



---

# PRESENT AT CREATION:

---

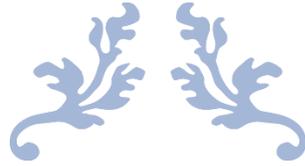
The Making of Internet Treaties, 1996



R V VAIDYANATHA AYYAR

2021





---

# PRESENT AT CREATION:

---

The Making of Internet Treaties, 1996





# Present at Creation

The Making of Internet Treaties, 1996



R. V. Vaidyanatha Ayyar

2021

©R. V. Vaidyanatha Ayyar, 2021

Creative Commons Attribution-NonCommercial 4.0 license (CC BY-NC 4.0) Details of that license are at

<https://creativecommons.org/licenses/by-nc/4.0/>

ISBN: 978-93-5578-867-2

The Book can be accessed at [R.V. Vaidyantha Ayyar \(rvvayyar.com\)](http://R.V. Vaidyantha Ayyar (rvvayyar.com))

The author can be contacted at [vaidyarv@gmail.com](mailto:vaidyarv@gmail.com)



# Summary Contents

## Prologue

Chapter 1: Opportunity Knocks on the Door Unexpectedly

## Part I: Prehistory

Prolegomenon

Chapter 2: Berne to TRIPs

Chapter 3: TRIPs to DipCon

Chapter 4: The Audio-visual Conundrum

Chapter 5: Digital Agenda

## Part II: Preparatory Phase

Chapter 6: Juggernaut Set in Motion

Chapter 7: Basic Proposals (Negotiation Texts)

Chapter 8: Securing Negotiating Mandate: Internal Negotiations

Chapter 9: Run-up to the DipCon

## Part III: The Conference

Chapter 10: DipCon: Starting Trouble and Mid-Life Crisis (December 3-12, 1996)

Chapter 11: Two Treaties, One Treaty or None? (December 13-17, 1996)

Chapter 12: Endgame- I-Incorporation of Berne Plus and Rome Plus Provisions of TRIPs Agreement

Chapter 13: Endgame-II-Provisions Other than TRIPs Incorporation & Digital Agenda

Chapter 14: Endgame-III- Digital Agenda

Chapter 15: What Good Came of It?

## Part III: The Conference

Select Bibliography

About the Author

## Annotated Table of Contents

Preface.....	i
Acknowledgements.....	viii
List of Abbreviations .....	x
Chapter 1: Opportunity Knocks on the Door Unexpectedly.....	1
Prolegomenon.....	13
Chapter 2: Berne to TRIPs.....	16
2.1 Copyright and Technology .....	16
2.2 Berne Convention.....	17
2.2.1 Supranational Code or Harmonisation”.....	18
2.2.2 Uniform Norms of Protection or Variable Norms? .....	21
2.3 Right of Reproduction and Debut of the Three-Step Test.....	25
2.4 Two Systems of Copyright .....	27
2.4 Authors are More Equal than Performers: The Rome Convention .....	31
2.5 Guided Development .....	37
Chapter 3: TRIPs to DipCon.....	40
3.1 Why Forum Shifting? .....	40
3.2 Competing Negotiating Strategies of the U.S. and Developing Countries...	42
3.3 Dunkel Draft.....	45
3.4 Copyright and Related Rights in TRIPs Negotiations .....	47
3.5 What the TRIPs Agreement had Accomplished .....	51
3.6 WIPO Committees of Experts.....	54
Chapter 4: The Audio-visual Conundrum	57
4.1 Introductory.....	57

4.2 Copyright and Related Rights Issues .....	57
4.3 Trade Issues.....	62
4.4 Private Copying (Home Taping) in Europe.....	65
4.5 Private Copying (Home Taping) in the U.S.: The Sony Judgement .....	66
<b>Chapter 5: Digital Agenda.....</b>	<b>69</b>
5.1 Computer Programmes.....	69
5.1.1 How to Protect Computer Programmes.....	69
5.1.2 Computer Programmes and the Reproduction Right.....	73
5.2 Music CDs and Digital Sampling.....	74
5.3 Dawn of the Digital Era.....	75
5.4 Three Approaches to the Adaptation of Copyright to Digital Technologies. 77	
5.4.1 Doomsday Prophecy .....	77
5.4.2 Second Approach: Rely on Copyright Law .....	79
5.4.3 Third Approach: Answer to the Machine is Machine.....	80
5.4.4 Techno-Legal Approach Wins the Day .....	81
5.5 Policy Development at National/Regional Levels .....	83
5.5.1 The United States .....	83
5.5.2 European Community .....	89
5.5.3 Australia and Japan .....	90
5.4 Policy Development in WIPO.....	90
Appendix I: Creativity and Copyright in Cyberspace: Barlow's Vision .....	93
<b>Chapter 6: Juggernaut Set in Motion.....</b>	<b>99</b>
6.1 In a Big Hurry.....	99
6.2 One for the Road.....	100
6.3 Calendar of Events.....	101
<b>Chapter 7: Basic Proposals (Negotiation Texts)</b>	
.....	<b>106</b>

7.1 Introductory.....	106
7.2 Draft WCT and WPPT .....	106
7.2.1 Digital Agenda .....	107
7.2.1.1 Definitions.....	107
7.2.1.2 Right to Reproduction.....	108
7.2.1.3 Digital Transmission and Delivery .....	110
7.2.1.4 Technological Protection Measures .....	115
7.2.1.4 Rights Management Systems (RMIs) .....	123
7.2.1.5 Limitations and Exceptions .....	124
7.2.2 Non-Digital Agenda: Incorporating TRIPs Provisions in WCT and WPPT.....	125
7.2.2.1 Computer Programmes (Article 4, Draft WCT) .....	125
7.2.2.2 Databases (Article 5, Draft WCT).....	125
7.2.2.3 Rental Right (Article 9, Draft WCT and Articles 14 and 17, Draft WPPT).....	126
7.2.2.4 Term of Protection under WPPT (Article 21, Draft WPPT)	129
7.2.3 Provisions Other than TRIPs Incorporation & Digital Agenda .....	129
7.2.3.1 Distribution and Importation Right.....	129
7.2.3.2 Enforcement Provisions (Article 16, Draft WCT and Article 27, Draft WPPT).....	132
7.3 Provisions Specific to Draft WCT .....	133
7.3.1 Non-voluntary Licences (Article 6, Draft WCT).....	133
7.3.1.1 Non-voluntary Licences for Primary Broadcasting (Article 6(1), Draft WCT).....	134
7.3.1.2 Non-voluntary Licences for the Sound Recording of Musical Works (Article 6(2), Draft WCT) .....	135
7.3.2 Term of Protection of Photographic Works (Article 11, Draft WCT) .....	136
7.4 Provisions Specific to Draft WPPT .....	136
7.4.1 Audio-visual Fixations .....	136

7.4.2 Moral Rights (Article 5, Draft WPPT).....	139
7.4.3 Economic Rights of Performers .....	142
7.4.3.1 Right of Performers in respect of their Unfixed Performances (Article 6, WPPT) .....	142
7.4.3.2 Right of Modification (Articles 8 and 15, WPPT) .....	142
7.4.3.3 Single Equitable Remuneration (Articles 12 and 19, Draft WPPT).....	143
7.4.5 National Treatment (Article 4, Draft WPPT) .....	146
7.5 Draft Data Base treaty .....	147

## Chapter 8: Securing Negotiating Mandate: Internal Negotiations ..... 150

8.1 Negotiations Between Organisations: Internal and External Negotiations.....	150
8.2 Consideration by Committee of Secretaries .....	152
8.3 Negotiating Mandate.....	157
8.4 Consideration by Cabinet Committee on Economic Affairs .....	158

## Chapter 9: Run-up to DipCon..... 161

9.1 American Diplomatic Moves.....	161
9.2 General Consultations, Geneva (October 14-15, 1996) .....	165
9.3 Digital Agenda's Interest Politics: AT & T Lobbies .....	169
9.4 Digital Agenda's Interest Politics: IFPI Lobbies .....	171
9.5 Japanese Show: Chiang Mai Regional Meeting.....	180
9.6 '15+15+1+1' Non-Meeting .....	186

## Chapter 10: DipCon: Starting Trouble and Mid-Life Crisis (December 3-12, 1996)..... 191

10.1 A Mega Bazaar of Vendors Hawking Their Wares.....	191
10.2 Fishes and Loaves .....	198

10.3 European Community: Neither Fish, Flesh nor Good Red Herring? .....	202
10.4 Rendezvous with Bruce Lehman .....	207
10.5 General Statements .....	209
10. 6 Meetings of the Main Committee-I.....	210
10.7 Champagne and Broken Glass.....	213
10.8 The Aftermath .....	215

## Chapter 11: Two Treaties, One Treaty or None? (December 13-17, 1996).....221

11.1 Competing Stands on Audio-visual Performances .....	221
11.2 Bilateral Discussions between the U.S. and EC.....	225
11.3 U.S. and E.C. Agree to Take out Audio-visual Performances from WPPT	229

## Chapter 12: Endgame- I-Incorporation of Berne Plus and Rome Plus Provisions of TRIPS Agreement..... 231

12.1 Introductory.....	231
12.2 Article 4 WCT (Computer Programmes).....	232
12.3 Article 5 WCT (Databases) .....	239
12.4 Rental Right (Article 9 Draft WCT and Articles 10 & 17 Draft WPPT) ....	240
Appendix II: Rental Right of Authors- Proposal, Final Text and Agreed Statement .....	251
Appendix III: Rental Right of Performers and Producers of Phonograms- Proposal, Final Text and Agreed Statement.....	253

## Chapter 13: Endgame-II-Provisions Other than TRIPs Incorporation & Digital Agenda 255

13.1 Provisions Common to WCT and WPPT.....	255
---	-----

13.1.1 Right of Distribution (Article 8, Draft WCT and Articles 9 and 16, Draft WPPT) .....	255
13.1.2 Enforcement Provisions (Article 16, Draft WCT and Article 27, Draft WPPT) .....	257
13.2 Provisions Specific to WCT .....	258
13.2.1 Non-voluntary Licenses (Article 6, Draft WCT).....	258
13.2.2 Term of Protection for Photographic Works (Article 11, Draft WCT) .....	260
13.3 Provisions specific to WPPT .....	261
13.3.1 Moral Rights .....	261
13.3.2 Right of Modification (Articles 8 and 15 of Draft WPPT) .....	265
13.3.3 Right to Single Equitable Remuneration (Articles 12 and 19, Draft WPPT) .....	266
13.3.4 National Treatment.....	269
13.3.5 Limitations and Exceptions.....	272
Appendix IV: Moral Rights: Proposal and Final Text.....	274
Appendix V: National Treatment in WPPT: Proposals, Key Amendments and Final Text.....	276
<b>Chapter 14: Endgame-III- Digital Agenda</b>	<b>278</b>
14.1 Digital Transmission .....	278
14.2 Technological Protection Measures .....	280
14.3 Rights Management Information.....	285
14.4 Striking a Balance: Limitations and Exceptions (Article 12 of Draft WCT, and Articles 13 and 20 of Draft WPPT).....	288
14.5 Striking a Balance: Indian Amendments to Preambles of WCT & WPPT	294
14.6 Enforcement Provisions (Article 16 of the Draft WCT and Article 27 of the Draft WPPT) .....	298
14.7 Nail-biting Battle over the Reproduction Right.....	300
Appendix VI: Obligations regarding Technological Measures: Proposals and Final Text.....	314

Appendix VII: Rights Management Information- Proposals, Final Text & Agreed Statements .....	316
Appendix VIII: Limitations and Exceptions- Proposals, Final Text & Agreed Statements (WCT) .....	318
Appendix IX: Limitations and Exceptions: Proposals, Final Text & Agreed Statements (WPPT) .....	319
Appendix X: Right of Reproduction- Proposals, Final Text and Agreed Statements (WCT) .....	321
Appendix XI: Right of Reproduction- Proposals, Final Text and Agreed Statements (WPPT) .....	322

## Chapter 15: What Good Came of It? 324

15.1 Comparative Overview of Internet Treaties .....	324
15.1.1 Preambles.....	324
15.1.2 Provisions.....	325
15.1.3 Framework Clauses .....	330
15.1.4 Administrative and Financial Clauses .....	330
15.2 Proposals which did not go through at DipCon .....	331
15.3 Reaction to Internet Treaties .....	331
15.3.1 WIPO and Its Functionaries .....	331
15.3.2 Opponents of the Lehman Report.....	333
15.3.3 Private Interest Groups .....	334
15.3.4 The U.S. and the EC .....	335
15.3.5 India.....	336
15.4 Overall Assessment .....	337
15.5 Internet Treaties: Do They Mark a Transition to the Future of International Copyright Lawmaking? .....	338

## Epilogue..... 346

1.Entry into Force of the Internet Treaties .....	346
2.Constructive Ambiguity Shifts the Locus of Conflict.....	347
3.Prolonged Time of Troubles .....	348

4. Paradigm Shift in the Way Academics Look at Copyright .....	349
5. Paradigm Shift in WIPO's Policy Environment.....	352
6. Revisionist Perception of Internet Treaties .....	354
7. BTAP, the Third of the Troika of Internet Treaties .....	355
8. Time of Troubles Over for WIPO? .....	358
9. Digital Renaissance.....	360

## Select Bibliography..... 364

A. WIPO Diplomatic Conference (1996) Documents .....	364
B. Articles, Working Papers and Book Chapters .....	365
C. Books and Monographs .....	377
D. Cases .....	381
E. Documents of Governments .....	382
Australia .....	382
Japan.....	382
United Kingdom .....	382
United States .....	382
F. Documents of Regional Organisations .....	383
European Communities (EC) / European Union (EU).....	383
Organisation for Economic Cooperation and Development (OECD)	384
G. Documents of International Organisations.....	384
United Nations Conference on Trade and Development (UNCTAD)	384
World Intellectual Property Organisation (WIPO) .....	385



## Preface

We are so often caught up in our destination that we forget to appreciate the journey- Anon

This is a book I did not plan to write. By sheer chance, I got the opportunity of leading the Indian delegation to the historic WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights, 1996 (hereafter referred to as DipCon) and being the Chairman of the Drafting Committee of that Conference. Soon after the DipCon, I wrote an article, 'Interest or Right: The Process and Politics of a Diplomatic Conference on Copyright';<sup>1</sup> I would not have written that article but for an episode in the DipCon which, to paraphrase Kafka, was an axe to break the frozen sea within me. India moved an amendment to add a recital to the Preambles of both the treaties adopted by the DipCon so as to bring out that the Contracting Parties recognised the need to maintain a balance between the *interests* of rightsholders (authors in the case of the WIPO Copyright Treaty [WCT] and the performers and producers of phonograms in case of WIPO Performances and Phonograms Treaty [WPPT]) and of the larger public interest, particularly education, research and access to information. I was surprised that the amendment, particularly its language, evoked a strong reaction from many delegates of countries with an authors' right system which holds copyright to be a personal right of the author and not a utilitarian conception (being an economic incentive to authors to create new works) as is held in countries like the United Kingdom and its erstwhile colonies like the United States (U.S.) and India. The use of the word 'interests' in relation to authors was considered extremely objectionable as those objecting the Indian proposal believed that there was a difference between the status of authors who were granted rights, and the status of general public 'who do not enjoy rights, under any treaty, but whose interests were to be taken into account in the treaty as defences, in particular as exceptions to, and limitations of the rights, of authors'.<sup>2</sup> Further, WCT being a special agreement under Article 20 of the Berne Convention it should grant more extensive rights than the Convention. Yet, contrary to the letter and spirit of Article 20, the Indian amendment sought to reduce the rights of authors to an interest and equate that interest with the interest of the larger public. Whatever copyright experts might feel, from the perspective of policymaking, all groups outside the

---

<sup>1</sup> Ayyar (1998), pp.3-35.

<sup>2</sup> Reinbothe and von Lewinski (2015), p.52.

government which seek to lobby and put pressure on government to accept their policy preference are interest groups. With copyright policy, the interest groups could be either authors or business groups like book publishers or film producers, or alternately public interest groups with a Cause like groups committed to enhance access to knowledge. In policymaking, unlike interest groups of any type, governments have to take into account multiple considerations, and try to harmonise conflicting interests. From the policymaking perspective, book publishers do not deserve any special consideration just because they are holders of copyright. Hence, the word 'interests' came naturally to me while drafting the amendment. Whatever, my article focussed on interest group politics and the doctrinal clash between the authors' right and the economic, utilitarian conceptions of copyright. After that article was published, I thought that the DipCon was over and done with; that was not to be.

One fine morning in February 2019, I got a phone call from Prof. N.S. Gopalakrishnan inviting me to a brainstorming session being organised at the Inter-University Centre of IPR Studies, Cochin in connection with the visit of David Nimmer of *Nimmer on Copyright* fame to the Centre. Gopalakrishnan had been a member of the Indian delegation to the DipCon, and figuratively, the sheet anchor of the delegation providing invaluable technical inputs. As I was getting ready to leave after the completion of the brainstorming session, Sri T. Prashant Reddy, one of the participants, asked me why I had not written in detail about the DipCon; the more I thought about the question the more I realised that there was much more to be written than what I wrote in my article twenty-three years ago. I also realised that come December 2021, the DipCon would be 25 years old and a retrospective of the DipCon and what it accomplished and what it did not would be timely. Thus, Sri Reddy's question triggered my decision to writing this book.

At the WIPO Diplomatic Conference, the Internet Treaties were negotiated and adopted. These Treaties adapted copyright and related rights to the Digital era. What is remarkable about these Treaties is the fact that even after twenty-five years the legal frame they put in place in respect of digital content had survived and there is no demand from any Member-State of WIPO for modifying the Treaties. This is despite the phenomenal changes in Internet, World Wide Web and digital technologies, in the business models for offering digital content and in consumption of digital content. In this Book, I revisit the WIPO Diplomatic Conference, describe the course of events, the negotiation dynamics, the doctrinal differences and sharply conflicting economic interests underlying the stands taken by the main parties to negotiations, the national

and transnational interest groups that sought to influence the negotiation process and outcomes, and the process whereby the Internet Treaties were concluded. The Companion Volume, *The WIPO Internet Treaties at 25*, describes all the developments germane to the Internet Treaties over the last twenty-five years, and examines at length how well these treaties withstood the creative gales of destruction having a bearing on the production, distribution and consumption of digital content. The Companion volume has been completed and would be published shortly.

While there have been authoritative legal treaties on the Internet Treaties there has been no book which tells the story of the Conference from a negotiator's perspective, like say the personal perspectives of select negotiators about the TRIPs negotiations.<sup>3</sup> My book is the first such narrative, and fills a serious void in the literature on the DipCon. WIPO had published in 1999 the records of the DipCon; however, there had been as yet no diplomatic history of the DipCon. As leader of the Indian delegation to the Conference and Chairman of the Drafting Committee of that Conference my narrative is a firsthand account of the Conference and the happenings in that Conference. A negotiator's narrative of the DipCon, that too from a developing country, would be interesting as it was a grave challenge for developing countries to meaningfully participate in the DipCon. The Indian perspective is particularly interesting for two reasons. It illustrates the grave challenges that developing countries had to face for meaningfully participating in the DipCon. In India, for example, Internet for general users arrived only in August 1995; Internet with a dial-up modem connection was terribly slow, email was a novelty confined to technology buffs and even such buffs knew little about the fledgling digital technologies. The officials dealing with copyright were generalist administrators, and expertise on international copyright laws in academia was sparse. All in all, addressing the digital agenda in the DipCon was akin to sailing in uncharted seas. Secondly, India was counted as a developing country and at the same time it was in 1996 a significant producer and exporter of films and information technology products and services for which copyright is vital for survival. As a developing country India had been a consistent champion of balancing IP on the one hand and user interest and public policy objectives on the other, and yet as a significant producer and exporter of copyrighted goods it could not approach DipCon the way it approached the Stockholm Revision Conference (1967) or even the TRIPs negotiations. It had to adopt a nuanced approach of not abandoning the

---

3 Watal and Taubman (2015).

principles of balance it had long espoused and at the same time support efforts to strengthen protection in the digital medium in a manner that would not constrict its choices as digital technologies and markets evolve. How India developed its negotiating stance and played the negotiating game would be of interest to students, experts and practitioners of multilateral negotiations as well as of intellectual property in general, and copyright and related rights in particular.

The Prologue describes how I came to lead the Indian delegation to the Diplomatic Conference and the formidable challenges which had to be faced while preparing for the forthcoming negotiations at the Conference. Part I (Chapters 2-5) of the Book outlines the historical perspective, Part II (Chapters 6-9) the preparatory phase of the Conference, and Part III (Chapters 10-5) the negotiations during the Conference which culminated in the Internet Treaties, and also an assessment of what the DipCon had accomplished. The Book ends with an Epilogue which offers an account of the spectacular developments, after the Conference, in the Internet, Worldwide Web, other digital technologies, and the marketing and consumption of digital content, and how well the provisions of the Internet Treaties relating to the digital agenda withstood the creative gales of destruction. The Epilogue also describes the paradigm shift in the way most academic copyright experts look at copyright and related rights, spectacular change of the policy environment of WIPO and the making of BATA, 2012, sometimes called the third of the troika of Internet Treaties for it also covers the offering of audiovisual content in the digital medium. Those more interested in these developments may consult my book *WIPO Internet Treaties at 25* which would be published shortly.

The Prolegomenon to Part I elaborates why a historical perspective is important to comprehend the significance of the Internet Treaties and their making. Chapter 2 outlines the principles laid down by the Berne and Rome Conventions which continue to be of relevance. The TRIPs negotiations and the making of the Internet treaties are literally back-to-back, and in fact the Internet Treaties were the unfinished business of the TRIPs negotiations. Chapter 3 outlines the making of the TRIPs agreement and the unfinished business it left to the DipCon. The North-South confrontation that was highly visible during the first three years of the TRIPs negotiations was conspicuous by its absence during the DipCon. Doctrinal differences in the copyright systems of the European Community (EC) and the U.S. enmeshed with sharp conflict of economic interest cast a long shadow on both the negotiations. Trade in audio-visual services almost wrecked the Uruguay Round Trade negotiations of which the TRIPs negotiations was a part, and audio-visual performances

threatened to wreck the DipCon; till the EC and U.S. agreed to take off audio-visual performances from the WPPT with just three days before the Conference ended it appeared that the Conference might end in failure with no treaty being adopted. Chapter 4 elaborates how a confluence of economic interests and doctrinal differences in copyright and related rights make audio-visual works and performances such a conundrum. Chapter 5 elaborates the emergence of the Internet, World Wide Web and other digital technologies; the challenge which they posed to copyright and related rights being utterly different and unprecedented, as different from previous reproduction and communication technologies as a severe earthquake followed by a massive tsunami is from a squall. This Chapter also describes the precocious policy response to the fledgling digital technologies, and the copyright wars which erupted in the U.S. over the proposals made by the report of the Working Group on IPRs under the chairmanship of Bruce Lehman, Commissioner of Patents and Trademarks.

Part III narrates , among others, (i) the course of negotiations with the inevitable standoffs and climactic moments when the DipCon seemed to be tottering on the verge of a collapse, (ii) an analysis of the underlying reasons as to why the main parties to negotiation took particular stands on issues during the negotiations, (iii) how consensus was arrived on most issues, (iv) how doctrinal differences, often enmeshed with sharply conflicting economic interests, made it difficult to arrive at a consensus on quite a few issues, (v) the impact of domestic politics on the stands taken by parties, particularly the U.S., EC, Canada and India, (vi) the role groups of countries played during the negotiations, (vii) the impact of interest groups, both business groups as well as 'public interest' groups, on the course of negotiations, and (viii) the role of informal negotiations, *constructive ambiguity* ( deliberate use of ambiguous language) and *agreed statements* ( a statement attached to a provision attached to a provision to set out what was agreed to) in hastening a consensus on contentious issues. The assessment of the outcomes includes (i) a comparison of the provisions of the Internet Treaties with the provisions of the Berne and Rome Conventions, and the TRIPs agreement, and (ii) a description of the reaction of senior WIPO functionaries, bitter opponents of the Lehman Report, important countries like the U.S., EC, and India, and interest groups to the outcomes of the DipCon. After the conclusion of the TRIPs agreement, it was widely believed that the entry into force of the TRIPs agreement on January 1, 1995, marked the end of the international era and the beginning of a new global era in the history of intellectual property wherein multilateral copyright treaties do not harmonise national laws but instead lay down binding

substantive and enforcement norms. However, Graeme Dinwoodie put forth the view that it was the making of the Internet Treaties ‘which represented a watershed moment in international copyright law’ and not the TRIPs agreement’ ; this was because ‘*the process* that led up to the conclusion of the two Internet treaties and the *conduct of the diplomatic conference* at which they were considered were quite different in several respects from that which had been seen heretofore’ (italics in original).<sup>4</sup> The assessment of the outcomes of the DipCon also explores the question whether the claims that TRIPs agreement and the Internet Treaties are historic turning points are valid.

Before I conclude, I should say that the centrality of negotiations in governance at all levels is a theme that has long fascinated me ever since my sabbatical at the Harvard Institute of International Development and Kennedy School of Government, Harvard University (1982-3), and my taking a course on negotiations offered by Prof. James Sebenius during that sabbatical. What I learnt from Sebenius on negotiations was like Revelation on Mount Sinai, or Great Enlightenment under the *Bodhi* tree at Gaya. I would have been at sea at the Diplomatic Conference but for the analytical framework of negotiations that I learnt from him and the years of experience in internalising that framework through policy negotiations as well as negotiations with bilateral, regional and multilateral agencies. After superannuation from the government, I took to teaching policy praxis at the Indian Institute of Management, Bangalore as a Visiting Professor (2003-9). In teaching policy praxis, I found myself handicapped by lack of material for development of cases in the public domain, not to speak of readymade cases. This was because of the absence of a tradition in India, as in the U.S., of people occupying high positions in government writing about their experiences of government soon after leaving government. and in so writing expose to public gaze the innards of government and the interplay of the ‘inside’ and ‘outside’ of the government which underlies every aspect of governance. To get over the paucity of material for case development I developed cases based on my experience, and used those cases in my courses and included them in my first book *Public Policymaking in India* published by Pearson Longman in 2009. In 2010, I decided to take to full time writing and document the policy and programme development in the areas I had worked in government. The documentation of policy and programme development in education sector resulted in the publication of two books both published by the Oxford University Press: *The Holy Grail: India’s Quest for Universal Elementary Education* (2016) and *History of Education Policymaking in*

---

<sup>4</sup> Dinwoodie (2007), pp.751-3.

*India, 1947-2016* (2017). This Book documents the making of international copyright and related rights law through multilateral negotiations. Its Companion Volume, *The WIPO Internet Treaties at 25*, documents policy negotiations (i) at the national level during transposition of the Internet Treaties into national laws, (ii) in EC for issuing a Directive to transpose the Internet Treaties, (iii) in Member States for transposing the EC Directive into national laws, and (iv) in WIPO, among others, for the adoption of the WIPO Development Agenda, the Beijing Treaty on Audiovisual Performances and the Marrakesh treaty. Though I am not a patch on V.S. Naipaul, I can echo his claim that 'All my work is really one. I am writing one big book'. My big book is about policy negotiations and their politics.

Apart from copyright scholars and policymakers the Book should be of interest to experts and practitioners of multilateral negotiations and policymaking given its focus on the dynamics of multilateral negotiations and the process and politics of policymaking.

## Acknowledgements

I cannot thank Prof. Gopalakrishnan enough: without his invitation to the *Brainstorming Session on the Future of Copyright* at the Inter-University Centre for IPR Studies, Cochin University of Science and Technology, this book would not have come into being and without his suggestion that I should not stop with the conclusion of the DipCon but look at the developments after DipCon I would have missed a fascinating voyage of discovery, and this book would have been poorer. I am also thankful to him for vetting and offering comments on the chapters. However, I should enter the caveat that I am fully responsible for any errors which remain.

Even if I had attended the Brainstorming Session I would not have written this book but for Sri Prashant Reddy, an eminent IPR lawyer and fellow participant, who 'provoked' me by asking why I had not written in detail about the DipCon; his question launched me on the voyage of intellectual exploration that culminated in this book.

I should also thank Professor James Sebenius of the Harvard Business School to whom I owe an enormous intellectual debt; what I learnt from his course on negotiations was like Revelation on Mount Sinai, or Great Enlightenment under the *Bodhi* tree at Gaya. I would have been at sea at the DipCon but for the analytical framework of negotiations that I learnt from him and the years of experience in internalising that framework through policy negotiations as well as negotiations with bilateral, regional and multilateral agencies.

*Notes from Geneva*, the authentic day-by-day account of the happenings at the DipCon authored by Seth Greenstein, who attended the DipCon as a representative of the Electronic Industries Association, was an invaluable source of information for every participant, all the more so as there was no official daily account of the happenings of the previous day. I cannot thank Greenstein enough for sharing with me his *Notes from Geneva* and providing the website of the archives where the 'Notes' could be located.

I offer my profuse thanks to Sneha and Medha, my granddaughters, for designing and developing my Home Page where this Book can be accessed. I owe an immense debt of gratitude to Sri Alajangi Vamsi Vardhan for formatting my MS Word manuscript into an elegant pdf book and uploading it with a lightning speed in the midst of a very demanding academic schedule. I should

also thank my colleague Sri Chakrapani for introducing me to Sri Vamsi Vardhan and putting in a word to him.

I would like to express my gratitude to my parents, R. V. Venkataramana Ayyar and R. V. Seshambal who have contributed so much to my Being and Becoming. This book would not have been possible without the encouragement and forbearance of my wife Seetha Vaidyanathan. For years I had been and continue to be engrossed in writing; such engrossment is burdensome for a spouse at a stage of life when loneliness is an ineluctable existential condition. I wish to also thank my daughter Aparna Sharma and my granddaughters Isha, Sneha and Medha for continuously prodding me to complete the book.

## **List of Abbreviations**

A2K: Access to Knowledge. Mostly used in connection with the Access to Knowledge movement

ACTA: Anti-Counterfeiting Trade Agreement

ALA: American Library Association

AT & T: American Telephone and Telegraph Company

BIRPI: French acronym for United International Bureaux for the Protection of Intellectual Property, the predecessor of WIPO

BSA: Business Software Alliance

BTAP: Beijing Treaty on Audiovisual Performances, 2012

CCEA: Cabinet Committee on Economic Affairs

CSS: Content Scramble System

CTEA: Sonny Bono Copyright Term Extension Act, 1998

DipCon: WIPO Diplomatic Conference on Certain Copyright and Neighbouring Rights, 1996

DAA: Australia's Digital Agenda Act, 2000

DFC: Digital Future Coalition

DG: Director General

DMCA: United States' Digital Millennium Copyright Act, 1998

DRM: Digital Rights Management

DSM: WTO's Dispute Settlement Mechanism

DVD: Digital Versatile/Video Disk

EC: European Community

EFF: Electronic Frontier Foundation

EU: European Union

EUCD: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society (European Union Copyright Directive for short)

GATT: General Agreement on Tariffs and Trade

GRULAC: Group of Latin American and Caribbean Countries

HRRC: Home Recording Rights Coalition

ICTSD: International Centre for Trade and Sustainable Development

ICJ: International Court of Justice

IFPI: International Federation of the Phonographic Industry

ILO: International Labour Organisation

IMF: International Monetary Fund

IP: Intellectual Property

IPC: Intellectual Property Committee, an *ad hoc* coalition of American companies to pursue the IPR agenda at the Uruguay Round

IPR: Intellectual Property Right

ISP: Internet Service Provider

JEIDA: Japanese Electronic Industry Development Association

Marrakesh Treaty: Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, 2013

MHRD: Ministry of Human Resource Development

MPAA: Motion Picture Association of America

NAFTA: North American Free Trade Agreement

NASSCOM: National Association of Software and Service Companies

NGO: Non-Governmental Organisation

OECD: Organisation for Economic Cooperation and Development

OSP: Online Service Provider

PIPA: The Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act

PTO: Patents and Trademarks Office, the U.S.

PrepCom: Preparatory Committee of the DipCon

QdN: *La Quadrature du Net* (an organization in France akin to EFF)

RIAA: Record Industries Association of America

RMI: Rights Management Information

Sect.: Section

SCCR: WIPO's Standing Committee on Copyright and Related Rights

SCMS: Serial Copyright Management System

SOPA: Stop Online Piracy Act

TPM: Technological Protection Measure

TRIPs: Trade-related Intellectual Property Rights

UCC: Universal Copyright Convention

UN: United Nations

UNCTAD: United Nations Conference on Trade and Development

UNESCO: United Nations Educational, Scientific and Cultural Organisation

U.S.: United States of America

VARA: Visual Artists Rights Act, 1990

WCT: WIPO Copyright treaty

WIPO: World Intellectual Property Organisation

WPPT: WIPO Performers and Phonograms Treaty

WTO: World Trade Organisation

# PROLOGUE

## **Chapter 1: Opportunity Knocks on the Door Unexpectedly**

People speak of misfortunes and sufferings... We imagine that when we are thrown out of our usual ruts all is lost, but it is only then that what is new and good begins--- Lev Tolstoy, *War and Peace*.

Not the deed which you choose, but that which befalls you against your will, your mind, against your desire, that is the path you must tread, thither do I call you, there be you His disciple, that is your time that the path your Master trod--- Martin Luther.

The year 1995 ended with a happy note; I was promoted to the position of Additional Secretary, just one rung below the highest in the civil service ladder. The celebratory mood did not last long; a few days later I received the orders of the Secretary allocating work to me as Additional Secretary. To my consternation, I found that precious little was allocated to me, and I was reduced to the position of an exalted sinecure very much like most American Vice-presidents. It used to be the practice in the Education Department that two or three bureaus were allotted the Additional Secretary for oversight, and the joint secretaries heading those bureaus to report to the Secretary through the Additional Secretary. In contrast to this custom, a single joint secretary was to report to me, and that too only in respect of a part of his charge: book promotion and copyright, considered to be an inconsequential charge- a fact vouched by the fact that a few years earlier, the Secretary of the Department was incensed with a Joint Secretary, and in a rage he assigned that Joint Secretary the book promotion and copyright division, and banished him to the Curzon Road Barracks, a derelict building a kilometre away from the Department, housing the book promotion and copyright division as well as furniture and junk discarded by the Department. Usually, that division had hardly any work because under Indian copyright law, once a literary or artistic work was created the author of the work automatically acquired copyright without fulfilling any formalities, and book promotion largely comprised overseeing the work of the National Book Trust. I tried to put on a brave face and console myself by taking note of the fact that that it was the prerogative of the Secretary, the administrative head of the Department, to use his number two in the manner he chooses fit, and that in most Departments the Additional Secretaries are kept on the shelf and asked to step in for the Secretary in useless meetings; the situation is all the more awkward as they are out of the

loop and yet are expected to perform in the meetings they are deputed to, often at the last moment, as if they were in command all along. I sunk in despair, and however much I tried to rationalise the allocation of work to me I could not get over my bitterness. Time hung heavily on my hands, and I had few visitors and fewer files; I spent almost all the time by myself. To while away the hours I spent in office, I took to reading which had been my lifelong passion. The range of my reading had always been vast, and that being so I could not help reading about copyright, an area which now fell within my far too brief remit. Copyright was *terra incognita*, and nearest to metaphysics in the domain of law. Exploring it was a fascinating voyage of discovery, and a challenge to the mind.

‘By nature, I was inclined  
In everything I want to reach  
The very essence...  
The essence of past days  
And when they start,  
Foundations, roots,  
The very heart...’<sup>5</sup>

Exploration of copyright complemented my knowledge of patents which I had to acquire a decade earlier while being Development Commissioner (pharmaceuticals).

As if to prove that life has a divinely ordained purpose, I soon found that my study was not a mere scholastic exercise but was of direct and proximate relevance to my job. Two weeks into my new job, a file came to me for onward transmission to the Secretary and the Minister seeking approval for the visit of Rudhra Gangadharan, the joint secretary in charge of copyright, to Geneva to attend a meeting of two Committees of Experts constituted by World Intellectual Property Organisation (WIPO), one for considering a possible Protocol to the Berne Convention and the other a possible new instrument for the protection of performers and producers of phonograms.<sup>6</sup> Around 12 February 1996, after his return from Geneva, Gangadharan informed me that WIPO would be convening a Diplomatic Conference in December 1996 to adopt the Protocol and the New Instrument. And as my luck would have it, about a week later the Copyright Division organised in collaboration with WIPO a

---

<sup>5</sup> Pasternak (1984), ‘When the Weather Clears’ pp.141-4.

<sup>6</sup> The idea of a Protocol to the Berne Convention was replaced by a special agreement under Article 20 of the Berne Convention. In the negotiation texts (formally called ‘Basic Proposals’) that agreement was called the WCT, and the new instrument came to be called WPPT.

national seminar on digital technologies and copyright.<sup>7</sup> I acquired some idea about the treaties-in-the-making from the papers circulated for the seminar, and my interaction with Mihály Ficsor, Assistant Director General ( Copyright), WIPO, and Lewis Flacks, Director (Legal Affairs), International Federation of the Phonographic Industry (IFPI) and Daniel Gervais who earlier served WIPO and was now Assistant Secretary General, International Confederation of Societies of Authors and Composers.<sup>8</sup> The treaties-in-the-making were, among others, expected to remove the uncertainties which businesses of publishing and distributing literary, artistic and musical works would face because of the spread of new digital technologies of recording, scanning, storage and communication. It did not take too long for me to comprehend the true significance of the digital technologies because a decade earlier, when I held a sinecure post, I made good use of the abundant free time to study technological innovation, Schumpeter's grand theory which related structural changes in world economy (since industrial revolution) to periodic technological revolutions, and contemporaneous futuristic speculation about the post-industrial information society and knowledge economy in the embryo . Schumpeter's dashing conceptual forays, brilliant exposition and ringing prose describing the gales of creative destruction unleashed by technology mesmerised me. Back in the 1980s, many futurologists saw in the ongoing convergence of hitherto distinct technologies of computing, telecommunication and control would lead to a new technological paradigm which in turn would result in the reformation of economy and society.<sup>9</sup> As I read the documents of the seminar it readily occurred to me that the futurologist speculations I read about a decade earlier were turning out to be true, and a digital reformation of society and economy was imminent.

From the documents circulated for the WIPO-India Seminar and my conversation with Ficsor, Flacks and Gervais I came to know that in the face of the formidable challenge to copyright that was expected to be posed by the

---

<sup>7</sup> WIPO-INDIA National Seminar (1996).

<sup>8</sup> Gervais went on to be a very distinguished academic specialising in copyright law.

<sup>9</sup> For an account of the reformation of economy and society under the impact of digital technologies, see McGeady (1996). The article was adapted from his keynote address to the Harvard Conference on the Internet and Society (May 1996). 1996 was the 50th anniversary of the first digital electronic computer, the ENIAC; The Internet was over 25 years old, depending on where its beginning is placed, and it was also the 20th anniversary of the personal computer. McGeady highlighted the fact that the new information technologies had been gestating for about 25-50 years, and with that gestation being over far-reaching changes analogous to the Reformation were about to take place.

emerging digital technologies the U.S., EC and WIPO were keen to put in place a new international copyright framework, as comprehensive as the current state of knowledge would permit, that would anticipate and lead the development of cybermarkets and amendment of national copyright laws; in other words, they wanted to write the rules of the road for the 'global information superhighway' still in the making.<sup>10</sup> If the U.S. and EC had their way the DipCon would have been held in September itself. WIPO set great store by the adoption of the treaties by the DipCon, a fact which came out during my conversation with Ficsor. Ficsor counselled me and my colleagues to get ready for 'an accelerated period of consultations'; he labelled the Protocol to the Berne Convention that the Conference was expected to adopt as the Protocol of Good Hope—a play on words given that Cape Town where the Conference was expected to be held was known as the Cape of Good Hope. My concern was that India might not be able to meaningfully participate in the DipCon and shape the treaties-in-the-making in a way that suited its interests as Internet for general users arrived only in August 1995,<sup>11</sup> Internet with a dial-up modem connection was terribly slow, email was a novelty confined to technology buffs, even such buffs knew little about the fledgling digital technologies. As I said in my valedictory address in the concluding session of the Seminar, 'there is a juggernaut which is already set in motion; you have got a DipCon, dates and venue is more or less settled, the drill is completed and rightly the developed countries can say well the consultation process on the digital agenda has been going on for over a year'.

Attending the seminar was a learning experience in another sense: I got acquainted with the interest group politics enveloping the arena of copyright. Looking back, the participants in the seminar took no note of the treaties-in-the-making; they were focussed on articulating their interests and concerns. The conflict of interest between authors, collecting societies and broadcasters came out vividly in the speeches of some of the participants. ZEE TV floated a collection society for cinemas; the competence of ZEE TV to float such a society was questioned by the representative of Bollywood. The representative of the film society floated by ZEE TV accused Doordarshan of being the greatest violator of film copyright; Doordarshan purchased the right to broadcast films from the film producers at a time when new modes of transmission like satellite

---

<sup>10</sup> Pamela Samuelson (1996b), p.372.

<sup>11</sup> Brijendra K. Syngal and Sandipan Deb, 'How the Internet Arrived in India', *Livemint*, 10 February 2020.

transmission were not even in the realm of imagination, and now Doordarshan was refusing to renegotiate the previous contracts thereby depriving film producers of a share in the revenue generated by new modes. In turn, Ramakant Basu, the Director General, Doordarshan accused of film producers of trying to make a quick buck in violation of the sanctity of contracts. Film producers cannot demand renegotiation of contracts just because new modes of transmission had expanded the outreach of TV and made TV a lucrative business. He bemoaned the fact that copyright had turned into an economic right and ceased to be a 'literary right'; actors of TV serials films made by Doordarshan were demanding payment again when parts of the footage of those films were used in new serials. Whatever, I realised that the making and implementation of copyright policy has to reckon with interest group politics and that the Indian response to the provisions of the treaties-in-the-making needs to take note of the conflicting views of the interest groups and harmonise those conflicting views to the maximum extent possible. My understanding of the interest group politics enveloping copyright was greatly facilitated by the course on negotiations I took at Harvard during my sabbatical. That course offered by the distinguished negotiation theorist and adviser 'Jim' Sebenius was a defining moment in my life, and thanks to that course I discovered the true nature of a life in government. Though unlearning was mind-wrenching I shed my naïve belief that policymaking and implementation were predominantly technical, rational exercises which do not allow subjectivity, and that there could be only one way of doing things. As I prized my intellectual ability immensely, I was hitherto cocksure that anyone who differed from me was mistaken, or worse had a vested interest in holding a different view. I learnt from Sebenius's course that many problems were bigger and more deeply irrational than I or anyone else could rationally understand, that the pursuit of uncompromising rationality was counter-productive, that following the dictates of abstract principles, and not the concrete requirements of the actual situation was a sure recipe for disaster, that people differ widely in their perception of what ought to be done and that these differences are not only due to different ideas and ideologies but also due to their interest and that it was necessary to make an attempt to win over others to one's point of view, and that even then some may not accept one's views. All in all, governance is as much about reconciling differences through informal negotiations, management and prevailing in policy conflicts as about rationality. My previous assignment gave me ample opportunities of the insights I acquired from Sebenius in my interactions and formal negotiations with a variety of bilateral, regional (European Commission) and multilateral organisations.

The Seminar was a turning point in my stint as Additional Secretary or for that matter in my career. Even though I knew that I might not have any meaningful role either in the run up to the Conference or during the Conference still I saw mastering the subject and developing an appropriate negotiating strategy an awesome challenge to the mind, and a reward in itself. I ceased to wallow in despair and self-pity and began to play a proactive role in formulating India's negotiating strategy for the DipCon and obtaining the necessary approvals for that negotiating strategy. I was more than amply rewarded; eight months later, just two months before the Conference, Secretary Dasgupta informed me that I would be leading the Indian delegation to the DipCon. It was a great honour and a once-in-lifetime opportunity. To give Dasgupta his due, once he entrusted me with leading the Indian delegation, he stood his ground even when Ambassador Arundhati Ghosh, his 'batchmate'<sup>12</sup> in foreign service and India's permanent representative to the Geneva-based UN organisations including WIPO, was upset that she would be a member of a delegation led by me, her junior in service, and remonstrated with Dasgupta. She suggested to Dasgupta that he should come over for a few days, and she could lead the Indian delegation before and after he left; however, Dasgupta was not willing to take a chance given the abstruse subject matter of the Conference whose outcome might be as contentious and politically controversial as the TRIPs agreement. Whatever, winning over Ms. Ghosh was a major challenge for me and so successful was I that she turned a dear friend, offered valuable advice based on her rich diplomatic experience, complimented me for the thorough preparation I made for the negotiations on an abstruse subject and told Dasgupta that she wished that all delegations to UN bodies were so well prepared and so well led as my delegation. Misery, it is said, loves company; so, it seems for happiness also. I had the privilege of not only leading the Indian delegation but also of being the Chairman of the Drafting Committee of the DipCon.

It was at the seminar that I met for the first time Shahid Alikhan who decades ago was dealing with copyright in the Ministry of Education before moving to WIPO, and after being Director, Copyright for over a decade was elected as Deputy Director General, the second highest position in WIPO. He was active in India and abroad as an expert on Intellectual Property Rights

---

<sup>12</sup> 'Batchmate' is Indian English meaning someone who entered service in the same year as you.

(IPRs). Going by the classification of copyright experts by Hugh Hansen<sup>13</sup> he was a ‘missionary’ who spread the gospel of ‘higher levels of IPR protection are good for you’. As part of his missionary work, he authored many articles and tracts including *Socio-economic Benefits of Intellectual Property Protection in Developing Countries*.<sup>14</sup> Over the next few years, even after I moved to the Department of Culture, Shahid Alikhan would drop by for chat as a *Hyderabadi* (a person from Hyderabad) to a fellow Hyderabadi.

I also learnt from Sebenius that preparing for negotiations holds the key to successful negotiations; the DipCon provided abundant opportunities to me for putting into practice the valuable insights into negotiations I acquired from Sebenius and from my previous assignment. I began preparing for the negotiations, the first step of which was identifying national interest in respect of every issue which would come up during the DipCon, envisioning the most desirable outcomes at the DipCon in respect of each issue as well as the least desirable outcomes. At Harvard I chanced to read Chalmers Johnson’s book *MITI and the Japanese Miracle*,<sup>15</sup> and that book cast a powerful spell on me. My reading of Johnson helped me to recognise in a trice that for ascertaining national interest it would be expedient not only to have inter-ministerial consultations but also continual and close interaction with copyright experts and representatives of ‘copyright industries’ (that is to say industries such as book publishing, recorded music, visual art, film and computer software for which copyright protection is vital) as well as organisations having a stake in copyright; to that end I suggested to Secretary Dasgupta the constitution of a national resource group, a suggestion which he readily accepted. By today’s norms and mores, the omission of civil society groups is a glaring omission in the composition of that group; but then yesterday was not today, and the policy environment for copyright was so different those days; civil society activism in copyright was unknown. In fact, even in Canada, the U.S., and West European countries the policy environment for copyright changed only after the wide spread of high-speed Internet and emergence of social media by mid-2000s. In the 1990s, the policy environment for copyright in India was a stark contrast to the highly contested environment for patents. Industry groups which stood to lose by accession to TRIPs and consequential changes in Indian patent law were vociferous and powerful naysayers, and their formidable lobbying power

---

<sup>13</sup> Hansen (2013), pp.452-3. 2

<sup>14</sup> Khan (2000).

