unfixed Broadcasts/Public Communications. The United States copyright law generally does not extend rights in unfixed works. An exception is made for unfixed **musical** performances, which are granted protection in the federal anti-bootlegging statute.[89] The adequacy of U.S. law to protect **non-musical** performances may be raised, however, since the Treaty requires protection of non-musical sounds, performances, and phonograms.[90] Reliance upon state law protection for performers may be seen as problematical especially in the case of broadcasting of performances.

Separate Economic Rights of Non-author Performers. The Treaty requires that performers be granted the rights of authorizing the reproduction, public distribution, commercial rental, and making available to the public by wire or wireless means of their performances, separate and independent of the producers' rights.[91]

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[86]The proposals in S. 2037 and H.R. 2281 apply to the rights of copyright owners in general and to limitations on those rights. Although sound recordings are covered by the proposed amendments (since sound recordings are copyrightable subject matter under U.S. law), the practical effects of most of the amendments are likely to be felt more significantly by works other than sound recordings.

[87]Art. 5(1).

[88]Art. 5(2).

[89]Pub. L. 103-465, December 8, 1994, codified as section 1101 of title 17 U.S.C. The parallel criminal penalties are codified at 18 U.S.C. §2319A.

[90]Art. 6; also Art. 2(b) (definition of "phonogram").

[91]Articles 7-10, inclusive.

Since the United States protects these economic rights under the copyright law, the rights belong initially to the author(s) of the sound recording. Some, but not all, performers are considered authors under U.S. law. If a performer is not an "author," the copyright law grants no rights to authorize reproduction, public distribution, commercial rental, or making available to the public of their performances. Under United States law, if the copyrighted work is made for hire (as defined in 17 U.S.C. §101),[92] the employer is the "author;" the individual employee-creator is not an author. Many sound recordings are considered works made for hire, and the performers are employees rather than "authors." They have no rights as "performers" under the Copyright Act, but the Performances-Phonograms Treaty grants rights to performers. Query: are the implementation bills, which are silent on these rights, consistent with the minimum Treaty obligations?

In the course of Senate consideration of the Performances-Phonograms Treaty and congressional consideration of the implementation bills, the record producers may argue that the performers' separate authorization rights are recognized under existing U.S. law through collective bargaining agreements and other contractual arrangements, and that the performers assign their economic rights to the producers through these contracts. Producers may further argue that no implementing legislation is needed to assure the economic rights of non-author performers.[93]

Remuneration for Broadcasts and Public Communications . Performers and producers of phonograms are entitled to a single equitable remuneration for use of commercially published phonograms for broadcasting or any communication to the public,[94] unless a country exercises the reservation permitted by Article 15(3).

The existing United States copyright law does not provide a full right of remuneration for broadcasts and communications to the public of phonograms. The United States law does not grant a general public performance right in sound recordings. Instead, the United States grants a narrow right in certain digital audio

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[92]The work for hire definition of the Copyright Act establishes two types of employee works: works prepared by employees within the scope of their employment, and certain categories of specially ordered or commissioned works, if the parties agree in writing that the work is done for hire. Sound recordings qualify for the "scope of employment" type of work for hire. A dispute exists about application of the commissioned work provisions to sound recordings, which are not expressly mentioned in the section 101(2) listing of the categories of works that, if commissioned, may qualify as works for hire under a written agreement. Record producers in the past, however, have taken the position that albums at least, and certain other collaborative recordings qualify as "collective works" and can therefore be deemed works for hire by written agreement.

[93]If this argument is advanced by record producers, the following questions would likely arise: Do the record producers concede that all performers are authors, who then assign their economic rights through contracts? (If so, these assignments are subject to termination after approximately 35 years, as provided in 17 U.S.C. §203.) If not all performers are authors, is a nonproprietary "right" based upon collective bargaining agreements in compliance with the Treaty obligations to grant separate proprietary rights to performers?

[94]Art. 15.

transmissions.[95] Therefore, analog broadcasts or public communications of phonograms themselves are not protected. (The public performance of the underlying musical, nondramatic, or dramatic work embodied in the phonogram is protected.)

