

## **WIPO Internet Copyright Treaties Coming Into Force**

In December 1996, a convention of delegates at the World Intellectual Property Organization (WIPO) in Geneva worked furiously to achieve before year-end the signing of two new copyright treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performance and Phonograms Treaty (WPPT). These treaties are often known together as the "Internet Treaties" because they provide new international norms for the protection of copyright and related rights in the digital age. The signing of these treaties took place on December 20<sup>th</sup>, an early Christmas present for creative artists, writers, composers and musicians everywhere.

The signing of these treaties, however, did not in fact mean they would immediately enter into force. They each require 30 country accessions – through each country's respective legislative process to implement the treaty into national law – before they will pass into effect. Since December 1996, WIPO has been working steadily, along with support from industry groups, to encourage its member States to become party to the new treaties. An important milestone was recently reached on December 6, 2001, almost exactly five years after the treaties were first signed, when Gabon became the 30<sup>th</sup> country to ratify the WCT. This accession has enabled the WCT to finally enter into force three months from that date, which occurred on March 6, 2002. Meanwhile, the WPPT has also now achieved 30 country accessions, and it will enter into force on May 20, 2002.

A significant amount of material has already been written about the WIPO Internet Treaties. This is unsurprising given that the dissemination of creative works via the Internet, often illegally, has sparked broad debate concerning the exploitation and protection of copyright and related rights over digital networks. In particular, it is commonly understood by now that digital technologies and networks have certain unique and challenging attributes, including the ability to make an infinite number of copies, each identical to the first, and disseminate them almost instantaneously wherever the network might lead.

Back in 1996, a relatively prescient group of delegates at the WIPO negotiations attempted to anticipate these issues, to respond to the realities of the electronic marketplace while striking a

balance through the new norms established in the WIPO Internet Treaties. The WCT introduces norms to protect the rights of authors in the digital environment, protecting literary and artistic works which is a broad category comprising art, books, computer programs, movies and music. The WPPT is a key analogue that similarly safeguards the interests of producers of phonograms or sound recordings, as well as of the performers whose performances are fixed in phonograms. Both treaties require countries to provide a basic framework of rights, allowing creators to control and be compensated for the myriad ways in which their creative content can be used and enjoyed by others in digital networks.

Among the key points, the WIPO Treaties make clear that the traditional right of reproduction (copying) continues to apply in the digital environment, including to storage of material in digital form in an electronic medium. As to the core right of communication, through the so-called ‘making available’ right, the treaties establish the rightholders' right to control the digital transmission of their works – on demand and interactively – to individual members of the public. This provision describes the act of digital transmission in a neutral, non-technology-specific way (i.e., as “making available” a work to the public “by wire or wireless means” so that members of the public “may access these works from a place and at a time individually chosen by them”).

It was recognized in the preparatory work leading up to the WCT and WPPT that legal rights alone would not be sufficient to protect the interests of rightsholders. The treaties thus also break new ground by ensuring that rightsholders can effectively use technology to protect their rights and creative works online. The treaties’ “anti-circumvention” provisions address the security and piracy risks, such as those posed by “hacking,” by requiring countries to provide adequate legal protection and effective remedies against the circumvention of technological measures, such as encryption. These security technologies are becoming ever more commonly used by companies in the content industry to protect their creative works as they develop new business models permitting the works to be transmitted for commercial ends over the Internet. A new “rights management” provision in the treaties serves to support the integrity of the online marketplace by requiring countries to prohibit the deliberate alteration or deletion of electronic rights management information. This is the information that can be embedded into the digital code of a creative work and used to identify the work, its author, performer or owner, the terms and conditions for its use, and any other relevant attributes. Finally, in order to achieve a proper balance of interests, the WIPO treaties also make clear

that countries have flexibility in establishing exceptions or limitations to rights in the digital environment, and may either extend existing exceptions and limitations or adopt new ones, as appropriate in the circumstances.

In certain jurisdictions like the United States of America, numerous legal cases, such as the widely covered Napster dispute testing copyright concepts, have already been handed down under the Digital Millennium Copyright Act, the 1998 legislation that enacted the WIPO treaties into U.S. federal law. In the European Community (EC), the implementation of the treaties has gone at a slower pace, given the roles to be played by the EC and the national governments of its Member States. Negotiations first took place at the EC level, to ensure that implementation of the new WIPO norms would take place in a harmonized manner among the member countries. The EC Directive on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society (the “EC Copyright Directive”)<sup>1</sup>, the instrument implementing the WIPO Internet Treaties into Community law, was formally adopted after much negotiation in April 2001. As to its implementation into national law, under the terms of the Copyright Directive, EU Member States have a period of 18 months, until December 22, 2002, in which to transpose it into their national laws. Many still view that this timeline, coming six years after the WIPO treaties were first signed, poses a tight deadline for implementation. Due to the Association Agreements that the EC has concluded with a number of third countries, the good news is that ratification by the EC and its Member States should eventually trigger ratification by no fewer than by 42 countries.

At the international level, the WIPO Internet Treaties were raised in the discussions leading up to the Seattle Ministerial meeting of the World Trade Organization (WTO) in late 1999. The intellectual property aspects of e-commerce were included on the Ministerial Agenda and there were some discussions in particular about the possible implementation of the WIPO Treaties either as part of the TRIPS Agreement<sup>2</sup> or as additional TRIPS-related agreements (i.e., with or without re-opening the TRIPS Agreement itself). The Seattle Ministerial, however, did not produce a successful outcome and by the time of the WTO’s next ministerial meeting at Doha, Qatar in November last year, the focus in the international intellectual

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<sup>1</sup> Directive 2001/29/EC of the European Parliament and Council of 22 May 2001 on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society, Official Journal 22.6.2001.

<sup>2</sup> The Agreement on Trade-Related Aspects of Intellectual Property Rights (1994)

property community was squarely on a different set of concerns being raised by developing countries, such as access to medicines and the relationship to patent rights and new norms of protection for traditional knowledge and folklore. The e-commerce-related intellectual property issues no longer appeared on the radar screen, this despite the fact that by the time of the Doha Ministerial in November 2001 the WIPO Copyrights Treaties were both very close to achieving the 30 signatures each required to enter into force.

Although the WCT and WPPT have reached an important milestone through their formal entry into force, they will not be truly internationally effective in encouraging digital commerce in copyrighted content and stopping piracy until they are adopted more widely by countries in all regions of the world. Only with the widespread international adoption of the WIPO Internet Treaties will the legal framework exist for the legitimate and broad-based distribution of creative content on the Internet.

Chris Gibson

[cgibson@steptoe.com](mailto:cgibson@steptoe.com)

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