<sup>15</sup> Chalmers Johnson (1982).

was augmented by civil society groups like the Voluntary Health Association of India. Critics of the provisions of the TRIPs agreement related to patents had succeeded in creating an exaggerated fear of that agreement.

It is human instinct to fear the unknown and conjure the worst; in retrospect, that fear often turns out to be exaggerated. I was much taken by a remark of Flacks at the seminar that in the face of uncertainty of technological development it would be advisable to adopt an incremental rather than root and branch approach to adapting copyright to digital technologies; the market should be given space to develop responses to new technologies. Extending his view to developing countries like India with little exposure to digital technologies, I came to the conclusion that the outcomes of the DipCon should be such that India's choices are not constricted and India retains the ability to respond to the further developments in technologies and seize new economic opportunities which arise from such developments. I feared the prospect of the treaties-in-the-making prematurely putting in place a very regimented legal framework which would constrict future choices for countries like India; that fear became more frightening when I thought of the possibility- nay inevitability- of that framework being brought within the fold of the TRIPs agreement and WTO's dispute settlement mechanism (DSM). When later I read more about the Uruguay Round multilateral negotiations as well as about the developments after the DipCon I discovered that my prognosis of the treaties-in-the-making being brought within the fold of the TRIPs agreement was well founded. Many copyright experts saw in the conclusion of the TRIPs agreement the dawn of a brave new world where old fashioned copyright no longer existed,<sup>16</sup> IP (intellectual property) law became a branch of international trade law, and 'this reconceptualization of IP law ... meant a country's interests in the IP system would be defined, asserted, defended and litigated in the domain of trade law not only for WTO members, but for all others that sought to be integrated into the global economy',<sup>17</sup> and that WIPO was reduced to being a poor cousin of WTO. TRIPs agreement provided for periodic review and updating; the Ministerial Conference of WTO could adopt 'without further formal amendment process' higher intellectual property standards found in other multilateral agreements provided all members of WTO acceded to those agreements (Article 71(2) of TRIPs agreement read with Article X (6) of the WTO Agreement). More specifically, it was widely expected that the new norms

---

<sup>16</sup> Nimmer (1995), p.1419. Nimmer was concerned that TRIPs could impede judicial interpretation and application of fair use.

<sup>17</sup> Taubman (2018), pp.21-2.

embodied in the WIPO Internet Treaties would be incorporated in the TRIPs agreement in its first review scheduled in the year 2000.<sup>18</sup> In fact, in 1999 as well as 2000 Australia proposed to the TRIPs Council draft amendments to TRIPs that would incorporate the principles of the WCT and WPPT, under the fast-track procedure outlined in TRIPs article 71.2. However, the Australian proposal found no support in the Council. Surprisingly, the U.S. opposed the Australian move.<sup>19</sup> Whatever, my imagination went wild; I saw the DipCon as a thin end of the wedge whereby higher intellectual property norms would come to be adopted in the relatively academic environment of WIPO, and those norms brought within the fold of the TRIPs agreement through a simple process. That was not to be WIPO's Internet Treaties as well as the Beijing and Marrakesh treaties subsequently negotiated under the aegis of WIPO continue to be standalone treaties and have not been assimilated into the TRIPs Agreement. All in all, the fear that the TRIPs agreement was a prelude to the emergence of a supranational international copyright and neighbouring rights law turned out to be unfounded mainly because of reasons unforeseen in 1996. The international political climate changed significantly in 1999, and the onward march of the TRIPs agreement was stalled once and for all, and the developed countries could never again regain their ability to drive a trade round the way they did with the Uruguay Round. Fear of God, it is said, is the beginning of wisdom; likewise, the fear that the treaties being negotiated would be assimilated into TRIPs and fall within the purview of DSM made me to be extra vigilant all the time in the runup to the DipCon as well as during the DipCon. It took quite some time to realise, mercifully much before the DipCon, that India's interests were different from those of most other developing countries, and therefore India a 'we (developing countries)' vs. 'they (developed countries)' approach would be self-defeating; it was in India's interest not to abandon the principle of balance it had long espoused, and at the same time to constructively engage the U.S. and EC who were the prime movers of the DipCon and have traffic rules put in place for the emerging digital superways and thereby safeguard the interests of its IT, cinema and recorded music industries in the digital medium in a way that does not constrict its future

---

<sup>18</sup> Ricketson and Ginsburg (2006), p.162.

<sup>19</sup> Ian Brown (2006), p.246. According to Silke von Lewinski the idea of including the substance of WCT and WPPT in the TRIPs agreement was not pursued because of the new policy environment created by the rise of the 'user movement'. Silke von Lewinski (2008), paragraph 17.180 and footnote at p.496 and paragraphs 25.27-25.35 at pp.590-3.

choices in regard to new emergent technologies and development of digital markets.

Looking around for expertise in international copyright law I noticed that such expertise was sparse in India. Teaching of intellectual property in universities was limited to equipping aspiring lawyers with rudiments of intellectual property law needed for legal practice. There was hardly any research. Scarcity of expertise in policy-oriented intellectual property rights was not unique to India. It is pertinent to note that according to Lars Anell, Chairman of the TRIPs Negotiating Group, when the TRIPs negotiations began ‘it was a new subject. very few experts on intellectual property (IP), if any, were posted in Geneva, and many delegations could not rely on high-level expertise in their capitals.’<sup>20</sup> The yawning gap in expertise in an area increasingly important for the Indian economy spurred me to think of concerted efforts to promote multidisciplinary IPR studies; the establishment of MHRD (Ministry of Human Resource Development of which the Department of Education was a constituent) chairs for IPR studies in some universities is an offshoot of that effort. My immediate need for copyright expertise was met by Valsala Kutty, deputy secretary in the copyright division, who located an extremely gifted IPR expert, Prof. N. S. Gopalakrishnan of National Law School, Bangalore; he was an invaluable member of the delegation providing from time-to-time sound advice on the various proposals which were being made by delegations. DipCon was the venue where Gopalakrishnan cut his teeth in policy advice and international treaty-making. He went on to advise the Department of Education, Ministry of Information and Broadcasting and Ministry of Commerce and Industrial Development on many different matters relating to IPRs and join official delegations to international Conferences such as the Diplomatic Conference on the audio-visual performances (2000), and the Marrakesh Diplomatic Conference (2013). Unusual in India, he was an academic who came to straddle the world of serious academic study of IPRs and the real world of policy advice and participation in international negotiations. No less importantly, as MHRD Chair of IPR and Founding Director of the Inter-University Centre for IPR Studies (IUCIPRS), Cochin University of Science and Technology, he pioneered the grooming of a new breed of IPR professionals. The five-year post graduate integrated programme he introduced brought together graduates from different backgrounds- economics, science, engineering and technology and law – in the study of IPR law; that programme culminated in the award of a doctoral degree transcended

---

<sup>20</sup> Arnell (2015), p.365.

the traditional legalistic study of IPRs as a prelude to legal practice and fostered interdisciplinarity in the study of IPRs.

By a stroke of luck, a fantastic breakthrough occurred in early June 1996 when I came across Pamela Samuelson's seminal *Copyright Grab*<sup>21</sup> in a bunch of articles which I used to receive from the American Center's article alert service every month.<sup>22</sup> In an interview in 2018, Pamela Samuelson reminisced about how the extraordinary contentions and recommendations of the Lehman Report turned her into an activist; 'Copyright Grab' was her 'big signature piece' in which she 'deconstructed the the 200-page white paper and said, here's what they are trying to do us and this is not a good idea;, and called upon 'tech-savvy people who are reading Wired magazine' to 'get involved here'.<sup>23</sup> The aggressive polemical tone of a tract by a pre-eminent scholar of IP, technology and information management vividly brought out in sharp relief that from the American perspective the DipCon was an extension of the bitter policy debate over the bills introduced in the House of Representatives (HR 2441) and the Senate (S 1284) in late September 1995 to give effect to the recommendations of the report of the Working Group on Intellectual Property Rights chaired by Bruce Lehman, Assistant Secretary of Commerce, Commissioner of Patents and Trademarks (hereafter referred to as Lehman Report) . Pamela Samuelson elaborated in quite some detail the contentious recommendations of the Lehman Report and the corresponding provisions of the bills and explained how the bills sought to advance the interest of the copyright industry to the detriment of public interest; if the bills were enacted the emerging information superhighway would be transformed into a publisher-dominated toll road, and fair use, traditionally a cornerstone of American copyright law, would be eliminated. Pamela Samuelson's tract was a call to arms, a clarion call to the public to enlist in the campaign against the Bills and stop the machination of 'copyright maximalists' in their tracks. My preparation for the DipCon was invigorated by the inputs provided by Pamela Samuelson's tract. Knowing oneself is not limited to ascertaining what one wants from the negotiation as well as the agreement one could live with. It is also necessary to ascertain the domestic policy environment in respect of the issues being negotiated; a strong domestic consensus on the issues being negotiated would enhance the bargaining power of a party to negotiation, and conversely, a bitter domestic contest over the issues being negotiated weakens

---

<sup>21</sup> Samuelson (1996a).

<sup>22</sup> American Center, New Delhi is an outfit of the United States Information Services.

<sup>23</sup> Moody (2018).

bargaining power. Developing communication strategies for shaping public perceptions and building support for the positions and outcomes the government desires is an important aspect of the preparation for negotiations. Knowing the other is a similar exercise in respect of other key parties to the multilateral negotiation. While preparing for multilateral negotiations it is important to acquire a good knowledge of the domestic politics (enveloping the main issues which would be negotiated) of key countries.<sup>24</sup> American positions in international negotiations offer good examples of the fact that almost all international negotiations are two-level games. As Robert Putnam, the theorist of the two-level game theory of international relations put it, 'at the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments'.<sup>25</sup> Therefore, while preparing for multilateral negotiations it is important to acquire a good knowledge of the domestic politics (enveloping the main issues which would be negotiated) of key countries which would shape their stands in the forthcoming negotiations. Against this background, Pamela Samuelson's tract was a valuable intelligence input; it spurred me to write to Ms. Kanthi Tripathi, Minister (Commerce), Indian Embassy, Washington, to keep track of the developments on the bills introduced in the Congress and keep me posted. The DipCon was the first international conference where all the interested parties made extensive use of the Internet and Web sites as well as e-mail to gather and exchange information as well as to lobby. I began to scour on the Web information relating to the DipCon and the 'copyright wars' raging in the U.S.; my efforts secured ample rewards. Openness of the policymaking process, adversarial interest group politics and the deep-rooted tradition of interest groups working on the media to shape public opinion and bring pressure on the government are defining features of American polity. Thanks to those features, I could garner a wealth of information useful for my preparation for the DipCon.

---

<sup>24</sup> For an elaboration of *knowing oneself* and *knowing the other*, and the salient aspects of multilateral negotiations see Ayyar (2009), pp.80-3, 84-90, 189-90.

<sup>25</sup> Putnam (1988):434.

# PART I: PREHISTORY

## Prolegomenon

The Past is not dead, it is not even past ---William Faulkner

[Fredrick the Great] concluded that history is an excellent teacher, with few pupils... “Whoever reads history with application will perceive the same scenes are often repeated, and one need only change the names of the actors” ---Durant and Durant (1997)

A host of people (in Washington) ... thought that the world was new and all its problems fresh Neustadt and May (1988).

Those who cannot remember the past are condemned to repeat it --  
-George Santayana.

A historical perspective is important for a full understanding of what the Conference accomplished. While the digital agenda was the *raison d’etre* of the Conference updating of the Berne and Rome Conventions was a major item of the Conference’ agenda. The Berne Convention had not been revised since 1971, and the Rome Convention was never revised. The TRIPs agreement updated the Berne and Rome Conventions only partially; the updating of the Berne and Rome Convention was much an unfinished agenda of the TRIPs negotiations as the digital agenda. While the negotiations relating to the digital agenda, particularly the reproduction right, gave rise to sharp disagreements the updating of the Berne and Rome Conventions was no less contentious, a major reason being the doctrinal differences between the two copyright systems (authors’ right system and utilitarian system) enmeshed with conflicting economic interests. In fact, while voting took place for resolving only one issue in the digital agenda it had to take place to resolve four issues of the non-digital agenda. Further, one can discern in every negotiation from the Berne Convention (1886) to the Marrakesh Convention (2013) a dialectical interplay of uniformity and flexibility- in other words, the tension between universalists who prefer a uniform code binding throughout the world and pragmatists who do not wish to impose a supranational code on the Contracting Parties depriving them of any latitude to adjust the standards of protection to local circumstances and public policy goals – shaping the outcome of negotiations. To elaborate a little bit, the runup to the Berne Convention witnessed a policy contest between those advocated universalists and pragmatists, and the Convention as finally adopted was a compromise between the conflicting points of view, and so were each of the six ‘Acts’ adopted by successive Berne revision conferences. The same dialectical interplay was at work during the TRIPs negotiations; while the universalists prevailed in regard to the substantive

provisions they could not in the matter of enforcement.<sup>26</sup> Again at the DipCon, in the policy contest about the key provisions relating to the digital agenda those between those who favoured uniform provisions not susceptible to variable interpretations were arrayed against those who did not wish to iron out different views and offered flexibility to the Contracting Parties. Eventually, the pragmatists prevailed; the design of provisions like the moral rights of performers in WPPT or the anticircumvention provisions in both the treaties made use of the principle of *freedom of legal characterisation* first followed in the Berne Convention. That principle allows flexibility to be granted to the Contracting Parties whereby they can characterise the acts and rights in a way different from those set out in the Berne Convention and to discharge the obligations under the Berne Convention in the way they thought fit so long as the scope and level of protection are not lower than those provided by the Berne Convention.

In quite a few negotiations countries which were exporters of ‘cultural goods’ (that is to say, goods for which protection of copyright and related rights is vital) had been universalists while importers had been pragmatists. Quite often, importers were relatively underdeveloped in comparison with exporters. During the 1960s, the newly decolonised Member States of BIRPI (predecessor of WIPO) challenged the idea of universal IP norms without regard to the levels of development; the challenge reached its climax during the Stockholm Conference(1967); similarly the demand for a WIPO Development Agenda in 2004 is also driven by the idea that universal IPR norms cannot be fixed without regard to the levels of development, and the imperative of leaving enough space for developing countries to pursue their public policy objectives in different areas like culture, education, health and technology transfer.

---

<sup>26</sup> Yu (2011b); Yu (2011c).



## Chapter 2: Berne to TRIPs

### 2.1 Copyright and Technology

Copyright is the child of technology. It was the invention of a new form of copying equipment, Gutenberg's moveable printing press and the discovery of engraving, that gave rise to the original need for copyright protection.<sup>27</sup> Originally designed to cover printed material (including musical scores), the scope of copyright law progressively expanded to cover artistic works like painting, drawing, sculptural works and architecture as well as newer and newer forms of creative expression like photographic and cinematographic works, as well as functional expressions like computer programmes which do not have the aesthetic qualities that are ordinarily associated with literary and artistic works. In other words, the scope of literary and artistic works covered by copyright law had been continuously expanding, the terms 'literary and artistic works' and 'author' being general expressions covering all categories of works eligible for copyright protection, and the creator of a work respectively.

The history of copyright and related rights is a history of the adaptation of copyright and related rights law to technological developments- development of new modes of creation of works, and new methods of fixing, reproducing and communication of works. The history of copyright has three significant landmarks: (i) the invention of moveable printing and engraving in the fifteenth century which gave birth to copyright, (ii) the invention of sound recording, cinematography and broadcasting in the late nineteenth century which gave birth to neighbouring rights in countries with authors' right system, and (iii) the digital revolution of the late 1990s which came into being by the convergence of hitherto distinct technologies of computing, telecommunication, control. The adaptation of copyright law to a given development in the technology of reproduction or communication of works had been historically a slow process because adaptation had to be invariably preceded by the development of a good understanding of the technology, its impact on markets as well as a good idea of how the technology could be assimilated into copyright law. It is difficult to anticipate how a given technology of reproduction or communication would evolve and how it would impact on the markets for copyrighted cultural products. This uncertainty together with the fact that

---

<sup>27</sup> Nicholas Negroponte, *Being Digital*, New York: Alfred A. Knopf, 1995, p.58.

copyright law is averse to technology-specific provisions gave rise to a time lag between the appearance of a technology and its assimilation in national copyright laws; it was not unusual for assimilation to be done gradually rather than in one go. Thus, when the Berne Convention was adopted in 1886 photography was around, and a few national laws did protect photographic work. In the very first of the three Diplomatic Conferences which culminated in the adoption of the Berne Convention the French delegation insisted that photographs should be included in the works which would be protected by the convention-in-the-making. In view of the opposition of the German delegation the Conference recognised that ‘that the protection of original photographs was appropriate’ and expressed the view that protection should be ‘introduced in the future’.<sup>28</sup> While successive Revision Conferences made progress towards assimilating photographs in international copyright law, it was only in 1948 that the Brussels Revision Conference included without any qualification photographic works in the list of literary and artistic works eligible for copyright protection, and it was only forty-eight years later in 1996 that parity between the general term of protection and that of photographs was achieved through the WCT. The Internet Treaties broke from the tradition of slow, incremental adaptation of copyright to technological developments in reproduction, storage and communication of works to the public; why this was so is, and whether the departure from the copyright tradition was beneficial or not is a major theme of this Book.

## **2.2 Berne Convention**

The printed word, the musical composition, and the artistic creation’, it is rightly said, ‘know no national boundaries’, though in case of books translation from the original language is necessary for readers in other countries to savour a literary work.<sup>29</sup> Even though a dense network of bilateral agreements fell in place by mid-1850s, their inadequacies, particularly their wide variance, gave rise to the demand for an international copyright convention. The International Literary and Artistic Association, ALAI<sup>30</sup>, led by Victor Hugo, a preeminent literary celebrity, was in the forefront of the demand; in today’s parlance, ALAI is an NGO. About a hundred and twenty-five years were to pass after the adoption of the Berne Convention before another multilateral copyright instrument spearheaded by an NGO was to be

---

<sup>28</sup> WIPO (1986), p.95.

<sup>29</sup> Ricketson (1986), p.18.

<sup>30</sup> Acronym of the French equivalent of the International Literary and Artistic Association: *L’Association littéraire et artistique internationale*.

adopted; that instrument was the Marrakesh Treaty (2013) and the NGO the World Blind Union. Less well known than the lead role played by ALAI is the fact that ‘the completion of the first comprehensive multilateral copyright convention, the Berne Convention in 1886, can be traced in part to a developing international market in the distribution of books’<sup>31</sup> much as the British Statute of Anne was the resultant of the lobbying effort of the Stationers who argued that ‘authors would not write books without the security of an easily enforced property right’,<sup>32</sup> Suffice to say, authors and their organisations as well as copyright industries had, and continue to have, a common interest in expanding and strengthening copyright protection and had generally worked together to further their common interest. It is appurtenant to mention that contemporaneous critics of the strengthening of copyright contend that that the benefits of such strengthening accrued almost exclusively to media industries so much so that ‘author's right (*droit d'auteur*) has become a right without authors (*sans auteur*).’<sup>33</sup>

### **2.2.1 Supranational Code or Harmonisation”**

A very important contest of ideas took place in the runup to the Berne Convention. Universalists called for a ‘single [copyright] code, binding throughout the world and giving fullest protection to the authors of every country, without distinction of nationality’.<sup>34</sup> ‘Pragmatists’ on the other hand considered the universalist view an impractical ‘beautiful dream of the idealists’.<sup>35</sup> A major reason for a universal copyright code being considered impractical is the ineluctable fact that the Berne Convention had to bridge two systems of copyright, authors’ right (*droit d'auteur*) and ‘Copyright’ with different conceptual underpinnings. In contrast to the universalist view, the ‘pragmatists’ advocated making haste slowly so that the international copyright convention attracts many adherents. They believed that once a convention falls in place, under ‘the influence of the exchange of views which would be established between the states [which are parties to the Convention], the most objectionable differences which exist in international law would be, by degrees, removed, to give place to a more uniform regime which is more certain for authors and their legal representatives’.<sup>36</sup> The Berne Convention, adopted in

---

<sup>31</sup> Dinwoodie (2000), p.479.

<sup>32</sup> Goldstein (1996), p.43.

<sup>33</sup> Dusollier (2006), p.285.

<sup>34</sup> Ginsburg (2000), p.3.

<sup>35</sup> Briggs (1906), p.162.

<sup>36</sup> Ricketson (1986), pp.6-7.

1886,<sup>37</sup> is a compromise between the conflicting points of view; it required the countries of the Berne Union, as Contracting Parties are called, to extend national treatment (with some exceptions) to the nationals of other countries of the Berne Union, treatment no less favourable that it accords to its own nationals with regard to the rights regarding which the Convention had laid norms. At the same time, in deference to the wishes of the universalists, the Berne Convention laid down substantive minimum standards of protection which the countries of the Union were required to provide to nationals of other countries of the Berne Union irrespective of whether they grant such levels of protection to their own nationals. It was open for a country of the Union to have higher standards of protection than those laid down by the Berne Convention; however, it was incumbent on that country to extend to nationals of other countries the higher standards of protection, Countries of the Union could enter into special agreements among themselves provided that such agreements (i) confer upon authors or their successors in title more extensive rights than those granted by the Convention and (ii) do not contain provisions contrary to this Convention; the WCT was one such agreement.

The basic structure of the Berne Convention had remained relatively unchanged despite six revisions (1896, 1908, 1928, 1948, 1967 and 1971); like the original Convention each of the six 'Acts' adopted by successive revision conferences were compromises between universalists and pragmatists. The universalists were responsible for the steady increase in the substantive minimum standards of protection, coverage of more and more rights, and very importantly, the Convention coming closer and closer to a law based on authors' rights with the doing away of formalities as a condition for securing copyright, longer duration of protection and protection moral rights. At the same time, the modifying influence of the pragmatists has ensured that changes (effected in each revision) have generally enjoyed the widest possible support.<sup>38</sup> That apart, the need to secure widest possible support was necessitated by the provision in the Berne Convention that it could not be revised without the unanimous consent of the countries of the Union. And further, it is open to a country not to accede to an Act adopted by a revision conference; in other words, it can choose to adhere to an earlier version of the Berne Convention. These provisions made it imperative for the prime movers of an amendment to build consensus in favour of the amendment proposed. A

---

<sup>37</sup> For a historical account of the Berne Convention and its revisions see Ricketson (1986) and Ricketson and Ginsburg (2006), pp.1-133.

<sup>38</sup> Ricketson (1986), pp.40-1.

principle which enhanced the acceptability as *freedom of legal characterisation* which allows a Member State the flexibility to characterise the acts and rights in a way different from those set out in the Berne Convention and to discharge the obligations under the Berne Convention in the way they thought fit so long as the scope and level of protection are not lower than those provided by the Berne Convention. Moral rights provide a good example of the freedom of legal characterisation. It was during the Rome Revision Conference (1928) that moral rights entered the Berne Convention (Article 6bis) mainly due to Eduardo Piolla Caselli, the Italian delegate, the conference's *rapporteur general* and 'savvy tactician'. The United Kingdom and Commonwealth countries initially received the proposal 'coldly' as they felt that moral rights were not part of copyright and that in any case existing civil and criminal laws like libel law sufficed to remedy violations. Given that unanimity was a binding principle for decision-making there was no way that moral rights could be introduced in the Berne Convention without bringing them on board. Piolla Caselli won over the English-speaking countries by arguing that they had already protected moral rights under common law legislation, and consequently they could implement the moral rights recognised by the Berne convention with their existing laws. The provisions of Article 6bis were tailored to ensure that English-speaking nations would not be required to introduce new legislation to fulfil their obligation under Article 6bis.

The principle of freedom of legal characterization came in handy when the U.S. decided to join the Berne Convention and to that end fast track the further amendments required for full compliance with the Berne Convention obligations. Moral rights turned out to be a prickly issue as they epitomise 'the broader cultural clash between Anglo- American copyright and European authors' right'.<sup>39</sup> Apart from the Hollywood even the domestic magazine press was wary of moral rights. Magazines from *Newsweek* to *Playboy* banded together to form the 'Coalition to Preserve the American Copyright Tradition' (PACT). PACT argued that moral rights would severely impair editorial discretion; journalists and photographers might assert their moral rights and object to the editing of their content by the editor. All in all, moral rights were a sure recipe for havoc.<sup>40</sup> The issue of moral rights was resolved once the majority of those who testified before Congress argued that the totality of the then U.S. law including contract rights was sufficient and offered sufficient

---

<sup>39</sup> Baldwin (2014), p.44. Baldwin's book, a historical narrative of the two systems of copyright, is a valuable addition to the literature on copyright.

<sup>40</sup> Baldwin (2014), pp.237.

protection to the rights of paternity and integrity. This view was supported by none else than Árpád Bogsch, Director General WIPO, who explained to the Congress that the United States did not need to make any changes to U.S. law to meet the obligations of Article 6bis as the requirements under this Article can be fulfilled not only by statutory provisions in a copyright statute but also by common law and other statutes.<sup>41</sup> In enacting the Berne Convention Implementation Act (1989) the U.S. took a minimalist approach, that is to say only the few essential changes necessary to comply with Convention obligations were made to American law, a good example being moral rights.<sup>42</sup> In 1991, two years after accession to the Berne Convention, the *Visual Artists Rights Act* (VARA) was enacted in 1990; VARA provided a framework to provide artists the moral rights of attribution and integrity. VARA is of limited scope and does not protect even all types of visual art, examples of excluded visual art being works made for hire, commercial art.

Before moving on, it should be mentioned that the TRIPs agreement was conceived as a supranational code while the Internet treaties were not; neither the TRIPs agreement nor the Internet treaties aimed at harmonisation, the TRIPs agreement because it aimed to be a supranational code and the Internet Treaties because the question of harmonisation did not arise because in 1996 there was no national law covering digitalised content (except computer software). While the TRIPs agreement did not permit freedom of legal characterization in respect of its substantive provisions the Internet Treaties did, examples being digital transmission and the proscription of the circumvention of effective technological measures used by authors to protect their works from copyright infringement.

### **2.2.2 Uniform Norms of Protection or Variable Norms?**

Akin to the ideational contest between a supranational code and a flexible international legal framework which aims at gradual harmonisation was another ideational contest between a uniform international norm of protection and a variable international norm which takes into account the special needs of importing countries which are often relatively less developed than the exporting countries. During the 1960s, the newly decolonised Member States of BIRPI (predecessor of WIPO) challenged the idea of universal IP norms without regard to the levels of development; the challenge reached its

---

<sup>41</sup> Cited in U.S. Copyright Office (2019), p.23.

<sup>42</sup> For an outline of the important changes made to the American copyright law preparatory to accession to Berne Convention, see Leaffer (1990), pp.384-8.

climax during the Stockholm Conference(1967); similarly the demand for a WIPO Development Agenda in 2004 was also driven by the idea that universal IPR norms cannot be fixed without regard to the levels of development, and enough room should be left for developing countries to pursue their public policy objectives in different areas like culture, education, health and technology transfer. These demands are not new in history of the Berne Convention. A good example is the translation right, hailed as '*la question internationale par excellence*';<sup>43</sup> it was so bitterly contested in the runup to the adoption of the Berne Convention as to cause concern that that issue might undermine the adoption of the Berne Convention.<sup>44</sup> Those days, most of the original textbooks were published in France and United Kingdom while the Scandinavian countries and Japan were 'user nations' which 'consumed' French and British works in translations. Scandinavian countries and Japan were particular that the term of protection of the translation right should be shorter than that of original works and fixed at ten years while France, Haiti and Switzerland demanded parity in the terms of protection; they were eventually successful in having their proposal approved by the Diplomatic Conference. France re-opened the issue in the 1896 Paris Revision wherein the term of protection was enhanced to the full term of copyright but expiring if not used during the first ten years. In the 1908 Berlin Revision, France obtained what it sought in 1886, a full term for translation right with no conditions such as early expiry or usage; that is to say, a term of fifty years after the death of the author. During the 1908 revision, Horiguchi Kumaichi, a Japanese delegate, argued that as a country that was mainly a user of foreign IP it should be granted access to foreign knowledge through an exception from the right of translation. Kumaichi highlighted the fact that while there was a great deal of interest in the translation of European works into Japanese there was no interest at all in translation of Japanese works into European languages. The demand of Kumaichi is of historic significance as it presaged the conflict during the Stockholm Conference between developing and developed countries over the question of special treatment for developing countries which would allow them to reprint foreign works or their translations for the purpose of teaching, scholarship and research on more liberal terms than what would be allowed by the copyright regime. The term of protection fixed by the Berlin Revision caused considerable resentment in colonies like India. The British Copyright Act of 1911 incorporated the term of protection of the translation

---

<sup>43</sup> Ricketson and Ginsburg (2006), p. 88.

<sup>44</sup> Wirtèn (2011), pp.17-27.

right approved by the Berlin Revision Conference, and was extended to India in spite of opposition from Indian publishing houses and the view of the Government of India that the term of translation right should be curtailed in India in order to promote school education with Indian languages as media of instruction; lobbying by publishers like Macmillan on the British Government did influence the British Government to extend the British Copyright Act.<sup>45</sup> No wonder that Independent India was in the forefront of the demand for special consideration for developing countries in the international copyright regime. The conflict between user countries which consumed works and those which exported works was a hardy perennial and cropped again during the Brussels Revision Conference (1948) when the Canadian delegate drew a distinction between countries who were net copyright importers like Canada that ‘*consumes* literary and artistic works’ (italics in original) and ‘net copyright exporters’. Canada did not ratify the Brussels revision text at all.<sup>46</sup>

The Stockholm Conference (1967) witnessed a bitter confrontation between developed and developing countries over the issue raised by Kumaichi at the Berlin Revision Conference. Many of the original textbook producing nations were former colonial powers, and that being so developing countries asserted that they had a special responsibility to help their erstwhile colonies to secure access to Western knowledge.<sup>47</sup> The Berne Convention was damned by many developing countries for being ‘run by an Old World club of former colonial powers to suit their economic interest’,<sup>48</sup> and copyright for being a ‘colonial doctrine in a post-colonial age’.<sup>49</sup> Led by India, these countries demanded that the system of protection under the Berne Convention should cater to their economic, social and cultural needs, and that if their demand was not conceded they would have to make drastic changes in their international copyright arrangements. The special provisions for developed countries were incorporated in a Protocol to the Berne Convention which provided, among other things, a reduced period of copyright protection; limited term for translation right; grant of compulsory licences for translation right (subject to certain conditions); reproductions in the original language to be permitted without authorization for ‘educational or cultural purposes’ (subject to certain conditions); broadcasts of works to be permitted without authorisation (subject to certain conditions). The Protocol was vigorously

---

<sup>45</sup> Bentley (2007), p.1240.

<sup>46</sup> Bannerman (2010), p.28.

<sup>47</sup> Altbach(1995), p.3.

<sup>48</sup> Drahos (2002), p.767.

<sup>49</sup> Roy (2008), pp.112-134.

contested by developed countries; however, eventually they gave in as they came round the view that approving the Protocol was better of the two possible outcomes both of which were bad, the first being erosion of the rights already provided in the Convention and the second being a sharp drop in the membership of the Berne Union as developed countries might withdraw if the Protocol were not approved.<sup>50</sup> In fact, the Indian Cabinet approved the proposal of the Department of Education<sup>51</sup> that the Indian delegation to the Stockholm Conference should threaten to withdraw from the Conference if the Protocol was whittled down. It is pertinent to point out that quite a few Latin American countries such as Argentina, Mexico and Uruguay, even though classified as developing countries, were against any weakening of the protection of copyright lest intellectual and artistic progress should be hampered and were not in favour of the Protocol. Further, the happenings in the Stockholm Conference were a prelude to similar assertion in other UN bodies like UNESCO and UN General Assembly and to the adoption of the UN resolution on New International Economic Order (1974).

The adoption of the Protocol to the Stockholm Act catered to the needs of developing countries; however, its adoption plunged the Berne Union in a crisis, so serious that the Stockholm Revision Act was the only Revision Act which did not fully enter into force. In the Stockholm Conference, the developed countries grudgingly acquiesced in the Protocol; however, it became obvious soon after the conclusion of the Conference that there was such bitter opposition to the Protocol from book publishers back home that it would be inexpedient for them to ratify the Protocol. On their part, developing countries were not interested in subscribing to a Revision Act which was not ratified by developed countries. Only the administrative provisions of the Stockholm Revision (Article 22-38) secured enough ratifications for them to enter into force.<sup>52</sup> As these provisions include the setting up of WIPO, WIPO was established. The Berne Convention was salvaged by the Paris Revision Conference (1971) where an Appendix with a few compromises was adopted in place of the Protocol, and Paris Revision Act entered into force.

---

<sup>50</sup> Olian Jr., (1974), p.103.

<sup>51</sup> The nodal Department for copyright in the Government of India.

<sup>52</sup> Lipszyc (1999), p.670.

## 2.3 Right of Reproduction and Debut of the Three-Step Test

The Paris Revision Act incorporated all the substantial provisions of the Stockholm Revision, the most important of which is the right of reproduction. Among the bundle of rights which together constitute copyright the most important is the right of reproduction, the right of the author to authorise the copying of his work. Even though it is the essence of copyright and it had always existed since the adoption of the Convention in 1886 it was only eighty years later at the Stockholm Conference (1967) that the right of reproduction was formally acknowledged *jure conventionis* and expressly incorporated in the Berne Convention. In successive revisions of the Berne Convention, attempts to introduce new rights encountered objections from many parties to the Convention which were reluctant to abandon exemptions which their national legislations already imposed on the right under consideration; the right of reproduction is no exception.<sup>53</sup> The countries of the Union varied widely in the exceptions they provided to the right of reproduction; however, taken together the number of exemptions, in order to promote cultural and public policy objectives, was pretty large. Thus, the exceptions included (i) public speeches; (ii) quotations; (iii) school textbooks and chrestomathies; (iv) newspaper articles; (v) reporting current events; (vi) ephemeral recordings; (vii) private use; (viii) reproduction by photocopying in libraries; (ix) reproduction in special characters for the use by blind; and (x) texts of songs and so on. The challenge in crafting a right of reproduction lay in devising 'a provision which accomplished two opposite tasks. On the one hand it has to safeguard the envisioned right of reproduction against the corrosive effect of potentially wide-ranging national exemptions. On the other hand, it should not encroach upon the margin of freedom countries which regarded as indispensable to satisfy important social or cultural needs.<sup>54</sup> The challenge proved to be so onerous that divergent views were expressed at all stages of the preparatory work and in the Stockholm Conference. The contest in the Stockholm Conference was between countries which wanted to narrow down the scope of exemptions and countries like India which proposed further broadening the scope of exemptions. The Chairman of the Indian delegation argued that the protection of authors' rights could not be considered apart from the rights of users, and

---

<sup>53</sup> For a drafting history of Article 9 of the Berne Convention see Senftleben (2004), pp.43-52.

<sup>54</sup> Senftleben (2004), p.48.

that the author's right of reproduction should be limited in public interest; the author is entitled to remuneration but has no right to withhold publication.<sup>55</sup>

The first paragraph of Article 9 recognised *juris conventionis* the right of reproduction and the second paragraph permitted the countries of the Union to provide for exemptions to the right of reproduction subject to the Three-Step test, the three step being: (i) limitations and exceptions being limited to certain special cases, (ii) the reproduction permitted should not conflict with a normal exploitation of the work, and (iii) the reproduction permitted should not unreasonably prejudice the legitimate interests of the author. In addition to Article 9(2), the Berne Convention provides some specific-purpose exceptions to the right of reproduction in Article 2bis (political uses, speeches delivered in judicial proceedings, lectures and addresses), Article 10 (quotations and teaching uses), Article 10bis (use for the benefit of the press) of the Berne Convention.

The controversial reproduction right proved to be more controversial in the digital medium. In keeping with its history, no other issue took so much of the DipCon's time and aroused so much passion as the right to reproduction; that Agreed Statement relating to that right has the distinction of being the only statement on which the participants in the Main Committee-I twice by roll call, and even after being approved in the Main Committee-I was put to voting in the Plenary. The sharp differences of opinion about the right of reproduction stretched the conclusion of the DipCon till the very last moment with the result that the DipCon came to an end just before the clock struck midnight, and December 20<sup>th</sup> gave way to December 21, 1996.

The Three-Step test had proved to be no less controversial; step by step, from the TRIPs agreement (1994) to BATP (2013) the scope of the Test expanded continually so much so that the Test had come to be a 'limit on limitations'<sup>56</sup> on all rights, whether copyright or related rights, and whether in the analogue or digital medium. Rightsholders strongly believe that the Test strikes a fair balance between the rights so essential to foster sustained creation of works on the one hand and public interest on the other. In contrast, for those who wish to usher in a new copyright paradigm, the Test, particularly its traditional interpretation, is a 'triple gauntlet',<sup>57</sup> and few limitations and exceptions can survive running through such a gauntlet. They also believe

---

<sup>55</sup> WIPO (1971), Volume II, paragraphs 136.9-10, pp. 806-7; paragraph 1063.1 at p.884.

<sup>56</sup> Hugenholtz and Okediji (2008), p.18.

<sup>57</sup> Vaver (2007), pp.735-6.

that it is a relic of the pre-digital era and anachronistically maintains the status quo of the analogue world because it ignores the potential of the digital environment for spreading the world's knowledge and wealth of artistic expression.<sup>58</sup> Alternative interpretations of the Three-Step test were put forth in academic literature so that it does not remain an insurmountable obstacle to realization of the potential of the digital environment;<sup>59</sup> however as yet, such academic formulations had no influence on real world policymaking.

## **2.4 Two Systems of Copyright**

Much has been written about the two systems of copyright, the authors' right system prevalent in Continental Europe, Francophone African and Latin America, and the utilitarian 'Copyright' system in United Kingdom and its erstwhile colonies. That being so, only a few observations of relevance to contemporaneous making of international copyright instruments would be made here.

First, judged by the sheer number of countries adhering to it, the authors' right system is the predominant system, a fact not without significance in international copyright forums based on the principle of one country, one vote. Secondly, the authors' right system is not monolithic, and that being so there are considerable variations among the national laws of countries with that system. This fact is brought out by the fact that the making of the EUCD(2001), the implementation legislation of E.C., stretched over about five years after the DipCon because it undertook the herculean task of harmonising limitations and exceptions among the Member States, and at the end of it all, in 2015 the EU was still characterised by 28 'different copyright systems'.<sup>60</sup> So deep are the doctrinal differences among the E.C. Member States over the specifics of moral rights that the EU has not yet taken up the harmonisation of moral rights. Just give an example, France and Germany approached moral rights differently. The French following the dualistic conception of authors' rights put forth by George Wilhelm Friedrich Hegel and developed by Josef Kohler, and the Germans the monistic conception put forth by Immanuel Kant.<sup>61</sup> According to the dualist notion economic and moral rights are distinct, serve different purposes. In keeping with the dualistic underpinnings of moral rights, the French 'bisected authorial rights.

---

<sup>58</sup> Senftleben (2004), p.295.

<sup>59</sup> Three Step Declaration (2008); Senftleben (2010); Hilty (2010); Bentley and Aplin (2018)

<sup>60</sup> Renda et al. (2015), p.iii.

<sup>61</sup> For a succinct account of monistic and dualistic theories see Lipszyc (1999), pp.155-8.

Exploitation rights (economic rights) dealt with the creator's economic stake and were fully alienable. Moral rights were treated as an aspect of personality rights and remained inalienably with him'. In contrast to the dualistic notion the French copyright law had adopted, the monistic theory holds that a clear distinction cannot be drawn between the two categories of rights which are to a large extent complementary. In contrast to the French legal provisions relating to moral rights, the German personality rights were 'packed together with the exploitation rights into one unified, monist conception of authors' rights';<sup>62</sup> German copyright law carried the concept of monism to its logical conclusion, and held that no right, neither economic nor moral rights, can be alienated. German authors can only grant authorisation for use of their works but cannot assign their economic rights. Moral rights expire at the same time as economic rights.

Thirdly, over the hundred and thirty-five odd years that the Berne Convention had been around there had been a significant convergence between the two systems because of two reasons: (i) the Berne Convention had come to be universal after the TRIPs agreement, and (ii) the process of making and revising the Berne Convention was dominated by countries with the authors' right system. Many features of the authors' right system such as lack of formalities, long terms of extension and moral rights had found their way into the copyright laws of countries with the 'Copyright' system. Yet, despite the considerable convergence of the two systems, there are still many differences, the most conspicuous being limitations and exceptions. The remaining doctrinal differences do complicate international copyright negotiations, particularly when doctrinal differences get enmeshed with conflicting economic interests had complicated the TRIPs negotiations; the best example of such enmeshing is provided by audio-visual works and services<sup>63</sup> (See Section 4.3)

Fourthly, from about 1994 the majority of American copyright scholars began to feel that copyright law had strayed away from the American tradition of copyright to the detriment of public interest and had emerged as a barrier to the harnessing of the full potential of the online environment for promoting

---

<sup>62</sup> For an elaboration as to how the distinction between monistic and dualistic approach evolved through litigation, see Baldwin (2014), pp.145-6.

<sup>63</sup> Audiovisual services comprise the production and distribution of audiovisual works; the distribution can be by way of physical copies or of digitalised content. It is now much easier to transmit large amounts of content across borders and to distribute content via a variety of platforms and devices, giving consumers greater control over what they want to watch or listen to, and how.

creativity and creators. In their view, there had been a continual ‘ratcheting’ of the levels of copyright protection, shrinkage of the public domain, inexorable prolonging of the duration of copyright protection far beyond what is necessary for copyright to act as incentive to creation of works. Fair use, as is known, may not survive because the Digital Millennium Copyright Act (DMCA), the American implementation legislation of the Internet Treaties, ‘reverses the traditional presumption of fairness that attaches to non-commercial uses, and because it bans the technologies that are likely to be necessary to make fair use of technologically-protected works’.<sup>64</sup> In principle, unlike the authors’ right system, the utilitarian ‘Copyright’ system, adopted by the U.S., does not place the person of the author and the act of creation at the centre. It is not primarily concerned with rewarding authors, and copyright protection can only be justified only if it can be deemed beneficial for society as a whole,<sup>65</sup> the benefit being enrichment of the stock of literary and artistic works and their dissemination to the public. The copyright clause of the Constitution and the first copyright law of 1789 (which was modelled on the British Statute of Anne (1710) laid the foundations for seeking balance between private (owner) and public (user) interests, and that balance was abandoned by expansion and strengthening of rights without regard for access to works by the public. Therefore, the users’ interests need to be recognised as rights and given due recognition while expanding and strengthening rights. To that end, features of the authors’ right system introduced in the copyright law because of the accession to the Berne Convention, such as long term of protection and elimination of formalities, should be rolled back. All in all, copyright scepticism had come to be widely prevalent among American copyright scholars.

Fifthly, the shift in the perspective about copyright ‘initiated by an epistemic community of U.S. law academics (such as Pamela Samuelson and Lawrence Lessig) and transnational advocacy groups such as the Electronic Frontier Foundation (EFF)’,<sup>66</sup> diffused to the heartland of authors’ right, a good example being the advocacy of the introduction of a flexible open-ended exception modelled after the fair use of the American copyright law.<sup>67</sup> Countries with the ‘Copyright’ system have a long tradition of providing limitations on and exceptions to the exclusive rights of authors under the

---

<sup>64</sup> Cohen (1999), pp.238-9.

<sup>65</sup> Senftleben (2004), p.48.

<sup>66</sup> Breindl and Briatte (2013), p.35.

<sup>67</sup> See for example, Dreier (2010), pp.51-2; Hugenholtz and Senftleben (2011); Dnes (2013); Senftleben (2014); Hugenholtz (2016); Geiger et al (2018); Geiger (2020).

rubric of fair dealing or fair use in order to advance in public interest in areas such as education, a free press and public libraries which enhance access to works. In the U.S., over time, copyright law acquired a distinct American flavour, and the British 'fair dealing' came to be called 'fair use'. A distinctive feature of the American copyright system,<sup>68</sup> which is still the closest to the normative 'Copyright' system, is that it provides for an open-ended fair use system that leaves the task of identifying individual cases of exempted use to the courts based on the criteria laid down in the Copyright Act. S.107 of the 1976 Act laid down four criteria to be applied by the courts in determining whether a use under adjudication was fair use or not. These criteria are (i) the purpose and character of the use, including whether the use is of a commercial nature or is for non-profit educational purposes; (ii) the nature of the work protected by copyright; (iii) the size and substantiality of the portion used in relation to the work as a whole; and (iv) the effect of the use upon the potential market for, or value of, the work. A case-by-case approach, with the inclusion of criteria to assist in the determination of the question of fairness has inbuilt flexibility, and 'enables new kinds of uses to be considered as they arise, without having to anticipate them legislatively'.<sup>69</sup> The difference between fair dealing and fair use is not just semantics. Fair dealing is not open-ended the way fair use is, for only those specified in the statute constitute fair dealing; no other use is. United Kingdom's fair dealing provision identifies research, private study, criticism, review and reporting current events as the enumerated purposes. Further, there should be enough acknowledgement of the author while using a work under fair dealing. And further, the U.K. Copyright Act does not lay down the criteria for determining fair use; the courts are expected to go by the criteria of common law in determining whether a use constitutes fair dealing.<sup>70</sup> All in all, The British concept of fair dealing percolated to its former colonies such as India<sup>71</sup> and Canada. In countries whose copyright laws follow the authors' right system, the term 'fair use' is often regarded as an oxymoron or even a taboo in classic author's rights doctrine'.<sup>72</sup> A standard legal textbook in France, the cradle of the conception of copyright as authors' right, set out

---

<sup>68</sup> As the United Kingdom was a founding member of the Berne Convention its copyright law assimilated several features of the author's right system. The trend of its copyright law straying away from the normative 'Copyright' system was accentuated after it joined the E.C., and E.C. began to issue directives which are required to be transposed into the national laws of Member States.

<sup>69</sup> WIPO (2003), p.68.

<sup>70</sup> Sklar-Heyn (2011), p.247. For a comparison of American fair use and British fair dealing, see Dnes (2011).

<sup>71</sup> Sambhar (2020).

<sup>72</sup> Hugenholtz, and Senftleben (2011), p.4.

that ‘the author owes society nothing. Quite the contrary, society owes him’.<sup>73</sup> Copyright is considered a personal right in such countries and is not an appropriate incentive for the creation of works and for their dissemination to the public, thereby furthering public good. Balancing interests is foreign to the authors’ right conception; this foreignness came out vividly in the discussions on an additional recital to the Preamble of the WCT proposed by India (See Sect 14.5). The copyright law in countries with an authors’ right system traditionally provides a definitive, closed catalogue/list of carefully defined exceptions.<sup>74</sup>

## **2.4 Authors are More Equal than Performers: The Rome Convention**

Before the invention of sound recording and cinematography performances were ephemeral and their outreach limited to the immediate audience, a fact captured by the remark of Adam Smith that ‘the work of all of them (performers) perishes in the instant of its production’. After the play or the concert was over, nothing was left except the impression created in the memory of the audience who had to be present at the place where the performance took place in order to appreciate it. Obviously, performers, being persons participating in an ephemeral event, could not lay claim to any property or personal right. And further, traditionally, a social stigma was associated with performers, a stigma that comes out in Adam Smith giving ‘players, buffoons, musicians, opera-singers, opera-dancers as classical examples of “unproductive labour”’.<sup>75</sup> The invention of the loudspeaker, sound recording, cinematography and broadcasting in the last quarter of the nineteenth century and their rapid dissemination in early twentieth century had a revolutionary impact not only on the experiencing of performances but also on the making and critical appreciation of performances. A far-reaching consequence of the popularisation of gramophone records was that, for the first time in history, performances could be separated from the person of the performer and could be preserved, reproduced and disseminated independently of the performer. Consequently, savouring music no longer required a visit to a public place like a concert hall, dance hall, bar, or restaurant; it could be done

---

<sup>73</sup> The standard French legal textbook quoted by Baldwin is Pollaud- Dulian (2005), pp.47–48. Cited in Baldwin (2014), pp.16-7.