If the Senate consents to the Treaty, the United States must either amend its copyright law to provide a broader remuneration right for broadcasts and public communications of phonograms, or declare a reservation to this right pursuant to Article 15(3) upon depositing the instruments of ratification with the Director General of WIPO. The President, in his message to the Senate, has requested that the Senate consent to United States ratification of the Performances-Phonograms Treaty subject to a reservation on Article 15.[96]

Term of Protection for Performers. Performers must be granted protection for a period of 50 years, at least, computed from the end of the year in which the performance was fixed in a phonogram.[97]

An implementation issue could arise for the United States for the reasons discussed under item 4.c) above, relating to the economic rights of non-author performers. Authors enjoy rights under the United States copyright law. Those performers who are not "authors" (because they are employees of works made for hire) apparently have no term of protection under U.S. copyright law.

Eligibility to Claim Protection. The Performances-Phonograms Treaty, like most intellectual property treaties, establishes certain rules or criteria to determine who is eligible to claim the benefits of the Treaty.[98] These rules are called " eligibility criteria" or "points of attachment." The Performances-Phonograms Treaty is unusual, however, in that it incorporates by reference the eligibility criteria of another treaty — the 1961 Rome Convention. The United States is not a member of the 1961 Rome convention, so it is not surprising that our law may not be fully consistent with Rome's eligibility criteria.

Without discussing all of the possible conflicts between U.S. law and the Treaty, two examples will be given. "Performance" in another State party to the

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[95]Digital Performance Right in Sound Recordings Act of 1995, Pub. L. 104-39, Act of November 1, 1995.

[96]The President recommended the following reservation:

> "Pursuant to Article 15(3), the United States declares that it will apply the provisions of Article 15(1) only in respect of certain acts of broadcasting and communication to the public by digital means for which a direct or indirect fee is charged for reception, and for other retransmissions and digital phonorecord deliveries, as provided under United States law."

MESSAGE FROM THE PRESIDENT TRANSMITTING WIPO COPYRIGHT TREATY AND PERFORMANCES AND PHONOGRAMS TREATY, Treaty Doc. 105-17, 105 Cong., 1st Sess. At page IX (July 28, 1997).

[97]Art. 17.

[98]Art. 3.

Performances-Phonograms Treaty makes the performance eligible for protection by application of Article 4(a) of the Rome Convention. United States copyright law does not recognize the place of performance as a basis for eligibility to claim rights.[99] Under Rome Article 5(1)(b), producers of phonograms are made eligible to claim protection based upon first fixation of the phonogram in another member State. United States copyright law does not recognize the place of first fixation as a basis for eligibility to claim rights (even though fixation is otherwise required for federal copyright protection). Regarding the fixation criterion, however, Rome Article 5(3) permits a reservation; a country may declare it will not apply fixation as an eligibility criterion by a notification deposited with the Director General of WIPO (pursuant to Article 3(3) of the Performances-Phonograms Treaty).

The pending bills (S. 2037 and H.R. 2281, as amended) include technical amendments relating to treaty relationships and eligibility of foreigners to claim copyright. One amendment addresses the fixation issue: the eligibility criteria of 17 U.S.C. §104 would be amended to include first fixation of a sound recording in a treaty party. The technical amendments apparently, however, do not address other possible conflicts between U.S. law and the Performances-Phonograms Treaty concerning the eligibility criteria of Rome Article 4.

Retroactive Application. Article 22 of the Performances-Phonograms Treaty requires retroactive protection for performers and producers by applying the same principles as Article 18 of the Berne Convention. The United States enacted retroactive protection for all copyright subject matter in the Uruguay Round Agreements Act of 1994 ("URAA").[100] However, only nationals and domiciliaries of certain "eligible countries" qualify for retroactive protection. The eligible countries are Berne Convention members, World Trade Organization members, and any country that is the subject of an appropriate presidential proclamation. While this coverage is broad, some countries who might join the new Performances-Phonograms Treaty might be excluded, unless U.S. law were amended to include members of this Treaty in the class of eligible countries.