<sup>74</sup> For a crisp account of the provision of limitations and exceptions in the two copyright systems see Senftleben (2010), p.68. Also see Cohen (1999).

<sup>75</sup> Smith (2005), 271.

in the privacy of home at one's leisure. The invention of broadcasting (1895) further enhanced the outreach of performances.

Once, performances ceased to be ephemeral and 'recorded music' was as 'permanent' as books, music scores and other creations of authors there was logically no reason why performers should be denied some form of protection. Writers and artists were in the forefront of the demand for an international copyright convention; likewise, performers were in the forefront of the demand for rights so as to exercise control over the many uses to which their performances could be put to use. Performers and producers of phonograms (sound recordings) also began to demand protection from unauthorised reproduction and dissemination of sound fixations by 'parasitic companies operating on the verges of legality'.<sup>76</sup> Recorded music became an essential component of broadcasting, and in the absence of any rights which regulate use of phonograms by broadcasting organisations such organisations could legitimately use without any limit recorded music without remunerating the producer of phonograms. Broadcasting companies, in turn, sought protection from unauthorised recording of their broadcasts and re-broadcasting. Countries with a 'Copyright' system like the United Kingdom, the U.S. and India had no difficulty in protecting producers of phonograms under the copyright law, even though they were corporate entities. In countries with the authors' right system began to protect producers of phonograms under a separate right which is close to or related to or connected to or neighbouring *droit d'auteur*. In Italy, which was one of the first to legislate the new right in 1941, the new right was called *Diretti Connessi* (Connected Rights), in Germany it was called *Verwandte Schutzrechte* (related rights), in France *Droits Voisins* (neighbouring rights).<sup>77</sup> The term 'neighbouring rights' came to be used in international parlance as well as in WIPO publications till the conclusion of the TRIPs agreement. The TRIPs negotiators chose to use the term, 'related rights' instead of the term 'neighbouring rights' as it was purportedly more neutral. After the TRIPs agreement the term 'related rights' displaced the term 'neighbouring rights', and WIPO publications themselves began to use the term 'related rights'. These rights were justified on the ground that the owners of these rights were auxiliaries in the intellectual creation process since they lend their assistance to authors in the communication of the latter's' works to the public.

---

<sup>76</sup> WIPO (1981), p.11.

<sup>77</sup> Khan (1996), p.6.

Protection of performers and phonograms at an international level began to be discussed in early twentieth century; the protection of broadcasting organisations began to be articulated in the 1930s. Attempts were made till 1948 to confer rights on performers and producers of phonograms were made within the framework of international copyright law; these attempts ultimately floundered on the rocks of conflicting doctrines and interests, and the Brussels Revision Conference (1948) rejected definitively the idea of covering performers and phonograms under the Berne Convention. Based on the need for literary or artistic creation, there was no logical reason, why [performers] should not be protected under the Berne Convention',<sup>78</sup> and if the Brussels Revision Conference rejected the demand for protection of performers it was because of the stiff opposition from authors and their organisations who believed without any basis that the size of the 'copyright cake' was considered to be fixed; conferring rights on performers and producers of phonograms would result in a smaller slice being available for authors.

Once the Brussels Revision Conference turned down definitively protection of phonograms, producers of phonograms and broadcasting organisations under the Berne Convention efforts began to lobby for an international convention based on the idea of neighbouring rights. However, it took thirteen years for the Rome Convention to be adopted because of the stiff opposition of authors' organisations and the sharp conflict of interest among the beneficiaries of the Rome Convention. Thus, phonogram producers were apprehensive that expanded scope and level of performers' rights or broadcasters' rights would jeopardise their interests; with an exclusive right to authorise or prohibit fixation of their performances performers might hold them in hostage and demand exorbitant remuneration; they might 'refuse even recording altogether'. Broadcasters had similar fears about of an exclusive right of authorising the broadcast of a live performance being conferred on the performers, and an exclusive right of authorising the broadcasting phonograms on the producers of phonograms; they feared that the exercise of an exclusive right by performers and producers of phonograms would be a pretext for creating difficulties over both original broadcasts and rebroadcasts, and might, in the end, have a harmful effect on the contractual relations which exist between the parties. They preferred the terms and conditions of using a performance or sound recording to be left to contractual arrangements, and worst come to worst the performers and producers of phonograms being vested with a right to remuneration rather than an exclusive right of authorising or

---

<sup>78</sup> Ricketson and Ginsburg (2006), Volume II, pp.1206-7.

prohibiting the use. All in all, while the grant of an exclusive right to producers of phonograms encountered the opposition of authors and broadcasting organisations, the quest of exclusive rights by performers faced a formidable opposition of authors, producers of phonograms and broadcasting organisations. The adoption of a new instrument to protect performers and producers of phonograms had to encounter the opposition of countries with a 'Copyright' system which wanted to protect performers against unfair appropriation through criminal law; further, accepting performer's right would implicitly be an acknowledgement that phonograms should be covered not under copyright but under neighbouring rights. In fact, at the Diplomatic Conference which resulted in the Rome Convention United Kingdom played a lead role in opposing the conferment of exclusive rights on performers with the result that performers were not given exclusive rights but the possibility of preventing acts which ought to have been covered under rights. At the behest of the U.S. visual and audio-visual performances were excluded even from the circumlocutory protection that the Rome Convention offered. No less importantly, they were such variations among countries in the matter of protecting the interests of performers, producers of phonograms and broadcasting organisations that formulating a Convention which does not provide for reservations proved to be a Mission Impossible. Eventually, so many reservations had to be provided that the Rome Convention was dubbed a Convention of Reservations and Compromises rather than of Rights. All in all, the Rome Convention made a number of compromises, fixed quite a low level of minimum protection and gave the Contracting States very wide latitude because of a number of reasons: (i) the acute conflict of interest among interested parties, (ii) the idea of neighbouring rights was relatively novel and only a few countries provided performers' rights, (iii) it was imperative to get the diverse group of delegations on board and ensure that the Diplomatic Conference successfully ends with a Convention being adopted, and (iv) it was desirable to secure as fast as possible a large number of ratifications by countries. Whatever, one cannot fault the TRIPs negotiators for opining that 'there was no general agreement at the global level on the merits of protecting these categories (performers, phonograms and broadcasting organisations) through special rights',<sup>79</sup> and not making it obligatory for the Contracting Parties of the TRIPs agreement to comply with the provisions of the Rome Convention in contrast to the obligation to comply with Articles 1 through 21

---

<sup>79</sup> Wager (2015), p.329.

(excepting Article 6bis) of the Berne Convention (1971) and the Appendix thereto.

A classic example of the difficulty of formulating a provision without reservation is provided by Article 12 which provided for the payment of a single equitable remuneration for use of a phonogram published for commercial purposes, or a reproduction of such phonogram directly for broadcasting or for any communication to the public; in order to accommodate competing demands at the Diplomatic Conference the single equitable remuneration was to be paid to the producer of phonogram or performers or both. A Contracting Party might even refrain from implementing Article 12 by entering a reservation. History was to repeat thirty-five years later, and the DipCon could not come up with a provision in WPPT for a single equitable remuneration without providing for reservation, and as aptly put by Reinbothe and von Lewinski, 'the right to remuneration, is in economic terms, among the most important economic rights of performers and producers and phonograms' and yet 'on the international level, it was not yet possible to provide this right as a minimum right without the possibility of reservation'.<sup>80</sup>

At the Diplomatic Conference there was sharp division of the delegations over the linkage between Rome and copyright conventions. The 'copyright school'<sup>81</sup> comprising, among others, Austria, France, Italy, India, Japan, the United Kingdom and the U.S. contended that there is an organic linkage between literary works and musical compositions on the one hand and performances on the other because a performance is generally a play (literary or dramatico-literary work) or a concert where music compositions are rendered. Further, the subject matter of the Rome are rights which neighbour copyright. And further, they believed it would be inequitable to have the performers, producers of phonograms, and broadcasting organisations of a country enjoy international protection when the literary and artistic works they used might be denied protection in that country because it was not a party to at least one of the international copyright conventions. Hence the stipulation that a State cannot join the Rome Convention without being a party to the Berne Convention or UCC was logical. On the other hand, the 'open school', comprising Czechoslovakia and Poland, argued that there was no logical or

---

<sup>80</sup> Reinbothe and von Lewinski (2015), paragraph 8.5.14, p.393.

<sup>81</sup> The nomenclature 'copyright school' and 'open school' was used in the WIPO, *Guide to the Rome Convention and Phonograms Convention*, pp.72-4. See also and the *Records of the Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations*, pp.54-5.

equitable reason to establish a link between the Rome and Copyright Conventions, particularly since the Rome Convention would also protect the performances of literary or artistic works which had already fallen into the public domain as well as phonograms or broadcasts which did not use literary or artistic works at all. In voting, the 'copyright school' prevailed. Consequently, Article 23 stipulated that the Rome Convention would be open for signature till June 30, 1962, by any State invited to the Diplomatic Convention provided such a State is a party to the Berne Convention or UCC. Article 24 is a similar provision in respect of accession to or ratification of the Convention.

Despite the relatively generous provision of exclusive rights granted to them broadcasting organisations deeply resented the right of single equitable remuneration provided by Article 12. Even by the end of 1990, the number of countries which acceded to or ratified was no more than thirty-four and most of them were countries with an authors' system of copyright. As already mentioned most countries with a 'Copyright' system were reluctant to join a convention and thereby implicitly acknowledge neighbouring rights. Even countries which have an authors' right system and were comfortable with the idea of neighbouring rights were reluctant to ratify the Convention, largely because of the objections to the Convention put forward by authors and by the broadcasting organisations. Article 12, dealing with payment of single equitable remuneration to the performers, producer of phonograms or both for secondary uses of phonograms (use of phonograms for communication to the public and broadcasting) was the epicentre of their resentment.

Given the raw deal the Rome Convention gave to performers their organisations continued press for full rights; though unstated in its Preamble, the WPPT sought to redress the grievance of performers. However, it offered only partial relief as it excluded audio-visual performances from its purview. Sixty-one years were to pass after the Rome Convention, and the BATP adopted before *all* performers could secure international recognition of their rights.

The scope of national treatment under Rome Convention had been 'controversial'<sup>82</sup>; opinion is divided over the question whether or the scope of the national treatment it provides is narrower than that provided by the Berne Convention. The preponderant answer is in the affirmative. A Contracting State is not obliged to extend to performers, producers of phonograms and broadcasting organisations of other Contracting States any of the rights or levels of protection it offers over and above the rights provided by the Rome

---

<sup>82</sup> von Lewinski (2008), paragraph 17.44 at p.445.

Convention. This is in contrast to the national treatment obligations under Berne Convention where, but for four exceptions, **if** the laws of a party to Berne Convention provide a higher standard of protection than those laid by that Convention it is required to extend national treatment to the (foreign) author of another Contracting State, even when the ‘home’ of the foreign author provides lower standards of protection. Attempts were made in vain during the TRIPs negotiations to bring national treatment in respect of the rights of producers of phonograms on par with that of authors under the Berne Convention and again during the DipCon in respect of performers and producers of phonograms.

In spite of its limitations, the Rome Convention is a landmark in the evolution of international IP law; it had been characterised as a ‘pioneer convention’ for two reasons. First, unlike the Berne Convention, at the time of its adoption very few countries provided specific rights for performers, producers of phonograms and broadcasting organisations. The Rome Convention set the precedent for WCT and WPPT which went a step ahead of the Rome Convention in that at the time of their adoption no country had adapted its copyright and neighbouring right laws to the digital environment. Secondly, in contrast to the Berne Convention, the Rome Convention defined the rights and obligations which, subject to the reservations provided by the Convention, each Contracting State should incorporate into its domestic law and make available to its nationals. The precedent set by the Rome Convention was extended further by the TRIPs agreement which not only laid down binding global minimum norms of protection and enforcement to be incorporated in national laws but also put in place strong institutional measures for overseeing compliance with the norms it set and to penalise the defaulting countries. WCT and WPPT adopted by the DipCon also followed the precedent of the Rome Convention and laid down rights and obligations which the Contracting Parties need to incorporate in domestic law.<sup>83</sup>

## **2.5 Guided Development**

The process which led to the adoption of the Protocol and Appendix to the Berne Convention during the Stockholm and Paris Conventions shook up the copyright experts and governments of developed countries and instilled such pessimism among them that they gave up hopes for a future revision of

---

<sup>83</sup> See WIPO (1981) p.12 for the germ of the idea that the Rome Convention was a landmark in the evolution of international intellectual property law and that its approach to rights and obligations were different from the Paris and Berne Conventions of late nineteenth century.

the Berne Convention as dangerous and hopeless, because with a large and diverse membership it was no longer possible to secure the unanimity necessary for revision, and one could no longer be sure what an attempt to revise the Convention might lead to; instead of expansion of the scope and levels of protection the revision might actually lower the scope and levels of protection instead of enhancing them as revisions prior to the Stockholm Conference always did. Even at the Paris Revision Conference it was extremely difficult to reach a compromise; it was expected that a compromise would be more difficult to achieve in future revisions because the economic importance of copyright had increased after 1971 and that in turn would lead to the development of new interests and aggravate the conflict of interest between different groups of industrialised countries.<sup>84</sup> Consequently, for eighteen years after the Paris Revision Conference ( 1971) international copyright law was in deep freeze; it was only after developing countries gave up their resistance to consideration of IP during the Uruguay Round was norm setting resumed in the international arena . In the 1970s and 1980s, a steady stream of new technologies and devices of reproduction like reprography, sound and videorecorders made their appearance, and they blurred the distinction between private recording in the privacy of the home on the one hand and commercial reproduction on the other; an equally important development was the spread of computers of various types including home computers. Going by the custom of revising Berne Convention, the Berne Convention would have been revised around 1990, and if so, revised the new technological developments might have been assimilated into international copyright law. Some of these technological developments needed to be assimilated into the Rome Convention also. Article 29 of the Rome Convention did provide for revision; however, the Rome Convention was never revised and the deep thinking necessary to bridge the yawning divide between the two systems of copyright and resolve the conflicting of interest among the different rightsholders was never attempted.

What followed after Paris Revision of the Berne Convention was a phase of ‘guided development’ in which the WIPO’s International Bureau as well as UNESCO’s Intergovernmental Committee organised study of and discussion about the new challenges to copyright and neighbouring rights with the expectation that parties to Berne and Rome Conventions as well as the

---

<sup>84</sup> Reinbothe and von Lewinski (2015), paragraphs 1.01 to 1.03 at pp.3-4.

Universal Copyright Convention (UCC)<sup>85</sup> would incorporate the recommendations of the studies in national legislation and that through such incorporation international harmonisation would be promoted even without a revision of the Conventions.

In spite of the guided development being steered by the International Bureau the deep pessimism spawned by the Stockholm and Paris Conferences still lingered in the centennial year of the Berne Convention, so much so in their magisterial work ( Second edition of the treatise on the Berne Convention first authored by Ricketson in the centennial ) Ricketson and Ginsburg wrote that, 'In 1986, in its centenary year, Berne appeared to be a static institution; to be sure, it had an interesting and illuminating past, but its future prospects were less than exciting. It was a good time to write a history of this important convention, with a reasonable expectation that updating would not really be necessary, at least for a long time'.<sup>86</sup> Such is the contingent nature of history that in about a decade the Berne Convention became universal despite being not revised, and its rival UCC was reduced to an academic curiosity. How this came about is elaborated in the next chapter.

---

<sup>85</sup> UCC, a multilateral copyright instrument, came into being in 1952 under the aegis of UNESCO.

<sup>86</sup> Ricketson and Ginsburg (2006), p.viii.

## Chapter 3: TRIPs to DipCon

### 3.1 Why Forum Shifting?

In the 1970s, the newly decolonised developing countries began to vociferously criticise the international patent system, and harnessed studies by UNCTAD to argue that the Paris Convention should be revised so as to stop ‘the pendulum which through six earlier revisions had swung further and further in favour of the monopolistic rights of the patentholders’.<sup>87</sup> Revision of the Paris Convention was one of the three negotiations to be conducted in the wake of the UN Declaration on the establishment of New International Economic Order. The Diplomatic Conference for revision of the Paris Convention met in four sessions spread over the period 1980-4, and ultimately ‘floundered in the marshes of mutual misunderstanding and mistrust’.<sup>88</sup> The Rules of Procedure of WIPO required that any revision of the Conventions required unanimity among the Member States. At the Nairobi Conference for the revision of the Paris Convention (1981), with the support of the Communist countries, Third World countries sought to replace the unanimity rule by a two-thirds majority rule so that they could push through changes in the Paris Convention that would benefit them. So concerned was the U.S. with this move that it seriously considered the possibility of denouncing and withdrawing from the Paris Convention; no wonder that negotiations for the revision of the Paris Convention ended in failure.<sup>89</sup>

The failed negotiations over patents convinced the American government and industries dependent upon IPR protection that (i) the Paris, Berne and Rome Conventions ‘no longer provided the basis for a functioning multilateral rule of law in the IP area, especially in the field of industrial property’<sup>90</sup> and that (ii) like many other UN agencies, WIPO was ‘kind of taken over by developing countries’, and that ‘it spent enormous amounts of time talking about how everybody ought to have technology free’.<sup>91</sup> Yet another reason for disenchantment with WIPO arose from the fact that neither the Paris nor the Berne Convention had any worthwhile mechanism for action against parties to

---

<sup>87</sup> UNCTAD (1985), p.165.

<sup>88</sup> Ricketson and Ginsburg (2015), p.36.

<sup>89</sup> For an excellent account of the New International Economic Order and the negotiations over the Paris convention see Sell (1999), pp.107-40; Sell (2011), pp.17-20. Yu (2009), pp.505-11; Dreyfuss and Reichman (2020), pp.116-9.

<sup>90</sup> Otten (2015) p.73. Otten was Secretary of the Uruguay Round TRIPs Negotiating Group (1986-1993).

<sup>91</sup> Jim Enyart of Monsanto in Devereaux et al. (2006), p.55.

the Convention which fail to fulfil obligations cast by the Convention. Theoretically, parties to the Berne or Rome Convention can approach the International Court of Justice (ICJ) to resolve disputes on interpretation and application of the Convention. However, referral to the ICJ has several deficiencies. First, only States can initiate proceedings in the ICJ; individuals, natural or legal, have no *locus standi*. Hence an aggrieved individual (or a corporation) can have his grievance referred to the ICJ only if a State is willing to act on his behalf and sue the Member State which is infringing the Convention. A second deficiency is that the Berne Convention allows for reservations as to the jurisdiction of ICJ. The third deficiency is that the ICJ's interpretative authority is the scope of a 'rendered judgment', that is to say, ICJ's interpretation is binding only on the parties to the proceeding. The most debilitating disadvantage of referral to ICJ is the unenforceability of ICJ judgements and the weak sanctioning options of the UN. For all these reasons not a single dispute regarding the Berne or Rome Conventions has so far been referred to ICJ.<sup>92</sup>

Even as the disenchantment with WIPO as a forum for strengthening the protection and enforcement of IPRs grew IPRs became increasingly important for American economy and its balance of trade. Thus, in 1992, when the TRIPs negotiations were in progress, the American entertainment industry (which is heavily dependent on copyright protection) was the second largest export industry in the U.S. after the aerospace and aviation sector, generating foreign revenues of approximately \$18 billion annually and producing a trade surplus of \$4 billion in 1992.<sup>93</sup> The Motion Picture Association of America (MPAA) estimated that in 1989, a hefty sum of \$1.2 billion was lost all over the world due to copyright piracy. Industry concerns about poor IPR protection abroad received a ready and very receptive hearing in Washington officialdom against the backdrop of a pervasive feeling of the decline of the American economy, of mounting concerns about the ballooning trade deficits,<sup>94</sup> the U.S. turning into debtor nation for the first time after the Second World War, and widespread fear about the US losing its technological lead over and competitive advantage to countries like Japan. Exports of goods and services dependent upon IPR protection appeared to be a 'shining exception to the dark field of America's chronic balance of payments deficit'.<sup>95</sup> The success of trade agreements like the

---

<sup>92</sup> Ginsburg and Treppoz (2015), pp. 92-3.

<sup>93</sup> Kessler (1995); Stokes (1991).

<sup>94</sup> From \$31 billion in 1980 the trade deficit ballooned to \$122 billion in 1984 and \$170 billion in 1987. Preeg (1995), p.49.

<sup>95</sup> Nimmer (1992) at p.217.

North American Free Trade Association (NAFTA) in strengthening IPR protection and enforcement encouraged the U.S. to shift the forum from WIPO to GATT(General Agreement on Tariffs and Trade), give a big push to the convening of a new round of trade negotiations, include IPRs in the agenda of those negotiations on the ground that poor IPR protection and enforcement was an unfair trade practice, and deploy a strategy of linking trade concessions with IPR standards and enforcement in the forthcoming round of trade negotiations.

### **3.2 Competing Negotiating Strategies of the U.S. and Developing Countries**

The American strategy of using a GATT round to strengthen globally IPR regimes was an audacious strategy which flew in the face of the historical tradition for hitherto GATT considered only trademarks to be trade facilitating in contrast to other IPRs which were considered ‘acceptable barriers to trade’. From the American perspective, the inclusion of IPRs in a GATT round has a distinct advantage over an attempt to revise the Berne or Paris convention in WIPO. A trade round negotiation had myriads of issues, and it is possible to creatively harness the linkages that multiplicity of diverse subjects offers. It is axiomatic that the greater the number of issues that are to be agreed upon, the more complex is a negotiation. However, complexity may facilitate agreement if some of the issues have linkages, and if the linkages are creatively harnessed. To give an example, an American threat to Brazil that if Brazil did not protect American software U.S. would not protect Brazilian software is unlikely to be as effective as the threat to stop Brazilian export of coffee to the U.S. because Brazil is the world’s leading exporter of coffee and the U.S. had been and continues to be the leading importer of Brazilian coffee. To jump the story, the TRIPs agreement is unlikely to have been concluded if it were negotiated in WIPO instead of in a GATT trade round because in WIPO there was no possibility to link IPR issues with non-IPR issues and make non-IPR side payments to secure approval for desired IPR outcomes. Many developing countries valued trade concessions more than IPR issues and did not mind giving in on IPR issues in return for trade concessions, examples being less developed countries with a slender manufacturing base and heavily dependent on a single crop like cotton or cocoa, and relatively industrialised, middle-income, export-oriented countries the ASEAN group of countries, Republic of Korea, Taiwan, and a few Latin American countries. Even countries which ‘were less enthusiastic about TRIPs realized that they needed to swallow that

pill in order to get the rest of the package'.<sup>96</sup> Suffice to say, by including IPRs in the Uruguay Round trade negotiations and by short-circuiting WIPO, the specialised organisation for IPRs, the U.S creatively used forum shifting and linkages to secure favourable outcomes.<sup>97</sup> After stormy debates within the American government the strategy of forum-shifting was approved; with help from the American industries seeking strong IPR protection the American government could, with considerable difficulty, persuade other members of QUAD (Quadrilateral Group, an informal group of trade ministers of the Canada, Japan, European Commission and the U.S.), to accept that strategy.

What is fascinating about the Uruguay Round negotiations is the clash of two contrasting strategies of (i) the strategy of hard-core developing countries like India and Brazil pinning their hopes on Third World solidarity and (ii) the American strategy which sought to exploit the sharp divergence of interests underneath the apparent solidarity of Third World countries, and drive deep wedges in a seemingly monolithic bloc. The attempt of the U.S. and a few other developed countries to include IPRs in the Uruguay Round trade negotiations encountered ferocious resistance from India, Brazil and many other developing countries who contended that IPRs were not a trade issue.<sup>98</sup> Through a brilliant negotiating strategy and equally brilliant tactical moves, and by fully harnessing the possibilities that a multi-sector, multi-issue, multilateral negotiations offer to link IPR issues with trade, and wielding methods such as use by the U.S. of 'Super 301' to levy punitive tariffs on the recalcitrant countries the resistance of the developing countries was worn down, and a Mission Impossible successfully accomplished.<sup>99</sup> Associations of industries having a strong interest in IPR protection like the Intellectual Property Committee (IPC) played a pivotal role in the development of the American strategy<sup>100</sup> and building up support for that strategy around the world. IPC forged a transnational 'Trilateral Group' with UNICE (Union of Industrial and

---

<sup>96</sup> Anell (2015), p.366. Lars Anell was Chairman of the TRIPs Negotiating Group.

<sup>97</sup> Sell (2009); Helfer (2004), pp.1-83.

<sup>98</sup> India's stand that IPRs were not a trade issue had a long history. At the Stockholm Conference, Sher Singh, leader of the Indian delegation, told the Plenary that IPRs are 'less as a trade matter and more as a question of improving the educational and cultural needs of the less fortunate users and making their existence felt in the fast-changing world'. WIPO (1971), paragraph 136.12, p. 807.

<sup>99</sup> For a detailed account of the globalisation of intellectual property rights, see Sell (2003). Also see Gervais (1999), pp.10-28. For a briefer account which focusses on the role of private actors in TRIPs negotiations, and the politics enveloping pharmaceutical patents and Indian adoption of the TRIPs obligations in respect of pharmaceutical patents see Ayyar (2009), pp.234-63.

<sup>100</sup> Jacques Gorlin, a consultant engaged by John Opel, CEO of IBM developed the American strategy of embedding IPRs in a trade regime.

Employers' Confederations of Europe) and *Keidanren* (Japanese Business Federation) to pursue its IP agenda. The allies of IPC were very valuable in persuading the West European and Japanese governments to support the IP agenda, and further in exacerbating the fault lines within developing countries. The IPC successfully brought on board Árpád Bogsch, DG, WIPO; without that co-option, WIPO could have been a strong adversary and could have provided institutional and technical support to the countries opposed to embedding IPRs code in the trade regime being negotiated in the Uruguay Round. The delegation of IPC which reportedly met Bogsch over lunch in his private dining room complained that WIPO was not found to be constructive and held out the threat that 'you are either going to help us or we are going to go round you...you have got your choice, you either get on board or get left in the dust'.<sup>101</sup> Carrots went along with the stick. A significant role was assigned to WIPO during the TRIPs negotiations; it comprised WIPO providing its invaluable in-house expertise to GATT Secretariat, a novice in the field of IPRs, and creating a favourable environment for strengthening IPRs in developing countries. From the late 1980s, WIPO had been in the forefront of IPR advocacy campaigns in developing countries. The key messages of these campaigns were 'IPRs are good for you', 'IPRs are property of the mind', 'appropriation of someone else's property, of knowledge resources someone else has worked hard to create, without the authorisation of that person is piracy', and 'IPRs are not trade barriers; instead, they enhance trade, investment and technology transfer'. These advocacy campaigns were so successful that the belief among the policymakers that IPRs are good for the economy came to be the dominant view in several developing countries while the opposite view came to be the dissenting opinion. By co-opting WIPO, the equation changed from GATT vs. WIPO to GATT+WIPO v. those opposed to TRIPs. WIPO provided GATT with technical expertise during the TRIPs negotiations. Further, the Preamble to the TRIPs agreement did express a desire to establish a mutually supportive relationship between the WTO (the successor to GATT) and WIPO, and a technical cooperation agreement was signed between WTO and WIPO in December 1995, about twenty months after the conclusion of the TRIPs negotiations.<sup>102</sup>

Once the U.S. decided to play a lead role in having new IPR instrument embedded in trade regime it became expedient for it to accede to the Berne Convention which offered stronger protection than the UCC in whose adoption

---

<sup>101</sup> Devereaux et al. (2006), pp.55-6.

<sup>102</sup> WIPO (1995).

the U.S. played a lead role. Officials in charge of curbing copyright infringement abroad like the U.S. Trade Representative found that 'their efforts to bring copyright piracy havens into the international fold often foundered on the United States' own reluctance to participate in "the world's most important copyright convention" [Berne Convention].<sup>103</sup> And further, once it withdrew from UNESCO, the organisation which administered UCC, the U.S. could no longer influence UNESCO's copyright policies.

### **3.3 Dunkel Draft**

Multilateral negotiations are usually high drama marked by spectacular swing of fortunes. The sequence of events would be such that after a slow start, negotiations move to the brink of collapse and failure. When all hope is lost, a knight in shining armour miraculously rescues the negotiations. After a few such sequences the negotiations come to a happy ending and conclusion of an agreement.<sup>104</sup> It is rare for the head of the multilateral organisation under whose aegis the negotiations not to be a knight in shining armour on some occasion or other. Thus, to jump the story, when the DipCon was stalemated over procedural matters and could not start discussion of substantive matters Bogsch donned the role of the knight. Similarly, after the Uruguay Round lost its momentum after the Brussels Ministerial Meeting (1990), Dunkel donned his shining armour, exercised decisive leadership which culminated in the 'take it or leave it' *Dunkel Draft* of December 1991.<sup>105</sup> No doubt, three more years were to pass before the Round was to conclude; yet, but for Dunkel's initiative it would have taken longer for the negotiations to conclude. In July 1991, he directed the Chairmen of the negotiating groups to organise continuous and simultaneous negotiations in October and November so that Draft Final Acts are available in different areas of negotiation. In regard to issues on which a group could not reach an agreement, the Chairman was to arbitrate; 'armed with a deep knowledge of national positions acquired through months of negotiation and consultation, and relying on their judgement of what would constitute, for all participants, a balanced and acceptable outcome', the Chairmen 'made their own decisions on all the questions still unsettled'.<sup>106</sup> The consolidated text of the outcome of the different groups is popularly known as the Dunkel Draft Final Act.

---

<sup>103</sup> Nimmer (1992), p.216.

<sup>104</sup> Ayyar (2009), p.89.

<sup>105</sup> Not quite the 'take it or leave it' text promised by Dunkel. Preeg (1995), p.139.

<sup>106</sup> Croome (1998), p.256.

As far as TRIPs negotiations are concerned, the Chairman of the TRIPs Negotiating Committee had to arbitrate only in respect of eight issues for want of agreement among the delegates. Of these five issues those relating to copyright and related rights were: (i) moral rights, (ii) the need to specify specific exceptions to the protection of computer programs, (iii) the definition of 'public' for the purposes of public performance and communication to the public rights under the Berne Convention, (iv) the scope of national treatment in respect of related rights and, (v) a possible provision calling for respect of contractual arrangements on the allocation of rights.<sup>107</sup> The Chairman's Draft (i) excluded moral rights (Article 6bis) from the obligation to comply with Articles 1 through 21 as well as the Appendix of the Berne Convention, (ii) did not specify specific exemptions to the protection of computer programmes; however, it was explicitly clarified that copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts and that parties to the agreement should confine the limitations and exceptions to those which pass muster with the Three-Step test, (iii) did not include any definitions, (iv) like the Rome Convention, limited the national treatment in respect of related rights to rights conferred by the agreement, (v) did not include a provision calling for respect of contractual arrangements on the allocation of rights.

As A.V. Ganesan, the leader of the Indian delegation, put it so aptly every delegation found 'good and bad parts in his (Lars Anell's) package, like the curate's egg';<sup>108</sup> however, the package embodied such a delicate compromise that it appeared to all delegations that the package would unravel should any large-scale modification be attempted. MPAA was upset with the exception from national treatment of the proceeds from levies by European countries on recording equipment. The U.S. submitted three proposals to modify Lars Anell's package in respect of copyright and related rights: rental rights, respect for contractual arrangements in the area of copyright and related rights, and shorter transition periods regarding enforcement obligations. While many other delegations would also have preferred some changes to the TRIPs text in the Draft Final Act, the delegations as a whole took the view that they could live with it as part of a balanced outcome to the Round and that any reopening would be dangerous. Consequently, compared to the text in December 1991 the final text had only two minor changes regarding substantive provisions. In addition, the provisions regarding dispute settlement arrived at in the committee on dispute settlement were inserted.

---

<sup>107</sup> Otten (2015), pp.69-70.

<sup>108</sup> Ganesan (2015), p.223.

### 3.4 Copyright and Related Rights in TRIPs Negotiations

Those spearheading the TRIPs agreement sought to lay down binding global minimum norms not only in regard to scope and levels of protection but also enforcement of those norms, give teeth to the Agreement by providing for reviews of national IPR laws and creating a DSM to deal with failure to comply with or enforce its binding norms. Rather than starting *de novo* and lay down standards afresh in respect of each IPR covered by it, the TRIPs negotiating group acted on the suggestion of the Australian delegation and tried to build on existing instruments such as the Paris, Berne and Rome Conventions. Even though there were suggestions to replace the existing forms of protection by economically more efficient ones the temptation to redesign from the scratch unencumbered by previous rules and practices was resisted for practical reasons. Some of the world's largest industries such as pharmaceuticals, agri-food, agricultural chemicals, computer software and entertainment are dependent upon IPRs for commercial success. A root and branch reform of IPRs would have led to large scale disruption and heavy costs of shifting to the new IPR regimes. The development of enforcement provision applicable to all countries was original and path breaking work requiring considerable ingenuity; unlike many substantive provisions they could not be built on Berne and Paris Conventions as those Conventions did not lay down comprehensive multilateral norms on the enforcement of IP rights. Developing enforcement provisions which apply to all countries necessitated ironing out the differences among different legal systems- by no means an ordinary task. No wonder, many commentators considered 'the extension of the mandatory dispute settlement process of the new trade regime to intellectual property disputes a crowning achievement of the Uruguay Round', and many others 'extolled the unprecedented benefits of having a set of multilateral enforcement norms built into the international intellectual property system'.<sup>109</sup>

Even while building on the existing IPR conventions such as the Berne and Rome Conventions rather than start *de novo* the TRIPs negotiators refrained from incorporating as they were the outdated norms of Berne Convention (last revised in 1971) and of the never-revised Rome Convention, and tried to make use of the considerable spadework done during the guided development phase of WIPO to update the Berne and Rome Conventions, and incorporate to the *extent possible* the suggestions emanating from the studies

---

<sup>109</sup> Yu (2011a), p.481.

in WIPO. However, to jump the story, not all the findings of the studies could be incorporated into the TRIPs agreements mainly because the TRIPs agreement was effectively negotiated over a short period (June 1990-December 1991), and that period was far too short to bridge the conceptual divide between the two systems of copyright and reconcile the clash of economic interests of the main parties and groups. However, those who desired full updating of the Berne and Rome Conventions were disappointed. As years rolled by, the great expectations aroused by the TRIPs agreement among rightsholders of developed countries turned sour;<sup>110</sup> the enforcement provisions displayed the characteristics of a difficult compromise reached during the Uruguay Round negotiations.<sup>111</sup> Development of enforcement provisions applicable to all countries was a very challenging task, all the more because a conscious choice was taken to take up the negotiation of the controversial nature of enforcement provisions towards the very end of the negotiations.<sup>112</sup> The shortage of time for dotting the i's and crossing the t's along with the skilful and subtle negotiation tactics deployed by a few developing countries Brazil and India like resulted in a text which was not ironclad. A *cause célèbre* which highlighted the weakness of the enforcement provisions is the case brought up by the U.S. against China in 2007 for failing, among others, to provide for adequate criminal penalties in its national legislation for the infringement of copyright on a commercial scale.<sup>113</sup>

The Berne Convention stood on a footing different from that of the Rome Convention. The scope and standards of protection of the Berne Convention were fairly high, higher than those of the UCC. With the accession of the U.S. to the Berne Convention in 1989 and USSR announcing in the same year its intention to join it the Berne Convention was fairly set on the way to universal membership. In contrast, the Rome Convention was anything but universal.<sup>114</sup> Consequently, the substantive relationship between the TRIPs agreement and the Rome Convention is less close than that between the TRIPs agreement and the Berne Convention. Thus, while the TRIPs agreement cast an obligation on its Members to comply with Articles 1 through 21 (except Article 6bis dealing with moral rights) of the Berne Convention and its Appendix it did not cast a

---

<sup>110</sup> The shifting perceptions about the TRIPs agreement are brought out by Yu (2006); Yu (2011a); Yu (2015a); Yu (2020).

<sup>111</sup> Matthews (2002), p.66.

<sup>112</sup> Yu (2011a), p.496.

<sup>113</sup> Yu (2011b),727-34. For a very detailed commentary see Yu (2011c).

<sup>114</sup> Wager (2015), p.329.

similar obligation in respect of the Rome Convention. While the TRIPs agreement did not cast an obligation on its Contracting Parties to comply with the provisions of the Rome Convention Article 2(2) of TRIPs agreement safeguarded the existing obligations which Members had to each other under both the Berne and Rome Conventions. Further, Article 14(6) also established an important substantive link between the TRIPs agreement and the Rome Convention by making it explicit that the rights granted to performers, producers of phonograms and broadcasting organizations are subject to the conditions, limitations, exceptions and reservations extent permitted by the Rome Convention. And further, the scope of the national treatment under the TRIPs agreement is like that of the Rome Convention in that the national treatment is limited to the rights conferred by the TRIPs agreement. This is in contrast to the national treatment enjoined by the Berne Convention.

During the TRIPs negotiations, the U.S. was particular that corporate entities be treated as authors, phonograms declared to eligible for copyright protection , and that national treatment under the TRIPs negotiations went beyond the Rome Convention and was on par with that under the Berne Convention so that European countries, particularly France could not deny American producers of films and sound recordings as well as broadcasting organisations their due share of the cesses levied on recording devices and media to compensate them for private copying. The U.S. was also particular that the terms ‘public communication of a work’ and ‘transfer of rights’ be defined, and further that a general distribution and importation right be granted in respect of phonograms. However, the U.S. could not have its way as Latin American countries like Brazil wanted to preserve the regime of the Rome Convention and had ‘misgivings as to the intention, in particular of the United States, which was not bound by [Rome Convention, being not a party], to introduce into any TRIPs agreement changes to the effect of extending the rights of producers of phonograms and of broadcasting organizations’. The E.C. also defended the regime of the Rome Convention.<sup>115</sup> Given the strong resistance to major alterations in the Rome Convention the TRIPs agreement left intact the Rome Convention except for three provisions. First was a rental right for producers of phonograms and any other right holders in phonograms as determined in the national law of a country which is a party to the TRIPs agreement. However, in deference to the demand of countries like Japan and Switzerland the rental right was subject to a grandfathering clause whereby it could be substituted by a system of equitable remuneration subject to the

---

<sup>115</sup> Santos Tarragó (2015) ,p.249.

condition that the commercial rental of phonograms does not giving rise to the material impairment of the exclusive rights of reproduction of right holders.<sup>116</sup> The second Rome Plus provision was a longer term of protection for performers and producers of phonograms (50 years) than what the Rome Convention provided (20 years); similarly, the term of protection for broadcasting organisations was extended from the twenty years fixed by the Rome Convention to thirty years. The third is the ‘application in time’ of the extended term of protection. Article 20(2) of the Rome Convention provides that no Contracting State was bound to apply the provisions of the Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State. In contrast to Article 20.2 of the Rome Convention, Article 14 (6) the TRIPs agreement laid down that Article 18 of the Berne Convention would apply, *mutatis mutandis*, to the rights of performers and producers of phonograms. Consequent to Article 14 (6) a party to the TRIPs agreement was obligated to protect producers of phonograms and the performances fixed in phonograms existing at the moment of the entry into force of that agreement for a Member of WTO, exceptions being performances or phonograms which were earlier protected but such protection had lapsed because of the expiry of the term of protection. Further, even countries which are not parties to the Rome Convention were obligated under Article 14(1) of the TRIPs agreement to authorise the performers to prevent: (i) the fixation of their unfixed performance and the reproduction of such fixation without their authorisation, and (ii) the broadcasting by wireless means and the communication to the public of their live performance without their authorisation.

The TRIPs agreement adopted a very innovative method for skirting the unanimity principle which stood in the way to revise the Berne Convention since 1971. Known as the *technique of legal compliance*, that method consisted in virtually incorporating almost all the substantive provisions of the Berne Convention in the TRIPs agreement and then introducing three Berne Plus provisions in the TRIPs agreement; adoption of a provision in the TRIPs agreement required only a majority and not unanimity and was thus far easier than revising the Berne Convention. The three Berne Plus provisions were computer programmes, compilations of data, and rental rights for computer programmes and cinematographic works. To elaborate, the ‘compliance clause’

---

<sup>116</sup> A legal provision whereby an old rule continues to apply to some existing situations while a new rule will apply to all future cases. Those exempt from the new rule are said to have *grandfather rights* or *acquired rights*, or to have been *grandfathered in*.

of the TRIPs agreement (Article 9(1)), required all its Members to comply with almost all the substantive provisions of the Berne Convention (Articles 1 through 21 except Article 6 *bis* dealing with moral rights) and its Appendix even if they were not parties to the Berne Convention. The technique of legal compliance was used in WCT.

The question of stipulating Article 6bis (moral rights) as one of the Berne Convention provisions to be complied with was bitterly contested. So was the question where the distribution right was exhausted. While there was agreement that the right of distribution was exhausted with the first sale there was sharp disagreement on the question whether the distribution right was exhausted once the right owner exercised his right anywhere in the world (international exhaustion) or whether the right owner could exercise his right country by country (territorial exhaustion). Further, going by the preponderant opinion,<sup>117</sup> while the Berne Convention explicitly provides for the three-step test only in respect of the right of reproduction, Article 13 of TRIPs agreement extended the three-step test to all exclusive rights conferred under the Berne Convention.

### **3.5 What the TRIPs Agreement had Accomplished**

For the developed countries the results of the TRIPs agreement were bittersweet. They were sweet in that the initial resistance of many developing countries to negotiate IPRs in GATT was overcome, for the first time a supranational code was put in place covering all areas of IPRs. What was accomplished by the TRIPs agreement was exceptional in the history of copyright and related rights. Unlike the Berne Convention, the objective of the TRIPs agreement was not harmonisation of national laws but laying down of binding global minimum norms not only in regard to scope and levels of protection but also enforcement of those norms. Back in the 1980s, the notion that 'IPRs, historically grounded in territorial law, might, in our lifetimes become converted into universal norms binding on some 125 states seemed like a pipe dream'; yet the TRIPs agreement 'transformed this dream into a reality'.<sup>118</sup> At the same time, the results were bitter in that not much progress was made during the TRIPs negotiations to update the provisions of Berne and Rome Conventions. France and the U.S. had much to be individually bitter

---

<sup>117</sup> Sun (2007), p.275; Reinbothe (2015), p. 198. Sam Ricketson held a different view of the TRIPs agreement neither expanding nor restricting Article 1-20 of the Berne Convention. See Ricketson (2003), pp.20,47, 49.

<sup>118</sup> Reichman (1995), p.764.

about the TRIPs agreement. France felt that it had suffered a defeat in the battle over moral rights, and the U.S. in turn felt that it lost out over the question of private copying and extension of the national treatment in full to American films and sound recordings.

After the conclusion of the TRIPs agreement, it was widely believed that the entry into force of the TRIPs agreement on January 1, 1995 marked the end of the international era and the beginning of a new global era in the history of intellectual property. The international era began in the penultimate decade of the 19<sup>th</sup> century with the conclusion of the Paris and Berne Conventions; it was preceded by the national era.<sup>119</sup> Once in about twenty years the Conventions used to be revised. The object of revision was essentially twofold: (i) harmonization to bring the national laws closer, and (ii) gradually raise the scope and level of protection. The guiding principle of revision was to make haste slowly. In the international era, countries could be parties to Conventions without a significant erosion of national autonomy. A single country of the Union was enough to block revision of the Conventions; a country of the Union could choose not to accede to a Revision Act. The principle of freedom of legal characterisation allowed a country of the Union considerable discretion in crafting and implementing its copyright law. The enforcement of IPRs was left entirely to the countries of the Union, and there was no worthwhile mechanism to ensure that Member States complied with the provisions of the Convention to which they are a party.

In contrast to the Conventions of the international era, the TRIPs Agreement that launched the global era in which the objective of treaty making is not harmonisation but laying down of binding minimum norms. Thus, the TRIPs Agreement is a comprehensive agreement that covers all IPRs including copyright, patents, trademarks, geographical indicators, and protection of plant varieties. It embeds IPRs in the international trade system, so much so that no country can opt not to accede to TRIPs unless it chooses to opt out of world trade. It lays down substantial and procedural IPR law, which a Member State is required to incorporate in the national laws within a specified time frame, and to enforce those laws effectively and broadly in the manner stipulated in the TRIPs Agreement. National laws are subject to periodic review by WTO, and other Member States can participate in such a review. And further, a Member Country can file a complaint against another Member Country before the standing DSM on the ground that the national laws of the defendant are not consistent with

---

<sup>119</sup> Sell (2003), pp.10-3.

TRIPs provisions, or that the enforcement is inadequate, or both. Should the DSM uphold the complaint, the defendant is required to take corrective measures on the pain of trade sanctions being imposed for non-compliance. All in all, the TRIPs agreement is claimed to have launched a new global era; did it is the logical question which arises from that claim. The validity of the claim can be put to test by comparing the TRIPs agreement with the subsequent multilateral treaties relating to copyright and related rights such as the Internet Treaties, BAPT and the Marrakesh Treaty.

Many experts saw in the conclusion of the TRIPs agreement the dawn of a brave new world where old fashioned copyright no longer existed,<sup>120</sup> intellectual property (IP) rights became a branch of international trade law, and ‘this reconceptualization of IP law ... meant a country’s interests in the IP system would be defined, asserted, defended and litigated in the domain of trade law not only for WTO members, but for all others that sought to be integrated into the global economy’,<sup>121</sup> and WIPO was reduced to being a poor cousin of WTO. Like most prophecies, such prophecies about copyright and WIPO went awry.

As mentioned above, the TRIPs agreement could not fully update the international law on copyright and related rights, an update which was long, long overdue because of the failure to revise the Berne and Rome Conventions. Updating the Berne and Rome Conventions, an unfinished agenda of TRIPs negotiations, was vast by itself. Towards the end of the TRIPs negotiations rapid advances in digital technologies began to take place towards the fag end of the TRIPs negotiations and many copyright experts in developed countries were vaguely aware that a new digital era was about to dawn. However, it was too late to reopen the TRIPs agreement and resume complex negotiations; in fact, many countries considered that it was dangerous to reopen the delicate compromises embodied in the draft TRIPs agreement (which was included in the Dunkel Draft) even though they would have preferred some changes. And further, the full impact of the new technologies was not yet felt and precisely known, and most negotiators did not want to indulge in futuristic speculation. Whatever be the reason, the TRIPs agreement was technologically obsolescent by the time it was concluded. Even as the Uruguay Round negotiations were winding down the adoption of copyright and related rights to the fledgling digital technologies (in short, the ‘digital agenda’) had risen to the

---

<sup>120</sup> Nimmer (1995), p.1419. Nimmer was concerned that TRIPs could impede judicial interpretation and application of fair use.