S. 2037 and H.R. 2281 would amend 17 U.S.C.§ 104A to include members of the Performances-Phonograms Treaty in the class of countries eligible for copyright restoration.[101]

Conclusion

Adoption of the WIPO Performances and Phonograms Treaty by the 1996 Geneva Diplomatic Conference culminates an international effort to modernize protection for performers and producers of phonograms that began as a "spin-off" in 1992 from the related effort to modernize the Berne Copyright Convention.

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[99]The eligibility criteria of U.S. law are set forth in 17 U.S.C. §104.

[100]SEC. 514 of Pub. L. 103-465, Act of December 8, 1994, codified as 17 U.S.C. §104A.

[101]SEC. 2(c) of the bills.

The United States had initially sought to include updated protection for sound recordings in the Berne Convention "protocol" process. The United States proposal to protect sound recordings through the copyright convention was successfully resisted by the European Union and other countries, who protect sound recordings under "related" or "neighboring" rights laws rather than under copyright laws.

The United States achieved another major policy objective, however. The Performances-Phonograms Treaty applies only to sounds of a performance, or representations of sounds. Audiovisual performances (such as performances by actors and actresses in motion pictures) are not protected. The Diplomatic Conference recommended further consideration of protection for audiovisual performances through the development of a protocol to the Treaty by the end of 1998.

The Performances-Phonograms Treaty significantly increases the international level of protection for phonograms (i.e., sound recordings). The term of protection increases from the 20 year minimum of the 1961 Rome Convention on Neighboring Rights to a 50 year minimum. The rights of reproduction, public distribution, commercial rental, and making available of phonograms to the public by wire or wireless means are recognized. Protection for phonograms expressly extends to digital, electronic environments such as the Internet and other computer networks. Since these rights are granted separately to performers and producers of phonograms, authorizations of both are required to use phonograms in the ways restricted by these exclusive rights.

A single remuneration right, however, is granted in the case of broadcasts and communications to the public. This nonexclusive right is also subject to a reservation, which allows a country to qualify the right or not even grant the right at all. This right applies to traditional one-way broadcasts and public communications, as distinguished from interactive communications which are covered by the exclusive "making available to the public by wire or wireless means" right.

Performers are given two additional rights — so-called "moral rights" and rights in unfixed performances. Moral rights include the right to be identified as the performer generally and the right to object to distortions or other modifications of the performance that prejudice the performer's reputation.

Limitations on rights are generally left to national law except that: 1) some qualifications are expressed in the grant of rights articles; and 2) Article 16 specifically permits national law to enact limitations that do not conflict with normal exploitation of performances or phonograms, and do not unreasonably harm the legitimate interests of performers and producers of phonograms. In an agreed statement, the Diplomatic Conference interpreted Article 16 of the Treaty as permitting appropriate limitations in digital, computer network environments.

The Treaty also includes a general article on enforcement of treaty rights, an obligation to provide adequate and effective legal remedies to prevent the circumvention of technological measures designed to inhibit unlawful copying, and an obligation to assure adequate and effective legal remedies against knowing removal or alteration of electronic rights management information.

The WIPO Performances-Phonograms Treaty was submitted to the Senate for its consideration in July 1997. At the request of the Clinton Administration, S. 1121 and H.R. 2281 were introduced to implement the treaty obligations. The original bills proposed no changes in the rights or limitations on rights of existing law, on the assumption that existing U.S. law is consistent with the Treaty. The Administration's implementation bills did propose new protection against circumvention of anti-copying systems and against removal or alteration of copyright management information. The bills also made technical amendments to the definitions in the Copyright Act, and to sections of the Act relating to treaty relationships and the eligibility of foreigners to claim copyright in the U.S.

Alternative implementation bills, S. 1146, H.R. 3048, were also introduced. These bills differed in important respects from the circumvention and CMI protection proposals of the Administration bills. S. 1146 also proposed amendments relating to OSP copyright liability, ephemeral copying, fair use, and distance learning. H.R. 3048 tracked many of the provisions in S. 1146 except for OSP liability, and added other provisions on the first sale doctrine and "shrink-wrap" licensing.

In addition to the issues addressed by the pending implementation bills, legislative consideration of the Treaty may include discussion of: moral rights protection for performers; rights of performers in unfixed performances; rights of non-author performers to authorize reproduction, public distribution, commercial rental, and making available to the public by wire or wireless means; and the term of protection for performers.

Record producers and other copyright owners originally supported ratification of the WIPO Performances and Phonograms Treaty based upon enactment of the minimal changes proposed in S. 1121 and H.R. 2281, as introduced. They initially argued that United States law is already consistent with the minimum obligations of the Treaty with respect to exclusive rights and limitations on rights. They favored early ratification of the Treaty and enactment of the bills to send an appropriate signal to other countries, which would encourage other countries to adhere to the Treaty and generally upgrade protection for the use of sound recordings in electronic, digital environments. Since the United States is a major producer/distributor of sound recordings, it was asserted that enhanced international protection under the Performances-Phonograms Treaty will benefit the United States recording industry and the U.S. economy in general.

Groups representing the telecommunications and electronics industries, libraries, and other educational interests generally support the ratification of the WIPO Performances and Phonograms Treaty in principle, but only on the basis of implementing legislation that addresses their concerns about OSP liability, fair use, ephemeral copying, distance learning, and other issues concerning use of copyrighted works in digital, electronic environments. They argue that United States law is not settled concerning the scope of rights and limitations on rights in digital, electronic environments. It is asserted that these issues must be addressed legislation rather than through judicial decision-making. S. 1146 and H.R. 3048 responded to many of the concerns of these groups.

Through the legislative process of hearings, debate, consideration, and amendment, the original implementation bills have been substantially modified. S. 2037 has replaced S. 1121. As amended S. 2037 and H.R. 2281 have passed the Senate and House of Representatives, respectively, under the short title of the "Digital Millennium Copyright Act of 1998." The bills have many common provisions, but also differ in significant respects.

The bills embody a consensus agreement by private sector interests concerning online service provider copyright liability. Other amendments: declare that nothing in the anti-circumvention provisions enlarges or diminishes the existing doctrines of vicarious or contributory infringement or affects existing defenses such as fair use; clarify that electronics manufacturers have no obligation to design consumer products to achieve protection against circumvention; expand the exemption of 17 U.S.C. 112 relating to ephemeral copying by broadcasters to apply in digital context and to override the anti-circumvention measures of the copyright owner under certain conditions; expand the exemption of 17 U.S. C. 108 for libraries and archives to preservation activities in digital formats; protect personal privacy interests on the Internet; provide exceptions from the anti-circumvention provisions (i) for computer interoperability, (ii) for libraries and nonprofit educational institutions in making purchasing decisions, and (iii) with respect to the right to control access by minors to the Internet; except law enforcement and intelligence activities from the anti-circumvention and CMI provisions; and direct the Copyright Office to study and report on distance learning and on the liability of nonprofit educational institutions and libraries when they provide online service to patrons.

H.R. 2281 includes additional amendments concerning the issues of circumvention of technological measures, fair use, the first sale doctrine, and encryption research. Moreover, H.R. 2281 adds two new forms of intellectual property protection — 15 years of misappropriation-style protection for databases that are not eligible for copyright protection, and 10 years of design protection for designs of boat hulls. These proposals were not considered part of the WIPO Treaties implementation issues until Titles V and VI were added to the bill passed by the House of Representatives.

It appears that compromises have been reached on formerly contentious issues such as OSP liability, the anti-circumvention provisions, and several issues of concern to libraries and educational institutions. Except for the inclusion in H.,R. 2281 of Title V ("Collections of Information Antipiracy Act:) and Title VI ("Vessel Hull Design Protection Act"), it seems likely that both copyright users and copyright owners are in general agreement on enactment of WIPO Treaties implementing legislation.