<sup>121</sup> Taubman (2015), ‘Negotiating “Trade-related Aspects of Intellectual Property Rights”’, pp.21-2.

top of the policy agenda of the American, Australian and Japanese governments as well as of the E.C. As it was premature to revise the TRIPs agreement there was no option for the U.S. but to turn to WIPO as the venue to address the digital agenda as well as the unfinished agenda of the TRIPs negotiations. The two Committees of Experts that WIPO had constituted while the TRIPs negotiations were underway came in handy to move forward the digital agenda.

### **3.6 WIPO Committees of Experts**

By September 1989 developing countries gave up their opposition to the negotiation of IPRs in the Uruguay Trade Round and began to focus on furthering their interests and positions through active participation in the negotiations and making concrete proposals and attempting to advance these proposals. This development emboldened WIPO to move beyond the phase of guided development and resume a pro-active role in promoting international harmonisation of copyright norms. At their September-October 1989 session, the Governing Bodies of WIPO directed the International Bureau to examine the possibility of preparing a Protocol to the Berne Convention. A Protocol was preferred because it did not require unanimity for adoption, and yet the same time it could update international copyright norms. The Committee of Experts constituted to this end had its first meeting in November 1991. The first two meetings of the Committee were devoted to identification of the issues to be considered by the Committee. As could be expected from the fact that the two systems of copyright had very strong views on the protection of performers and phonograms, the ‘most passionate discussion’ took place on the issue whether sound recordings should be covered by the proposed Protocol to the Berne Convention.<sup>122</sup> There was unanimity about the need to strengthen the protection of producers of phonograms; however, the participants were sharply divided over the legal framework for strengthening the protection. Countries with the ‘Copyright’ system preferred producers of phonograms being covered under the proposed Protocol to Berne Convention. The U.S. was keen that the Protocol acted as a bridge between countries that protect sound recordings under related rights, and those that protected sound recordings under copyright. Another group of countries would not mind phonograms being covered either by a Berne Protocol or a special agreement under Article 22 of the Rome Convention. The third group of countries with the authors’ right system were categorical that a clear distinction between authors’ rights and

---

<sup>122</sup> Ficsor (2002), paragraph 1.30 at p.21.

related rights should be maintained, and that as sound recordings were not works under the Berne Convention enhanced protection for producers of phonograms could not be provided through a Protocol to the Berne Convention. Or figuratively, they were unwilling to brook, what Oman and Flacks called, 'the Great American Copyright Hersey', and the proposal to cover phonograms under the Protocol 'went up in flames'.<sup>123</sup> These group of countries preferred either a special agreement under Article 22 of the Rome Convention or a New Instrument. Only through such an approach could the appropriate balance between copyright and related rights as well as balance between performers, producers of phonograms and broadcasters be maintained. The third approach was approved by the WIPO Governing Bodies and in September 1992, a second Committee was set up to consider all questions concerning international protection of the rights of performers and producers of phonograms and prepare a New Instrument.

By December 1991 the Final Text of the TRIPs Agreement was ready, included in the Dunkel Draft and circulated to all the countries participating in the Uruguay Round. Hence, when in September 1992, WIPO Governing Bodies decided to set up a second committee they had a clear idea of what would be covered in the TRIPs agreement, and what the Berne Protocol and the New Instrument should cover and could specify the remit of the two Committees. It should be noted, however, that the digital agenda was nowhere in the horizon and that only towards the end of the Uruguay Round was the need to adapt copyright to the new digital technologies felt. The issues to be considered by the Berne Protocol Committee were : (i) Computer programmes, (ii) Databases, (iii) Rental right, (iv) Non-voluntary licences for sound recording of musical works, (v) Non-voluntary licences for primary broadcasting and satellite communication, (vi) Distribution right, including importation right, (vii) Duration of the protection of photographic works, (viii) Communication to the public by satellite broadcasting, (ix) Enforcement of rights, and (x) National Treatment.

The two Committees did the preparatory work for the DipCon, and their work culminated in the negotiating texts of WCT and WPPT (technically called 'Basic Proposals'). The Committees did not start with a blank state. Even though few countries acted on the findings of the studies conducted under the aegis of WIPO and UNESCO during the phase of guided development the

---

<sup>123</sup> Oman and Flacks (1993), pp.143, 146, 147. During the TRIPs negotiations also, the U.S. attempted to have sound recordings covered by the TRIPs agreement.

studies came in handy for the Committees to proceed further; so did the deliberations of the TRIPs negotiations, and once the Committees began to consider the digital agenda the policy discussions in the U.S., E.C. Australia and Japan as well as in the WIPO worldwide symposia over the issues which the new digital technologies gave rise to prove to be invaluable.

The first meeting of the Committee of Experts on a Possible Instrument for the Rights of Performers and Producers of Phonograms was held in June 1993; in all there were six sessions of the Committee, the last three being joint sessions with the Committee of Experts for considering the Protocol to the Berne Convention. During some of these sessions some pressed for the inclusion of the broadcasting right in the New Instrument. However, the terms of reference of the Committee were not modified because of the apprehension that the inclusion of broadcasting rights might slow down, perhaps even undermine, the conclusion of the New Instrument. As it is, there was conflict of interest among authors, performers, and producers of phonograms; bringing in broadcasters would further aggravate the conflict of interests. TRIPs negotiation reinforced that apprehension for it was not possible to 'reach a truly substantive common provision regarding broadcasting right.<sup>124</sup>

By late 1993, the GATT Uruguay Round of negotiations had reached an advanced stage and several countries requested that the work of these two Committees be suspended so that they could pay exclusive attention to the Uruguay Round multilateral negotiations of which the TRIPs negotiations were a part.<sup>125</sup> The two Committees met again in December 1994 by when the TRIPs agreement was concluded. The conclusion of the TRIPs agreement boosted up the spirits of the copyright community in developed countries who were keen to finish the unfinished agenda of the TRIPs agreement.

---

<sup>124</sup> Ficsor (2002), paragraph 2.50 at p. 75; von Lewinski (2008), pp.511-2.

<sup>125</sup> The Uruguay Round trade negotiations (1986-94) were very complex and culminated in the establishment of the World Trade Organisation and conclusion of sixty agreements and decisions totalling five hundred and fifty pages.

## **Chapter 4: The Audio-visual Conundrum**

### **4.1 Introductory**

Audio-visual works and services have the infamous distinction of threatening to wreck the Uruguay Round Trade of which TRIPs negotiations were a part as well as the DipCon. It was just a day before the scheduled closure of the Uruguay Round negotiations that the U.S. and E.C. decided to agree to disagree, and the U.S. backed out and decided not to let 'the Uruguay Round fail over the issue of American films on Parisian prime time television when all other issues...were settled'.<sup>126</sup> France was jubilant; Jack Lang, the French Minister of Culture, declared that 'it is not a victory of one country over another. It is a victory for art and artists over the commercialization of culture'.<sup>127</sup> The issue of moral rights, particularly with reference to cinematographic works, was a contentious issue in the TRIPs negotiations. The U.S. aggressively argued that moral rights were not a trade issue and had its way in regard to moral rights, and Article 6bis was excluded from the provisions of the Berne Convention which Member Countries of the TRIPs agreement. France, in particular, considered the exclusion of moral rights as a humiliating setback just as it was jubilant over its success in thwarting the American move to include audio-visual services in GATS. The tenacity with which countries with authors' right system, particularly France, demanded the inclusion of moral rights and coverage of audio-visual works in WPPT can only be explained by the lingering rancour of France over the defeat in the TRIPs negotiations. Suffice to say, audio-visual works and services had been stirring up the proverbial hornet's nest in multilateral negotiations on copyright and related rights.

### **4.2 Copyright and Related Rights Issues**

Cinematographic works constitute the archetypal complex work with several dimensions of complexity. The complexity arises from two significant facts: (i) a cinematographic work is the outcome of coordinated contribution of many artists and technicians, and (ii) the production of a cinematographic work, particularly if it belongs to the mass entertainment genre, calls for hefty, risky investment. The array of rights associated with a cinematographic work is

---

<sup>126</sup> Preeg (1995), pp.171-2.

<sup>127</sup> Putnam (2000), p.274. Putnam is the acclaimed producer of such classic items such as *Chariots of Fire* and *Killing Fields*.

multi-layered. The first layer comprises the exclusive rights of authors of literary and musical works which are adapted into the script and musical compositions of the movie. The second layer comprises the exclusive rights of the authors of screenplay, lyrics, and musical compositions of the movie. The third layer comprises the rights of the performers and the authors (only in countries with authors' right system) while the fourth comprises the copyright a cinematographic work has independent of the other rights associated with a cinematographic work. The specifics of the copyright of a cinematographic work vary widely between countries of the 'Copyright' system and those with the authors' right system, and even among the countries of each system so much so that the copyright laws relating to cinematographic works had been described as a legal quagmire;<sup>128</sup> no other class of works has presented as many problems in the making of international copyright law. The major differences in the way copyright laws treat cinematographic works centre round three issues: (i) who is the author of a cinematographic work, (ii) if the producer is not the author, how the rights are transferred to the producer, and (iii) moral rights. Whoever is legally the author of a cinematographic work, the authorial rights need to be securely transferred to the producer who invests a hefty sum and takes heavy risk, particularly to produce a big-ticket mass entertainment film. That risk is captured by the saying that, 'Nobody knows anything'.<sup>129</sup> Producers and directors 'know a great deal about what had succeeded commercially in the past and continually seek to extrapolate that knowledge to new projects. But their ability to predict at an early stage the commercial success of a new film project is non-existent'.<sup>130</sup> Given the hefty investment and high risk, the legal arrangements should be such that the producer's investment is firmly secured, and the producer is able to fully exploit the cinematographic work and earn a decent return on investment.

Broadly speaking, there are three systems of which the first one is sometimes labelled 'film copyright'. In this system, the producer of a film acquires a right to adapt a literary work, and thereafter enlists the various skills required for producing the cinematographic works through contracts. The film producer is the owner of the copyright in the cinematographic work. This system is predominantly in vogue in countries with the 'Copyright' system like India and the U.S., and the other two systems are in vogue in countries with an

---

128 Kamina (2002), p.xxii.

129 Saying attributed to William Goldman, noted American novelist, playwright and screenwriter.

130 Caves (2000), pp.4-5, footnote 3, p.371. Also see Bell and Oakley (2015), p.27.

authors' right system. Common to the second system of 'legal transfer' and the third system of 'presumption of transfer' is the fact that the cinematographic work is treated as a work of joint authorship a number of artistic contributors (sometimes, but not always, listed in the national law). In the system of 'legal transfer' the rights necessary for exploitation of a film come to be owned by the producer on the basis of a complicated legal structure whereby the authors are regarded, under the law, to have immediately assigned their rights to the producer. In the 'presumption of transfer system' the original owners of copyright are presumed to have transferred their rights to the producer when they contributed to a cinematographic production; such a presumption could be rebutted.<sup>131</sup> A certain degree of harmonisation of copyright and related rights relating to cinematographic works was effected by the EC Rental and Lending Rights Directive (1992).<sup>132</sup> The Directive laid down that the principal director of a cinematographic or audio-visual work shall be considered as its author or one of its authors.<sup>133</sup> At the same time, it vested in the 'performing artists' the economic rights of the rights of fixation, the right of reproduction of fixations of the performance, and the rights of distribution, rental, and lending. When a contract concerning film production is concluded, individually or collectively, by performers with a film producer, the performer covered by this contract shall be presumed, subject to contractual clauses to the contrary, to have transferred his rental right; the right of the performers to an equitable remuneration is not affected by the presumption. It should be noted that the E.C. Directive left it to the Member States to determine who else apart from the principal director should be treated as co-authors and how the rights of the co-authors should be transferred to the producer. Consequently, there are wide variations in the national laws of the Member States in regard to these two issues. Further, countries with the authors' right system protect audio-visual works as original works of expression, distinct from the recordings and other manifestations thereof. Recordings and other manifestations are protected under neighbouring rights which are usually vested in the producer.<sup>134</sup> An area which was not yet been harmonised in the EU even now is

---

<sup>131</sup> WIPO Guide (2003), paragraph BC-14bis.3 at p.89.

<sup>132</sup> Council Directive 92/100/EEC of 19 November 1992 on Rental Right and Lending Rights and on Certain Rights Related to Copyright in the Field of Intellectual Property.

<sup>133</sup> Article 2(1) of the E.C. Term of Protection Directive is a similar provision. The full name of the Term of Protection Directive is Council Directive 93/98/EEC of 29 October 1993 Harmonizing the Term of Protection of Copyright and Certain Related Rights.

<sup>134</sup> Kamina (2002), p.59.

the moral rights of performers, may be because they have no significant impact on the Internal Market.

The application of moral rights to cinematographic works give rise to specific problems which are difficult to solve; these problems together with the wide variation and complexity of legal provisions regarding moral rights has been one of the sore points of Hollywood with European copyright laws. Commercial exploitation of many films, not necessarily limited to Hollywood films, requires alterations to be made, 'some dictated by technical requirements, some by commercial requirements, some in order to comply with censorship or administrative rules.' Moral rights, particularly the right of integrity, might come in the way of alterations such as film colourisation, cuts, editing, changes in format, dubbing, subtitles, adaptations, and marketing;<sup>135</sup> anyone of the many rightsholders of copyright and performers' rights who are involved in the production might exercise his moral right to stall the production, or to prevent full commercial exploitation by exercising moral rights after the production of a film. Further, a cinematographic work is a derivative work whose production involves the use or adaptation of pre-existing works; as a consequence, conflicts involving moral rights might arise not only between the creative contributors to a film and the film's producer but also between authors of a cinematographic work (director, script writer, lyric writer, music composer) and the authors of the pre-existing works adapted into the cinematographic work. There could be even conflicts among the co-authors of the cinematographic work and between any one or more of the co-authors and performers. Potentially, producers are faced with several moral right claims and the difficulty of identifying the origins of such claims. In order to ensure that the competition of a film is not impeded by moral right claims, the 1957 French Copyright law contained provisions which adapted the regime of moral rights to film production. Thus, when an 'author' refuses to complete or cannot complete his contribution due to unforeseen reasons, he cannot object to the use of his part contribution for the completion of the film. Further, moral rights of paternity and integrity can be exercised only after the film is completed. Otherwise, every performer could plausibly dictate which scenes could be used in the final version of a film or the placement of their name in the end credits.<sup>136</sup> Many countries with authors' right system have similar provisions. This law and similar other laws, however, do not prevent the exercise of moral rights to prevent the editing and modification of a film. In France, for example,

---

<sup>135</sup> Kamina (2002), p.292.

<sup>136</sup> Bernard (2002), p.1099.

the motive for editing (eg., for better reception by the audience and better commercial exploitation of a film) or the importance of the cut are in most cases irrelevant; 'respect for the integrity of the film requires that it is released in an unabridged form'.<sup>137</sup>

Among the moral rights, the right which impedes the most the full exploitation of film and gives rise to transatlantic conflicts is the stronger version of the right of integrity prevalent in France. A telling example is the *cause célèbre* of *The Asphalt Jungle* (1950), a much-acclaimed film directed by John Huston and produced by Metro-Goldwyn-Mayer (MGM); along with Ben Maddow, Huston also wrote the screenplay. As the film was produced in the U.S., MGM held the copyright in the film, and had the full right to fully exploit its right in the film without the need to secure any approval of the Director, cast or anyone else. The film was shot in black and white. When, in 1988, Turner Entertainment obtained MGM's permission to screen a colourised version of the film on television Huston and Maddow sued MGM to prevent the colourised version from being shown; they were unsuccessful. In France, however, the heirs of Huston (Huston had in the meanwhile died) and Maddow, were successful as they could invoke the right of integrity which prohibited any alteration to a film without the permission of the director or of the film writers of the screen play and their heirs. The matter went all the way to the highest civil law court, the *Cour de cassation*, and the case revolved round the questions as to (i) who the author was and (ii) which copyright law was to be applied. Under the U.S. law, Turner Entertainment was the author of the coloured version of *The Asphalt Jungle*. Had the *Cour de cassation* decided that the U.S. law should be applied Huston would not have been recognised as author and his heirs not entitled to moral rights under the French law. In upholding the entitlement of Huston's heirs to moral rights the *Cour de cassation* 'stressed the international applicability of the French concepts of authorship and of these moral rights, whatever the country of the work's origin, the nationality or domicile of the work's creators, or the law governing the contract between creators and grantees'. Jane Ginsburg and Pierre Sirinelli characterized the decision of the *Cour de cassation* as 'juridical imperialism' as it totally ignored the international dimension of the case, and disregarded the 'choice of law' rule applied usually in cases where a choice has to be made in applying the domestic or foreign copyright law to a case.<sup>138</sup> The retrospective and extra-territorial application of French law to a film whose colourisation was

---

<sup>137</sup> Kamina (2002), p.326.

<sup>138</sup> Ginsburg and Sirinelli (1991) pp.137,141.

lawfully done abroad led Jean-Luc Piotraut to cite this case as an example of French courts going to 'such extremes with the integrity right that certain judgments may actually call into question the fairness and morality of droit d'auteur'.<sup>139</sup>

### 4.3 Trade Issues

As the noted copyright expert William Cornish put it vividly 'on the film scene in Europe Americanophobia is never far from the surface' and 'the governing law has developed in many countries in response to pressures from national film-makers and also from powerful outsiders led by Leviathan that is Hollywood';<sup>140</sup> that phobia is most acute in France. French takes pride as the country which gave birth to cinematography as Auguste and Louis Lumière patented the *cinematograph* in 1895 and Georges Méliès who built one of the first film studios in 1897 were Frenchmen. In the 1900s, European film companies dominated international film distribution and had not only the largest market share in Europe, but also in the United States'.<sup>141</sup> By 1908, the domination of world cinema by Charles Pathé, a French entrepreneur who 'industrialised' the production of films, was complete.<sup>142</sup> In a little over a decade the position was reversed, and the reign of Hollywood in European and North and South American markets had begun. By 1928, 54 percent of all films shown in France, 72 percent in Britain, and 80 percent in Italy came from Hollywood. As Hollywood penetration of European markets became deeper and deeper country after country began to put in place protective measures, the most important of which were tariffs, import quotas which place a ceiling on the number of films which can be imported in a year, and screen quotas which stipulate that the number of foreign films screened in theatres should not exceed a certain proportion of the films screened (the rest would be of domestic origin), and subsidising local production. No doubt economic arguments were adduced to justify protectionist policies. It was contended that Hollywood had a huge competitive advantage because of the size of its domestic market; this advantage could be set off only by protectionist measures. This argument was countered by distributors and exhibitors who argued that that the audience preferred Hollywood movies because they offered drama, action and excitement all too often absent in domestic films, an argument captured by the riposte of

---

<sup>139</sup> Piotraut (2006), p.606.

<sup>140</sup> Kamina (2002), p.xxi.

<sup>141</sup> Katsarova (2014), p.2.

<sup>142</sup> Putnam (2000), p.37.

Carla Hills, U.S. Trade Representative during the Uruguay Round Negotiations, 'Make films as good as your cheese and you will sell them'. And further, protectionist restrictions like quotas violate the freedom of the audience to choose. Far more compelling and strident than economic arguments were the cultural arguments that films are a form of cultural expression and hence of national identity, and as such worthy of protected against the 'American cinematic invasion',<sup>143</sup> and the deadening influence of a mass-produced, foreign banal culture. The cultural argument was reinforced by the deep-rooted distrust and dislike of American civilisation and all its manifestations, economic, cultural, political and social by cultural elites in countries like France. All in all, the inter-war years witnessed the American cinematic invasion of Europe and the European response to that invasion by way of protectionist ways. They also witnessed the U.S. State department interceding with the European governments on behalf of Hollywood on its own and because of the lobbying efforts of the MPAA established in 1920. During the GATT negotiations European countries succeeded in securing a special dispensation for cinematograph films. Article IV of GATT (1947) provided exceptions to national treatment and most-favored nation treatment for film screen quotas.<sup>144</sup>

The need to protect domestic industry from Hollywood became more pressing after the Second World War. In the 1950s and 1960s there were two parallel trends in Europe. Even as Hollywood's dominance of cinema as mass entertainment became more and more entrenched West European cinema graduated to high culture and acquired a lasting reputation for artistry and originality. New wave cinema like the French *Nouvelle Vague* set out to reinvent the praxis of film making. The director of a film who was hitherto considered an employee of the producer was transformed into the *auteur* (author) who could stamp his distinctive style and personality on the film he created and could explore human condition and lay bare inequities and injustices of all types.

---

143 *American Cinematic Invasion* written by celebrated French commentator René Jeanne in 1930; see David Putnam with Neil Watson, *Movies and Money*, p.120.

144 The principle of national treatment was embodied in Article III of GATT; it requires Members to treat imported products of other Members no less favorably than like domestic products with respect to such matters as internal taxation and other regulations related to sale and distribution. The principle of most favoured nation was incorporated in Article I of GATT. It requires that any benefit (in regard to customs duties and other rules affecting import or export of goods) offered by a Member to the product originating in or destined for any other country should be extended to all other Members of GATT.

European Cinema as high art was believed to be a shining contrast to the ‘tinsel make-believe, grubby little form of entertainment’ offered by Hollywood.<sup>145</sup> The elevation of the Director as *auteur* along with the rise of personalist doctrines of the authors’ system of copyright impacted on the copyright law in European countries like France. In keeping with the perception of the French elites that film was high culture Charles de Gaulle created, a Ministry of Culture in 1959 and appointed André Malraux as its head. At the same time, in a powerfully symbolic act, the *Centre de la Cinematographie*, responsible for the production and promotion of cinematic and audio-visual arts in France, was shifted from the Ministry of Industry and Commerce to the new Ministry of Culture. However, new wave cinema like the French *Nouvelle Vague* turned out to be aesthetic rather than economic phenomenon doing little to revive the fortunes of European film industry.<sup>146</sup>

The advent of television made matters worse. Hollywood, after recovering from the disruption by a new technological medium, went on to dominate the production of TV programmes as well as the TV screenings in Europe and Latin America. Even in France which had the strongest audiovisual industry among EC members nearly seventy percent of films screened in theatres and audiovisual content telecast were of American origin. The substantial displacement of domestic products in West European countries by Hollywood films, American TV programmes, popular music and products like Coca-Cola gave rise to widely popular expressions with resonance like ‘Coca-Colonisation’, and ‘cultural imperialism.’ The deadly combination of the crassness of the American culture and the predatory nature of American corporates producing cultural products like films and popular music was perceived to threaten French culture and national identity, and strike at ‘the very roots of the mental and moral cohesion of the peoples of Europe’.<sup>147</sup> Some of the reactions of the French elites to American cultural products bordered on hysteria. Thus in 1983, Jack Lang the French Culture Minister and a former theatrical entrepreneur warned that the widely watched television series *Dallas* was a serious threat to French and European identity. Nine years later, his successor echoed Lang’s remarks when *Jurassic Park* was screened in French cinema theatres. With the rise of satellite TV networks and cable TV countries found it impossible to shield their citizens from foreign programmes and media

---

<sup>145</sup> Cornish in Kamina (2002), p.xxi.

<sup>146</sup> Putnam (2000), p.201.

<sup>147</sup> Judt (2005), p.221.

channels, thereby giving rise to the expression ‘invasion from the skies’. All these expressions gained global currency.<sup>148</sup>

During the TRIPs negotiation the EC Member States, particularly France, were particular that the protectionist regime should continue while the U.S. was particular that that regime should be dismantled, and audio-visual services should be brought under GATS.

#### **4.4 Private Copying (Home Taping) in Europe**

There was yet another vexatious issue relating to audio-visual works where rights and the trade protection intermingle, and that is private copying. Before the widespread use of home taping devices like compact cassette systems and video-recorders, private copying that is to say, reproduction for private, personal, non-commercial use such as entertainment, research or learning was *de minimis* (a small thing or trifling matter about which law should not concern itself). However, as newer and newer devices for reproduction and playing the recorded material made home copying easier and easier and the quality of home copying came to be closer and closer to the quality of commercial reproduction, private copying ceased to be a trifling matter in many developed countries. In most European countries, rightsholders began to be compensated for private copying of recorded music and films through a levy on blank media like tapes or recording equipment or both. In the EC, Germany was the first country to introduce a right of remuneration for private copying in 1965, and other countries followed suit. In Germany, these levies are treated as royalty payable to the rightsowner in compensation for use under the author’s right; under national treatment principle the proceeds are distributed among eligible domestic as well as foreign rightsowners. Many national legislations do not provide for any share being paid to foreign rightsowners at all.<sup>149</sup> Thus, Finland, Iceland and Sweden provide a *sui generis* remuneration right outside copyright; consequently, the national treatment principle does not apply. France, Belgium, and a few other countries provided such a right within the copyright law. The remuneration is payable by manufacturers and importers of recording equipment and blank audio and video tapes as a percentage of the sale value. National laws are not uniform in regard to the rates of levy, the categories of beneficiaries and their shares in the proceeds.<sup>150</sup> Thus, France restricts the remuneration right for

---

<sup>148</sup> Manchanda (1998).

<sup>149</sup> Goldstein and Hugenholtz (2013), pp.371-2.

<sup>150</sup> Kamina (2002), pp.280-3.

private copying to those phonograms and video-recordings which are fixed in France; the denial of a share in the proceeds of the levy on phonograms and video-recordings of foreign nationals is justified on the ground that phonograms and video-recordings are covered by neighbouring rights and national treatment under the Rome Convention is limited to the rights explicitly provided by that Convention.<sup>151</sup> For this reason, neighbouring rights came to be perceived by the U.S. as a protectionist ploy by France and other European countries to deny American phonograms and cinematographic works national treatment and thereby deprive American producers a share in the collections from levies even though American movies and recorded music account for bulk of the home taping. One of the main goals pursued by the U.S. during the TRIPs negotiations was to ensure that American phonograms and cinematographic works receive their due share of the proceeds from levies on recording equipment and audio and video-tapes; the goal was sought to be achieved by ensuring that the national treatment under the TRIPs agreement goes beyond that of the Rome Convention and is extended to all rights-copyright and neighbouring rights- and not the rights specifically provided by the TRIPs agreement. Further, the U.S. also wanted corporate entities to be recognised as authors so that they are eligible to receive the remuneration granted to authors under European copyright laws. The American demand did not secure enough support. Nevertheless, the U.S. pursue its objective during the negotiations on WPPT

#### **4.5 Private Copying (Home Taping) in the U.S.: The Sony Judgement**

True to Keynes's *mots* that when the *Mayflower* sailed from Plymouth, it must have been filled with lawyers<sup>152</sup> the question of home copying was first contested in courts. When Sony began to market Betamax video-recorders in 1976, Universal and Disney studios sought a legal injunction against the marketing of the video-recorders on the ground that Betamax could be used for recording TV shows and build a library of favourite shows, and that such use infringed their copyright in cinematographic works. The suit was litigated all the way up to the Supreme Court. In the landmark case of *Sony v. Universal City Studios, Inc.*, (1984) the Supreme Court rejected the plea of Universal and

---

<sup>151</sup> Some countries with authors' right system draw a distinction between cinematographic works which are covered by copyright and their recordings which are protected under neighbouring rights. In addition, specific rights sometimes protect broadcasts and cable programmes. Kamina (2002), p.3.

<sup>152</sup> Skidelsky (2000), pp.117-8.

Disney studios and took note of the fact that the recording of a TV show could as well as be used for 'time shifting', viewing the show at a time convenient for the person who recorded it. Time-shifting was a legitimate unobjectionable purpose.<sup>153</sup> Hailed as 'the Magna Carta of the Information Technology Industry',<sup>154</sup> the Sony judgment provided a "safe harbor" from copyright challenges that it established for technologies suitable for substantial non-infringing uses'; it was claimed that without the 'safe harbour' it provided 'tape recorders, photocopiers, CD burners, CD ripping software, iPods, and MP3 players, and a host of other technologies that facilitate private or personal use copying might have never become widely available'.<sup>155</sup>

During the legal journey of about eight years from the trial stage to final adjudication by the Supreme Court bills were moved in the Congress to protect the copyright of Hollywood studios; the proposals included levy, as in some West European countries, of a cess on the recording equipment and tapes so as to compensate the rightsholders for private copying. However, legislation was deferred as the litigation was pending and after the Supreme Court judgment the Congress was reluctant to give any relief to Hollywood as during the five-year period of litigation the number of homes with videorecorders shot up from nearly zero to a significant ten percent and Congressmen were wary of alienating such a large population.<sup>156</sup> The bitter lesson that the entertainment industry drew from the Sony episode was the delay to regulate a new reproduction technology would be fatal; it was this lesson which induced the entertainment industry to prevail upon the Congress to enact the Audio Home Recording Act ( 1992) as soon as digital audio recording devices entered the market . That Act prohibited the manufacture, import or distribution of a digital recording device that was not equipped with a Serial Copy Management System; the Act also levied a cess on digital audio recording devices and digital recording media. And further, it was also the lesson drawn from the Sony episode that induced the content providers and Lehman to have national and

---

<sup>153</sup> *Sony v. Universal City Studios, Inc.*, 464 U.S.417 (1984).

<sup>154</sup> In his testimony before the Senate Committee on the Judiciary, 108th Cong. (July 22, 2004) Gary Shapiro, Consumer Electronics Association referred to the fact that the consumer electronic industry long referred to the *Sony* judgment as 'the Magna Carta for our Industry'.  
<sup>154</sup> Samuelson (2006), pp. 1831, 1850. Samuelson attributes the epithet 'Magna Carta' to Litman (2005), p. 951.

<sup>155</sup> Samuelson (2006), pp. 1831, 1850. Samuelson attributes the epithet 'Magna Carta' to Litman (2005), p. 951.

<sup>156</sup> For an overview of the litigation and legislative proposals see Goldstein (1996), pp.144-57.

international copyright laws amended well before the users develop habits that do not respect copyright in the digital medium.<sup>157</sup>

The Sony judgment is also significant in the history of copyright in that the litigation led to the formation of a powerful interest group, the Home Recording Rights Coalition (HRRC) which played an important role in the runup to the DipCon, during the DipCon and later during the enactment of DMCA. HRRC was established in 1981 by the Consumer Electronic Association, an outfit of the electronic hardware industry, to protect its interests of its constituents in the litigation and in the Congress. It was ‘a pretend consumer rights organization’<sup>158</sup>, which according to Jessica Litman, ‘styles itself a grass-roots lobby organized to protect consumers’ right to private home audio- and videotaping’; however, operating through the HRRC, ‘the consumer electronics industry had used the public’s desire to make free copies of music and movies as a tool to block copyright owner’s efforts to prevent unauthorized copying, while making bundles of money selling devices that facilitated it’.<sup>159</sup>

---

<sup>157</sup> Lehman in Worldwide Symposium, Mexico City (1995), p. 77.

<sup>158</sup> Baldwin (2014), pp.292-3.

<sup>159</sup> Litman (2006), p.124.

# Chapter 5: Digital Agenda

## 5.1 Computer Programmes

### 5.1.1 How to Protect Computer Programmes

The first interaction between digital technologies and copyright can be traced back to late 1970s by when software had become a business of its own distinct from the manufacture and distribution of hardware, and the advent of microcomputers, the precursors of personal computers, began to turn computers into a home product. Initially, software businesses relied on trade secret as the principal means of protecting computer programmes. Software vendors treated source code forms of their products and other human-readable documentation as trade secrets and not divulged.<sup>160</sup> That practice had also the advantage of enhancing the dependence of the client on the company which supplied the programme as an ordinary purchaser who wished to add extra functionalities to the programme had no alternative but to approach the seller. Further, in the absence of source codes competitors cannot easily build upon the programmes of a software firm to create new compatible programmes with additional features or fewer bugs.

The refusal of the software industry to part with the source code gave birth to the free software movement which was pioneered by Richard Stallman, and that movement revolutionised the development and distribution of computer programmes. Stallman believed that software was a form of expression, and that being so it ought to be free and uncontrolled. The free software movement ushered a new way of developing and distributing computer programmes which, in contrast with proprietary computer programmes, would provide the source code along with a programme, and more importantly would allow others four freedoms: the freedom to run the programme for any purpose, the freedom to study how the programme works and adapt it to one's needs, the freedom to redistribute copies of the programme to others, and the freedom to improve the programme and release the improvements to the public.<sup>161</sup> The practices of the free software movement spawned the now-well known open source software, Creative Commons, open access scholarly journals, archives and repositories of journals, open educational resources, open science and open design movement.

---

<sup>160</sup> For the strategies employed by software companies see Litman (1992).

<sup>161</sup> Gay (2002), pp.22-3.

By early, 1970s software businesses began to feel that trade secret (on which they had so far relied) did not provide adequate protection of computer programmes. No wonder that it was the legal system of the United States which first grappled with various issues relating to computer programmes 'because of its leadership role in the development and widespread use of computers and associated products'.<sup>162</sup> The very first question to arise was whether computer programmes should be protected under copyright law, patent law or under a *sui generis* intellectual property regime specially designed for computer programmes. Copyright was an obvious candidate since computer programs are written in lines of code resembling textual material; however, fitting of computer programmes in copyright's legal framework was figuratively 'squeezing a square peg in a round whole'.<sup>163</sup> Based on the recommendations of the National Commission on New Technological Uses of Copyrighted Works (CONTU), the U.S. copyright law was amended in 1980 to provide for protection of computer programmes under copyright law. Countries such as India and Japan also began to protect computer programmes under copyright law. At the international level also, after considering patents and *sui generis* expert opinion veered towards protection of computer software under the Berne Convention and the UCC.<sup>164</sup> It is significant that even after copyright protection became the norm distinguished academics specialising in copyright and technology law like Pamela Samuelson repeatedly advocated *sui generis* protection specially designed for computer programmes;<sup>165</sup> a *sui generis* system can better suit the specific needs of the production and use of computer programmes; the term of protection as a literary work is far too long to be of practical relevance for software production and use. However, neither the software business nor the legislators were keen for a change of legal regime; the adage which warns against 'repairing that which, even if imperfect, nonetheless works reasonably well' applies as well to the protection of computer programmes through copyright.<sup>166</sup> Early during the TRIPs negotiations also there were discussions about the relative merits of copyright protection and *sui generis* protection.<sup>167</sup>

---

<sup>162</sup> Palmer and Vinje (1992), p.66.

<sup>163</sup> Menell (2002-2003), p.103.

<sup>164</sup> Ficsor (2002), *The Law of Copyright and the Internet*, paragraphs 1.07 at p.7, C4.08-10 at pp.409-10.

<sup>165</sup> Samuelson (1986); Samuelson, et al. (1994), pp.2317-8.

<sup>166</sup> Ginsburg (1994), p.2572. Goldstein (1994), pp.2573-8.

<sup>167</sup> Mogens was the chief negotiator of E.C. during the TRIPs negotiations. Even twenty-fives after the TRIPs negotiations he continued to hold the view that *sui generis* protection was better, Mogens (2015), pp.109-11.

Once it was decided to protect computer programmes under copyright law, two issues arose: first, what was the scope of protection and secondly, the relationship between computer programmes and the right of reproduction. The issue regarding the scope of protection was whether the ‘crown jewels’ of a programme such as ‘structure, sequence and organisation’ of a programme and its graphical user interface which assists the user to operate the programme (eg., menu bars, toolbars and icons) are covered by protection. A contentious issue related to reproduction right was whether buyers could adapt a copyrighted computer programme in order to improve it or adapt it for hardware systems other than that for it was developed or use it to develop other applications; all these activities necessitate copying a programme. The question underlying this issue was what is the source of innovation in programme development? In the U.S., the scope of protection, and limitations on and exceptions to the reproduction right were bitterly contested in courts in what came to be called the ‘Software Wars’.<sup>168</sup> Initially, judgements like that in the *Whelan* case<sup>169</sup> extended the scope of copyright protection of computer programmes beyond what is justified by the copyright doctrine or the essential requirements of computer programming. However, three landmark judgements in 1992 curtailed copyright overreach in the realm of computer programmes, restored the traditional limits of copyright protection for computer programmes and laid down what were the fair uses of a protected programme.<sup>170</sup> These judgments marked the end of the Software Wars, and ensured that the copyright protection kept pace with developments such as networking of computers, and did not curtail consumer choice. Be that as it may, the greatest casualty of the software battles was ‘copyright itself, and not because the judicial decisions in any way injured copyright principle—they did not—but because the debate ignited a scepticism about the value of copyright that was unprecedented in the law’s long history’.<sup>171</sup>

---

<sup>168</sup> Clapes (1993); Graham (1999).

<sup>169</sup> *Whelan Associates v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222, 230 USPQ 481 (3d Cir. 1986). Cited in Samuelson (2010), p.230.

<sup>170</sup> *Apple Computer, Inc., v. Microsoft Inc.*, 799 F.Supp.1006 ( N.D.Cal.1992). This judgment was upheld in 1995 by the Ninth Circuit of Appeals. The *Altai* case held that copyright protection did not extend to interfaces necessary to interoperability and the *Sega* case held that reverse engineering of a computer programme code for a legitimate purpose such as extracting interface information from another software’s software was fair and non-infringing use of that code. *Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992). *Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992). Both cited in Samuelson (2010), pp.232-3.

<sup>171</sup> Goldstein (2007,) p.96.

Turning to the EC, in 1991, it issued a Directive for the protection of computer programmes, the very first directive issued by the EC in the area of copyright and related rights in order to eliminate legal barriers to the realization of the objective of Single Market;<sup>172</sup> interoperability and reverse engineering were the main bones of contention during the legislative process that culminated in the issue of the Directive. The Proposed Directive did not provide for reverse engineering and interoperability exceptions.<sup>173</sup> The European Committee for Interoperable Systems (ECIS), a grand coalition of programme users and computer hardware companies with low market share (such as Groupe Bull, Olivetti, NCR, Unisys, Fujitsu), was formed to lobby against the prohibition of interoperability and denying an exception from the right of reproduction for the purpose of reverse engineering. Arrayed against that coalition was another grand coalition, the Software Action Group for Europe (SAGE) which included dominant firms like IBM, DEC, Microsoft, Apple, Lotus. Incidentally, American computer firms dominated SAGE while their European rivals dominated ECIS. ECIS forcefully contended that interoperability and reverse engineering were essential for fostering competition in the software markets and catering to diverse consumer needs. In contrast, SAGE took the position that the Proposed Directive was consistent with the U.S. law (rightfully so, as the trinity of judgments which restored the traditional limits of copyright protection for computer programmes was a couple of years away), and argued that 'any exclusion of protection for logic, algorithms, programming languages, and interface specifications would severely damage protection for legitimate works, and that any amendment that would authorize copying under "research and analysis" [reverse engineering] techniques would deny U.S. software authors the level of protection in Europe to which their efforts are entitled'.<sup>174</sup> As the Proposed Directive wound its way through the labyrinthine decision-making system of E.C. <sup>175</sup> the arguments of ECIS received a more sympathetic attention. Article 6 of the Final Directive permitted decompilation for the purpose of achieving interoperability of an independently created programme with other programmes.<sup>176</sup>

---

<sup>172</sup> Computer Programme Directive (1991)

<sup>173</sup> Proposal for a Council Directive on the Legal Protection of Computer Programs, 1989 O.J. (C91) 4. Cited in Palmer and Vinje (1992), p.68, and Samuelson and Scotchmer (2002), footnote 178 at p.1612.

<sup>174</sup> *Industry Statement in Support of the Software Action Group for Europe* cited in Palmer and Vinje (1992), footnote 27 at p.71.

<sup>175</sup> For a detailed account of the legislative process see Palmer and Vinje (1992), pp.71-8.

<sup>176</sup> For a commentary on the provisions of the Directive see Palmer and Vinje (1992), pp.78-86.

For the first time in international law, Article 10 of the TRIPs Agreement explicitly mandated that ‘computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention’. By so mandating, the TRIPs agreement put an end to the debate as to how computer programmes should be protected. The TRIPs agreement also put an end to the uncertainty over the conditions subject to which computer programmes would be protected as literary works. Thus, prior to the TRIPs agreement courts in France were insistent that the ‘personality’ of the author and originality should be established for a programme to be eligible to be protected as a literary work. The French law of 1985 treated computer programs as works of applied art with a shorter term of protection than literary works. The German law recognised computer programmes as literary works. However, the highest court in Germany disentitled a vast number of programmes from protection as literary works by applying standard similar to the French courts. The German high court relegated most of these programmes to unfair competition law, hinting that unfair competition law would inhibit slavish imitation.<sup>177</sup> Article 10 of the TRIPs agreement also rejected the view that computer programmes may be protected by copyright as literary works only long as they are in source code and not in object code.

### **5.1.2 Computer Programmes and the Reproduction Right**

Turning to the second issue of the relationship between computer programmes and reproduction right, the complexity of the reproduction right was compounded by the emergence of computer programmes. A programme cannot be used even for legitimate purposes without temporary reproduction and storage in the computer memory, but once a programme is so reproduced and stored there is no way to stop perfect copies of the programme to be made in external storage devices and ‘share’ it with friends. Some specialists characterised reproduction occurring in the computer’s memory as falling within the right of reproduction; however, they proposed that temporary reproduction needed for the purpose of accessing the programme and making it perceptible should be exempted from the right of reproduction. Others would not consider such temporary reproduction to be falling within the right of reproduction at all; what was not within the purview of the right to reproduction needed no exemption. The WIPO model provisions on the electronic storage of works (1990) defined the right of reproduction so as to include a work or part of it in either the internal storage unit or an external

---

<sup>177</sup> Reichman (1995), pp.774-5. Gervais (1999), pp.80-1.

storage unit of a computer. Keeping with the requirement of users, many national laws granted an exemption from the right of reproduction in regard to the making the backup (archival) copy of a programme as well as the adaptation of software for the purpose of interoperability between devices made by different manufacturers.<sup>178</sup>

## **5.2 Music CDs and Digital Sampling**

After computer programmes, the second digital technology that copyright encountered was digital recording of music. Digital recording technology was introduced to the music industry during the early 1970's; in 1981, the music industry adopted a digital format and from 1983 CD began to be marketed. CDs were the mainstay of music industry till mid-2000s. Despite the digital format, the recording industry's control of content remained intact till the mid-1990s. The control began to loosen with the development of audio compression devices like MP3, and CD ripping techniques which enabled the content in CDs to be copied and stored in computer memory and transmitted over the Internet.

At about the same time when digital recording was discovered digital sampling was also discovered; during the digital sampling process, sounds are taken from a source, either live or recorded, and encoded in binary bits into the computer sampler's memory. The samples can then be edited and stored in an external memory. A musician can assemble a library of samples and he can use his collection of samples to create virtually any type of recording instead of hiring individual instrumentalists to play each part. Digital sampling technology is an extremely useful tool, and over years digital sampling has been used in myriads of ways.<sup>179</sup> While musicians who made use of digital sampling view old recordings as a source of raw material for creating new works many musicians who own copyright in recordings used for digital sampling felt threatened by the sampling technology as it allowed other musicians to lift entire phrases from their recordings; they claimed that that they were are harmed by these new uses of their recordings without their authorisation and without compensating them for copying and adapting their work.<sup>180</sup> The question whether digital sampling is infringement or is fair use (in the U.S.) subject to the criteria for determining fair use or is an analogue of quotations has divided judicial opinion in the U.S. and elsewhere.<sup>181</sup>

---

<sup>178</sup> 1980 amendments to the U.S. Copyright Law; EC Computer Programme Directive (1991).

<sup>179</sup> Webber (2007), p.373.

<sup>180</sup> Percifull (1992), p.1265.

<sup>181</sup> Mulraine (2019).

### **5.3 Dawn of the Digital Era**

In 1990s there was an explosive growth of homes with personal computers and Internet connectivity. The first commercial dialup Internet Service Provider (ISP) started operations in the U.S. in 1989, and that year just 160,000 computers were connected to Internet in 1989. In 1991 the World Wide Web Was Launched. By 1992, the number of computers connected to Internet grew to one million and in another seven years there were nearly fifty million users of Internet; about a fifth of the American households had Internet connection in 1997 and by about 2001 half the households. Hardly had the explosive growth of home computers begun and Internet and the World Wide Web made their debut when digital/knowledge economy entered the policy agenda in the U.S., EU, Japan and Australia; their entry in the policy agenda occurred even before there was a clear idea about the technologies and how they would evolve. To a considerable extent, the reason for their entry in the policy agenda was due to the forecast by futurologists from the 1980s onwards that the ongoing convergence of hitherto distinct technologies of computing, telecommunication and control was setting the stage for a technological revolution which would bring about profound and systemic structural changes in national and global economies as well as the way of life of people. In short, an El Dorado of knowledge economy was in the offing. Given that ensuring global competitiveness had come to be perceived as a prime duty of a government the significance of preparing for the forthcoming information revolution and gaining an edge over other countries through advance measures was quickly grasped by policy wonks and policy makers in developed countries. As mentioned above (See Sections 3.5-6), TRIPs negotiations did not cover digital agenda, and that for about a year (1993-4) the Committees of Experts suspended their work so that Member Countries could focus on the TRIPs negotiations which were in the final stage. However, during the period when the Committees suspended their work thinking on the digital agenda had moved forward fast at the national level in Australia, Japan and the U.S., and at the regional level in the E.C. WIPO organised and in the developed world as well as a few developing countries because of the 'worldwide' symposia on the impact of digital technologies on copyright and related rights. Even by early 1990s the impact of the emerging digital technologies was precociously anticipated by some copyright experts in developed countries.<sup>182</sup>

---

<sup>182</sup> For example, Samuelson (1990).

There are seven major differences between the new digital technologies and the technologies which in the past challenged the balance in copyright law. First, the previous technologies were discrete technologies in that each one of them applied only to some and not all categories of content. Thus, photocopying could reproduce only text, and sound recording only the sound part of a film. Videorecording could reproduce both the sound and images of a film. In contrast to previous reproduction technologies the new digital technologies cover all types of works: text, sound and image, or their mixes, and the quality of reproduction is so high that it is difficult to distinguish the original from its copy. Secondly, scanning erases the distinction between text, voice, and image. Thirdly, digital works are not directly accessible to the user. Being only a sequence of 1 and 0, the digital works may be used only with the intermediating help of the computing devices through user interfaces. Digital transmission, is increasingly, the mode through which digitalised literary works, music and audio-visual works are made available to the public. Fourthly, there is no way to use any digitalised content without first producing a copy of the content and storing it in the memory of a computer. Therefore, the distinction between copy-related rights (reproduction, rental and distribution rights involving the making and distribution of copies), and non-copy related rights (such as the rights of public performance where works are made available without making a copy of the work). Fifthly, digital works can be easily modified and manipulated even by ordinary users, and the modification can be easily saved. The consequence of this characteristic is an enhanced possibility to obtain derivative works. Sixthly, once digitalised and put on the World Wide Web, any work can be accessed and savoured by anyone with a computer and access to Internet anywhere in the world; with a click of the mouse one can share the work with, that is to say transmit simultaneously to, millions across the globe. If he chooses, he can download the work from his computer and obtain a perfect copy. Conversely, the author of a work or producer of a phonogram or audio-visual work can make available/ distribute his creative product to 'users' online without taking the trouble of making tangible copies and making them available. Communication of performances to the public can be done online in lieu of communication through wire (loudspeakers/cable) or through wireless.<sup>183</sup> Seventhly, in the past, at any given time copyright law coped with changes in one or two technological features that are related to artistic and literary works, such as

---

<sup>183</sup> In copyright jargon, 'making available', 'distribution' and 'communication to the public' have specific connotations and are not exactly equivalent. Here these terms are used in a general sense.

modes of artistic creation, fixing (recording, storing), reproduction, publication and transmission of works; never did copyright have to cope with simultaneous changes in all these features. To give a few examples, photography was a new mode of creating and fixing works, but it did not alter the modes of reproduction or distribution. For reproduction on a large scale, photography depended upon block printing and lithography, which were earlier modes of reproduction. And as to distribution, it relied on the physical chain of wholesalers and retailers. Sound recording altered the nature of music performances only to the extent that they lost their ephemeral character by virtue of being fixed in a physical medium. Unlike photography, it did not create a new mode of creation. However, distribution of the recordings was still through the chain of wholesalers and retailers. Analogue audiotaping was no more than a better mode of fixing and reproduction that facilitated home reproduction of sound recordings. Broadcasting and telecasting were new modes of communication but that did not alter the modes of creation, storage, and reproduction. Standalone computers without internet connectivity posed a more complex challenge than the earlier technologies that copyright assimilated. Traditionally, there has been a physical distinction between access, reproduction (copying) and storage of works. Even then, so long as the computers were standalone without being linked to Internet and the Web the challenge to copyright was rather limited. Once the linkage was effected copyright faced the challenge of a new technological paradigm that knocked down the distinction between an author and a publisher, between a private use of a work and commercial reproduction and distribution, and between access to, storage, reproduction, distribution and communication of a work. Once Napster made its appearance in 1999 the challenge foreseen for the rights of reproduction, distribution and public communication materialised. Once Web 2.0, social media like YouTube made their appearance each and every right encompassed by copyright was challenged. All in all, the digital technologies posed a challenge to every right encompassed by the bundle of rights that together constitute copyright. Before moving on, it should be mentioned that digital technologies not only impact on copyright but also the process and politics of making copyright law.

## **5.4 Three Approaches to the Adaptation of Copyright to Digital Technologies**

### **5.4.1 Doomsday Prophecy**

In early 1990s when access to Internet and the Web began to spread three approaches to the adaptation of copyright to the new technological

environment came to the fore.<sup>184</sup> The first is associated with the prophecy of John Perry Barlow that copyright was a sinking ship, and that one could not sail into the future on a sinking ship. ‘A civilization of the mind’ could be ‘created in Cyberspace’; that civilization would be ‘more humane and fair than the world your governments have made before’ and that culture, ethics and unwritten codes could provide the governance the new civilization needed.<sup>185</sup> Barlow’s prophecy about the demise of copyright is in keeping with similar prophecies made in the first flush of Internet becoming available to general public.<sup>186</sup> Rather than accepting the premise that ‘the Internet was the "brave new world" in which law would be both unneeded and unworkable’ governments all over the world had been “cyberizing” law, translating familiar legal concepts and the rough balance of interests created by the legal system into the Internet environment’.<sup>187</sup>

Even though his prophecy about the demise of copyright did not materialise Barlow’s ideas inspired many academics specialising in copyright law to believe that laws made by government should not be allowed to endanger the fundamental and attractive aspects of the Internet such as access to a cornucopia of information<sup>188</sup> and awakening the innate creativity of ordinary users of Internet. ‘Cyberlaw scholarship in the Barlowian mold’<sup>189</sup> emerged as the dominant voice in the American academia and spread to even countries with a strong authors’ right system not to speak of countries like India. The transvaluation that copyright underwent in the 2000s can be traced to the musings of Barlow (see Appendix I: Creativity and Copyright in Cyberspace: Barlow’s Vision).

Before moving on, it should be mentioned that Barlow did just not remain a seer; he was a man of action also. From the publication of his seminal *Economy of Ideas* in 1994 till his death in 2018, ‘most of the Barlowian energy’ was devoted ‘to block attempts to expand copyright law, sometimes in ways

---

<sup>184</sup> See Goldsmith (1998), Anon (2008) for a critique of competing points of view about the feasibility and legitimacy of Internet regulations based on geographical boundaries.

<sup>185</sup> See Goldsmith (1998), Anon (2008) for a critique of competing points of view about the feasibility and legitimacy of Internet regulations based on geographical boundaries.

<sup>186</sup> In the mid-1990s, ‘cyber-separatists’ asserted that cyberspace was immune from regulation by national governments; their assertion was challenged by ‘cyber-nationalists’ who argued that cyberspace could be regulated without the need for any special jurisdictional tools. For a brief account of the debate between cyber-separatists and cyber-nationalists see Fairfield (2009), pp.828-31. May also see Lessig (2006).

<sup>187</sup> Hughes (2003), pp.359-61, 365.

<sup>188</sup> In the sense that Barlow used the term ‘information’, information includes knowledge.

<sup>189</sup> Cohen (2019), p.85.

that seemed to threaten fundamental and attractive components of the Internet' <sup>190</sup> . His legacy to policy activism is the EFF which he, Mitch Kapor and John Gilmore founded in 1990.<sup>191</sup> Since its establishment the Foundation had been a key player in the copyright field not only in the U.S. but also in Europe, and a powerhouse of advocacy deploying every weapon in the armoury of advocacy to advance digital privacy, free speech, and innovation, and to oppose the expansion of copyright including liberal use of public interest litigation

### **5.4.2 Second Approach: Rely on Copyright Law**

The second approach asserted that digital technology was not the first nor the last technological challenge to copyright,<sup>192</sup> and that therefore, with legal ingenuity it should be possible to craft innovative legal solutions to the challenge posed by the new digital technologies. The legal approach sought to reiterate the rights of the rightsholder in the digital medium by, among others, redefining the rights of reproduction and communication. However, as greater knowledge about digital technologies and its impact on copyright spread it became obvious this approach necessitated resolution of a host of issues, some of them rather intractable. To illustrate some of the questions which need to be answered for adaptation of copyright law to the digital environment: which activities related to digital technologies need to be controlled by copyright law? Should both downloading and uploading need to be controlled by copyright? Is caching (temporary storage of data) something that should be restricted? Does caching constitute a reproduction and storage of a work within the meaning of copyright, or is it a process necessary for the effective functioning of Internet technology? How much control should be exercised on the use of works in digital medium? In other words, should all use of a work be controlled, or only some uses? This question raises the fundamental problem of what the limitations on and exceptions to the rights in the digital medium exceptions should be. What should be an appropriate balance, in copyright terms, between rightsholders and users of a work in the digital medium?<sup>193</sup> Should all the limitations on and exceptions to copyright be carried *as they are* to the digital medium. Is that possible without rendering copyright largely nugatory?

---

<sup>190</sup> Cohen (2019), p.85.

<sup>191</sup> Bollier (2009), p.53.

<sup>192</sup> *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 430-31 nn. 11-12 (1984), cited in U.S. Green Paper (1994).

<sup>193</sup> Sundara Rajan (2016), pp. 767.

If so, what? And should the intermediary<sup>194</sup> which is used for transmitting copyright-infringed material be held liable for secondary liability? These questions were to figure conspicuously in the DipCon, and later during the making of implementation legislations.

### **5.4.3 Third Approach: Answer to the Machine is Machine**

The conceptual underpinning of the third approach is captured by the famous statement of Charles Clark that ‘the answer to the machine lies in the machine’. This approach held that it should be technologically possible to prevent unauthorised access to digitalised works and to closely monitor the access and use of digitalised works through rights management. TPMs have been classified in different ways; following the classification by Koelman and Helberger<sup>195</sup> they can be classified into two main categories: (i) those that control access (access controls) and (ii) those that protect against copying, adapting, and publicly communicating protected works as well as distributing of physical copies once access is secured (use controls, or copy control or more accurately exploitation controls)<sup>196</sup>. There are a variety of access controls using technologies such as cryptography, digital signatures, passwords, paywalls or subscriptions, registration keys, time limits (e.g., 48-hour movie rental), limits on the number of simultaneous users (e.g., library e-books), encryption/scrambling (e.g., regional encoding on DVDs, IP blocking based on location) and selective incompatibility (e.g., a CD that will read in a CD player but not a computer CD drive). Examples of user and rights controls are read-only works (e.g., e-books), download blocking of streaming content, copy blocking (e.g., digital music and movies), print blocking, labelling, watermarks, Serial Copyright Management Systems (SCMS). However, the distinction should not be overdrawn as quite a few TPMs such as Content Scramble System (CSS)

---

194 As the use of high-speed Internet expanded the terms ‘Internet Intermediary’, or ‘Online Intermediary’ or simply ‘Intermediary’ came to be increasingly used in place of the terms ‘Internet Service Provider (ISP)’ and ‘Online Service Provider (OSP)’. ISPs only provide the services to make the customers connect to internet; OSPs on the other hand provide online services. Examples of OSPs are Google and Yahoo providing online search services, Amazon offering online shopping services. For definition and understanding of Internet intermediaries and of their economic function and economic models see OECD (2010).

195 Koelman and Helberger (2000).

196 Referring to them as anti-copy controls is not accurate as these technologies can protect not only against the mere copying of the work, but also against acts infringing *other* exclusive rights of the copyright owners. For example, a multimedia product (CD-ROM) can be protected by a technological measure in order to prevent not only its mere duplication, but also its use on a network, thereby preventing the infringement of the right of public performance and the right of distribution also. See Jacques de Werra (2002), pp.5-6 and Fernandez-Molina (2003), pp.43-45.

can be used to control access as well as copying and communicating after access. CSS, an encryption based TPM for DVD players, requires the use of appropriately configured hardware (such as DVD players or computers) to decrypt, unscramble and play back motion pictures on DVDs.

#### **5.4.4 Techno-Legal Approach Wins the Day**

The charm of Clark's quip notwithstanding, there are limits to the 'technologisation' of copyright protection because protective technologies are not immune from vulnerability because what one technology can do, another can generally undo. In fact, copyright-sceptics claim that no protective measure could ever be devised which would withstand the efforts of hackers. as Ginsburg succinctly put it, "supplying a technological lock may offer only short-lived solace... If end users may easily procure the means to circumvent technological impediments, then we are back where we started'.<sup>197</sup> Consequently, a techno-legal hybrid approach came to be embraced by the content industries as the best of a bad bargain; this approach comprises (i) use of TPMs to control access and to protect rights, and (ii) a legal prohibition of circumvention of such measures. A techno-legal approach offers three layers of protection: the first layer is the basic legal protection of copyright law, the second layer is the technical protection provided by TPMs, and the third layer is the legal protection against the circumvention of the TPMs.<sup>198</sup> Or to use another metaphor, a TPM is a fence and legal protection 'electrifies' that fence.<sup>199</sup> Policymakers around the world veered towards the techno-legal approach.

During the 1980s, TPMs, such as scrambling devices to prevent unauthorised access to protected content broadcast or communicated through other means, and SCMSs for preventing multiple copying of musical recordings, made their appearance. Soon thereafter, circumvention devices like decoders which decode the encrypted content which is broadcast also made their appearance. Legal measures to prevent circumvention also made their appearance by late 1980s. Thus, Section 296(2) of the Copyright, Designs and Patents Act, 1988 of United Kingdom imposed a ban on the supply of devices that could circumvent copy-protection applied to copyright works as well as devices that could circumvent encryption devices in respect of broadcast signals;. It prohibited not only the act of circumvention of TPMs, not even the

---

<sup>197</sup> Ginsburg (2005), pp.2-3,9.

<sup>198</sup> de Werra (2002), p.182.

<sup>199</sup> Dusollier (1999).

making, importing, selling or letting for hire or advertising for sale any device or means specifically designed or adapted to circumvent TPMs but also the publication of information on how to circumvent TPMs. EC's Directive on the Computer Programmes (1991) required Member States to prohibit 'any act of putting into circulation, or the possession for commercial purposes of, any means the sole intended purpose of which is to facilitate the unauthorized removal or circumvention of any technical device which may have been applied to protect a computer program' Similarly, the U.S. Audio Home Recording Act (1992) required all 'digital audio recording devices' to be equipped with the 'SCMS; the Act also prohibited the distribution of any device or provision of any service the primary purpose or effect of which is to circumvent SCMS<sup>200</sup>. Thus, the American legislation not only prohibited trafficking devices like the EC Directive but also mandated the incorporation of a TPM in a consumer electronics device. At the behest of the U.S., the NAFTA (1994) required the three parties to the Agreement (Canada, Mexico and the U.S.) to make it a criminal offence the manufacture, import, sale, lease, or otherwise making available a device or system that was primarily of assistance in decoding an encryption programme carrying satellite signals. Initiatives were also taken by a few countries to include provisions in their tort or unfair competition laws, as well as in their telecommunication and penal laws, to prohibit the sale of satellite descramblers, and computer hacking.<sup>201</sup>

Over time as digital technologies evolved and new business models and distribution services (eg., e-books, Apple's iTunes) developed to distribute digitalised content Digital Rights Management (DRM) systems acquired greater prominence than the use of TPMs alone. To put it simplistically, a DRM system is a mix of TPMs and electronic rights management systems. While TPMs focus narrowly on the unauthorised access to or use of a work DRMs includes a larger set of technological tools that not only protect the content and prevent unauthorised access, but also monitor consumer behaviour, ensure that copying and various types of use are possible only in compliance with the contractual terms set by the rightsholders, and incorporate elements such as authorisation schemes, payment mechanisms and customer management.<sup>202</sup> It follows that if DRM systems are to be properly designed, they should not only protect the copyrighted works from unauthorised access but also be user friendly and accommodate important interests of users and future creators;

---

200 Herman (2012), pp.169-76; Herman (2013), pp.29-36.

201 Dusollier (2002).

202 Guibault et al (2007), p.14.

otherwise, DRMs may turn out to be Digital Restriction Measures. Despite a generally improving outlook for DRM, TPMs used by DRMs are not immune from circumvention. The more complex the DRM, the greater is the cost of running it on a device. These costs will always be borne by the consumer purchasing protected content and devices for savouring content. Hence it is of the utmost importance to the consumer and the market as a whole, to minimise costs associated with protection measures.<sup>203</sup>

## **5.5 Policy Development at National/Regional Levels**

### **5.5.1 The United States**

As with computer software, (See Sect.5.1) the legal system of the U.S. first grappled with various issues arising from the emergence of digital technologies because it was globally the largest producer and exporter of content, and it was in the U.S. that Internet and digital technologies began to spread rapidly. Hence willy-nilly the developments in the U.S. hog considerable attention in any account of the impact of digital technologies on markets for goods covered by IPRs and the law relating to copyright and related rights.

To elaborate the American scene on which there is abundant information in the public domain,<sup>204</sup> the 1991-1992 recession spread a pandemic of insecurity and anxiety throughout the country; in the 1992 presidential elections, the 'economy, stupid' slogan that helped propel Clinton into the White House.<sup>205</sup> Consequently, economy was on the top of the policy agenda of the new president. In February 1993, within a month of assuming office, President Clinton formed the Information Infrastructure Task Force (IITF) to formulate policies for the new knowledge economy. The IITF, in turn, set up three committees of which the Information Policy Committee (IIC) was one. The IIC, in turn, set up in April 1993 a working group under the chairmanship of

---

203 Gooch (2003), p.22.

204 For a very good account of the American scene see Litman (2006); Samuelson (1996b).

205 Kingdon offered a schema to explain why out of the hundreds of issues that demand attention a few make it to the policy agenda. Convergence of three streams: problem, politics, and solution- opens a window of opportunity for an issue to enter the policy arena. A problem stream includes highly visible and threatening events like an economic downturn; it also includes less visible issues identified by policy networks as requiring resolution. Political stream includes events like the presidential election, which create climate for some issues to be attended to. A solution stream comprises pre-existing solutions circulating among interest groups and policy networks. See Kingdon (1995), pp.91-195; Ayyar (2009), pp.91-101. The economic downturn comprised the problem stream, and the background of Clinton's election the political stream. The opportunity presented by the digital technologies comprised the solution stream. However, the absence of a consensus on the policy to be adopted resulted in policymaking being so contentious.

Lehman to study the relationship between intellectual property and the information infrastructure.

In July 1994, the Lehman Group came up with a Green Paper for eliciting public opinion.<sup>206</sup> The Green Paper in July 1994 was widely disseminated as hard copies and over the Internet. For the first time, the Internet came to be an important vehicle for the policy development process; the administration used it for circulating policy papers (the Green Paper, transcripts of the hearings both as text and as audio) in order to elicit public opinion, and the interest groups used Internet for networking, sharing information and intelligence, mobilising support and lobbying. The Green Paper put forth the view that the copyright law was fundamentally sound and adequate, and that clarification of the well-settled principles together with modest legislative changes would suffice to adapt copyright to digital technologies. It contended that the right of reproduction would legitimately include temporary and incidental reproduction and consequently would extend to accessing works in the digital medium. It recommended amending law to prohibit not only circumvention of the TPMs for protecting copyright but also the creation, sale or import of a device or service that enabled circumvention. It also suggested amendments to put beyond doubt the right of copyright owners to control digital transmission and publication of works as well as a provision legitimising a copyright management system and penalising tampering with such a system. After further hearings and consideration of the representations the Lehman Working Group incorporated, with marginal changes, the recommendations of the Green Paper in its final report usually referred to as the White Paper (hereafter referred to as the Lehman report). The Lehman Report also contained a draft bill to give effect to its recommendations; it also elaborated the reasons why a legislation should be expeditiously enacted even though 'there is much that we do not -- and cannot -- now know about how the National Information Infrastructure (NII) will develop'. This was because unlike previous technologies impacting on copyright time was not on copy owner's side, and 'the full potential of the NII will not be realized if the education, information and entertainment products protected by intellectual property laws are not protected effectively when disseminated via the NII'.<sup>207</sup> The Lehman Report also rebutted the view that copyright should be reduced, if not eliminated, in the digital medium. It referred to the point of the view that 'since computer networks now make unauthorized reproduction, adaptation,

---

206 U.S. Green Paper (1994); Lehman Report (1995].

207 Lehman Report (1995), pp.5-6, 10.

distribution and other uses of protected works so incredibly easy... the law should legitimize those uses or face widespread flouting'; it rebutted that view by pointing out that 'simply because a thing is possible does not mean that it should be condoned', an example being the computer networks being 'used to embezzle large sums of money and to commit other crimes'. It also referred to the argument point of view made famous by Barlow that all activity using national or global information infrastructure takes place in cyberspace 'a sovereignty unto itself that should be self-governed by its inhabitants, individuals who, it is suggested, will rely on their own ethics -- or "netiquette" - - to determine what uses of works, if any, are improper'. The Lehman Report pointed out that 'activity on the Internet takes place neither in outer space nor in parallel, virtual locations'. Satellite, broadcast, fax, and telephone transmissions 'had not been thought to be outside the jurisdiction of the nations from which or to which they are sent'. Computer network transmissions had 'no distinguishing characteristics warranting such otherworld treatment'. Further, 'such a legal free-for-all would transform the NII into a veritable copyright Dodge City. As enticing as this concept may seem to some users, it would hardly encourage creators to enter its confines'.<sup>208</sup>

The American policy process and politics had always been adversarial and often acrimonious, and interest group politics is an acknowledged feature of policymaking. American positions in international negotiations offer good examples of the fact that almost all international negotiations are two-level games. A characteristic feature of the American politics is that in the runup to the making of a policy or a major international negotiation the decibel levels soar enormously when the issues under consideration are divisive like abortion and environment or when a policy is a breakthrough policy which seeks to bring about far-reaching changes and provokes intense clash of interests. Even by American standards, the process from the constitution of the Lehman group in April 1993 to the enactment of the DMCA in October 1998, often referred to as Copyright Wars, was exceptionally acrimonious and marked by a lack of civility and moderation on both sides; personal attacks flew left, right and centre. Jessica Litman, a leading academic critic, was purportedly threatened with grievous bodily harm; the Bills' detractors were scarcely less gentle.<sup>209</sup> Lehman and the content providers were depicted as desperados out to colonise the cyberspace; driven by corporate greed, they were bent on converting copyright into a fence in a manner reminiscent of the enclosure movement in

---

208 Lehman Report, pp.14-5.

209 Ginsburg (2001). She cites the observations of Litman (2006), p.125 and Samuelson (1996a).

English history during the 17<sup>th</sup> and 18<sup>th</sup> centuries, wherein landowners closed off the land they owned from that which was previously public domain shared with peasant farmers. Even much of the academic commentary was not immune from the inclination of advocacy to exaggerate and indulge in polemics, to embellish facts and reasoning which were favourable to one's point of view and conversely tone down those which were unfavourable, a fact captured by the observation of Jessica Litman that 'we've all become too accustomed to feverish overstatements in the course of the continuing copyright wars. It becomes easy to forget that some things we say are exaggerations amplified for rhetorical effect'.<sup>210</sup> The policymaker does not have the privilege of a policy critic or a person engaged in policy advocacy and focus merely one or two aspects of a policy-in-the-making. Larger policy questions cannot be pigeonholed into a single category (a copyright question is also an economic question, social question and so on). It would be necessary to approach policy questions from different perspectives and apply multiple criteria. Consequently, the policymaker faces difficult trade-offs, and adverse criticism from those not satisfied with the policy choice as well the considerations and criteria underlying that policy choice.

The U.S. Green Paper as well as the Lehman Report claimed that 'existing copyright law needs only the fine tuning that technological advances necessitate, in order to maintain the balance of the law in the face of onrushing technology'.<sup>211</sup> Their interpretation of what the copyright law is, their characterisation of the legislative changes needed (particularly the recommendations regarding the vexatious reproduction right) as being no more than minor clarification incensed many academics who specialised in copyright law. The Lehman Report drew flak from librarians who were as zealous as ever to safeguard their perceived mission of providing and defending public access to learning and cultural resources. Legal provisions which prohibit circumvention of TPMs (generally referred to as anticircumvention measures) upset the computer hardware industry which felt that these measures may impact on further development of hardware. The recommendations also drew fierce opposition from a set of industries which were hitherto not in the copyright policy arena such as (i) those engaged in encryption research as they felt that anticircumvention measures would restrict their research and marketing of products based on that research even when such products had uses other than for infringement of copyright, and (ii) intermediaries which,

---

210 Litman (2005) p.919.

211 Lehman Report (1995), p.17.

transmit daily hundreds of millions of third-party messages, data and content. They contended that the enormous volume and speed of these communications together with technical features intrinsic to transmission (such as routing, package switching and encryption) made it well-nigh impossible for them to constantly monitor and verify all third-party communications. They feared that they would be saddled with secondary liability for transmission of infringed content, of which they may not be even aware. Telephone companies are not generally liable for illegal conversations that take place on their systems; likewise, intermediaries were keen to be exempted from secondary liability for copyright infringement. Peter Jaszi (a professor of IPR law) and Adam Eisgrau (a lobbyist for the American Library Association (ALA)), played a key role in forging the DFC (Digital Future Coalition), a grand alliance of all interests opposed to the Lehman Report and the bills based on that Report.<sup>212</sup> DFC could draw upon the deep purse and lobbying skills of several industries and their associations such as the HRRC (See Sect.4.5), the grassroots support and the public-spirited image of the ALA, and the brainpower of the engaged academics like James Boyle, Peter Jaszi, Jessica Litman, Jerome Reichman and Pamela Samuelson. In scholarly journals and popular press, the engaged academics blasted the premises, legal interpretation, ratiocination and conclusions of the Lehman Report and the bills based on that Report. While content providers argued that unless their exclusive rights were extended further in the digital medium, and limitations and exceptions reduced to the bare minimum the stimulus for creativity would be dampened<sup>213</sup> critics contended that if the bills were enacted the emerging information superhighway would be transformed into a publisher-dominated toll road, and fair use would be eliminated. In the American tradition of copyright fair use is an integral part of copyright. In contrast to the civil law concept of *droit d'auteur*, the American tradition laid as much emphasis on expanding access of the public to the enlightenment provided by literary and artistic works as providing economic incentive to foster literary and artistic creativity. In short, no fair use, no copyright. That being so, in the U.S. any shrinkage of fair use, and thereby of public domain, elicits visceral opposition, and that explains the opposition which erupted in response to Clinton administration's national and international initiatives to adapt copyright to the digital environment. The critics also contended that copyright law was being transformed into an industrial policy, a policy designed to give a boost to the new digital

---

212 For a succinct account of the formation of DFC see Litman (2006), pp.123-5.

213 Lehman Report (1995), p.14.

technologies and thereby boost American economy, to the detriment of traditional concerns of copyright policy such as the interests of education, research, access to information, freedom of expression and right to privacy.<sup>214</sup> So effective was the lobbying by critics that the bills introduced in the Congress to implement the recommendations of the Lehman Report were stalled. Lehman followed a dual-track strategy for implementing his report: the first comprised enacting a domestic legislation, and the second fast tracking the deliberation of the WIPO Committees of Experts and convening a diplomatic conference to adopt a treaty in synch with the Lehman Report. The U.S. was indeed the 'driver' in the runup to the DipCon, and the Lehman Report 'had great influence in the discussions, and negotiations leading to the Diplomatic Conference and the adoption of the two WIPO Treaties'.<sup>215</sup> The domestic critics of the Lehman report saw the second track as a devious ploy to sidestep domestic opposition, and use the treaties adopted by the DipCon to prevail over the Congress to enact domestic legislation which the Lehman Report had recommended. Lehman himself highlighted the need national and international copyright laws should be amended well before the users develop habits that do not respect copyright in the digital medium (See Sect.4.5). The American over-eagerness to get a treaty of its liking adopted at the very earliest was a major factor in letting loose the juggernaut in motion. The critics were not off the mark; as David Nimmer put it aptly 'events in Geneva were an "international" conference for an "American" problem'.<sup>216</sup> From the American point of view, the controversies which erupted over the Lehman Report and the bills introduced in the Congress to give effect to the bill suggested by the Lehman Report, the controversies about the stand the U.S. should take at the DipCon, and the controversies which surrounded the Clinton Administration's efforts to give effect to the WIPO Internet treaties through the DMCA are different acts of the same play. As preparations for the DipCon were going full steam ahead WIPO Member States became the target of lobbying; the intensity of lobbying increased at a spectacular rate as the DipCon became closer and closer.

Be that as it may, the Copyright Wars were veritably a continuation of the Software Wars (See Sect. 5.1) for soon after the landmark judgments which curtailed copyright overreach in the realm of computer programmes and restored the traditional limits of copyright protection for computer software the U.S. Green Paper was published and the Copyright Wars flared up. Copyright

---

214 Bollier (2009), p.46.

215 Ficsor (2006), p.21.

216 Nimmer (1998), p.509.

Wars further deepened the scepticism about the value copyright law instilled by the Software Laws. A legacy of the Copyright Wars, which lasts even now, is suspicion and distrust, among a large chunk of academics specialising in copyright law, of the way copyright laws are made, of how public interest is sacrificed at the altar of corporate interests, and about how S.1201 of DMCA dealing with anti-circumvention provisions nearly extinguished the tradition of fair use and chilled innovation and competition.

Before moving on, it is appurtenant to mention that the terms ‘national and global information infrastructures highways’, in vogue in policy documents those days, are seldom heard these days. It is noteworthy that the initial documents of the Clinton administration describing the National Information Infrastructure (NII) made little mention of the Internet. The term ‘information superhighway’ was used, but it was meant in a broader sense than the Internet and included cable TV, dialup computer bulletin boards, and many other components of infrastructure to store and communicate information. The *Agenda for Action*, which expounded Clinton’s administration’s vision for a NII, described NII as ‘a seamless web of communications networks, computers, databases, and consumer electronics that will put vast amounts of information at users’ fingertips’<sup>217</sup>. No doubt the vision of the Agenda was realised, but through a rather different route than what the Agenda envisaged. It was the Internet (a ‘bit player’, in the Agenda’s view) and the World Wide Web (not even mentioned in the Agenda), more than any other technologies, that defined the NII of the 1990’s.<sup>218</sup> Such is the contingent nature of history and evolution of technologies!

### **5.5.2 European Community**

In fact, it was the EC and not the U.S. which first began exploring the impact of digital technologies on copyright law. As early as 1988, the European Commission’s Green Paper on Copyright and the Challenge of Technology, surveyed that impact of the digital technologies-in-the-offing on copyright and related rights.<sup>219</sup> If ‘any one document can be credited’, observed Pamela Samuelson ‘with formulating the questions whose answers came to comprise the digital agenda at WIPO, it was this Green Paper’.<sup>220</sup> The lead of EC on digital issues was lost because of its focus on harmonising Member States’ laws on a number of other IPR issues. The appointment of IITF by the incoming

---

217 The White House (1993).

218 Samuelson and Varian (2002), pp.363-4.

219 EC Green Paper (1988).

220 Samuelson (2002), p.376.

Clinton Administration spurred action by the E.C. lest the Community should lose out in the race to the El Dorado. In July 1995, the E.C. came up with a Green Paper *Copyright and Related Rights in an Information Society* which offered presentation of the issues and posed questions to serve as the basis for consultations.<sup>221</sup> The European Commission hoped to conclude its consultations on the Green Paper and issue its White Paper on digital copyright issues by January 1996, but all that it could manage before the DipCon was issue in November 1996 of a *Follow-Up Report on its Green Paper. Commission of the European Communities*.<sup>222</sup> The proposals which E.C. made at the DipCon were based in the Follow-up report.

### **5.5.3 Australia and Japan**

In January 1994, a Copyright Convergence Group was set up in Australia with the goal of establishing appropriate copyright laws that would meet the swift changes taking place in the communication industry. The Group published a report in August 1994, *Highways to Change: Copyright in the New Communication Environment*.<sup>223</sup> In Japan, a Working Group of the Sub-Committee of Multimedia of the Copyright Council came forth with a report in February 1995.<sup>224</sup>

## **5.6 Policy Development in WIPO**

The world-wide symposia organised by WIPO at Harvard University (March-April 1993, in Paris (June 1994), Mexico City (May 1995) and Naples (October 1995) also contributed to the development of the policy thinking on the adaptation of copyright and related rights to the digital era.<sup>225</sup> These symposia led to clarity on what the digital agenda should comprise, how digital transmission should be treated and what international harmonisation should aim at.

---

221 EC Green Paper (1995), p.5.

222 EC Follow-up Report (1996). For a brief outline of the EC Green Paper (1995) and Follow-up Paper see Ficsor (2002), paragraphs 4.72 to 4.79 at pp.194-8.

223 Copyright Convergence Group (1994).

224 Agency for Cultural Affairs (1995). For a brief outline of the Ficsor (2002), paragraphs 4.80 at pp.198-9.

225 Worldwide Symposium, Harvard (1993); Worldwide Symposium, Paris (1995); Worldwide Symposium, Mexico City (1995); Worldwide Forum, Naples (1996).

For a brief outline of the proceedings of these symposia see Ficsor (2002), paragraphs 4.81 to 4.87 at pp.199-209. For an excellent sum up of the issues see Ficsor in Worldwide Forum, Naples (1996).

## **Appendix I: Creativity and Copyright in Cyberspace: Barlow's Vision**

Like all prophecies, some prophecies of Barlow turned out to be true and some did not; however, what is remarkable was Barlow's uncanny foresight about the manner in which the nascent digital economy would evolve, and the challenges copyright law and enforcement would face when content is digitalised. In the pre-digital world, if a Shakespeare's play or Mozart's *Eine Kleine Nacht-Musik* is to be savoured the tangible object in which the literary or music expression is embedded - book or a CD- has to be accessed. However, in the digital environment, content is detached from the material in which it is embedded, or figuratively, the wine is detached from the bottle in which it is encased. Commercialising copyrighted material in the digital age is akin to selling wine without bottles, and ownership of the wine bottle is no longer needed to savour the wine. Over years, as digital economies evolved, services and experiences have come to be a more important component of the economies of developed countries than goods; in other words, the emphasis in developed economies had moved from 'goods to good life'.<sup>226</sup> In keeping with the prophecy of Barlow, today's marketing models for recorded music and cinematographic works no longer distribute and sell physical objects like CDs and DVDs; they sell access to streamed music and films. Barlow was convinced that selling wine in bottles was so different from selling wine without bottles that the law applicable to the former business would no longer suit the latter. Digital technology was 'detaching information from the physical plane, where property law of all sorts has always found definition'. The premise that property cannot be protected in the non-physical domain and consequently property laws have no relevance in that domain led him to rhetorically ask 'if our property can be infinitely reproduced and instantaneously distributed all over the planet without cost, without our knowledge, without its even leaving our possession, how can we protect it?' His emphatic answer to that question was that copyright was a sinking ship, and one could not sail into the future on a sinking ship; that ship comprising 'the accumulated canon of copyright and patent law' was developed 'to convey forms and methods of expression' which were 'entirely different from the vaporous cargo [of information]<sup>227</sup> in the digital medium]. Intellectual property law 'cannot be patched, retrofitted, or

---

226 Chander and Sunder (2019), pp.145-6. For an elaboration of the experience economy see Sunder (2018).

227 Barlow consistently used the term 'information'; however, for the purpose of copyright law the term 'content' is more appropriate.

expanded to contain digitized expression any more than real estate law might be revised to cover the allocation of broadcasting spectrum'. He forecast that 'these towers of outmoded boilerplate will be a smoking heap sometime in the next decade, and we mind miners will have no choice but to cast our lot with new systems that work'.<sup>228</sup> He declared confidently future would win, and 'there will be no property in cyberspace'.<sup>229</sup>

Barlow was equally sure that that in the digital medium content cannot be protected by 'crypto bottles', or to use the term commonly used TPMs. Cryptography 'is the "material" from which the walls, boundaries—and bottles—of Cyberspace will be fashioned'; with these crypto-bottles rightsowners believe that, figuratively, they can sell wine in bottles. However, crypto bottles were not without problems. The 'more security you hide your goods behind, the more likely you are to turn your sanctuary into a target'. A 'social over-reliance on protection by barricades rather than conscience will eventually wither the latter by turning intrusion and theft into a sport, rather than a crime'. This fact is confirmed by the activities of computer crackers as well as by the fact that 'most otherwise ethical computer users seem morally untroubled by their possession of pirated software. 'Crypto-bottling' of information would lead to an obsessive competition between digital lock makers and lock breakers.<sup>230</sup> Complementary to this belief was another belief that 'a civilization of the mind' could be 'created in Cyberspace', that that civilization would be 'more humane and fairer than the world your governments have made before' and that culture, ethics and unwritten codes could provide the governance the new civilization needed. This belief is the heart of his *Declaration of Independence of Cyberspace* which claimed that cyberspace was a separate world, a 'new home of the mind' over which governments have no sovereignty;<sup>231</sup> cyberspace should remain the realm of complete freedom, and where things that have not been free in the traditional world would enjoy freedom.

Much had been written about the reasons why the Barlow's prophecy about the demise of copyright did not take place. Jessica Litman, for example, observed that, in retrospect, Barlow 'underestimated the tenacity of legacy copyright owners. A revisionist interpretation expanded 'the understanding of a "copy" beyond the idea of a tangible material object to include temporary and ephemeral instantiations' in the memory of a computer. Thereby, copyright

---

228 Barlow (2019), p. 24

229 Barlow (2000).

230 Barlow (2019), pp.29.

231 Barlow (1996).

owners ‘were able to sell their wine in ... make-believe bottles’. And worse, the ‘make-believe copyright bottles have given copyright owners more legal control over uses of their works than [what] they enjoyed under the old-fangled bricks-and-mortar law’, and the copyright industries ‘are earning more money than ever’.<sup>232</sup> While hacking did turn into a sport and protecting TPMs turned into an arms race between designers of TPMs and hackers as foreseen by Barlow ‘crypto-bottles did not totally fail’ so much so that Pamela Samuelson, one of the foremost opponents of anti-circumvention legal provisions, observed Barlow’s prediction that ‘crypto bottles would fail was, it seems, off the mark’. Consumers had ‘adjusted to technological protection measures more likely than might have seemed likely in 1994’ when Barlow made his prophecy, and in spite of online copyright infringement conventional copyright industries have bene thriving as never before.<sup>233</sup> It had been possible to protect the interests of copyright owners through TPMs backed by legal prohibition of circumvention of TPMs, and business models which offer a better experience than ‘stolen’ content could for the same or less cost (whether measured in search costs, download times, monetary outlay). And further, contrary to the oft-repeated claims, when DMCA was being enacted and for quite some time thereafter, that the anti-circumvention provisions of DMCA would chill innovation and competition it is now conceded that while had proved ‘inconvenient, expensive, and downright frustrating but not a measurable drag on innovation’.<sup>234</sup>

More to the point, ‘Barlow may have been insightful enough to recognize the enigma of digitized property a quarter of a century ago, but he was not enough of a prophet to articulate a framework for a comprehensive solution’.<sup>235</sup> Even James Boyle, a critic with empathy for Barlow’s ideas, observed that ‘Barlow was not right everywhere’, that ‘he underestimated the ability of law to adapt, and to incentivize private actors to make compliance more profitable than illegality’, and that ‘he overestimated the power of the web’ to be ‘a self-governing entity, free from state power, organized only by the dictates of custom and the Golden Rule [Do unto others as you would have then do unto you]’. As long as the Netizens were a small community Golden Rule might suffice but not when a majority of world’s population use the Internet.<sup>236</sup> Critics less sympathetic than Boyle indicted Barlow’s techno-utopianism ‘as

---

232 Litman (2019), pp.128-9, 134.

233 Samuelson and Hashimoto (2019), pp.113-4, 116-9. See also Masnick and Beadon (2019).

234 Jaszi (2019), footnote 1 at p.162.

235 Samuelson and Hashimoto (2019), p.112.

236 Boyle (2019) p.40.

stilted as other utopianisms—and equally far removed from reality’.<sup>237</sup> One has only to look at the variety and magnitude of cybercrimes and privacy violations in cyberspace to realise that cyberspace cannot be a self-regulating space beyond the pale of governments. Even though his prophecy about demise of copyright went awry, under the influence of his writings many academics veered round the view that the inherited concepts and laws of copyright no longer suit the digital age.

The prophecies of Karl Marx about the immiseration of the working class in advanced capitalist countries, the historic inevitability of capitalism being displaced by communism, and of the proletariat emerging as the ruling class in place of the bourgeoisie, and the withering away of the State did not turn out to be true. Yet even now, even after the Fall of the Soviet Union, the ideas of Marx continue to influence large numbers all over the world, even in the U.S., the high citadel of capitalism. Large numbers feel that capitalism is evil, and that inequality of wealth should give way to a more egalitarian distribution of wealth, income and access to healthcare and education; their conviction influence their writings and motivate many of them to indefatigably struggle for the realisation of their objectives. Likewise, in spite of Barlow’s prophecy about copyright turning out to be wrong, the idea that the emergence of digital technologies calls for an abandonment of the inherited conceptualisation of copyright had a powerful spell among the majority of U.S. academics. In Foucauldian terms, the emergence of digital technologies marked a sharp discontinuity in the history of copyright, and when a discontinuity occurs, ‘things are no longer perceived, described, expressed, characterized, classified, and known in the same way’.<sup>238</sup> Most American academics now conceptualise copyright in a way very much different from the conceptualisation in the past, and their vocabulary of discourse is different from the minority of academics who still think about copyright in the old-fashioned way. And further, ‘most of Barlowian’ energy over the last twenty-five years had been devoted to block attempts to expand copyright law, sometimes in ways that seemed to threaten fundamental and attractive components of the Internet’;<sup>239</sup> the narrative that follows provides example after example. The transvaluation of copyright had spread even to countries with a strong authors’ right system like France, not to speak of countries like India. The transvaluation is not only reflected in academic writing but also in policy advocacy; thus, when the E.C. Digital

---

237 Edelman (2019), p.97.

238 Foucault (1970), p.235.

239 Boyle (2019), p.58.

Single Market Directive (2019)<sup>240</sup> was being considered a group of 169 academics specializing in intellectual property sent a statement to the EU Parliament in April 2018 strongly opposing Article 11 as they believed that that Article would likely impede the free flow of news and other information vital to a democratic society.<sup>241</sup> With exceptional intellectual honesty, Jessica Litman wrote about the consequences of an academic specialising in copyright law like herself straddling two worlds, the world of teaching the details of the copyright statute and the case law construing it, and the world of scholarship writing normative and historical articles and books about copyright. The disjunction between the two worlds was ‘serious and growing’ with the result that ‘practicing copyright lawyers are finding much copyright scholarship less useful than they used to, and many copyright scholars are finding members of the copyright bar less thoughtful than they used to’.<sup>242</sup> Litman could have also referred to fact that by the 1980s, ‘law schools become more like graduate schools and less like professional schools, copyright commentary began to get more scholarly and independent of the industries it studied’, and that a group of progressive copyright scholars were ‘constructing a new narrative of what copyright policy should be’.<sup>243</sup> This development led to a disjunction between the policy advocacy by academics and real-world policy making during the Copyright Wars of the 1990s. A major reason why the policy advocacy by academics did not cut much headway was because generally policymaking does not usually adopt new ideas except in times of crisis when thinking as usual would not do. Further, as Woodrow Wilson, an academic turned politician put it, uncompromising thought is the luxury of the recluse, and compromise is the true gospel of democratic politics. In public life, it is necessary to adjust views, compound differences and placate differences.<sup>244</sup> Such an approach does not come easy to those wedded to the pursuit of truth,

---

240 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC; hereafter referred to as the E.C. Digital Single Market Directive (2019).

241 Pamela Samuelson and Kathryn Hashimoto, *The Enigma of Digital Property*, p.107-8.

242 Jessica Litman, ‘The Copyright Revision Act of 2026’, *Marquette Intellectual Property Law Review*, Volume 13, Number 2, 2009, pp.249-262 at pp.249-50.

243 David Bollier, *Viral Spiral*, pp. 42, 53.

244 Yet as President [of Princeton University and later of the United States] Wilson forgot the wisdom of his youth and of what he wrote as a scholar. The crowning glory of his life’s achievement was getting the cynical statesmen of Europe to accept the League of Nations, and yet he failed to get the U.S. Senate to ratify the Peace Treaty and approve America joining the League. ‘Through self-will, inflexibility, egotism, failure to distinguish between the essential and inessential, he successfully defeated his own *purpose*’. Phyllis Lee Levin, *Edith and Woodrow: The Wilson White House*, New York: Scribner, 2001, p.495.

and that explains why, as would be elaborated below, the industry interest groups left the arena once they could cut a deal, and academics who joined the Copyright War were left to themselves.

Barlow posed the question as to how ‘we are going to get paid for the work we do with our minds’ if in the digital environment content cannot be protected, and ‘if we can’t get paid, what will assure the continued creation and distribution of such work?’.<sup>245</sup> His answer overturned the basic idea underlying the ‘Copyright’ system of copyright, namely that without the economic incentive that copyright provides works would not be created and disseminated to the public. At a time when Internet was being conceived as a tube through which content would flow, or alternately as an information superhighway Barlow perceived Internet to be ‘a space for virtual interaction and collaboration’,<sup>246</sup> and foresaw that ‘most information [and content] on the Internet will be generated collaboratively by the cyber-tribal hunter-gatherers of Cyberspace’.<sup>247</sup> If the Internet was perceived to be an information superhighway, figuratively, the objective of adapting copyright law would be assuring the car [content] owners that their cars [content] would be safe and secure on the information superhighway, and would not be carjacked.<sup>248</sup> The content that the cyber-tribal hunter-gatherers of cyberspace is not produced like a car; in the networked digital environment ‘content is more akin to a living organism than a static package of knowledge; it evolves, spreads, and, over time, it spoils’.<sup>249</sup> There are any number of examples which prove the veracity of Barlow’s contention that many works would be created in the digital environment through collective, collaborative, voluntary effort, two very good examples being Wikipedia and open source software. The works created by collective volunteer work continuously evolve like a living organism; they are not frozen in print or other medium in which a work is embedded. In other words, there is no such thing as ‘final cut’ as it used to be in the age of oral tradition before the discovery of printing.

---

245 John Perry Barlow, ‘Selling Wine Without Bottles’, p.2.

246 For this insight, due credit should also be given to Howard Rheingold, *The Virtual Community: Homesteading on the Electronic Frontier*, Boston : Addison Wesley, 1993; see Peter Jaszi, ‘What didn’t Happen: An Essay in Speculation’ in James Boyle, ed., *The Past and Future of Internet: A Symposium for John Perry Barlow*, 2019, pp.162-73 at footnote 17 at p.172.

247 John Perry Barlow, ‘Selling Wine Without Bottles: The Economy of Mind on the Global Net’, p. 20.

248 Jane C. Ginsburg, ‘Putting Cars on the Information Superhighway: Authors, Exploiters, and Copyright in Cyberspace’, *Columbia Law Review*, Volume 95, 1995, pp.1466-99.

249 Jessica Litman, ‘Imaginary Bottles’, p.128.

# PART II: PREPARATORY PHASE

## **Chapter 6: Juggernaut Set in Motion**

### **6.1 In a Big Hurry**

The 'We can do' spirit spawned by the conclusion of the TRIPs agreement emboldened the developed countries, particularly the U.S., to move back to WIPO take up with dispatch and resolve the 'digital agenda', an unfinished agenda of the TRIPs negotiations. The Committees of Experts resumed their work in December 1994; the digital agenda was briefly mentioned for the first time in the Committees only during the sessions in December 1994, but no discussion took place. Following the recommendation of the Committees of Experts, the DG, WIPO invited government members of the Committees and the European Commission to submit proposals for discussion at the September 1995 and February 1996 sessions. The next session of the Committees was held in September 1995; even before that session WIPO Secretariat came to the conclusion that a diplomatic conference should be held in 1996 to conclude treaties on the subjects under consideration by the Committees, included the expenditure which would be incurred by the diplomatic conference in the annual budget and workplan for 1996, and sought approval of that annual budget and workplan in a meeting of its Governing Bodies which was scheduled back-to-back with the session of the Committees in September 1995. Thus, the move to hold a diplomatic conference began even before the Committees took up serious discussion of digital agenda. The workplan announced by the Chairman of the Committees of Experts in the joint session of the Committees in September 1995 carried forward the intention of WIPO to hold the diplomatic conference in 1996. The workplan proposed that WIPO should call upon its Member States to send proposals in treaty language by November 27, 1995, should convene the next session of the Committees on January 11-19, 1996, and should hold a meeting of its Governing Bodies back-to-back with the next session of the Committees for a final decision on the convocation of the diplomatic conference. The Chairman graciously accepted the request of some participants for a slight delay in the convening the next session and scheduled the session of the Committees for February 1, 1996. From the unseemly hurry to firm up a diplomatic conference even before deliberations over the digital agenda were concluded it is fair to infer that WIPO, either on its own or at the behest of powerful Member States or both, was too keen to organise a diplomatic conference without allowing the time and space required for informed deliberation of the relevant issues, much less forging a consensus. That unseemly hurry militated against the interests of developing countries, particularly from the African and Asian regions, whose experts had no

exposure either to the new digital technologies or a proper understanding of the digital agenda. Consequently, the deliberations of the sessions were dominated by experts from developed countries and representatives of industry associations having a stake in the digital agenda;<sup>250</sup> to the extent there was participation it was mostly by experts from Latin America and Caribbean Islands (GRULAC) some of whom had exposure to the relevant issues because WIPO organised a worldwide symposium on copyright in the global information infrastructure in Mexico City (May 1995). Developing countries constitute the majority of the Member States of WIPO; hence, if they chose to insist on time and space for deliberation they could have stopped the juggernaut but they did not, perhaps because the copyright experts from developing countries were prone to accord considerable deference to the experts from the U.S. and E.C. who were knowledgeable about the digital technologies.<sup>251</sup> The way the Committees of Experts functioned after the conclusion of the TRIPs agreement establish that the metaphor of a juggernaut I mentioned at the WIPO-India Seminar was apt (See Chapter 1).

## **6.2 One for the Road**

I was in for a surprise when the record of the deliberations in the February 1996 session of the Committees of Experts were received a couple of weeks after the WIPO-India Seminar. As I pored through the record of that session, I noticed that in addition to the Internet Treaties another treaty for creating new *sui generis* right for databases was in the making. It was the EC which first proposed creation of a *sui generis* right for databases based on its directive on databases in-the-making. The databases right went far beyond protection provided by the Berne Convention for collections of literary and artistic works (Article 2(5)), and the provision in the TRIPs agreement (Article 10(2)) which is an adaptation of the Article 2(5) of the Berne Convention. The Berne Convention (by extension the TRIPs agreement) protects only collections which

---

250 David Nimmer, a noted expert in copyright law who attended the Diplomatic Conference on behalf of the Computer & Communications Industry Association, wrote aptly in his account of the Diplomatic Conference that though the subject matter was Internet the expertise of most of the experts who attended the Committee of Experts and later the Diplomatic Conference lay entirely in traditional copyright. This was all the more so in the case of experts from developing countries who had no exposure to the digital technologies. David Nimmer (1998), pp.507, 509.

251 Samuelson (1996b), p. 433. She also made the percipient observation that national delegations attending the diplomatic conference in Geneva included not only officials who had previously attended the Committee of Experts meetings, but also other government officials who were not necessarily copyright specialists and were not prone to show deference to the positions of the U.S. and the EC the way copyright experts were prone at the meetings of the Committees.

are intellectual creations, and so did all national laws; the test of intellectual creation is the use of creativity in the selection of the material which goes into the collection and the method used for collection. The provision in the U.S. Copyright Law relating to compilations is similar to Article 2 (5) of Berne Convention, and its scope was adjudicated in the landmark *Feist* case (1991)<sup>252</sup>. The American Supreme Court rejected the ‘sweat of rationale’ for conferring protection, that is to say merely expending time and effort on making a collection is not a ground for claiming protection, and that originality was needed. Like much else, with the advent of new digital technologies the making and use of databases underwent substantial transformation. The making of databases became big business as data is the lifeblood of the new Information Economy, and digitalisation opened up new vistas of compiling and accessing data. With a view to give a boost to European database industry, the EC sought to issue a directive on *sui generis* protection of databases which would be binding on its Member States; it was a right accruing not from originality in compilation but from investment of either human or financial resources or both. In the February 1995 session of the Committees of Experts, EC proposed a *sui generis* database right on the lines it proposed in its draft directive.. The Lehman Report did not suggest a *sui generis* database right, and yet the U.S. welcomed the proposal of the EC; surprisingly, so did experts from quite a few African countries. Quite a few expressed reservations and a few were outright opposed. The expert from Thailand highlighted the long period taken by the EC to prepare the draft directive on databases; that being so, more studies and additional time would be required to reach an agreement on databases at the international level. Further the protection of investment through *sui generis* right could change the very concept of intellectual property. Summing up the arguments for and against, the Chairman of the Committee concluded that there was interest in the new right, that hesitation on the part of some experts was mainly due to its newness and lack of studies on the right proposed, and that work on that right should continue.<sup>253</sup>

### **6.3 Calendar of Events**

Even while announcing the next session of the Committees would be held on May 22-24, 1996, the Chairman of the Committees laid down a detailed roadmap for the convening of a diplomatic conference from December 1 to 21, 1996. He suggested that the meetings of a Preparatory Committee of the

---

252 *Feist Publications, Inc. v. Rural Telephone Service Co*, 499 U.S. 340 (1991).

253 Committees of Experts, February 1996, paragraphs 246 and 265.

DipCon (PrepCom) and WIPO Governing Bodies should be held back-to-back with the May meeting of the Committees so that they could take necessary decisions about organising the diplomatic conference. He also proposed that he would prepare draft treaties (negotiating texts called Basic Proposals), and they would be circulated to Member States by September 1, 1996; they would serve as the negotiating texts of the DipCon. Further, a joint consultation meeting of the three regional groups of developing countries—the African Group, the Asian Group, and GRULAC<sup>254</sup> was to be held in Geneva on May 17, 1996, and again on September 20, 1996. In mid-October 1996 a ‘12+12’ consultation meeting would be held in Geneva, where in twelve developed countries and twelve developing countries (comprising four each from the three groups of developing countries) would participate. During the first half of November 1996, a regional meeting would be convened in each of the three regions which would be attended by all the countries of the region. The rationale for the ‘12+12’ meeting was never spelt out; however, it was generally believed to have been inspired by the informal negotiations which took place between developed and developing countries during the TRIPs negotiations, and purportedly contributed to the success of the TRIPs negotiations. It was expected that the ‘12+12’ meeting preceding DipCon would similarly build consensus and hasten agreements at the DipCon. The proposals of the Chairman were approved, the sole feeble, discordant note being that of the expert from Korea who voiced reservation about the convening of the DipCon without adequate preparatory work.

The juggernaut rushed forward briskly with clockwork precision. In May 1996, at the session of the Committees of Experts, the Delegation of Hungary, speaking on behalf of the countries of the Central and Eastern European region, suggested that the proposed ‘12 + 12’ meeting be expanded to a ‘15 + 15’ meeting, and stressed that the countries of his region should be granted appropriate representation in that meeting. However, the Committees did not approve the suggestion; a couple of days later, the meeting of the WIPO Governing Bodies approved the proposals of the Committees of Experts at their February 1996 session and fixed the dates for the various consultation meetings and the DipCon. It also deferred a decision on the selection of the countries of the ‘12+12’ meeting to its next session in September-October 1996. At the next meeting, the WIPO Governing Bodies (September 23-October 1996)

---

254 These three groups replaced ‘Group 77’ which was a negotiating group representing all developing countries in the UNCTAD and some other UN bodies. The replacement was appropriate as the three groups of developing countries expressed different views on many aspects.

decided to reconfigure the consultation meetings to be held prior to the DipCon. On October 14-15, 1996, a General Consultation meeting would be held in Geneva in which all Member States of WIPO would participate. In late October-November regional meetings would be held in each of the three regions of developing countries wherein the developing countries of that region would participate. On November 29-30, 1996 a '15+15+1+1' closed door consultation meeting would be held in place of the '12+12' meeting, and the DipCon from December 2-20. The two 'plus 1' participants would be a representative of China on behalf of the developing countries and Jukka Liedes from Finland on behalf of developed countries, 'it being understood that Jukka Liedes would serve as Chairman, and the representative of China would serve as Vice-chairman'. The Governing Bodies also decided that 'the mandate of the October November regional meetings was an exchange of views on the Basic Proposals to be considered by the Diplomatic Conference in December 1996, with the understanding that the mandate does not extend to making any amendment in the Basic Proposals, nor to taking any decisions or making any recommendations regarding the Diplomatic Conference'; the mandate of the '15+15+1+1' meeting was to be decided upon at the October meeting.<sup>255</sup> However, no mandate was decided in the October meeting.

The idea underlying the deliberations of the Committees of Experts appeared to be that the deliberations would constitute the preparatory work; thereafter, 'the preparatory work would move into a consultative process, and then the Diplomatic Conference would have the final opportunity to shape the treaty or treaties.<sup>256</sup> However, no consultations were held. A closed door '15+15+1+1' consultation meeting comprising fifteen developed countries, fifteen developing countries, China and Finland was scheduled for October 1996. However, no such meeting was held and in lieu of that meeting a General Consultation meeting of all Member States was held. It was anything but a venue for informal negotiations

After the joint session of the Committees, PrepCom and WIPO Governing Bodies in May 1996, the officer who attended the meetings reported to me, after he came back, that the *sui generis* databases right would not come up for consideration in the DipCon. I was not sure and told him that *sui generis* right was unlikely to be dropped if the U.S. as well as the EC were keen on that right. Once the records of these meetings were received my guess was proved

---

255 WIPO Governing Bodies, May 1996, pp.2-3.

256 Chairman's concluding remarks at the May 1996 meeting of the Committees of Experts. Committees of Experts, May 1996, paragraph 121 at p.37.

right. In the concluding session of the Committee of Experts in May 1996, the U.S. submitted its own proposal on the *sui generis* right which was based on a bill (H.R. 3531) earlier introduced in the Congress. There was no consensus on that right; the Chairman noted that even though ‘most interventions had expressed an interest in this form of protection’ many delegations felt that the *sui generis* right required further study and consultations. Then, he went to inform the Committee that the Basic Texts of the treaties he would be submitting would include the Basic Text of the database *sui generis* right; no one objected.<sup>257</sup> In the meeting of the PrepCom that followed, there was a great deal of inconclusive discussion on the question whether the Conference should adopt one, two or three treaties. DG, WIPO suggested that instead of three separate treaties there could be a single treaty with two or three chapters corresponding to the various kinds of rights, with Member Countries having the right to make reservations about one chapter or the other. During that discussion, the Database Treaty ‘was viewed, by a number of delegations as requiring further study, and therefore premature to be dealt with by the Diplomatic Conference of December 1996’. However, given that both the EC and U.S. were keen to push through the Database Treaty it came to figure on the agenda of the DipCon. The PrepCom took a view on the venue, title dates and organizational questions of the DipCon such as the draft agenda and the draft rules of business; no delegation questioned the propriety of taking a view on those matters without an agreement on the number of treaties to be considered by the DipCon. It also approved the Draft Administrative and Final Clauses of the each of three treaties which spelt out the organisational structures for administering the Treaty, the eligibility for becoming a party to the treaty, the minimum number of countries which were required to ratify the treaty for a treaty to enter into force, languages of the treaty and so on<sup>258</sup> The WIPO Governing Bodies approved the views of the PrepCom without any discussion.

In September 1996, WIPO circulated the four Basic Proposals: (i) the Basic Proposals of the three treaties to be considered by the DipCon, and (ii) the Basic Proposal of the administrative and final clauses of the treaty to be considered by the DipCon.<sup>259</sup> All in all, the juggernaut of a DipCon was let loose due to three plausible reasons: first, the U.S. was very keen to have domestic legislation and international treaty-making to go hand in hand;

---

257 WIPO Committees of Experts, May 1996, paragraphs 44-71.

258 WIPO PrepCom Report (1996), paragraphs 7-9, pp.2-3.

259 The administrative and final clauses were to be the same for all the three treaties; hence only one basic proposal was drafted.

secondly, WIPO was keen to take advantage of the momentum imparted by the TRIPs agreement to have the treaties adopted by an early DipCon and thereby recover the turf it lost to WTO, and ; thirdly, Bogsch, who had been DG, WIPO for nearly quarter of a century from 1973, wanted to end his long career with the crowning glory of effecting major changes to the Berne Convention whose revision was given up as hopeless and dangerous after the Paris Revision (1971).

## **Chapter 7: Basic Proposals (Negotiation Texts) <sup>260</sup>**

### **7.1 Introductory**

The Basic Proposals of the three treaties proposed to be considered by the DipCon-WCT, WPPT and the Database Treaty- were received by the third week of September 1996. No sooner the Basic Proposals were received when we began their analysis in right earnest. The inputs provided by the National Resource Group were very limited; the NASSCOM (National Association of Software and Service Companies, the trade association of Indian IT industry) and the Indian film industry were of the view that what was good for their American counterparts was good for them, basically because the Indian IT industry was trying to replicate the American IT industry, and Indian film industry and Hollywood were similarly organised. I and my colleagues in the Department of Education had to rely on the legal analysis of the issues and provisions of the draft treaties by Gopalakrishnan.

Even though the Database Treaty sought to create a new right that was neither copyright nor a related right, the draft Database Treaty had two features in common with the drafts of the other two treaties. First, all the three treaties share a common trigger, namely the emerging digital technologies which aroused great expectations among the policymakers of leading developed countries and at the same time evoked great fear that copyright and related rights might not survive the onslaught of digital technologies without far reaching changes, and that without such changes the full prospects of the new economy would not be realised. Secondly, all the three treaties had common, identical provisions regarding obligations concerning technological measures and rights management information, enforcement measures, and administrative and final clauses.

### **7.2 Draft WCT and WPPT**

The impression I got from the documents circulated WIPO-India Seminar and my conversation with Ficsor was that digital agenda would be the only agenda of the forthcoming DipCon. It turned out to be a mistaken impression. As I dug deeper and deeper into the background of the DipCon and the provisions of the Basic Proposals, I discovered that, however important it was, the digital agenda was not the be all and end all of the DipCon; there was a vast unfinished agenda of the TRIPs negotiations arising from the failure to

---

260 Draft WCT; Draft WPPT; Draft Database Treaty.

fully update the Berne and Rome Conventions. Broadly speaking, the agenda of DipCon had two parts, the first being the digital agenda, and the second updating Berne and Rome Conventions. The non-digital agenda of WCT and WPPT comprises two groups of items: (i) incorporating the Berne Plus and Rome Plus provisions of the TRIPs agreement in WCT and WPPT respectively, and (ii) updating those provisions of the Berne and Rome Convention which were left untouched by the TRIPs negotiations (with the exception of issues relating to broadcasting) and incorporating them in WCT and WPPT respectively. A few exceptions apart, the non-digital agenda were no less important and contentious than the digital agenda. Thus, the only issue in the digital agenda on which voting took place was the reproduction right while four issues in the non-digital agenda had to be resolved through voting: rental right (Article 7 of WCT), Non-voluntary licenses (Art.6 of Draft WCT), moral rights (Art. 5 of WPPT), National Treatment (Article4 of WPPT). Further, despite intense negotiations between the U.S. and the EC the only agreement that could be reached as to exclude audio-visual performances from the purview of WPPT.

A brief outline of the provisions of Draft WCT and WPPT) and Draft Database Treaty follows.

### **7.2.1 Digital Agenda**

The digital agenda comprises six elements: (i) redefining some terms like phonogram to take into account new methods of production and making available works and performances; (ii) clarifying that downloading and storage in the memory of a computer constitutes reproduction; (iii) vesting an exclusive right in the authors to control digital transmission of their works , and vesting a similar right in (a)performers to control digital transmission of their performances and (b) producers of phonograms to control digital transmission of their phonograms; ( iv) prohibit the circumvention of TPMs which rightsholders might put in place to prevent unauthorised access and transmission of their works/performances/phonograms; (v) prohibit the tampering of right management system which rightsholders might put in place to track the use of their works//phonograms, and; (vi) limitations and exceptions in the digital environment. Except the definitions the provisions in respect of the other five elements of the WCT and WPPT are, *mutatis mutandis*, the same.

#### **7.2.1.1 Definitions**

Digital technologies make possible new ways of producing works, phonograms and audio-visual recordings. With digital technologies sound or

images need no longer be fixed on a material support (a sound carrier like tape or record or a visual carrier like tape or film). There is not even need for a sound in the first instance for the production of phonograms. Phonograms may now be produced through fixing digital representation of sounds (binary codes/data) that are able to generate sounds with the assistance of electronic equipment even though the corresponding sounds had not yet existed. Likewise, audio-visual recordings may now be produced through fixing data that are able to generate images and sounds with the assistance of electronic equipment even though the corresponding images and sound had not yet existed. These technological developments were deliberated in the Committees of Experts and based on those discussions the Draft WPPT redefined fixation, phonogram, producer of phonograms and publication. The definition of fixation proposed by Draft WPPT does away with any reference to ‘material’; a fixation could as well be a *representation* of sound or images or both from which sound or images or both can be ‘perceived, reproduced or communicated through an appropriate device’ (italics added). Given the sharp difference of opinion between the U.S. and the EC over the coverage by WPPT of audio-visual performances the definition of fixation (Article 2(c)) had two alternatives, first limiting itself to sound and the second covering sound as well as images. The definition of producer of phonograms (Article 2(d)) was recast on the same lines as that of phonogram.

In contrast to the definition of ‘phonogram’ by the Rome Convention the definition of literary and artistic works in the Berne Convention does not require that a work should necessarily be fixed in a material form ; Article 2(2) of the Berne Convention leaves the countries of the Union free to make protection conditional on the work being fixed in some material form.<sup>261</sup> Therefore, the definition of literary and artistic works does not require any modification to reckon with the fact that a work produced or transmitted might not be in material form but is an intangible string of ‘0’s and ‘1’s.

#### **7.2.1.2 Right to Reproduction**

As mentioned above (See Sect.5.1.2) the complexity of the right of reproduction was compounded by the emergence of computer software. The advent of high-speed internet added a new dimension of complexity to the as-it-very complex right of reproduction because once any digitalised content is in the memory of a computer it could be communicated to myriads of other computers spread all over the world with a click of the mouse thereby erasing

---

261 WIPO (1978), para 2.11, p.18.

the distinction between private and commercial reproduction and private sharing and commercial distribution/communication of works. The divergence of views about the precise characterisation of the right to reproduction cast a long shadow over the deliberations of the Committees of Experts. The question whether temporary reproduction and storage in the memory of a computer was covered by the reproduction right was once again hotly debated, and the same old arguments surfaced. One school of thought held that temporary reproduction and storage in the memory of a computer temporary reproduction and storage in the memory of a computer did not fall within the right of reproduction at all; what was not within the purview of the right to reproduction needed no exemption. The second school of thought that temporary reproduction and storage in the memory of a computer were covered by the right of reproduction because Article 9(1) of Berne Convention used the expression ‘in any manner or form’ while enunciating that ‘authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, *in any manner or form*’ (italics added). The members of this school, however, were divided over the question whether the legal position held by them should be made explicit through an article of the Berne Protocol or whether a mention in the Records of the Conference would suffice. Whatever be such differences, these groups of countries were faced with the problem of exempting temporary reproduction and storage which are incidental to the authorised use of a work or other content as well as to their digital transmission. Here again opinions differed. Some were of the view that no specific limitations or exceptions were needed because the Three-Step test laid by Article 9(2) of the Berne Convention provided a sufficient legal framework to determine whether a particular act of reproduction should be exempted or not. Others took a different view and argued that the provision regarding the right of reproduction itself should spell out appropriate limitations on the right of reproduction in respect to transient and incidental reproductions whose nature and purpose justified a limitation. ‘

While drafting WCT and WPPT, Liederfelt felt that in order to firmly secure the functioning of the system of copyright and related rights in a digital future it was imperative to have a uniform interpretation of the very important right to reproduction.<sup>262</sup> He proceeded from the view that the correct interpretation of the right of reproduction should be made explicit through an article in the WCT, and that that article itself should spell out the conditions subject to

---

262 Draft WCT, paragraphs 7.14-5, p.30 and Draft WPPT, paragraphs 7.18-9 , p.42 and paragraphs 14.16-7, page 68.

which certain types of temporary and incidental reproduction should be exempted. Accordingly, Article 7 of the Draft WCT dealt with the right of reproduction; the first part of that Article spelt out that the right of reproduction included 'direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form'. The expression 'direct or indirect' was taken from Article 10 of Rome Convention concerning the rights of producers of phonograms. The purpose of using the expression 'direct or indirect' in Article 7 of Draft was to make it clear that 'the exclusive right may not be diminished simply because of the distance between the place where an original fixed performance is situated and the place where a copy is made of it. Recording from a broadcast or wire transmission is as relevant as copying locally from one cassette to another. Any form of remote copying that is made possible by a communication network between the original and the copy is intended to come within the reach of this provision'.<sup>263</sup> The second part of Article 7 permitted a Contracting Party to enact a national legislation which limited 'the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature' *provided that* 'such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law'; the limitation, however, was subject to the Three-Step test of Berne Convention. Articles 7 and 14 of the Draft WPPT were similar to Article 7 of Draft WCT.

### **7.2.1.3 Digital Transmission and Delivery**

Creating an exclusive right in regard to digital transmission involved addressing three questions: (i) what constitutes digital transmission and how it differs from other modes of making available, (ii) whether digital transmission could be covered within one or more existing rights, if need be, through clarification or whether it could be covered only by creating a new right, and (iii) how to extend immunity to ISPs from secondary liability arising from acts of infringement by their clients.

For the purpose of copyright and related rights, digital transmission, can be best understood by considering the different modes through which creators or their legal assignees can make available their products to the public. Traditionally, there had been two distinct types of making available a work through performance, the first not requiring fixation of the performance to be made (eg., recitation or live performance before an audience or live

---

<sup>263</sup> WIPO, Draft WCT, paragraph 7.07 at p.38.

broadcasting or cablecasting of a live performance), and the second set requiring fixing a performance to be made before it is made available to public (eg., distribution of a tangible copy of a sound recording). Digital transmission necessitates making a transient copy of the electronic file corresponding to a digitalised work or performance; in other words, reproduction is an indispensable step in any digital transmission. In a digital delivery, a digitalised work or fixation of a performance is transmitted to the user as an electronic file which could be downloaded and converted into a tangible copy; in other words, while in traditional publishing copies are first manufactured and then distributed, in digital delivery (which is also called electronic publication through networks or tele-reproduction) copies are produced at the recipient end after the act of dissemination. Instead of downloading, the user could savour the work or performance online provided he has, in his computer or attached to his computer, a *player*, which has a special program that ‘uncompresses’ and sends video data to the display and audio data to speakers. Traditionally, with broadcasting the listener has no right to choose what he is receiving from a particular source of broadcast. In contrast, with interactive, on-demand digital transmissions the recipient can choose transmission of what he likes to savour from the collections of content available with the transmitter at a time and place of his choice so long as he has a broadband connection and the necessary equipment to receive the digital signals and convert them into sound. With interactive, on-demand digital transmissions the actual extent of the use is not determined at the moment of making available (uploading) and is not determined by the person or entity alone who or which carries out the act of making available. It is the given member of the public, who, through his ‘virtual negotiation’ with the system, determines the extent of use, and whether the use will be deferred (through obtaining a more than transient copy) or direct (such as studying an on-line database, watching on-line moving images, listening to online music).<sup>264</sup> There are subscription systems and services based on particular technical arrangements and programming structures which make it possible to access entire digital-quality repertoires of authors, performers and producers of phonograms provided by a given subscription service without such access being fully interactive. From the point of view of the members of the public these services are ‘near to interactive’ or ‘near on-demand’, and in many cases the only difference between interactive and ‘near to interactive’ is in the time required for access. Near to

---

264 Ficsor (2005), paragraph 51 at p.12.

interactive services can be established by using cable or wire networks or by wireless means. Single channels offered on a subscription basis without being part of such near-interactive services do not have these effects.<sup>265</sup>

Discussions of an exclusive right to digital transmission involve distribution right and right of communication. Distribution right and right of communication to the public do figure in the Berne Convention; however, their scope is limited to a few works. Though not defined in the Berne or Rome Convention distribution is generally taken to be ‘making available of the *original or copies of a work or an object of related rights to the public: (i) by sale or other transfer of ownership; or (ii) by rental, lending or other transfer of possession*’ (italics in original).<sup>266</sup> The Berne Convention does not provide a general distribution right; it limits the distribution right to cinematographic works (Articles 14 (1) and 14bis (1). Like the right of reproduction, the distribution right is a copy-related right, that is to say a right related to the making and distribution of copies. In fact, some hold that the distribution right is implicit in the right of reproduction.

Just as it does not provide a general distribution right the Berne Convention does not provide a general right of communication to the public; it covered the right of communication to the public ‘incompletely and imperfectly through a tangle of occasionally redundant or self-contradictory provisions on “public performance,” “communication to the public,” “public communication,” “broadcasting,” and other forms of transmission’. The scope of rights depended on the nature of the work, with musical and dramatic works receiving the broadest protection, and images the least; literary works, especially those adapted into cinematographic works, lie somewhere in between musical and dramatic works and images.<sup>267</sup> Once the digital agenda began to be considered at the international level (eg., WIPO’s Worldwide Symposiums and the Committees of Experts) there was consensus about conferring an exclusive right to digital transmission on authors in respect of all types of works, and a similar right on performers and producers of phonograms in respect of phonograms. However, there was sharp divergence of the approach to be adopted for a precise legal characterisation of such a right. Sharp differences about legal characterisation of digital transmissions arose mainly due to two reasons. First, digital transmissions are of a complex nature, and there was no unanimity among the participants about relative importance of different

---

265 Draft WPPT, paragraphs 18.06 and 18.07, p.78.

266 WIPO Guide (2003), p.283.

267 Ginsburg (2004), p.2.

aspects of the transmission. Secondly, legal characterisation of digital transmissions had to reckon with the fact that countries of the Union exercised freedom of legal characterisation with the result that there was no uniformity in the way national laws characterised the acts and rights covered by distribution, public performance, communication to the public, public recitation and broadcasting (Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis* (1) of the Berne Convention). Thus, U.S. copyright law had a right to distribution and public performance right, but not an exclusive right to communicate works to the public. In contrast, in certain countries the public performance right covered not only the acts referred to by the Berne Convention as public performance but also the right of broadcasting and the right of communication to the public which are separate rights under the Berne Convention. In many countries, the right of communication to the public covers all the rights provided by Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis* (1) of the Berne Convention, that is to say, public performance, communication to the public and broadcasting rights. In a few countries, the broadcasting right also covers communication to the public by wire.<sup>268</sup> It is but human nature to prefer one's characterisation to those of others and plead for coverage of digital transmission by the right in vogue in one's country. Consequently, there were competing suggestions to cover digital transmission through existing rights of broadcasting, distribution, rental, and communication to the public.<sup>269</sup> Thus, the Copyright Convergence Group of Australia took a different tack, and recommended a general transmission right to cover the transmission of copyright material in intangible form to the public by any means or combination of means which is capable of being made perceivable by or used by a receiving device'.<sup>270</sup> Ideally, a general transmission right should cover transmissions by wire, as well as transmissions by wireless means, point-to-point transmissions as well as point-to-multipoint transmissions, simultaneous transmission to various members of the public as well as on-demand transmissions, and analogue transmissions as well as digital transmissions. To jump the story, Australia did move an amendment to Article 10 of Draft WCT (right of communication and making available) proposing a general transmission right; however, it did not secure much support.

---

268 Ficsor (2002), paragraph C 8.07, p.497.

269 Lehman Report, pp.217-8; EC Green Paper (1995), pp. 56-60; Australian Copyright Convergence Group (1994), pp.9, 25-8.

270 Copyright Convergence Group (1994), pp.9, 25-8.

At the Worldwide Forum organised by WIPO in Naples in October 1995, about a month after the September 1995 joint session of the Committees of Experts, Ficsor elaborated the details of the umbrella solution (also referred to as inter-operable solution) proposed by him in a rudimentary form at the Worldwide Symposium organised in Mexico City by WIPO (May 1995).<sup>271</sup> The umbrella solution proceeded from the fact that (i) countries varied widely in transposing the provisions of the Berne Convention relating to distribution, public performance, communication to the public, public recitation and broadcasting, and (ii) bringing digital transmission within the fold of only the distribution right or right of communication to the public would not be acceptable to many countries because it was difficult to 'get rid of categories, rights and exceptions in existing conventions and laws' because on such categories, rights and exceptions 'well-established practices are based, and on the basis of them, long term contractual relations have been formed'. The introduction of a new right in a new field was equally undesirable as it would upset existing licensing and marketing arrangements and create new uncertainties. The essence of the full umbrella solution is to identify and describe the acts involved in making available content to the public in a technology-neutral and legal characterisation-neutral way, fill the gaps in international copyright regarding the distribution right and the right of communication to the public and leave as much freedom as is necessary and reasonable to national laws concerning the specific legal characterisation of the acts, in other words, whether the acts involved in making available works or objects of related rights to the public should be characterised as communication to the public or distribution or both.

In the joint sessions of the Committees of Experts various proposals were put forth but no consensus was reached. In formulating the Basic Proposals Lieder took a 'Solomonic approach'<sup>272</sup> to resolve differences in national approaches in the Draft WCT. Article 8 of Draft WCT obligated all Contracting Parties to confer on copyright owners an exclusive right to control distributions of physical copies of protected works to the public; at the same time, it treated digital transmissions as communication to the public, and obligated all Contracting Parties to confer on copyright owners an exclusive right to control communications of protected works to the public (Article 10). Articles 9 (relating to performers) and 19 (relating to producers of phonograms) of Draft WPPT correspond to Article 8 of Draft WCT. Similarly Articles 11 (relating to

---

<sup>271</sup> Ficsor (1996), pp.135-7.

<sup>272</sup> Samuelson (1996b), p.394.

performers and 18 (relating to producers of phonograms) of Draft WPPT corresponded to Article 10 of Draft WCT with the difference that unlike Article 10 of Draft WCT, Article 11 of the Draft WPPT bore the title ‘right of making available fixed performances’, and Article 18 bore the title ‘right of making available phonograms’. All in all, the right of making available is a new right covering interactive, on-demand transmission of fixed performances and phonograms.

Article 10 of Draft WCT had two parts: first, expansion of the right of communication to the public in the Berne Convention to cover all works; secondly, the author would have the exclusive right of communication to the public in respect of interactive on-demand transmissions, that is to say, ‘making available to the public of their works by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them’. The proposal is referred to as half-umbrella solution as it adapted umbrella solution of being not technology specific in its characterisation of the act of interactive on-demand transmission but did not adapt the other characteristic of umbrella solution, namely, legal characterisation of interactive transmissions in a neutral way neutral in the sense that it does not refer either to distribution or to communication to the public of content. It labelled the right in respect of interactive on-demand transmissions as the right of communication to the public.

#### **7.2.1.4 Technological Protection Measures**

All through, in the Committees of Experts, during the DipCon and later in the transposition of the provisions in WCT and WTTP into national laws, anticircumvention provisions<sup>273</sup> have been controversial. As mentioned above, (See 5.4.4) during the 1980s, TPMs such as scrambling devices to prevent unauthorised access to protected content broadcast or communicated through other means and SCMSs for preventing multiple copying of musical recordings made their appearance, and that there were quite a few legislations which dealt with TPMs and circumvention of TPMs. Circumvention of TPMs entered the policy discourse in WIPO when WIPO set up in 1989 a Committee of Experts on a Model Copyright Law; the Committee’s work was aborted in 1991 when WIPO set up a Committee of Experts for considering a Protocol to the Berne Convention; a similar committee established to draw up a Model law for sound recordings met with a similar fate when in 1993 WIPO set up a Committee of Experts for considering a for considering a new instrument for the protection of

---

273 These are legal measures that prohibit circumvention of TPMs.

rights of performers and producers of phonograms. However, during their brief existence both the committees discussed proposals made by WIPO in regard to circumvention of TPMs. The thinking of WIPO's International Bureau evolved from a device-specific provision which made it mandatory for copying devices like recorders to have TPMs to an omnibus law similar to United Kingdom's Copyright, Design and Patent Act, 1988. The members of the Committee on Model Copyright Law expressed divergent views on the initial proposal of WIPO's International Bureau. Some expressed doubts whether technical solutions that could be circumvented could really offer a solid basis for the protection of copyright. Some others were worried that the mandatory obligation on manufacturers of recorders to incorporate TPMs would create trade impediment as well as obstacles to the enjoyment of the public of the technological developments in recording. Some, however, were of the view that it was possible to reconcile the concerns of rightsowners about unauthorised copying of protected works on a large scale on the one hand and the interests of consumers on the other. The subsequent proposal of WIPO to incorporate in the Model Law (proposed to be developed by the Committee) a provision similar to the United Kingdom law also did not secure a consensus. The divergent opinions on anti-circumvention measures anticipate similar divergence of views during the DipCon as well as the preparatory work by the Committees of Experts.

The anti-circumvention provisions made their debut in the Berne Protocol Committee meeting in its third meeting ( June 1993)<sup>274</sup>; the International Secretariat of WIPO suggested that as part of the enforcement measures the Protocol should make it obligatory for the Contracting Parties to provide for criminal sanctions, civil remedies and provisional and border measures in relation to the circumvention of copy protection measures , and for the decryption of broadcasted or otherwise communicated programmes. The Committee, however, felt that the enforcement provisions of the Protocol should be based on similar provisions in the TRIPs agreement which was still a work in progress. Consideration of the anti-circumvention provisions was taken up again in the Fourth meeting of the Committee (December 1994) by when the TRIPs agreement was concluded. As the TRIPs agreement did not provide for anti-circumvention provisions it could not throw light on the legal provisions needed to curb the circumvention of TPMs used by rightsholders to protect their copyright and related rights. Even though most experts who attended the Berne Protocol Committee meeting had little idea of TPMs, anticircumvention measures

---

274 For elaboration of the deliberations on anticircumvention measures by the Committees of Experts see Ficsor (2002), paragraphs 6.40-59, pp.384-96, and Geist (2010), pp.212-8.

and the United Kingdom law they presciently raised vital issues which needed to be resolved if obligations regarding anti-circumvention were to be imposed on Contracting Parties in Berne Protocol or the New Instrument. The issues which surfaced during the discussions included the relationship between anti-circumvention provisions and other copyright and related rights enforcement measures as well as laws outside the area of intellectual property such as competition, criminal and telecommunications laws. And further, there was also debate on the question whether the anti-circumvention provision in the Berne Protocol and the New Instrument should only lay down broad principles and leave it to national legislations to flesh out the details or whether it should be comprehensive dotting the ‘i’s and crossing the ‘t’s.

For the joint meeting of the Berne Protocol and New Instrument Committees held in February 1996 <sup>275</sup> the U.S., and Argentina submitted proposals in treaty language; though not in treaty language the Brazilian proposal was similar to the Argentine proposal. The American proposal was based on the recommendations of the Lehman Report and focused on trafficking in circumvention devices and services. It required the Contracting Parties to make it unlawful the ‘import, manufacture or distribute any device, product or component incorporated into a device or product, or offer or perform any service, the *primary purpose or effect* of which is to avoid, bypass, remove, deactivate, or otherwise circumvent without authority, any process, treatment, mechanism or system which *prevents or inhibits the unauthorized exercise of any of the rights under the Berne Convention or this Protocol*’ (italics added to key phrases). The proposals of Argentina and Brazil were broader than the American proposal and covered both the act of circumvention and trafficking in devices which circumvented copy controls or disabled coded signals designed to restrict communication or broadcasting of protected works to the public. The Group of African countries supported the American proposal and GRULAC countries supported the Argentine proposal. While stressing that legislative measures were needed to protect TPMs and to this end initiative should be taken at the international level EC raised a number of key issues which needed to be closely examined and resolved.

During the discussions of the Committees of Experts, six key issues needed to be resolved in the design of anti-circumvention provisions; they are (i) the acts of circumvention which needed to be addressed, that is to say whether circumvention of access controls should be prohibited or use controls

---

275 Committee of Experts, February 1996, paragraphs 194-236, pp.48-58.

or both; if circumvention of access controls were prohibited it would create a new access right and if exceptions are not provided fair use might be extinguished, (ii) whether manufacture, distribution, sale, import, possession in the course of business of circumventing devices should also be prohibited, (iii) which type of circumventing devices should be prohibited, namely whether only those TPMs whose *sole* intended purpose was circumvention of TPMs or those whose *primary* purpose or effect was circumvention should be prohibited; the scope of prohibition would be narrower with the criterion of sole intended purpose, (iv) whether the definition of circumvention should include an element of knowledge, and if so what should be that element, (v) whether the treaties in the making should only lay down broad norms and leave it to the national legislations to specify the details, and (vi) the limitations and exceptions which ought to be provided.

Widely divergent views were expressed on each of these issues by the experts as well as the representatives of the business interest groups which participated in the meetings of the Committees. Those who believed that trafficking in TPMs should also be prohibited in addition to acts of circumvention of TPMs argued that given that digital technologies had erased the distinction between private and commercial copying, and between sharing of content by individuals and commercially making available content an 'act of circumvention only approach' would necessitate copyright law enforcing authorities to go after myriads of individuals in the privacy of their homes. It is administratively more expedient to pursue a small number of circumventing device manufacturers and suppliers than myriads of private individuals. In regard the third issue, those who favoured a broader provision argued that the criterion of sole intended purpose would not effectively curb circumvention of TPMs while those who favoured that criterion of sole intended purpose argued that expressions like 'primary purpose' and 'primary effect' were vague, and that choosing the criterion of primary purpose/effect would have serious unintended consequences such as circumvention devices have multiple uses and shrinking of public domain. During the joint session of the Committees in February 1996 as well as May 1996, the Korean delegate was a steadfast critic of the proposals to impose obligations on Contracting Parties regarding TPMs, expressed concern that the anticircumvention might have unpredictable impact on public benefit limitations and exceptions under copyright laws. Exceptions and limitations should be provided not only as exemptions but also as an obligation on the part of copyright owners. The anticircumvention provisions could render manufacturers, who produce legally approved products, liable for the infringing acts of others. Digital technology was still in the stage of

experimentation. Although the need to incorporate provisions on technological measures into copyright laws was acknowledged, there were legitimate concerns about the possibility of TPMs being misused. Thailand also opposed a legal provision against circumvention as it required further study. An international instrument required global acceptability and all countries should have the opportunity to study TPMs before a true consensus was possible. China also asked for further study of all issues connected with digital technologies. Speaking on behalf of African countries, Nigeria said that legal systems in developing countries were not yet fully developed, and that being so legal provisions of the treaties in the making should be fair and clearly understandable. Quite a few interest groups also spoke, and the stand they took on TPMs was linked to their interest. The representative of Business Software Alliance (BSA) made the significant point that the legal provision against circumvention should be technologically neutral, otherwise it would soon become obsolete with rapid changes in the technologies underlying TPMs and circumvention technology, and it would be necessary to come up from time to time with a new legal provision. With circumventing devices, it is important not only to look at the intent of the designer or manufacturer but also how the device is actually used. Responding to the suggestion of some delegates that the treaties in the making should only lay down broad norms and leave it to the national legislations to specify the details a representative of Association of European Performers Organisations said that technological matters should be handled at an international level since works, performances and other content were used and sold on a worldwide basis. The representative of JEIDA (Japanese Electronic Industry Development Association) articulated the interest of electronic industry and expressed concern; the issues needed further study as they were new and there was little research or information available at that point. The 'primary purpose or effect' test was too broad and vague in that many computer-related products could be used for legitimate as well as illegitimate purposes. Therefore, he preferred the use of sole intended purpose test, and a requirement of knowledge of illegal use. The opposite view was expressed by the representative of Information Technology Industry Council who argued against the sole intended purpose test saying that it was possible to establish some non-infringing use for every circumvention device. Therefore, the primary purpose or primary effect test should be preferred. In his concluding remarks, Liedes summed up the different points of view which were expressed. Even while stating that several delegations had indicated that further studies were necessary and that some had expressed reservation or opposition to speedy introduction of any system without further studies, he noted that there had been an overwhelming majority in favour of measures for

prohibiting circumvention of TPMs; the overwhelming majority also felt that the use of TPMs should be voluntary.

At the final session of the joint meeting of the Committees in May 1996<sup>276</sup> the EC and its Member States submitted their proposal on TPMs. It was similar to that of the American proposal and focused on the trafficking of circumvention devices and provision of circumvention services. However, it differed from the American proposal in that it added a knowledge element; the infringer would have to know or would have reasonable grounds to know that the device or service in question would be used for circumvention. Israel, Hungary, Norway, Switzerland supported the proposal. The U.S. expressed its appreciation of the E.C. proposal and said that ‘the process of working out the differences among the various proposals is a very accomplishable task’. Canada stated that for the time being it could not endorse any proposal as studies were in progress in its country. However, it was necessary to ensure the TPMs as well as anti-circumvention measures do not get in the way of access to works in the public domain; they should also not curtail the exceptions and limitations of which certain users already benefited. Colombia said the EC proposal needed consideration in depth by its government. China said it was considering the issues involved as to determine if they were to be settled by copyright law or some other laws. Argentina expressed its preference for the American proposal, as it did not include the necessity of the person ‘knowing or having reasonable grounds to know’, a subjective element that did not reflect sound legislative technique in criminal matters. Chile supported the Argentinian view. Egypt felt that there was need for more clarity and less vagueness in the EC proposal. South Africa also felt that the provisions, particularly with regard to ‘reasonable grounds’, ‘primary purpose’ and ‘primary effect’ were vague, and it was not clear which act triggered liability on the part of the manufacturer or distributor. Morocco expressed its disagreement with the proposal. Singapore thought that the proposal on TPMs extending the obligation to apply criminal penalties went too far, and would incriminate legitimate users, stifle industry and inhibit innovation. Thailand said that the provisions were too broad and recalled previous efforts to ban video-recorders. Ghana endorsed the view of Thailand and wanted reconsideration of the proposal as these provisions could prove to be rather oppressive for developing countries where knowledge of intellectual property

---

<sup>276</sup> The Committees discussed the right of reproduction, digital transmission and technological means of protection were discussed together. Committee of Experts, May 1996, paragraphs 10-43, pp.4-13.

was low. Speaking on behalf of African countries, Nigeria said that the EC proposal was vague. Legal systems in developing countries were not yet fully developed, and that being so legal provisions of the treaties in the making should be fair and clearly understandable. Nigeria also insisted that ‘the proposal on technical devices must be examined as to its economic, social and other implications: how it will effect economy, development and access to information’. Guinea said it shared the views of the African group. Korea reiterated its concerns about the proposals. The provisions relating to TPMs could render manufacturers, who produce legally approved products, liable for the infringing acts of others. Digital technology was still in the stage of experimentation. Although the need to incorporate provisions on technological measures into copyright laws was acknowledged, there were legitimate concerns about the possibility of misusing technological measures. Interestingly Korea also submitted a proposal in treaty language along with an elaborate rationale for its proposal.<sup>277</sup> Copyright law attempts to strike a balance between the privileges of right-holders and the public interest. The maintenance of such a delicate balance has been a source of cultural development. However, the very aim of cultural development may be disrupted if rightsholders control each and every use of copyrighted works and non-copyrighted materials. Korea proposed that it should be a matter for national legislation of the Contracting Parties to exclude from the purview of TPMs works which are neither original nor protected by law, and to lay down the limitations on and exceptions to anti-circumvention provisions to the extent permitted by the Paris Act of the Berne Convention. A similar proposal was made in respect of performances and phonograms wherein ‘Paris Act of the Berne Convention’ was replaced by ‘Rome Convention’. Interestingly, the Report of the meeting brings out that none of the participants commented on the Korean proposal.

It is obvious that divergent views were expressed in the meetings of the Committees, and no attempt was made to forge a consensus. The Chairman concluded the discussion cryptically saying that the proposal of the EC and its Member States had come to an end; there was no need for further conclusions or recommendations, since the preparatory work would now move into a consultative process, and then the DipCon would have the final opportunity to shape the treaty or treaties.

Notwithstanding the dissenting opinions expressed in the Committees of Experts Article 13 of Draft WCT and Article 22 of Draft WPPT relating to obligations concerning TPMs were modelled after Section 296(2) of the United

---

<sup>277</sup> Korean Proposal, May 1996.

Kingdom's Copyright, Design and Patent Act, 1988 and the corresponding provision in the American NII Copyright Bill of 1995 based on the Lehman Report.<sup>278</sup> And further, the Articles also incorporated the knowledge element of the EC proposal. The first clause of the Articles cast an obligation on the Contracting Parties to make it unlawful the importation, manufacture or distribution of *protection-defeating devices* or the offer or performance or services having the same effect. A condition for proscription was that the person performing the act *knows or has reasonable grounds to know* that the device or service would be used for or in the course of the *unauthorized exercise of any of the rights* provided for under the proposed Treaty (italics added). In subsequent literature, the acts of importation, manufacture and distribution of protection-defeating measures had come to be known as 'preparatory activities' without which circumvention not possible. The second clause cast an obligation on the Contracting Parties to provide for appropriate and effective remedies against the unlawful acts referred to in the first clause. However, the second clause provided a great deal of flexibility to choose the legal remedy against the unlawful acts referred to in the first clause so long as the remedy is appropriate and effective. Hence, it was not necessary that the legal remedy against anti-circumvention devices or services should be covered by copyright law; it could be located in criminal law or civil law or public administrative law so long as the remedy is '**expeditious** so as to prevent circumvention and abuse and **dissuasive** so as to constitute a further deterrent to further circumvention and abuse' (emphasis in the original).<sup>279</sup> Clause 3 defined a protection-defeating device; the definition rejected the sole intended effect or purpose criterion for determining whether a device was protection-defeating; it opted for primary effect or purpose criterion. A protection-defeating device was defined to be 'any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty'.

It is worth mentioning that the use of TPMs is voluntary; there is no obligation on a rights holder to use TPMs unlike the obligation in the American Audio Home Recording Act ,1992 (See 5.4.4).

---

278 Lieder (1997), p.10.

279 Reinbothe and von Lewinski (2015), paragraph 7.11. 32, pp.172-3.

### **7.2.1.5 Rights Management Systems (RMIs)**

Along with the development of digital technologies electronic rights management systems had been developed to assist the rightsowners to better keep track and monitor the use of copyrighted works. Such systems would be attached to digitalised versions of works and performances and would help the user know about attribution, creation, and ownership interests. The information likely to be included in rights management systems would comprise, among others, information regarding authorship, ownership of copyright / related rights, date of creation or last modification, and terms and conditions of authorised uses. Once such information is attached and readily accessible, users will be able to easily address questions over licensing and use of the work. It was expected that a rights management system would serve as a kind of license plate for a work on the Internet. Providing false information and tampering with such information or distributing or importing of distribution works from which the copyright management information has been removed or tampered was proposed to be declared illegal.

Discussion of rights management systems (RMSs) in the Committees of Experts was brief and cursory. While there was agreement about the necessity of protecting RMSs discussion of the finer aspects of RMSs was rather cursory and a number of questions were left unresolved. Article 14 of the Draft WCT and Article 23 of the Draft WPPT spelled out the obligations of Contracting Parties to legally protect RMSs attached to protected content by rightsholders. The first clause of Article 14 of Draft WCT and Article 23 of Draft WPPT require Contracting Parties to make it unlawful for any person to knowingly remove or alter any electronic rights management information without authority, or to knowingly distribute, import for distribution or communicate to the public, without authority, copies of fixed performances or phonograms from which such information has been removed or in which it has been altered. A requirement for proscription is that the person who performs these acts does so knowingly. The obligation of Contracting Parties covered rights management information in electronic form only. The second clauses defined rights management information. Thus, Article 14 of Draft WCT defined rights management information to be information which (i) identifies the work, the author of the work and the owner of any right in the work represent such information, and (ii) is attached to a copy of a work or appear in connection with the communication of a work to the public. Article 23 of the Draft WPPT is a similar provision in respect of performances and phonograms. The Notes attached to the Articles make it clear that nothing precluded a Contracting Party to provide for a broader field of application for provisions on rights

management information in its national legislation, or to design the exact field of application of the provisions envisaged in these Articles taking into consideration the need to avoid legislation that would impede lawful practices. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for tampering with rights management information. The use of RMI systems was voluntary.

#### **7.2.1.6 Limitations and Exceptions**

As mentioned above in the context of the right to reproduction (See Sect. 7.2.1.2), Article 7(2) of the Draft WCT and Articles 7 (2) and 14 (2) of the Draft WPPT set limitations on the right of reproduction. The Contracting Parties were permitted to enact a national legislation which limited ‘the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature’; the limitation, however, was subject to the Three-Step test of Berne Convention. Article 12 (1) of Draft WCT and Article 13 (2) of Draft WPPT (applicable to performers) and Article 20(2) (applicable to producers of phonograms) permitted the Contracting Parties to provide in their national legislations limitations and exceptions to the rights (other than the reproduction right) in certain special cases subject to the Three-Step test.

As mentioned above, (See Sect. 3.4) the preponderant opinion is that the Article 13 of TRIPs agreement extended the Three-Step test to all exclusive rights conferred under copyright law under the Berne Convention, and that it had become the international standard. The Internet Treaties had carried forward what the TRIPs agreement did; Article 12(2) of Draft WCT made it explicit that when applying the Berne Convention, the Contracting Parties shall confine any limitations of or exceptions to rights which pass muster with the Three-Step test. And further, Articles 13(2) and 20(2) of WPPT extended the Three-Step Test to the rights conferred on performers and producers of phonograms by WPPT. By doing so, WPPT departed from the Rome Convention which provided four specific exemptions: (i) private use, (ii) use of short excerpts in connection with the reporting of events, (iii) ephemeral fixation by a broadcasting organisation using its own facilities, and for its own broadcasts, and (iv) use solely for the purpose of teaching or scientific research. In addition to these four specific exceptions, Article 15 (2) of the Rome Convention allowed a Contracting State to provide limitations it provides in its copyright law. Articles 13(1) and 20(2) of Draft WPPT retained the import of Article 15(2) of the Rome Convention. All in all, subjecting all limitations and exceptions to the

Three-Step Test Articles 13 and 20 of WPPT curtailed the scope of limitations and exceptions as compared to the Rome Convention and the TRIPs agreement.

## **7.2.2 Non-Digital Agenda: Incorporating TRIPs Provisions in WCT and WPPT**

### **7.2.2.1 Computer Programmes (Article 4, Draft WCT)**

For the first time in international law, Article 10 of the TRIPs Agreement explicitly mandated that ‘computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention’. (See Sect.5.1). Article 4 of Draft WCT sought to incorporate Article 10 of the TRIPs agreement in WCT. However, Article 4 of Draft WCT changed the clause ‘whether in source code or object code’ in Article 10 of the TRIPs agreement into to ‘whatever may be the mode or form of their expression’. The change in language was justified on the ground that the clause introduced was more in keeping with traditional copyright language and taken word by word from Article 2(1) of the Berne Convention. It was further contended that the clause ‘whatever may be the mode or form of their expression’ is more appropriate considering the possibility that, in the future, the source code/object code categorisation might become obsolete.<sup>280</sup>

### **7.2.2.2 Databases (Article 5, Draft WCT)**

Literary works can be classified into primary works and derivative works. With a derivative work the author starts with a pre-existing work and by infusing intellectual input of his own creates a new work, e.g., translations, adaptations, collections like anthologies, encyclopaedia, etc. In collections, the originality or the intellectual creativity lies in the selection and arrangement. Not only copyrighted works but even unprotected works may be selected and arranged in an original manner so as to entitle the collective work to copyright protection. Article 2(5) of the Berne Convention protects the collective works provided they constitute an intellectual creation. By an extensive interpretation the eligibility of original databases (collections of data) for copyright protection could be deduced from Article 2(5). What could be deduced was made explicit by Article 10(2) of TRIPs Agreement. Two important clarifications are included in the second sentence of Article 10.2 of the TRIPs Agreement. First, it is clarified that the protection of compilations is without prejudice to any copyright subsisting in any element of their contents; that is to say, those elements continue enjoying copyright protection independently

---

280 Ficsor (2002), paragraph C.4.18, p.475

from the protection of the compilations. Second, protection granted for compilations does not extend to the data or material contained in them. That is, if they are not protected by copyright, they do not obtain copyright protection themselves just because they are included in compilations protected by copyright. Article 5 of the Draft WCT sought to incorporate the provisions of Article 10 (2) of the TRIPs agreement into the copyright treaty with two changes: first, Article 5 replaced the word 'compilation' in Article 10 (2) of the TRIPs agreement by 'collections', the word used by Berne Convention. Secondly, Article 10(2) of the TRIPs agreement referred to compilations 'in machine readable and other form' while Article 5 of Draft WCT referred to collections 'in any form'.

### **7.2.2.3 Rental Right (Article 9, Draft WCT and Articles 14 and 17, Draft WPPT)**

The Berne and Rome Conventions do not mention rental right. By the beginning of the 1980s, the rental and lending of phonograms and videograms became significant, and a Group of Experts on the rental of phonograms and videograms, constituted jointly by UNESCO and WIPO, suggested that authors should enjoy, under copyright law, an exclusive right to authorise the rental and lending of phonograms or videograms embodying or constituting their works.<sup>281</sup> In its working document on 'Right of Distribution: Right of Rental and Public Lending Right' prepared for the first session of the Berne Protocol Committee in November 1991 the International Bureau of WIPO suggested recognition of a rental right and a public lending right, at least for (i) audio-visual works, (ii) works whose performances are embodied in sound recordings, (iii) computer programmes, (iv) databases, and (v) sheet music. The International Bureau's proposal was discussed by the Committee of Experts at its second session (February 1992). In the session there was broad support for conferring a rental right in regard to works embodied in sheet music, sound recordings and computer programmes. Views were divided on rental right for other category of works, and there was not much support for a public lending right.<sup>282</sup> During the TRIPs negotiations, attempts were made to introduce a general right of distribution and importation; however, agreement could be reached only on a rental right limited to computer programmes, cinematographic works and sound recordings. Thereby, TRIPs agreement came to be the first multilateral instrument to introduce a rental right even though

---

281 Ficsor (2002), paragraph C 1.08, pp.7-8.

282 Ficsor (2002), paragraph 4.89, pp.209-10.

quite a few national laws provided such a right already.<sup>283</sup> The TRIPs agreement stipulated that a rental right should be provided at least in respect of computer programmes and cinematographic works (Article 11), and phonograms (Article 14(4)). Rental right is the right to authorise or prohibit the *commercial* rental to the public of originals or copies of a copyrighted work or a phonogram protected by related right; it is an exception to the first sale doctrine. In the case of computer programmes the obligation to provide a rental right does not apply to rentals where the program itself is not the essential object of the rental, examples being computer programs included in cars, aircraft and different machines which are used through a rental arrangement. In the case of cinematographic works, a Member Country shall be exempted from the obligation unless such rental has led to widespread copying of such works as to materially impair the copyright owner's right of reproduction. The impairment test was incorporated at the behest of the U.S.; rather oddly, it wanted to impose a rental right on the rest of the world while leaving the U.S. out. The U.S. desired this rather odd provision because a TRIPs agreement with an unqualified rental right ran the risk of being not ratified by the Senate as the U.S. Congress had a few years ago rejected the proposal of the film industry to introduce a rental right for films. The impairment test would come in handy not to introduce the rental right for cinematographic works in the U.S. and avoid a confrontation with the Senate.<sup>284</sup> The impairment test had come in for considerable criticism as 'may depend on some subjective judgments and this may create legal uncertainty'.<sup>285</sup> Initially India was opposed to the U.S. proposal as 'a grossly unequal provision' but eventually accepted it as 'we needed rental rights in our own country anyway'.<sup>286</sup> A Member Country which has in force a system of equitable remuneration of right holders in respect of the rental of phonograms may maintain such a system provided that the commercial rental of phonograms does not give rise to the material impairment of the exclusive right of reproduction of right holders. The rental right is vested in the producer of phonogram; a country is free to extend or not to extend the rental right to performers whose performance is fixed in the phonogram.

During the deliberations of the Committees of Experts many countries were in favour of incorporating Article 11 of the TRIPs agreement in WCT and

---

283 Gervais (1999), paragraph 2.65, p.84.

284 Gervais (1999), paragraph 2.65, pp.84-5.

285 Ficsor (2002), paragraph C 7.04 at pp.488-9. Gervais is also of a similar opinion. Gervais (1999), paragraph 2.66, pp.85-6.

286 Sagar (2015), p.345.

Article 14 of the same agreement in WPPT; some, however, preferred a broad rental right covering all categories of works. Article 9 of Draft WCT went far beyond Article 11 of the TRIPs agreement and came close to conferring a broad rental right. The only feature common to the Article 9 of Draft WCT and Article 11 TRIPs agreement is the rental right in respect of cinematographic works; both of them waive the obligation of a Contracting Party to provide a rental right in respect of cinematographic works if the rental of such works does not lead to such widespread copying as to materially impair the exclusive right of reproduction. There were four salient differences between the TRIPs agreement and Draft WCT in respect of rental right. First, Articles 9 of Draft WCT and Articles 10 and 14 of Draft WPPT did not qualify the word 'rental' by 'commercial'. Secondly, Article 9 (1) conferred on authors of literary and artistic works the exclusive right of authorising the rental of the original and copies of their works. However, Contracting Parties could except (i) specific types of works unless the rental of such works has led to such widespread copying as to materially impair the exclusive right of reproduction, and (ii) exclude architectural works or works of applied art from the purview of a rental right. Thirdly, Article 9 of Draft WCT imposed an obligation on Contracting Parties to provide a mandatory rental right not only in respect of computer programs (as Article 11 TRIPs agreement did) but also machine-readable compilations of data and other material, and musical works embodied in phonograms. The compilations of data covered included not only intellectual creations entitled to be protected by Article 5 of Draft WCT but also compilations of data which were not intellectual creations but would be protected by the proposed *sui generis* Database Treaty. Fourthly, unlike Article 11 of the TRIPs agreement Article 9 of Draft WCT did not exclude from the purview of rental right a computer programme which was not the essential object of the rental.

Turning to Draft WPPT, the rental right sought to be provided to performers (Article 10) and producers of phonograms corresponded to Article 14 (4) of the TRIPs agreement which provides a rental right to producers of phonograms and *any other right holders in phonograms* as provided in the national law of a Member Country. Article 10 of Draft WPPT sought to provide performers with the rental right in respect of their fixed performances; two alternatives were provided, the first applying only to musical performances fixed in phonograms, and the second cover all performances fixed in any medium including audio-visual performances.

A major difference between Articles 10 and 17 of Draft WPPT on the one hand and Article 14 (4) of the TRIPs agreement on the other is that Article 14 (4) allowed a Member Country to retain a system of equitable remuneration

indefinitely subject to a material impairment test while Articles 10 (2) and 17 (2) allowed a Contracting Party with a system of equitable remuneration of performers to maintain that system only for a period of three years from the date of entry into force of WPPT. Yet another difference is that, unlike Article 14(4) of TRIPs agreement, Articles 10 and 18 of Draft WPPT did not qualify the word 'rental' by 'commercial'.

#### **7.2.2.4 Term of Protection under WPPT (Article 21, Draft WPPT)**

Article 14 of the Rome Convention sets a minimum term of protection for performers and producers of phonograms of twenty years; the term is calculated from the year in which the fixation was made, or in which the performance took place. Article 14.5 of the TRIPS Agreement enhanced the term of protection for performers and producers of phonograms to fifty years; the term shall last at least until the end of a period of fifty years calculated from the end of the calendar year in which the fixation was made or in which the performance took place. The term of protection proposed in Draft WPPT (Article 21) was broadly similar to that proposed by Article 14.5 of the TRIPS agreement. The term of protection for performers had two alternatives, the first alternative limiting the protection to musical performances, and the second extending the protection to performances fixed in any medium including audio-visual performances.

### **7.2.3 Provisions Other than TRIPs Incorporation & Digital Agenda**

#### **7.2.3.1 Distribution and Importation Right**

Many national laws recognise a right of distribution, and that right is considered to have been exhausted after the first sale. However, neither the Berne nor the Rome Convention explicitly provides for a general distribution right (See Sect. 7.2.1.3). Attempts made to provide for a general right of distribution during the Brussels (1948) and Stockholm (1967) Revision Conferences were unsuccessful. Many experts considered that a right of distribution was implicit in the right of reproduction, in other words the right to authorise production of copies, as set out in Article 9(1). While authorising the reproduction of his works an author could lay down the conditions governing the distribution of works. The attempt to formulate a separate right of distribution was motivated by the apprehension that a reproduction right of wide scope might have some unintended and problematic effects. And further, contractual stipulations did not offer an appropriate legal basis for authors to enforce limitations on the distribution of copies by third parties not bound by such contractual stipulations. WIPO listed rental rights, and distribution right

including importation rights as two of the ten issues to be considered by the Berne Protocol Committee. There were animated discussions in that Committee over two issues, even before the Committee's work was suspended for over a year because of the ongoing TRIPs negotiations being at an advanced state. The issues were (i) whether a distribution right was implicit in the right of reproduction, and (ii) when is the distribution right exhausted. Detailed discussions also took place on the distribution and importation right in the very first session of the New Instrument Committee (June/ July 1993); as in the Berne Protocol Committee the question when the distribution right is exhausted proved to be contentious.

In most countries the right of distribution is exhausted with the first sale. A major exception is provided for authors of artistic works and original manuscripts of writers and composers (*Droite de Suite*; Article 14<sup>ter</sup> of the Berne Convention). This exception takes note of the fact that the volume of sales of works of art is limited in comparison with other works sold as copies, say books, and therefore the visual artists should be allowed to benefit from subsequent sales which are often at greatly increased prices. Quite a few countries also provide for an exception to the doctrine on first sale exhaustion by providing (i) a rental right which entitles right owners to collect royalties for commercial rentals of their works, and (ii) remunerating copyright owners for lost sales by public lending of their works through non-profit institutions like libraries. While there was agreement that the right of distribution was exhausted with the first sale there was sharp disagreement on the question whether the distribution right was exhausted once the right owner exercised his right anywhere in the world (international exhaustion) or whether the right owner could exercise his right country by country (territorial exhaustion). With international exhaustion, a copy of the work could be imported anywhere in the world from the country where the first sale took place, and no further authorisation is required from the rightsholder who effects the first sale. With national exhaustion, copyright and related rights are expected to be exploited territorially, and hence imports into another country of a legitimate copy of that work from the country where the right of distribution is exhausted constitutes an infringement. In other words, there is an importation right in addition to the distribution right, and 'parallel imports' are illegal.<sup>287</sup> During the TRIPs negotiations the deliberations over exhaustion were literally very exhausting. Negotiations had continued on the TRIPs text 'until the small hours of the morning of 19 December, with exhaustion

---

287 Parallel imports are imports without the authorisation of the rights holder; with national exhaustion parallel imports like parallel economy are illegal.

(Article 6) the last issue to be resolved, perhaps aptly'.<sup>288</sup> Unable to resolve the differences, the negotiators agreed to exclude exhaustion from dispute settlement under Article 64. The reason why the question of exhaustion and parallel imports proved so contentious during the TRIPs negotiations was that it was linked with the highly contentious question of pharmaceutical imports. Pharma MNCs and countries which were homes of Pharma MNCs like the U.S., Germany and Switzerland strongly advocated national exhaustion and an importation right arguing that patents were territorial rights that subsisted distinctly and independently in each country. It was therefore logical that owners of patents should have a right to impose a territorial restriction of the commercial exploitation of a work and take advantage of the ability to practice price differentiation in different markets and recoup the hefty investment in the development of a new drug; price differentiation would benefit consumers in countries with low purchasing power. Germany, Switzerland, and the U.S. extended the logic underlying national exhaustion of patents to other territorial rights such as copyright and related rights. Their argument was countered by the argument that territorial exhaustion and an importation right would restrict the flow of cultural goods across national borders by requiring that licences for the use of works be negotiated on a country-by-country basis, rather than on a worldwide basis; further, they adversely affect availability and prices, thereby hurting the interests of consumers.

The exhausting argument about exhaustion was resumed after the Committees of Experts resumed their work after the conclusion of the TRIPs. The debate over a general right of distribution acquired a new dimension with digital agenda coming to the fore. Distribution right was discussed in two different contexts: (i) non-digital agenda which sought to upgrade the Berne and Rome Conventions and (ii) digital transmission. The discussions on the distribution right in the second context were outlined above (See Sect. 7.2.1.3). In the Committees of Experts, there was broad agreement on the need to recognise a general distribution right, i.e., the right of the author of a literary or artistic work or the producer of a phonogram to authorise any act where the ownership or possession of the original or copies of the work changes hands by way of sale, gift or other transfer of ownership, or by way of rental or other transfer of possession. However, the sharp disagreement on the question of exhaustion continued unabated. During the discussions, the U.S. was in favour of national exhaustion while Australia, India and Japan were against national exhaustion; the EC was in favour of regional exhaustion as national exhaustion would

---

288 Otten (2015), p.68. Also see Mogens (2015), p.113.

prevent free movement of goods among the Member States of the EC and thereby violate a cardinal principle of EC and international exhaustion would not give preference to imports from a Member State over imports from a non-member state. During the discussions the contending parties marshalled the very same arguments they adduced during TRIPs negotiations. Concluding the discussions Lieder observed that the issue of exhaustion was discussed many times, and that it was better to resolve it in the DipCon.

Article 8 of the Draft WCT vested in authors of literary and artistic works an exclusive right of making available to the public (distribute) the original and copies of their works through sale or other transfer of ownership; however, as there was sharp disagreement in the deliberations of the Committee over the question of exhaustion, Article 8 presented two alternatives, the first proposing national exhaustion along with an importation right and the second international exhaustion. Article 9 of the Draft WPPT (relating to performers) and Article 16 of the Draft WPPT (relating to producers of phonograms) were similar to that of Article 8 of Draft WCT excepting that apart from providing the alternatives of national and international exhaustion Article 9 of Draft WPPT also provided for two alternatives one covering musical programmes fixed in phonograms and the second covering performances fixed in any medium.

#### **7.2.3.2 Enforcement Provisions (Article 16, Draft WCT and Article 27, Draft WPPT)**

Articles 41 to 61 of the TRIPS Agreement impose obligations on the Member Countries to enforce the IPRs covered by that Agreement. In the sessions of Committees of Experts, the EC and Australia were in favour of suitably incorporating these articles in the new treaties proposed to be adopted by the Diplomatic Conference. That had been the stand of the U.S. also before the conclusion of the TRIPS agreement. It later revised its position and contended that that inclusion of the enforcement provisions of the TRIPS agreement in the new treaties would be redundant and create a possibility of conflicting norms and interpretations; in its view, the new treaties should include only TRIPS plus elements agreed to in the Diplomatic Conference. Article 16 of the Draft WCT and Article 27 of the Draft WPPT presented two alternatives. The first made no reference to the TRIPs agreement, listed the enforcement provisions of the TRIPs agreement in an Annex to the treaty and declared that that Annex was an integral part of the Treaty. The second alternative specifically referred to the enforcement provisions of the TRIPs agreement and obligated the parties to apply *mutatis mutandis* the enforcement provisions of the TRIPs agreement.

## **7.3 Provisions Specific to Draft WCT**

### **7.3.1 Non-voluntary Licences (Article 6, Draft WCT)**

In the early days of commercialisation of phonograms, the fledgling phonogram companies were afraid that well established societies of authors and musical composers would impose onerous terms and conditions. For that reason, the Berlin Revision Conference (1906) introduced Article 13 (1) of the Berne Convention which permits the provision by national laws of non-voluntary licenses in respect of the right of mechanical recording of a musical work. In the first few decades of broadcasting governments were keen to promote broadcasting; they saw radio broadcast of music to be of socially significant value and believed that a profit maximising license fee set by copyright holders might endanger the socially optimal level of broadcasting.<sup>289</sup> For that reason the Rome Revision Conference (1928) introduced Articles 11bis (2) which provided for compulsory licensing simultaneously with conferring the broadcasting right on authors and musical composers (Article 11bis(1). These articles also stipulate that the owner of the copyright is entitled to an equitable remuneration.<sup>290</sup> There was simultaneously strong opposition as well as strong support for introducing non-voluntary licensing and a right of single equitable remuneration right. At the Brussels Revision Conference the scope of broadcasting right was expanded to include both sound and television broadcasts, and the scope of secondary uses was expanded to cover (i) ‘any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organisation other than the original one’ and (ii) ‘the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work’. At the Brussels Revision Conference, the opposing groups ‘clashed with each other with an even greater vehemence than (during the Rome Revision Conference) 20 years before’.<sup>291</sup>

In the 1980s, the feeling that restraints on the rights of rightsholders (such as compulsory licenses) were unwarranted gained ground; this feeling was the driving force behind the restrictions imposed by the TRIPs agreement on compulsory licensing of patents. With the passage of time, the feeling gained ground that non-voluntary licenses had become obsolete as music recording and

---

289 Watt (2014), p.118.

290 None of the international conventions define the term ‘equitable remuneration’, and national laws have leeway to shape it beyond the ordinary meaning of a just and fair compensation.

291 WIPO Guide (2003), BC-11bis.21 at p.79.

broadcasting industries acquired strength and the emergence of strong collective administrative societies in many countries had obviated the difficulties besetting music companies and broadcasters in locating multiple owners of rights and setting the fees for use. It was this feeling which drove many experts to demand in the Committee of Experts the abolition of non-voluntary licenses provided by the Berne Convention. Countries without a strong collective administrative system were opposed to the abolition of non-voluntary licenses as in the absence of such licenses the producers of phonograms and broadcasters would be put to enormous trouble in locating the multiple owners of rights and the fees for use.

#### **7.3.1.1 Non-voluntary Licences for Primary Broadcasting (Article 6(1), Draft WCT)**

Article 11 *bis* (1) of the Berne Convention provides the authors of literary and artistic works the exclusive right of authorising:

- (i) the broadcasting of their works, or
- (ii) re-broadcasting the works by wireless diffusion or cable where such communication is by an organisation other than the original broadcaster, or
- iii) the public communication by loudspeaker or analogous instruments.

To prevent the abuse of this right and to protect the interest of broadcasting organisations, Article 11 *bis* (2) recognised in 1928 the right of members to introduce conditions under which these rights could be exercised. This enabled the Member Countries to incorporate appropriate provisions in their national laws to issue non-voluntary licence for primary broadcasting as well as re-broadcasting of works. The Committee of Experts dealing with the Berne Convention deliberated a proposal to delete the provision for non-voluntary licences. There were two special pleadings. Article 11 *bis* (2) as it stands does not provide for non-voluntary licensing for the purpose of cable originated programmes. The latter as well as broadcasters competed for the same audience and yet only broadcasters had the exclusive privilege of non-voluntary licence. Secondly, the proliferation of satellite broadcasting has created anomalies. The transmissions may be from a country which provides for non-voluntary licence, but the reception may be in a country which does not. In the Committee of Experts, China, India and many African countries opposed the elimination of non-voluntary licenses on the ground that elimination would disrupt business practices in the absence of strong collective administration systems. Experts from African countries suggested that if elimination was unavoidable along transition period of 10-15 years should be provided.

Article 6(1) of the Draft WCT proposed that within three years of acceding to WCT the Contracting Parties would no longer provide for non-voluntary licenses under Article 11bis (2) of the Berne Convention.

#### **7.3.1.2 Non-voluntary Licences for the Sound Recording of Musical Works (Article 6(2), Draft WCT)**

Article 13 (1) of the Berne Convention enables parties to the Convention to impose conditions and reservations, either by way of compulsory licensing or by other means, to the exclusive right given to the authors of musical works to authorise the creation of sound recording of their work. This provision was intended to prevent possible abuses of exclusive rights by music publishers' and authors' societies and thereby put producers of sound recordings to a disadvantage.

During the discussions in the Committee of Experts, the majority of delegations felt that the provisions under Article 13(1) of the Berne Convention has become obsolete as recording industry has become one of the most vigorous industries in the entertainment field and that producers of sound recordings acquired exclusive rights of reproduction under the Rome Convention and Phonogram Conventions. Many of the delegations felt that within a period of 3-5 years, non-voluntary licences for musical works should be deleted from the national laws of the contracting states. Experts from U.S., China, India and African countries opposed the elimination of non-voluntary licences for musical works. U.S. felt that care must be taken to avoid disruption to established business practices which relied on such compulsory licensing schemes. Neither its recording industry nor its music industry were in favour of such a step. New legislation in the U.S. establishing a digital public communication right for phonograms relied on compulsory mechanical licences. India, China and many African countries opposed the elimination of non-voluntary licenses for musical works on the ground that collective administration organisations are still in their infancy and would take a long time before they could be effective. Experts from African countries suggested that if elimination was unavoidable a long transition period of 10-15 years should be provided. Notwithstanding the opposition, Article 6(2) of Draft WCT proposed that within three years of ratifying or acceding to this Treaty, Contracting Parties would do away with the system of non-voluntary licenses for sound recordings.

### **7.3.2 Term of Protection of Photographic Works (Article 11, Draft WCT)**

Article 7 (4) of the Berne Convention provides for a minimum twenty-five-year period of protection for photographs from the year of making the photograph whereas for other literary and artistic works the minimum term of protection is the lifetime of the author and fifty years after his death. The lower term of protection for photographic works is rooted in the perception in many countries during the early years of Berne Convention that photography was a mechanical process. As realisation spread that photography may involve considerable creativity the lower term of protection came to be viewed as unduly discriminatory. During the revisions of the Berne Convention a few unsuccessful attempts were made to extend the duration of protection of photographs. The anomaly in regard to the term of protection of photographs was not rectified in the TRIPs agreement. During the deliberations of the Committee of Experts dealing with Berne Convention many strongly expressed the view that the discrimination against photographs should be done away with. Article 11 of Draft WCT proposed that the duration of the protection of photographic works should be governing by general rules of term of protection and not by the special rule under Article 7 (4) of the Berne Convention. That is to say, the minimum term of protection of photos would be the lifetime of the author and fifty years after his death, and fifty years from making available of the work in case of anonymous or pseudonymous photographic work.

## **7.4 Provisions Specific to Draft WPPT**

### **7.4.1 Audio-visual Fixations**

The New Instrument Committee was partly a response to the widespread feeling that the level of protection extended to performers and producers of phonograms needs to be enhanced beyond the level provided by the Rome Convention. The denial to a performer of any further control over an audio-visual performance once the performer gave his consent for the fixation was considered by many of placing performers in a position inferior to authors and other rightsholders. However, the question of conferring rights on performers in respect of audio-visual fixations turned out to be divisive as during the making of the Rome Convention. The *Hague Draft* which was the negotiating text of the Rome Diplomatic Conference sought to protect (i) performers against clandestine filming of their performance live or off the air, and (ii) broadcasting organisations against reproduction of telecast films. However, in respect of visual or audio-visual fixations for which he consented the *Hague Draft* did not provide a performer protection against reproductions of such fixations made for

purposes other than those for which he had consented. At the Diplomatic Conference Austria and Czechoslovakia proposed amendments to the *Hague Draft* in respect of visual and audio-visual fixations. These amendments sought to limit the exclusion from the rights of performers only films; visual or audio-visual fixations intended for telecasting would be included in the rights of performers. The rationale for the amendments was that performances were *only one of the many* inputs that go to make a film while the performers' production is *the only* input of visual or audio-visual fixations made for telecasting. Many delegations thought that the distinction between films and visual or audio-visual fixations proposed by these amendments was impractical. Yet another reason why many delegations rejected the amendments was that the changes in the copyright protection of films was being actively debated then. Film producer associations and their champions like the U.S. strongly opposed the amendments proposed by Austria and Czechoslovakia as they felt that recognition of performers' right in visual and audio-visual fixations would jeopardise the ongoing debate on the copyright protection of films.<sup>292</sup> The Stockholm Revision Conference (1967), held about six years after the Rome Diplomatic Conference, brought about far-reaching changes in the protection of cinematographic works through introduction of Articles 14 and 14bis in the Berne Convention. Be that as it may, the net effect of Article 19 of the Rome Convention is that once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, protection under the Convention will cease to be applicable to him. Article 19 has no effect upon performers' freedom of contract in connection with the making of visual or audiovisual fixations, nor does it affect their right to benefit by national treatment, even in connection with such fixations.<sup>293</sup> To jump the story, sixty-one years were to pass after the Rome Convention was adopted before performers could secure international recognition of their rights in visual and audio-visual fixations through the Beijing Treaty of Audio-visual Performances (2012).

Again, audio-visual fixations deeply divided the experts who participated in the sessions of the Committee were divided into two groups. The first group comprised the EC and its Member States, Central and East European Countries, and a majority of African and GRULAC countries; this group was of the firm view that the New Instrument should cover audio-visual fixations also.

---

<sup>292</sup> Traditionally, the traditional process involved in the production of films comprises audio-visual fixation on celluloid.

<sup>293</sup> WIPO (1968), paragraph 19.6, p.53; Lipszyc, pp.834-5.

The second group, numerically a minority and others, included the U.S., the largest producer and exporter of films in the world, and was of equally firm view that the New Instrument should cover exclude audio-visual fixations. A discussion paper prepared by WIPO's International Bureau for the Fourth Session of the Committees of Experts (Document INR/CEIIV /3; September 1995) neatly summed up the arguments for and against coverage of audio-visual performances by the WPPT.<sup>294</sup> The first argument in favour of coverage was that if the New Instrument was considered to be a special agreement under Article 22 of the Rome Convention, it has to improve protection over that offered by the Rome Convention. The recognition of the status of *all* performers was a necessary element of improved protection. Those in favour of coverage of audio-visual performers believed strongly that it was discriminatory and invidious to differentiate between performers based on fixation. The second argument was that the performances of many musicians and of opera and ballet performers were frequently available in video-recordings. Therefore, the differentiation that Article 19 of the Rome Convention made between aural and audio-visual performances was no longer realistic; this was all the more so because the digital environment makes no distinction between aural and audio-visual fixations. The third argument in favour of coverage was that many national laws already provided for protection of audio-visual performers, and experience had shown that for practical problems concerning exercise of rights could substantially be resolved through collective administration of rights. The main argument for continuance of the status quo of Rome Convention and TRIPs agreement was that there were fundamental differences between the phonogram and audio-visual industries. The status and employment of performers in the phonogram and audio-visual industries were completely different. Treating both industries would weaken the audio-visual industry; further, the difference in the viewpoints of those who were for coverage and those who were against coverage boils down to the relationship between employers and employees in the audio-visual industry. Those who preferred coverage preferred rights of performers to determine that relationship while those who were against preferred contracts to cover that relationship. The relationship between employers and employees was not a proper subject for an international IP instrument. Notwithstanding the clarity of the discussion document the discussions in the Committee of Experts only accentuated divergences for the deadly fusion of copyright ideology and sharp conflict of economic interests prevented any practice of give and take without which no

---

294 Reinbothe and von Lewinski (2015), paragraphs 5.0.7-8, p.25.

compromise is possible with any issue. Proponents of the inclusion of audio-visual performances and the opponents of such inclusion submitted proposals based on their stand, and there was no attempt to develop a compromise text.

Given the sharp, irreconcilable differences of opinion in the New Instruments Committee, the Draft WPPT presented three alternatives to the DipCon.<sup>295</sup> the first alternative of limiting the scope of WPPT to musical performances only, the second of covering all kinds of performance, aural as well as audio-visual, and the third being the same as that of the second alternative with the possibility of a Contracting Party being allowed to make a reservation in respect of audio-visual performances. In keeping with the three alternatives, the definitions of fixation ( Article 2(c)) and communication to the public (Article 2(h)) and provisions relating to moral rights of performers (Article 5), economic rights of performers in their unfixed performances (Article 6), right of reproduction (Article 7) , right of modification (Article 8) , right of distribution and right of importation ( Article 9(1)) , right of rental ( Article 10) , right of making available of fixed performances (Article 11) and term of protection (Article 21(1)) presented two alternatives, the first confining the scope of protection to musical performances and musical performances fixed in any medium and the second covered all performances and performances fixed in any medium. also. Article 25 permitted a Contracting Party to make a reservation in case the DipCon decided that WPPT would cover all types of performances and their fixations in any medium.

#### **7.4.2 Moral Rights (Article 5, Draft WPPT)**

The Rome Convention, unlike the Berne Convention, does not protect the moral rights of performers basically because moral rights for performers was an idea whose time had not yet come when the Rome Diplomatic Conference (1961) was deliberating over an international convention which recognised for the first-time related rights. Except for Argentina and Mexico no delegation, not even the French, which were very vociferous at the Rome Revision Conference (1928) for incorporating moral rights in the Berne Convention, pleaded for vesting performers with moral rights. Moral rights did not fare well during the TRIPs negotiations; the U.S. aggressively argued that moral rights were not a trade issue and succeeded in excluding Article 6bis of the Berne Convention from the obligations of the TRIPs agreement. And the issue of moral rights for performers was not raised in the TRIPs negotiations at all.

---

<sup>295</sup> Draft WPPT, paragraphs 2.16-8, 25.01-6, at pp. 20.96; Reinbothe and von Lewinski (2015), paragraphs 5.0.10-2, pp.25-6.

In the memorandum it prepared for the first session of the Committee of Experts for the New Instrument (1993), WIPO's International Bureau proposed that performers should be conferred two moral rights, the right of integrity and the right of paternity. The Memorandum justified the conferment of the right of integrity on the ground that the intensive manipulation of recorded performances made possible by digital technology<sup>296</sup> might result in distortion, mutilation or other modifications of a performance which would be prejudicial to the honour or reputation of the performers. In addition, some techniques such as dubbing and play-back, which are an essential part of producing sound or audio-visual recordings, might be applied in a way that might be prejudicial to the honour or reputation of the performers. Therefore, performers ought to be protected against such acts. The proposal formulated in treaty language was similar to that of Article 6bis (1). The Memorandum also proposed a right to paternity. As far as practicable, the name of a performer should be indicated on a copy of the fixation of his performance. In case of performances by several performers the Memorandum suggested three possibilities for indication on the copies of fixation of their performances: (i) the name jointly used by the performers (such as the name of the orchestra), (ii) the name of the artistic leader of the performers (such as the conductor) and (iii) the names of the featured performers (such as the soloists).<sup>297</sup> The right of paternity was more elaborate than that of Article 6bis of the Berne Convention as befitting the distinctive feature of performances with several performers. The proposal of the International Bureau, however, was silent about the term of protection of moral rights, a contentious issue.

In the meetings of the Committee of Experts, most delegations supported the proposal of WIPO. However, some delegations preferred a less detailed formulation and the right of paternity being not subjected to the condition of practicability. However, as is customary in the discourse on moral rights there was sharp difference of opinion on the duration of moral rights to be conferred on performers. Some wanted the duration to be perpetual as the personality of an author or a performer could never be severed from his work or performances, and it was the duty of the heirs of an author or performer to preserve and protect the moral rights of their forebearers. Some delegations, however, favoured a duration identical to that of economic rights while some others favoured the lifetime of the performer to be the duration. The Committee overwhelmingly endorsed the proposal to incorporate moral rights in the New Instrument, though opinion was divided whether the article on moral rights in the New Instrument should be based on Article 6 bis of the Berne Convention or whether a new

---

296 The Memorandum referred to 'digital technologies' because by then digital sampling was very much in vogue in the music industry. WIPO (1993), paragraph 18, p.6.

297 WIPO (1993), paragraphs 30-1, p.12.

provision should be drafted. Opinion was also divided on the duration of moral rights and the 'waivability' of moral rights, figuratively, a hardy perennial of the discourse on moral rights. The proposal of the U.S. that a performer could waive his moral rights through a fairly negotiated contract was bitterly contested by those who were strong proponents of moral rights. For such proponents the 'non-waivability' (inalienability) and non-transferability of moral rights were articles of faith while for those who had reservations about moral rights allowing the performers to waive and transfer moral rights were non-negotiable conditions, in the absence of which they could not accept a provision on moral rights. Greece presciently cautioned against referring the matter to DipCon without harmonising different viewpoints as well as alternate texts proposed by different countries. Among the many interest groups that participated in the Committee sessions, those representing performers were in favour of inclusion of moral rights in Draft WPPT while almost all broadcasting organisations were upset by the proposal. They felt that broadcasters were the ones mostly affected by any possible moral right provisions in the Instrument.

Article 5 of Draft WPPT proposed conferment of moral rights on performers; this article was modelled on Article 6*bis* of the Berne Convention. Article 5(1) set out the right of the performer to be identified as the performer of his performances and to object to any distortion of his performances that would be prejudicial to his honour or reputation. The moral rights were independent of economic rights and could exist even after the economic rights are transferred. Article 5 (2) was similar to Article 6*bis* (2) of Berne Convention, and allowed national legislation where protection was claimed to determine the persons who or institutions which can exercise the rights under the moral right after the death of the performer or the end of the economic rights. Article 5 (3) reproduced Article 6*bis* (3) of Berne Convention, namely that 'the means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed'. Like many articles of Draft WPPT, Article 5 proposed two alternatives, the first covering only musical performances and musical performances fixed in phonograms, and the second all performances including audio-visual performances. The Explanatory Notes also mentioned the fact that the performer might or might not opt to exercise, or might even waive his moral rights, and that the established interpretation of Article 6 bis of Berne Convention should be used for the interpretation of Article 5 of draft WPPT. Therefore, no specific provision regarding inalienability or 'waivability' was needed.

### **7.4.3 Economic Rights of Performers**

#### **7.4.3.1 Right of Performers in respect of their Unfixed Performances (Article 6, WPPT)**

As outlined above, (See Sect.2.5) Article 7 of the Rome Convention shied away from conferring exclusive economic rights on performers, and the TRIPS agreement left intact the provisions Article 7. In contrast, Article 6 of Draft WPPT conferred on the performers exclusive rights in regard to the authorising (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance, and (ii) the fixation of their unfixed performances. Draft WPPT also proposed new rights like distribution and rental rights which Draft WCT proposed to confer on authors. It also proposed to adapt the economic rights of performers to new modes of delivery by conferring the right of making available fixed performances (Article 11). As there was sharp disagreement in the Committee of Experts over it, the importation right was presented as an option along with distribution right, the other option being limited to the distribution right.

#### **7.4.3.2 Right of Modification (Articles 8 and 15, WPPT)**

Adaptations, as the *WIPO Guide to the Berne Convention*, aptly put it, ‘occupy an important place in the intellectual property field, and the multiplicity of communications media offers them an ever-wider forum. Many novels, often unknown or forgotten, have found their way to the stage, screen, radio or television, in the form of plays, scripts and radio or TV serials. The adaptation is a work in itself, in a sense subordinate to the earlier work but with its own importance. Adaptations may also be translations if the original work was in a different language.’<sup>298</sup> Article 2(3) of the Berne Convention provides that adaptations of a literary or artistic work shall be protected as original works without prejudice to the copyright in original work. Article 12 confers on the author of an artistic or literary work the exclusive right to authorise adaptations of their works. Typical of the fact that the scope and level of rights conferred by the Rome Convention on performers and producers of phonograms are lower than those conferred by the Berne Convention the Rome Convention does not confer a right of adaptation on either the performers or the producers of phonograms.

In the memorandum it prepared for the first session of the New Instrument Committee, WIPO’s International Bureau proposed two rights in

---

298 WIPO (1978), paragraph 2.15, p.19.

respect of phonograms and performances fixed in phonograms in view of the widespread manipulation of fixations of performances, and the subsequent combination of various fixations: a right of adaptation and a right to authorise inclusion of pre-existing phonograms (fixations of performances) in collections (combinations) of phonograms (fixations).<sup>299</sup> These rights were analogous to Articles 12 (Right of Adaptation, Arrangement and Other Alteration) and 2bis (3) of Berne Convention. Conferring these two rights on performers was a far-reaching step which would narrow the gap between performers' rights and authors' rights; precisely for that reason it was opposed by many experts in the New Instrument Committee. Some experts argued that any alteration or modification of a performance or a phonogram cannot occur without reproducing the fixation of the performance or the phonogram, and therefore a right of adaptation was redundant. Some experts were of the view that there is apparently an overlap between the right of modification and the right to integrity.<sup>300</sup> Articles 8 and 15 of Draft WPPT prepared by Liedes used the term 'modification' instead of 'adaptation' because it is sufficiently neutral and general and because it does not imply any interference with Article 2(3) of the Berne Convention, according to which certain adaptations and alterations of works may be protected'. Note to Article 8 of Draft WPPT explained the rationale for the proposal to have a right of modification in WPPT.<sup>301</sup> Articles 8 and 15 were parallel provisions, the first dealing with performers and the second with producers of phonograms. Articles 8 and 15 of Draft WPPT offered two alternatives, the first limiting the economic right to sound, musical performances or musical performances fixed in phonograms only, and the second proposal covering audio-visual fixations also.

#### **7.4.3.3 Single Equitable Remuneration (Articles 12 and 19, Draft WPPT)**

While considering the issue of single equitable remuneration for 'secondary uses' of phonograms the New Instrument Committee had to take note of two major factors: (i) Article 12 of the Rome Convention (which dealt with secondary uses) offered so much latitude to Contracting States that a Contracting State Party 'might reduce the single equitable remuneration to nothing', and (ii) with the spectacular development of reproduction and transmission technologies, use of phonograms for broadcasting or communication to the public were becoming primary rather than secondary

---

299 WIPO (1993), paragraphs 48 at p.16 and 56(d) at p.19.

300 von Lewinski (2008), p.485.

301 Draft WPPT, Note 8.03 at p. 46 and Note 15.03 at p.70.

uses from the viewpoint of the possibilities of normal exploitation of rights in phonograms. This is particularly true in the case of on-demand and near-on demand transmissions. Therefore, the term 'secondary use' has become obsolete. The questions which arose with updating of Article 12 would be (i) should a single equitable remuneration be replaced by an exclusive right of communication to the public (including broadcasting), (ii) should a single equitable remuneration be permitted in certain cases of communication to the public, and if so what should be permitted and what should be excluded, and (iii) should reservation be permitted in some cases, and if so when should reservation be permitted and when excluded.

In the memorandum it prepared for the first meeting of the Committee of Experts the International Bureau of WIPO highlighted the fact that digital technologies had transformed the conditions and effects of the exploitation as well as use of phonograms and performances fixed in phonograms. First, digital technology could be used 'to make unlimited generations of perfect copies of phonograms without any loss of quality'. Secondly, the use of digital technology in broadcasting and communication to the public (which had by then begun in certain countries) would bring about even more fundamental changes; by receiving programmes in digital format, 'CD quality' copies of phonograms can be made. Technology (particularly fiber optics) is also available for the use of phonograms in interactive systems, that is, in systems that make it possible for those who are connected to such systems to listen to a specific phonogram at a specific time of their choice, to use jargon on-demand communication to the public. All this, the Memorandum concluded, might lead to a situation where the classic rights of reproduction and distribution might lose their importance, and the owners of rights in phonograms and in the performances fixed in them might be unable to exploit their productions unless they were given appropriate rights in respect of the new, more relevant means of exploitation. The right of communication to the public in the digital medium should be an exclusive right; single equitable remuneration in lieu of an exclusive right of communication to the public should be limited to analogue (non-digital) communication).<sup>302</sup> At the second session of the New Instrument Committee (1994) the majority of experts preferred a single equitable remuneration for performers and producers of phonograms in respect of broadcasting analogue communication to the public; they preferred an exclusive right for digital on-demand digital communication. At the fifth session of the Committee there was a broad agreement on the need to cover on-demand and similar interactive

---

302 WIPO (1993), paragraph 46, pp.15-6.

services by an exclusive right of performers and phonogram producers. Traditional analogue broadcasting and communication should be covered by an exclusive right together with the possibility of limiting that right to a right to remuneration or alternately by a single equitable remuneration as with the Rome Convention. There was also agreement that performers and producer of phonograms should enjoy equal treatment.<sup>303</sup> In the sixth and last meeting of the Committee of Experts similar views were expressed: a remuneration right for performers and producers of phonograms with the exception of on-demand transmissions for which an exclusive right was proposed. The EC submitted proposals which formed the basis for Articles 12 and 19 of Draft WPPT.

Based on the discussions in the Committee of Experts the Draft WPPT drew a distinction between remuneration right and on-demand transmission (making available phonograms by wire or wireless means, in such a way that members of the public can access them from a place and at a time chosen by them). Articles 11 and 12 of Draft WPPT conferred on performers the rights of making available phonograms and remuneration. Articles 18 and 19 were corresponding provisions in respect of phonogram producers. Article 12 of Draft WPPT conferred on performers a right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes and their reproductions for broadcasting or for any communication to the public. The second paragraph of Article 12 regarding the share of remuneration between performers and producers of phonograms substantially corresponded to Article 12 of the Rome Convention. The basic structure of reservations provided by the Rome Convention was reproduced in Draft WPPT. The reservations clause in paragraph (3) left the degree of reservation open, subject to the provisions of paragraph (4). Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16(1) (a)(iv) of the Rome Convention. However, Article 1(1) of Draft WPPT makes it clear Contracting Parties should not make any reservations to this Article, or the rights provided for therein, that would derogate from their obligations to each other under the Rome Convention. And further, paragraph (4) of Article 12 made it very clear that no reservation could be made in respect of broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription-based services. The reason for this proposal was that in the context of such services, fixed performances of

---

303 Committee of Experts, February 1996, paragraph 150-189, pp. 39-47.

performers are exploited directly for commercial gain. Article 19 was an identical provision in respect of producers of phonograms.

#### **7.4.5 National Treatment (Article 4, Draft WPPT)**

National treatment in WPPT was one of the five issues on which no consensus could be built in the DipCon, and the differences could be resolved only through voting. In comparison, the issue of national treatment in WCT was a relatively smooth affair because the principles of national treatment in the Berne Convention were well established, and WCT was a special agreement under Article 20 of the Berne Convention. No more was required than a provision which would adapt with clarity the well-established principles to the specific provisions of WCT. This was not so with WPPT which was a standalone treaty.

As mentioned above, (See Sect.2.5) the scope of national treatment under Rome Convention had been ‘controversial’ with a preponderant majority of experts holding that national treatment was limited to the rights conferred by the Rome Convention itself; the TRIPs agreement did not extend that scope of national treatment in respect of performers’ rights, (See Sect.3.3). The Memorandum prepared by the International Bureau of WIPO for the first meeting of the New Instrument Committee proposed a specific provision ‘concerning the application of national treatment in respect of collective administration of rights, particularly to guarantee that remuneration collected for foreign rights owners was not used, without their consent, for so-called collective (national) purposes’.<sup>304</sup> Figuratively, what the International Bureau proposed was music to the ears of the U.S. as the Memorandum endorsed the American position in respect of private copying and collections from levies on recording devices and tapes. For exactly the same reason, the Memorandum came in for criticism at the first meeting of the Committee by France and many other countries. There was particularly strong opposition to the proposal of submitting the collective management of rights to remuneration in respect of private copying and communication to the public, to a national treatment obligation.<sup>305</sup> By the end of 1993, the TRIPs agreement was finalised, and Article 3 of that agreement drew a distinction between national treatment under Berne Convention and national treatment in respect of phonograms, producers of phonograms and broadcasting organisations. In respect of the latter national treatment was limited to ‘the rights provided under this

---

304 New Instrument Questions (1993), paragraph 85, p.28.

305 Reinbothe and von Lewinski (2015), paragraph 8.4.2, p.292.

Agreement'. The TRIPs provision regarding the national treatment in respect of performers and producers of phonograms was particularly disappointing for the U.S. and at the same time a shot in the arm of countries like France which wanted the national treatment in respect of performers and producers of phonograms to be limited to the rights conferred by the New Instrument. So sharp was the disagreement between the U.S. and countries like France on the other that no consensus was reached in the Committee of Experts. In fact, the third session of the New Instrument Committee (December 1994) took note of the TRIPs provision and postponed the discussion to a later stage when there would be greater clarity on the new rights which the New Instrument would provide. The fourth session (September 1995) the issue of national treatment was not discussed at all; the U.S., E.C. and other countries made their submissions for the fifth session (February 1996) reiterating their positions. It was the common understanding during the fifth Session that the degree of agreement reached on the substantive provisions of the New Instrument was not yet enough to tackle the issue of national treatment, and therefore the issue was not discussed at all. The Chairman of the Committee proposed that national treatment could be discussed at the next level of preparatory work.<sup>306</sup> In the concluding session in May 1996 the issue was not discussed at all.

Article 5(1) of the Draft WPPT relating to national treatment followed Article 3(1) of the TRIPs agreement in limiting the national treatment 'to the protection provided for by this Treaty'. Similar to Article 2(2) of the Rome Convention Article 5(2) subjected national treatment to 'the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty'. All in all, the scope of national treatment that Article 5 of Draft WPPT proposed was restrictive and did not cover private copying and communication to the public of phonograms.

## **7.5 Draft Data Base treaty**

As mentioned above, ( See Sect. 6.2) with the advent of new digital technologies the making of databases became big business as data is the lifeblood of the new Information economy, and digitalisation opened up new vistas of compiling and accessing data, and that with a view to give a boost to European database industry the E.C. issued a directive on sui generis protection of databases,<sup>307</sup> and that the E.C. and the U.S. submitted separate

---

306 Committee of Experts, February 1996, paragraph 193, p.48.

307 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the Legal Protection of Databases.

proposals for a sui generis database right in the penultimate and the final session of the Committees of Experts. Many delegates expressed the view that the database right needs more study, and yet when the Chairman summed up the discussion, he went to inform the Committee that the basic texts of the treaties he would be submitting would include the basic proposal of the Database Treaty; no one objected to the Chairman's statement. The Draft Database Treaty was also received along with the Draft WCT and WPPT.

Article 1 of the Draft Database Treaty spelt out the scope of the treaty. Contracting Parties were obligated to protect any database that represented a substantial investment in the collection, assembly, verification, organisation, or presentation of the contents of the database. The protection had to be extended to a database regardless of the form or medium in which the database was embodied, and more significantly regardless of whether the database was made available to the public or not. The protection would not extend to any computer programme as such, including any computer programme used in the manufacture, operation, or maintenance of a database. The maker of a database was defined to be a natural or legal person or persons with control and responsibility for the undertaking of a substantial investment in making a database. (Article 2 (iii)). The definition of substantial investment was vague and meant 'any qualitatively or quantitatively significant investment of human, financial, technical or other resources in the collection, assembly, verification, organization or presentation of the contents of the database'. No threshold was laid down for deeming an investment to be substantial; the Draft did not specify how significance was to be assessed. Extraction was defined to mean 'the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form' (Article 2(ii)). The definition of 'substantial part' was again vague; it was defined to mean 'any portion of the database, including an accumulation of small portions, that is of qualitative or quantitative significance to the value of the database' (Article 2 (v)).

Article 3, the most important operative portion of the treaty accorded to the maker of a database the right to authorise or prohibit the relevant acts of extraction and utilisation. The right of utilisation granted to the maker of a database covered, according to the definition of 'utilization', the making available to the public of all or a substantial part of the contents of a database *inter alia* by the distribution of copies. Article 5 enabled Contracting Parties to provide exceptions to and limitations on the rights provided by the treaty subject to the Three-Step test. Article 5 (2) gave flexibility to the Contracting

Parties to determine the protection that shall be granted to databases made by governmental entities or their agents or employees. The provision relating to national treatment (Article 7) was similar to the corresponding provisions of the Berne Convention. Article 8 spelt out the minimum term of protection and proposed two alternatives corresponding to the American (25 years) and E.C. (15 years) proposals. Article 10 dealt with TPMs, and its provisions were similar to the corresponding provisions in Draft WCT (Article 13) and Draft WPPT (Article 22). Article 11 (3) dealt with transitional arrangements. The purpose of these provisions was to protect investments made in the making copies by persons who in good faith engaged in the exploitation of databases in a situation where no protection existed. The provision made it possible for Contracting Parties to provide for conditions under which copies made before the entry into force of the Treaty might continue to be distributed to the public after the entry into force of the Treaty. The time limit for such provisions was two years. Transitional arrangements only concerned distribution of copies and did not extend to the reproduction of new copies by extraction, or to utilization of the database by making it available to the public by transmission. Article 13 deals with enforcement measures; the provisions were the same as in the Draft WCT (Article 1) and WPPT (Article 27).

## **Chapter 8: Securing Negotiating Mandate: Internal Negotiations**

### **8.1 Negotiations Between Organisations: Internal and External Negotiations**

Negotiations at the DipCon were negotiations among Member States of WIPO. Negotiations between organisations like governments are analytically distinct from negotiations between individuals. Organisations, particularly governments, are not monolithic, rational entities approaching negotiations with utmost rationality, identifying their interests, and single-mindedly pursuing those interests with a negotiating strategy chosen rationally for effectively pursuing those interests. If two organisations A and B negotiate there are actually three negotiations: (i) internal negotiations within A, (ii) internal negotiations within B, and (iii) external negotiations between A and B. External negotiations between A & B would be successful only if its outcome is consistent with the outcomes of the two internal negotiations. Government is a constellation of departments; each department having a stake in a given multilateral negotiation is a player in its own right. Thus, while the Department of Education was the nodal agency responsible for interaction with WIPO it was not the arbiter of deciding what the government's stand ought to be. It has to carry along other departments having a stake in the issues covered by the DipCon such as the Ministry of External Affairs which bears the overall responsibility for India's external relations with other countries, UN and its organisations like WIPO and the Commerce Ministry which steered the TRIPs negotiations and is the nodal ministry for WTO. Each department has (i) its own identity, priorities and interests, (ii) clientele whose interests it cannot afford to ignore eg., capital markets in case of the Finance Ministry, and (iii) its 'peers' and 'wise men' whose opinion and appreciation it values, eg., economists and international economic institutions in case of the Finance Ministry. Each department is extremely possessive of its turf but does not hesitate to poach on the turf of other departments. Mechanisms like the Committee of Secretaries<sup>308</sup> strive to reconcile the different interests and viewpoints of different departments. In important matters like a multilateral negotiation the final decision-making authority is the Cabinet or one of its committees which is an explicitly political body, 'the apex where politics and

---

308 Presided by the Cabinet Secretary, the composition of the Committee of Secretaries is not fixed; its composition depends on the matter to be considered. All Ministries and Departments having a stake in the matter under consideration are represented. A Ministry is a cluster of Departments headed by a minister. Department is the basic unit of decision-making.

administration come together and where differences and conflicts have finally to be reconciled and resolved'.<sup>309</sup> In regard to most matters considered by the Cabinet, there would be several ministers whose departments have no institutional stake. Such ministers necessarily bring to bear on the decision-making process their political and personal interests and viewpoints. A minister whose department has a stake in the issues under consideration, no doubt, argues in favour of his department's position; however, it is unlikely that he does not eschew political and personal interests and viewpoints. The position of everyone in the Cabinet refracts intensely the views and interests of groups outside Government. In taking positions on a matter under consideration, each minister instinctively takes into account multiple considerations: What is in it for the country? What is in it for my party? What is in it for my group within the party? And what is in it for me? A decision emerges through a process of implicit negotiations among the members of the Cabinet, and among the groups within the Cabinet. As with most negotiations, the internal negotiations within the Government are often more acrimonious than negotiations with outside groups. The record of every administration is a tale of battles within the Government and those outside. The battles outside impact on those inside, and vice versa. Internal disagreements spill over to the public arena. It follows that well before the DipCon the Department of Education had to secure approvals, among others, for the composition of the negotiating team as well as the negotiating mandate which spells out the issues which are non-negotiable, the goals of other issues and the minimal outcome which one could accept if it is not possible to secure the most desirable goal. While I had vast discretion in choosing the negotiating strategy and modifying the strategy and choosing tactics to deal with the evolving situation during the negotiations it was incumbent on me to regularly report to Dasgupta, Secretary, Department of Education so that he could review the developments, give counsel and issue, and if need be obtain orders of the government and convey them to me so that I could appropriately take a stance in the negotiations.

Even though the Department of Education submitted a note for consideration of the Committee of Secretaries as early as August 6, 1996, it was taken up for consideration only about three months, later on November 1, 1996, and that too as a result of lobbying the Cabinet Secretariat T.S.R. Subramanian. The delay did not matter much for in the period intervening between the submission of the note and its consideration greater clarity was

---

309 A former British Cabinet Secretary, Lord Armstrong quoted in Hennessy (2000), p.4.

obtained because of the receipt of the Basic Proposals of the three treaties (negotiating texts). Greater clarity was also obtained about the policy contestation in the U.S. which was the prime mover of the DipCon. Based on my experience I am rather sceptical about the meetings of the Committee of Secretaries. Secretaries are heavily overworked, and most are too engrossed in firefighting to do strategic thinking. As elegantly put by Secretary of State Lord Morley back in 1907:

The trouble with bureaucrats was not that they did not work. They were able men, and they did work hard. They were not found wanting as administrators. But their weakness lay in the fact that they were too immersed in detail to find leisure to look out of the window and scan the skies and weather and all the business of elements.<sup>310</sup>

It is therefore not unusual that most interventions in the meeting of Committee of Secretaries are improvisations and, at best, reflect the viewpoint of the department concerned. The outcome of deliberations very much depends on the Cabinet Secretary's willingness to give room for presenting different viewpoints, his ability to get to the bottom of the matter under consideration, reconcile different viewpoints, and come up with a conclusion which is likely to pass muster with the Cabinet.

## **8.2 Consideration by Committee of Secretaries**

The meeting of the Committee of Secretaries which considered the DipCon began with my presentation. I was no stranger to the principles of effective communication such as keeping the message straight and simple, tailoring one's message as well as its tone and tenor to the audience, and subtly repeating the message for reinforcement. I tailored my message to the audience of overworked senior officials who would be put off by technicalities and abstract principles and wanted to quickly move on to the decision-points, and were unlikely to be knowledgeable about the difference even between patents and copyright, not to speak of the distinction between copyright and related rights.<sup>311</sup> There were two messages which I wished to convey: ( i)

---

310 Morley to Minto, 29<sup>th</sup> November 1907, India Office, Mss. Eur.D. 573/2, p.304, cited in Misra (1970), p.234.

311 In 1970, Alan Litman, a noted American copyright lawyer, told a group of IP specialists that 'most people do not understand the differences between patents, trademarks, and copyrights. This applies to clients, other lawyers, and at times even judges. When I tell a general practitioner that I am a copyright lawyer, he immediately corrects me: 'You mean patents'. See Goldstein (1996), p.9.

copyright and related rights were different from patents of which the participants were wary of, given the controversy that pharmaceutical patents gave rise to during the TRIPs negotiations and thereafter, and (ii) the treaties which would be considered by the DipCon include only four provisions of the TRIPs agreement, and there were many others, particularly the digital agenda, which were never considered by the TRIPs agreement. I designed my presentation which would kick off the deliberations of the Committee of Secretaries as an intelligent layman's guide to the deliberations of the Committees of Experts as well as the Basic Proposals of the three treaties due to be considered by the DipCon. I began my presentation with a brief introduction to copyright and related rights, illustrating the different types of rights with reference to well-known personalities in Indian cinema like Javed Akhtar (lyricist), A.R.Rahman (music director and composer), Lata Mangeshkar (singer) and Yash Chopra (film producer), and organisations like H.M.V. Recording Company (producer of phonograms) and Doordarshan (broadcaster), and went on to briefly outline the salient features of the Berne and Rome Conventions as well as of the Indian Copyright law, and the far reaching impact of digital technologies on copyright and related rights, and the 'digital agenda'. I also highlighted the fact that over the last six months the Department of Education had held consultations with all the industries for which copyright and related rights are important, concerned ministries and departments, and experts. Then, I took the audience through the note submitted to the Committee of Secretaries highlighted ten salient points. First, as a leading producer of films, computer software and recorded music, it was in our national interest that the rights and interests of our copyright industries, authors and performers are protected in the digital environment. Secondly, the Berne Convention was not revised after 1971 and the Rome Convention was never revised; consequently, international copyright law needed to be updated to factor in technological and market developments. Thirdly, the TRIPs agreement had to some extent updated international copyright and related rights law by specifically providing for protection of computer programmes and compilations of data as literary works, a rental right in respect of computer programmes, cinematographic works and sound recordings, and extending the term of protection of performers and producers of phonograms from twenty years (as provided by Rome Convention) to fifty years. However, the TRIPs negotiations did not cover many far-reaching changes, particularly the impact of digital technologies on copyright and related rights. Fourthly, WCT and WPPT sought to update the international copyright law by incorporating the new provisions covered by the TRIPs agreement and updating most other provisions not touched by the TRIPs agreement. However, WPPT did not cover

broadcasting rights event though they were left untouched by the TRIPs agreement. Fifthly, while considering the 'digital agenda' it was important to bear in mind that the digital technologies were still in the initial stages, and no one knew how exactly they would evolve and what their impact would be; it was therefore imperative that the treaties provide parties to treaties sufficient flexibility to cope with unforeseen developments. Flexibility was all the more necessary because international treaties are not revised often. Sixthly, while considering the 'digital agenda' it was imperative not to do away with the balance between the rights of the rightsholders and the interests of users. Seventhly, there were attempts to go beyond the provisions of TRIPs agreement in respect of commercial rentals and the importation right; such attempts should be opposed as the TRIPs agreement it was too premature to reopen the TRIPs agreement and upset the delicate balance of that agreement arrived at through arduous negotiation. TRIPs agreement entered into force just twenty months ago on 1 January 1995, and developing countries were permitted a transition period of five years from entry into force to shift to the TRIPs regime. Eighthly, WPPT aimed at fulfilling the long-standing demand of performers that their rights should be brought on par with those of authors; it also aimed at covering the rights of performers of audio-visual works. However, the U.S. had made it clear that it would be politically impossible for it to accede to any treaty which included audio-visual fixation since Hollywood would prefer the rights of performers to be regulated by commercial practices and contracts than by a related right regime. A similar view was taken by the Film Federation of India as film business in India is organised in the same way as in Hollywood. Ninthly, Draft WCT proposed to abolish non-voluntary licenses for primary broadcasting and sound recordings within three years; effective implementation of this proposal hinged on the existence of a strong collective administration system for collection of royalties. Given the present state of collective administration societies it was desirable to seek a longer transition period for abolition. Tenthly, the Database Treaty aimed at protecting substantial investment in the creation of electronic databases which would not pass the test of creativity; in the medium term, such a protection would be in India's interest. NASSCOM had supported the draft treaty. However, in the meetings of the Committees of Experts most countries were of the view that the treaty needs further study. It would be desirable to go by the consensus so that a well- designed treaty might fall in place.

Three interventions stood out in the deliberations of the Committee of Secretaries. Tejinder Khanna, Secretary, Commerce Ministry. He felt it was premature to undertake revision of copyright law so soon after the TRIPs

agreement. His constant refrain was 'do not go beyond TRIPs agreement'. R.A. Mashelkar Director General, Council of Scientific and Industrial Research (CSIR) drew Khanna's attention to my presentation and highlighted the fact that digital agenda was not discussed at all during the TRIPs negotiations. The Cabinet Secretary Subramanian also highlighted the fact that items not discussed at TRIPs were qualitatively different from those discussed and included in the TRIPs agreement. Thereupon, Khanna expressed the view that it was for the Department of Education to assess the national interest in regard to non-TRIP provisions, and that there was no need for the importation right and Database Treaty. Mashelkar saw merit in protection of value-added databases such as the value-added patent services being provided by CSIR laboratories like the National Chemical Laboratory, Pune and Central Manufacturing Technological Institute, Bangalore. However, he felt that consideration of the Database Treaty was premature, and that treaty needed further study. Miles Law (where you stand depends upon where you sit) was also evident during the discussions; as could be expected of a department which is expected to take care of the interests of broadcasters, N.P. Nawani, Secretary, Information and Broadcasting opposed extension of performers' rights. Towards the end, Subramanian said it was necessary to educate the public about the treaties, and how they furthered our interests. He went on to say that in retrospect it was a mistake to keep the issues relating to IPRs under wrap during the TRIPs negotiations. Taking up this point, Mashelkar said it was necessary to 'inoculate' the public; initially there might some reaction, but the fever would abate, and immunisation would be beneficial. Subramanian wanted a number of seminars to be organised in different parts of the country so as to arouse public awareness about the DipCon.

Truth to be told, the suggestion of Subramanian and Mashelkar did not have much relevance for DipCon. Even during the TRIPs negotiations copyright was not contentious like patents. And further, the premise of the suggestion that during the TRIPs negotiations issues relating to IPRs were kept under wrap was not correct. The Indian pharmaceutical industry owed its spectacular growth to the extant Indian patent regime which excluded product patents for pharmaceutical products, and the industrial licensing system which positively discriminated in favour of the Indian pharmaceutical industry; figuratively, the product patent regime was the life support system of its profits. As it therefore had a vital interest in continuation of that patent regime it keenly followed with an Argus eye the TRIPs negotiations. Within two years of the commencement of the Uruguay Round negotiations, Indian pharmaceutical companies established the National Working Group on Patent Laws [NWGPL]. NWGPL

came to be an advocacy powerhouse enlisting well-known personalities in the cause of protecting the Indian patent regime and developing every conceivable argument in support of that cause. It strongly influenced the Indian position on IPRs during the TRIPs negotiations. However, eventually India had to fall in line as developing country after developed country abandoned its opposition to IPRs being considered in a multilateral trade forum and began to consider the proposals of developed countries. Even after the TRIPs negotiations and India acceded to the TRIPs agreement, government's efforts to amend the patent law so as to make it TRIPs-compliant met with ferocious resistance. Because of that resistance the Indian government could not fully comply with its transitory obligations under the TRIPs agreement,<sup>312</sup> and on July 2, 1996, the U.S. and E.C. initiated separate proceedings in WTO against India for failing to fulfil its transitory obligations under the TRIPs Agreement. India could make the necessary changes to the Indian patent law not one in go but in three instalments, and the third patent amendment legislation was enacted just in the nick of time before the expiry of the transitory period provided by the TRIPs agreement. Suffice to say, in policymaking there might be 'Irreconcilables' who would not give up their entrenched interest, and neither reasoning nor bargaining would make them budge.

Based on my experience with developing and regulating pharmaceutical industry, I am deeply convinced that, even with the inoculation Mashelkar spoke about, the TRIPs provisions about patents could have never avoided strong opposition and controversy as they encountered the formidable and ferocious politics of entrenchment. The TRIPs agreement obligated the Indian government to do away with the exclusion of pharmaceutical products from patent protection. It would be naïve to think that the Indian pharmaceutical industry would stand idle when its entrenched privilege was being taken away, all the more so as it could easily create the perception that it was defending

---

312 For countries like India which did not have product patents for some technologies the TRIPs agreement provided a period of ten years ( from January 1 1995 the date of entry of TRIPs agreement into force) for compliance subject to two conditions: (i) a mailbox should be provided for receiving product patent applications from January 1 1995; those applications should be processed once the patent law was amended and the applications in the mailbox shall have priority from the date of filing, and (ii) exclusive marketing right (EMR) shall be provided for a product for which a patent application was filed in the mailbox; the EMR would be valid for a period of five years or till the grant of patent whichever is shorter. The ordinance issued on December 31, 1994, was designed to fulfil these two conditions; however, it was approved only by the Lok Sabha and not the Rajya Sabha. For elaboration of the provisions of the TRIPs agreement regarding product patents, the politics enveloping pharmaceutical patents and Indian adoption of the TRIPs obligations in respect of pharmaceutical patents see Ayyar (2009), pp.234-59.

public and national interest against the assault on self-reliance and affordability of medicines by self-serving foreign companies. In the battle of perceptions, the government could never go on the offensive. Waiting till the force of inner truth can work on the situation is sometimes a good strategy. Thus, while the government received lot of flak for acceding to the Uruguay Round agreements (which include the TRIPs agreement) eventually most of the industries other than the Indian pharmaceutical industry veered round the view that keeping out of the international trade regime was against national interest, and in fact suicidal. When in office, even opposition parties veered round the same view. Thus, it was the National Democratic government led by the BJP which enacted the second patent amendment act in order to fulfil the TRIPs obligations in respect of patents, and it was the UPA government supported by the Communist parties which enacted the third patent amendment act so that the process of aligning Indian patent law with the TRIPs obligations on patents was completed. Activists like Vandana Shiva criticised the Left parties for losing a golden opportunity to strike down TRIPs agreement. 'Through the Indian parliament, one billion people, a sixth of humanity would have voted down TRIPs and WTO. This historical opportunity has been sadly lost by the Indian left'. An article in *People's Democracy*, a weekly organ of the CPM, pooh-poohed the criticism. It is not always a good strategy in all types of battles, including policy battles, to rebut straightaway the offensive of an opponent; it may be better to let the offensive lose steam and then go on offensive.

However, in the meeting of the Committee of Secretaries which discussed the forthcoming negotiations at DipCon I did not make an issue of Subramanian's suggestion as the Committee of Secretaries was not an academic seminar, and it would be imprudent to alienate the Cabinet Secretary particularly when he was so supportive of my approach to the DipCon. To jump the story, the DipCon was just four weeks away, and time was rather short for organising nation-wide seminars. I turned to S. Narendra, Principal Information Officer, and his journalistic friends to get stories about the DipCon and Indian stand appear in newspapers; I also enlisted Arvind Kumar, Director, National Book Trust and Sanjay Tandon of the Indian Performing Right Society Limited (IPRS) with extensive contacts with the film and recorded music industry to organise seminars in Delhi, Mumbai and Hyderabad.

### **8.3 Negotiating Mandate**

Given the technical nature of the subject, I was asked to draft the record of discussion and the conclusions of the meeting of the Committee of Secretaries in regard to the negotiating mandate. The negotiating mandate

comprised ten elements. First, only such obligations should be entered into which were in India's national interest and which protect the interests of Indian industries, authors, performers, and users. Secondly, the language of the provisions should be clear and unambiguous based on a common understanding among the Contracting Parties of what the obligations were. Thirdly, with regard to the Database Treaty the preferred option was deferring the treaty for further examination. In case this was not possible then the second-best option was to ensure that there was greater clarity in the definitions, that protection was limited only to databases which were marketed, and that specific exceptions such as those provided in the EC Directive were provided for. Fourthly, where an obligation under the TRIPS Agreement was proposed to be incorporated in WCT or WPPT, it should be incorporated *as it is* in the treaty in question, without any modification of the scope or level of protection, and without any change in language lest the difference in language should lead to divergent interpretations of a TRIPS provision and its corresponding WCT or WPPT provision. Fifthly, the preferred position on enforcement measures was adapting the TRIPS provisions without any reference to the TRIPS agreement. It should also be ensured that these treaties do not have any linkage to TRIPS agreement. This stand was non-negotiable. Sixthly, on TPMs the preferred option was deleting the provisions altogether as circumvention of TPMs could be dealt with by other laws. Alternately, it could be suggested that the use of TPMs to prevent infringement should be made illegal rather than prohibit the manufacture of and trade in devices *per se*. Seventhly, with regard to the right of distribution, the alternative which integrates distribution right with importation right should be opposed. This was non-negotiable. Eighthly, the preferred option with respect to right of rentals was incorporating in WCT and WPPT what was agreed to in the TRIPS agreement without any change. In case this was not possible then the second-best option was to go with the consensus particularly among developing countries. Ninthly, regarding the phasing out of non-voluntary licenses for sound recordings and primary broadcasting, the problems arising from lack of well-functioning till collective administration societies should be highlighted. A transition period longer than the three years proposed should be sought. Tenthly, regarding the scope of related rights, the preferred alternative was exclusion of audio-visual fixation from WPPT.

#### **8.4 Consideration by Cabinet Committee on Economic Affairs**

About eleven days after the meeting of the Committee of Secretaries, on November 12, 1996, to be precise, the Cabinet Committee on Economic Affairs

(CCEA) approved without much discussion the negotiating mandate recommended by the Committee of Secretaries. The meeting of the CCEA started late at about 6 40 PM. I, Dasgupta and other officers whose subjects were to be discussed by the Committee and D.M.M Rao, Deputy Secretary, Cabinet Secretariat waited in the anteroom of the room where the CCEA met. From time-to-time Rao would peep into the room where the CCEA was meeting to take stock of the progress of deliberations and send in the officers whose subject would be discussed next by the CCEA. The discussion on the first two items, relief package to Andhra Pradesh to cope with the aftermath of a cyclone and public distribution system, went on and on. Rao observed, like a wise seer, that after the first two items the next four items would be disposed in just two minutes; his prognosis turned out to be right. I and Dasgupta were ushered into the Committee room a few minutes before 8 PM. We were no more than passive spectators for the minute the subject was taken up Subramanian began to sum up the case with such a rapidity that I was reminded of a bullet train, or a fusillade of an AK-47 machine gun. I was not sure that what he said registered on the audience. He said that a diplomatic conference was being organised, elaborate preparatory work was meticulously done by the Department of Education, and the Committee of Secretaries had meticulously considered the proposals of the Department. The Department would also organise seminars to gauge public opinion. What was being sought was approval for the mandate approved by the Committee of Secretaries. Then he mumbled out the first two paragraphs of the conclusions the Committee of Secretaries. As he fired the fusillade of words, he looked at me for approbation, and I deferentially nodded my head in the Tamilian way to convey approval and appreciation. For a moment, I was lost in thought, thinking about the decision-making process in the real world as compared to theory. Before I recovered from my brief reverie Dasgupta tapped my shoulder and beckoned we should leave. That was it. I could not help agonising over the summary way the DipCon matter was disposed of and tried to discover an explanation. Did the ministers have a 'deliberation fatigue' after elaborately considering the first two subjects? Or was it because of the unfamiliarity with the issues covered by the DipCon? A quip of Parkinson goes that the decision-making about a bicycle shed takes about a couple of hours while a project of constructing a new nuclear power plant costing millions of rupees is disposed of in two and half minutes. Or is there a policy process distinctive of the third world countries?

<sup>313</sup> How true is the contention that while in many developed countries the main

---

313 Horowitz (1989), pp. 197-212.

area of policy contestation is in the process of policy formulation, in developing countries there is not much discussion on the 'policy on paper' and that it is the process of policy implementation that witnesses most struggles and contestations? <sup>314</sup> I came to the summary conclusion that what mattered was the political salience of a subject, and how, much 'noise' it created 'outside'; after all, it was the squeaky wheel which gets the oil. The DipCon was disposed summarily as compared to the Andhra Pradesh cyclone and public distribution system because it was not politically salient as the other two subjects are. No one 'outside' spoke about the DipCon; no interest group felt threatened by it and lobbied the ministers. If, however, Subramanian uttered the dreadful word 'TRIPs' hell would have broken loose.

---

314 Thomas and Grindle (1990).

## Chapter 9: Run-up to DipCon

It is no longer possible to locate the issue of copyright internationally within the cultural baggage of 'us' (Third World) versus 'them' (developed countries) ... neither the so-called developed nor the so-called developing countries are static, or homogenous. They change; indeed, they develop... As realities on the ground change, so do the terms of the debate... India has grown into becoming a significant producer and distributor of knowledge worldwide. While, in terms of economic definitions, it may continue to be numbered among developing nations, its status is nonetheless very different even from that of its neighbours.....Urvashi (1995)<sup>315</sup>

### 9.1 American Diplomatic Moves

In its bid to hasten the DipCon and ensure its success the U.S. began to lobby with the Member States of WIPO. Thus, as requested by Lehman, Kanthi Tripathi, Minister (Commerce), Indian Embassy, Washington, D.C. met him and Ms. Carmen Guzman- Lowrey, Associate Commissioner for International and Governmental Affairs, Patent and Trademark Office on July 31, 1996. Lehman began by saying that in the past the relations between India and the U.S., particularly in the area of patents, were not cordial; in India there was 'some residue' of the old way of looking at international relations and of keeping the U.S. at a distance. But times had changed, and because of India's advances in information technology there was now a commonality of interest between India and the U.S. The U.S. wanted a dialogue with India on the issues to be considered by the DipCon. Lehman was not forthcoming on specifics and went on 'harping on the idea that these were changed times and that India should not reject the proposals of the E.C. or of U.S. at the DipCon merely on the ground that they came from developed countries'. He also said that the negotiations at WIPO thus far had not really progressed because some of the countries sent delegations that were narrowly technical and had no idea or vision about global developments. Guzman-Lowrey supplemented Lehman's observations and listed three specific areas where the U.S. sought Indian support: (i) the American proposal on *sui generis* database right, (ii) TPMs, and (iii) the American stand on the rights of performers in audio-visual works which was contrary to that of the French. Kanthi Tripathi assured Lehman that India would not reject or object to any proposal out of pique, and those Indian

---

315 Butalia (1995), pp.43-4, 46.

responses would be based on reason and content. The subject matter of the DipCon was of considerable interest to India, especially in the areas of software, films, and music. Therefore, India was open to discussions with the U.S.

Six days after the meeting between Kanthi Tripathi and Lehman the Deputy Chief of the American Embassy, New Delhi presented a *démarche* to Gangadharan which reiterated the points made in the Tripathi-Lehman meeting. In addition, the *démarche* sought India's support for a successful conclusion of the DipCon and highlighted the fact that the issues which would be considered at the DipCon issues were not North-South issues but issues of utmost relevance for ensuring that all authors and creators were protected in the 'world of information superhighways'; without such protection they would not make their works available in the new marketplace. The growth of the global information society would provide new opportunities for economic growth, job creation and cultural enrichment for all countries. The scope of performers' rights was an issue that had long resisted comprehensive international resolution, and to achieve success of the DipCon the scope of performers' rights should be limited to phonograms and should not extend to audio-visual works. Looking back, it was odd that a diplomat based in New Delhi could have missed the crucial fact that Hollywood and the Indian film industry were similarly organised, that the contractual arrangements between the producer and the performers were similar, that the American and Indian copyright laws treated cinematographic works similarly, and that unlike civil law countries with an authors' right system Indian and American copyright laws had no difficulty in accepting full alienability of all rights and vesting all rights associated with cinematographic works in the producer, whether an individual or legal entity. These are invaluable facts for persuasion which is mainly what diplomacy is about. Regarding *sui generis* database right the *démarche* resorted to poetic license. During the meetings in WIPO, several countries expressed concern that there would not be adequate time to fully consider and evaluate the proposals. However, the American proposals were modest in scope and were discussed extensively in several formal and informal expert group meetings. Therefore, they should not be postponed but considered at the DipCon. The American government was prepared to discuss with the Indian government any concerns or questions which the Indian government might have. Further, American experts would be available at the forthcoming Asian Group meeting in November 1996. To jump the story, there was no further bilateral contact between the two governments till the DipCon, and the U.S. itself quietly abandoned the *sui generis* database right treaty because of

strong domestic opposition, including the scientific community. Because of these two meetings, one in Washington, D.C. and the other in New Delhi I could get a clear picture about the stand which India should take *vis-à-vis* the U.S. and its proposals at the DipCon well before I left for Geneva to attend the General Consultations organised by WIPO on October 14-15, 1996.

When I began my engagement with the DipCon the fact which struck me most was the unseemly haste with which the DipCon was being convened without providing developing countries who had little exposure to the new digital technologies time and space to get acquainted with the issues and deliberate over them. At the WIPO-India National Seminar (February 1996) I was inclined to look at the DipCon and the issues which would be considered at the DipCon solely from the perspective of a developing country with little exposure to the new digital technologies. I was upset that the documents furnished by WIPO for the seminar did not include any which put forth the perspective of developing countries. I might have been irritated by bluntly asserting that India's perception of the treaties-in-the-making might not be those of WIPO; he might have wondered who the new bull in china shop was. Some of the views I expressed at the Seminar were unnuanced, and in line with the strident rhetoric of 'we' (developing countries) versus 'you' (developed countries) that most Indian delegates used in international conferences, particularly during the TRIPs negotiations. I was also blind to the fact that in the matter of copyright the interests of India were not necessarily congruent with developing countries given that India was the leading producer of films in the world, a major producer of software and had a respectable book publishing and recorded music industry, and that Indian movie industry, in particular, was being hurt significantly because of piracy in India and neighbouring countries. Indian film industry and software stood to lose more in the digital environment. As I deeply studied the issues, I developed a more nuanced response to the issues which would be considered at DipCon. I recalled the fact that during the TRIPs negotiations copyright and related issues stood on a separate footing from patents and the provisions regarding enforcement of IPRs; unlike with patents the TRIPs proposals in regard to copyright and related issues were totally free of any controversy. In contrast to patents, the Indian Copyright Act could be amended in June 1994 without even a whisper of opposition two months after India's accession to the TRIPs agreement and half a year before that agreement entered into force. The amendment introduced rental right in respect of computer programs, cinematographic works and phonograms, and the negative rights of performers provided by Article 14 (1) of the TRIPs agreement. Performers' rights made a debut in the Indian copyright law

through the 1994 amendment. As the 1994 amendment fixed twenty-five years as the term of protection of performers and producers of phonograms the Act had to be amended again in 1999 to raise the term of protection to fifty years as obligated by the TRIPs agreement. On a consideration of all the relevant facts I came to the conclusion that that the concern that treaties-in-the-making might prematurely put in place a very regimented legal framework which would constrict future choices for countries like India should be balanced by the fact that India needed modification of copyright and neighbouring rights so as to protect the rights of its authors, performers and producers of phonograms in the digital medium. That being so, it was imperative to look at individual proposals of the treaties-in-the-making, evaluate how far each one of them served the Indian interests, come up with alternate proposals wherever needed, and try to negotiate earnestly. I was reassured that my thinking about the DipCon was on the right track when I met B.L. Das at the behest of Cabinet Secretary T.S.R. Subramanian. Das was the Indian Ambassador and Permanent Representative to GATT (1980 - 1983), and later served in GATT (1985-90) when the Uruguay Round trade negotiations were being conducted. Subramanian himself had considerable experience in international negotiations; he was of the view that India's standing as an opinion builder and leader of the developing countries collapsed during the Uruguay Round negotiations when 'we' conducted 'defensive battles with the objective of damage control', were averse to striking a bargain, and 'took an aggressive, all or nothing, posture, and was isolated and routed in the final negotiating arena'. He went on to say that 'I attribute this to extremely poor representation characterised by a rabid, dogmatic, and impractical approach ...We lost our relevance not only in the context of the Uruguay Round, but in terms of our capability to participate effectively in future events'.<sup>316</sup> To jump the story, during the DipCon, Arundhati Ghose, India's Permanent Representative to WIPO, herself expressed a similar view. Just a little before the DipCon, she won great renown for the tough stand she took against the Big Five of Security Council during the Conference on Comprehensive Test Ban Treaty (CTBT), particularly the U.S., earning the sobriquet 'India's CTBT "Durga"',<sup>317</sup> . In popular image Arundhati Ghosh was the slayer of the American dragon. With enormous experience in multilateral diplomacy, she told me that our strident

---

316 Subramanian (2004), p.167.

317 Bhaskar (2016). Durga is a Goddess who killed the demon *Mahisasura* and is worshipped all over India, particularly during the nine-day Dusserah festival.

stance in GATT was unfortunate and dysfunctional. S.P. Shukla<sup>318</sup> and Co. had made great names for themselves but did the country poorly in the Uruguay Round trade negotiations. In trade we were irrelevant and before asserting stridently we should build strength. It is only in a few selected areas where our national interest is vital that we should take firm positions and in other areas keep off rather than preach. She was critical of the Indian trait to speak on every issue. I took her advice in right earnest.

Das was happy that negotiations were being conducted under the aegis of WIPO and not WTO; this would take away much of the opposition to the treaties-in-the-making. He recalled the fact that India took the stand during the Uruguay Round trade negotiations that WIPO was the legitimate forum for IPRs and therefore IPRs should be excluded from the negotiations. As the DipCon was being organised under the aegis of WIPO it would escape the widespread negative perception about WTO and the TRIPs agreement in the political class and general public. He accepted the fact that copyright and neighbouring rights stood on a different footing from patents; therefore, we need not adopt a strident note and can in fact be a bridge between developed and developing countries. When I brought to his notice the proposal of WIPO to 12+12 negotiations in order to build consensus and hasten agreement at the DipCon Das percipiently observed that such negotiations could not be formally announced. In the Uruguay Round negotiations, the 'Green Room' negotiations between developed and developing countries were informal. The Chairman used to invite a few countries, but everyone knew who was invited, and that was it.

## **9.2 General Consultations, Geneva (October 14-15, 1996)**

Nearly two months after the Deputy Chief of the American Embassy, New Delhi presented a démarche to Gangadharan, I attended the WIPO General Consultations in Geneva (October 14-15, 1996). My participation in the General Consultations gave me a foretaste of the way the DipCon would be conducted. It was made clear at the very beginning of the General Consultations that no record would be kept; the Governing Bodies of WIPO decided just about a fortnight earlier that the mandate of the '15+15+1+1' meeting would be decided at the General Consultations, and yet neither WIPO officials nor Lieder who presided

---

318 The comments of T.S.R.Subramanian and Arundhati Ghosh were about the period during which S.P.Shukla was India's Permanent Representative to GATT( 1984-9) and played a lead role in the initial years of the Uruguay Round Negotiations. T.S.R.Subramanian's account is no different. He wrote that Ambassador Shukla took an extreme position, and that with none in Delhi capable of checking Shukla India ignored all moderate opinion. There was a sea change in India's negotiating strategy once A.V.Ganesh succeeded S.P.Shukla.

over the General Consultations thought it necessary to take the participants into confidence about their latest thinking on '15+15+1+1' meet. Strangely, no one objected to that omission. The General Consultations as well as the meeting of the Asian Group were thinly attended. Unusual for it the U.S. mounted a tiny delegation of two. I met Liedes for the first time. He played a pivotal role in the runup to the DipCon as well as during the DipCon and had the exceptional distinction of being entrusted with drafting the three draft treaties instead of the International Bureau of WIPO, a departure from the tradition of entrusting the organisation in charge of organising a multilateral conference with drafting the negotiating text. This unusual entrustment came in for much criticism from many delegates of the Asian Group; I came to know the plausible reason for this unusual entrustment: Lehman was annoyed with Bogsch, DG, WIPO, and did not trust him to come up with negotiating texts to his satisfaction and wanted the task to be entrusted to someone whom he could trust. That this was not a rumour, but a fact came out in my conversation during the DipCon with Ficsor on December 13, 1996 (See Sect.10.8). While drafting the negotiating texts Liedes did not, avowedly, have any discussion with International Bureau of WIPO; he discussed only two or three substantive issues including the title of the DipCon with DG, WIPO.<sup>319</sup> He informed the General Consultations that while drafting the treaties he took into account his assessment of what was acceptable to the majority of Members States; further, he proceeded from the premise that the negotiating text should be a little ambitious going much beyond the lowest common denominator of protection possible. In addition to drafting the negotiating texts he also attended each of the regional meetings of the three developing country groups including the meeting of the Asian Group at Chiang Mai, Thailand (November 21-2, 1996) as well as meetings in the U.S. And then, he went to chair the Main Committee-I of the DipCon which settled the provisions of the WIPO Internet Treaties.

During the General Consultations, I had an exposure to Jukka Liedes's way of conducting meetings as if they were seminars where everyone could have his say for any length of time and any number of times. The imagery of a seminar which struck me when I sat through the General Consultations was not off the mark. In response to a question at the briefing session in the Patent and Trademark office, Washington, D.C. on the Basic Proposals he had drafted, Liedes described the discussions in the Committees of Experts he had chaired as 'discussing some issues in a free space, like in a seminar, when we are trying to

---

319 U.S. Commerce Briefing (1996), pp.14-5.

find the wisdom'.<sup>320</sup> He seemed to believe that what was important was to keep the dialogue going, that eventually a consensus would emerge, and that he could constructively use his position as Chairman to sum up the discussions in a way that the process could be moved forward to next stage. Thus, he played a very pivotal role in securing the acquiescence, if not the agreement, of the Committees of Experts to convene the DipCon well before the deliberations were conclusive. He was Chairman of the WIPO Standing Committee on Copyright and Related Rights for over a decade and was a leading luminary on the copyright landscape, national, European, and international, till 2014 when he demitted office in the Finnish Ministry of Education and Copyright. He came to be my friend, generously travelling all the way Finland to Delhi to attend a seminar I organised in February 1997 to acquaint the Indian academics about the DipCon and to promote inter-disciplinary study of IPRs.

In the Asian Group meeting, I noticed that many ASEAN countries like Thailand and Singapore were in the grip of digital phobia. There was no agreement on who should be represent the Group in '15+15+1+1' discussions, and whether the representatives chosen should negotiate on behalf of the Group or only report what was discussed in the Group meetings. In keeping with my negotiating strategy of taking care of Indian interests only rather than engaging in high-flown rhetoric and confrontation with the U.S. and EC, I kept a low profile rather than assume a leadership role. I also got the impression that Japan was orchestrating the positions of some of the ASEAN countries; that impression was proved at the Regional Meeting at Chiang Mai.

At Geneva, I had a side meeting with Michael Scott Keplinger of the U.S. Patent and Trademark Office (PTO). I came to know from that conversation that the Bills introduced in the Congress to implement the recommendations of the Lehman Report had lapsed, and that officials of the PTO were negotiating with different groups in order to resolve the differences and arrive at an American position that could be adopted at DipCon. I guessed that the U.S. might alter its position depending on the outcome of the negotiations being conducted by the PTO as well as the political scene after the Presidential and Congressional elections in November 1996. I also came to know from Keplinger that Hollywood was strongly opposed to the inclusion of audio-visual works in the WPPT. Keplinger's observation together with the support the American Government sought in Washington, D.C. as well as New Delhi for the American version of the *sui generis* database right as well as the exclusion of audio-visual

---

320 U.S. Commerce Briefing (1996), p.68.

works helped me discover that the conflict over the digital agenda was not the only conflict associated with the making of the WIPO Internet Treaties. There were conflicts among rightsholders also as did among nations strongly supporting the digital agenda. Thus, analogous to the rights of authors performers wanted to expand their rights even after their performances were fixed in sound and audio-visual recordings, and Hollywood as well as the music industry in the U.S. opposed that expansion and wanted the transactions between them and performers to be regulated by contracts only. At another level, during the General Consultations the differences between the U.S., the prime mover of the DipCon and the EC which strongly seconded the American move to convene the DipCon early came out in the open. Each of them wanted their own proposals accepted on matters where their proposals differed such as digital transmission and *sui generis* database right. They had also sharply divergent views on audio-visual works as well as a few other aspects of the Draft WPPT. I could acquire a better understanding of these divergent views during the DipCon because of my interaction with delegates of different groups and representatives of interest groups, and deep reflection over what I heard. The digital agenda was not the only unfinished agenda of the TRIPs negotiations. Both the U.S. and EC attempted to rectify the inadequacies of the Rome Convention, and because of their divergent economic interests and no less importantly their copyright philosophies not much progress could be made. These differences paled into insignificance when compared to the vast Atlantic Ocean which separated the American and EC's position on audio-visual works. I did report about these 'tussles' in my report to Dasgupta but truth to be told, I did not expect the differences would remain unresolved before the DipCon convened; on the very first day of the DipCon I was totally surprised that they were not. Ironically, it was North-North confrontation and not North-South Confrontation which seriously threatened the successful conclusion of the DipCon. At the General Consultations, I also got a hint that the Database Treaty may not pass muster with the DipCon; many Member States expressed the view that the Database Treaty was premature and needed further study and consultation, and during a luncheon meeting with me Ficsor indicated that should the Database Treaty be not concluded by the DipCon the *sui generis* database right could be taken up for consideration at Phuket, Thailand where WIPO and UNESCO were organizing in collaboration with the Thai government a World Forum on Protection for Folklore in April 1997<sup>321</sup>. The course of events seemed to have infused pessimism in Ficsor; when I asked

---

321 World Forum Folklore (1998).

him why the DipCon was not being held at Cape Town he replied that the new South African Minister in charge of IPRs withdrew the offer to host the conference, and the Cape of Good Hope was no longer a suitable venue as there was not much hope about the outcomes of the DipCon.

### **9.3 Digital Agenda's Interest Politics: AT & T Lobbies**

Surfing of Web gave me a good idea of the Copyright Wars which were being waged in the U.S. over the Lehman Report and the bills based on that Report. However, it was at Chiang Mai that I personally felt the gusty winds of intense lobbying by interest groups which wanted to shape the treaties in the way that suited them, and at DipCon the gusty winds turned into a terrific tornado. However, I had a foretaste of what was in store in Chiang Mai by visitations of two high-profile personalities just before I left for Chiang Mai.

The first visitor was Suresh Mathur, a fellow IAS officer who was ten years senior to me in service and had retired as Secretary in the Ministry of Commerce and Industrial Development. He began by saying that he was now working for American Telephone and Telegraph Company (AT & T) and sought to impress upon me that he was a stickler for rules by clarifying that he abided by the government rule that only after completing a two year 'cooling period' could a retired officer take up employment in a private company. I was not surprised at a very senior official turning lobbyist after retirement for I met many such in the Ministry of Petroleum and Chemicals in the 1980s, the heyday of the license-permit control *raj* (regime) when businesses fought not so much in the marketplace as in the corridors of government. Businesses employed many senior officials to liaise with very senior officials in government who would consider it to be improper to deny their former colleague or even a former boss an interview, put up with his pleadings in favour of his latest employer, and even share confidences which they would not with others. Retired officials also had the advantage of being well-versed in the anatomy and physiology of decision-making in government and could offer expert advice as to how go about in lobbying the government and as to what line of reasoning to adopt. It was not unusual for such officials to create a perception that they are too senior to be keyed into details, and in keeping with that practice Mathur said that some legal chap of AT & T was on long line, said something about some Article 7 of some treaty which would be negotiated soon in Geneva. His employers were keen that the treaties should not saddle them with liability for infringement of rights by third parties and further and should not burden them with the responsibility for monitoring the content they were transmitting to check whether there was any infringed material which they were transmitting.

Many telephone companies had come together and set up an Ad Hoc Copyright Coalition to protect against measures in the treaties-in-the-making which might hurt them. Alerted by Suresh Mathur, I later ascertained details about the Ad Hoc Copyright Coalition. The Coalition comprised twenty-five American telecommunication companies, ISPs and OSPs including MCI Communications, AT & T, America Online, Netscape and the U.S. Telephone Association. It was formed to oppose the American legislation based on the Lehman Report and targeted the DipCon once it became clear that the Clinton Administration was following a dual-track strategy to implement the recommendations of the Lehman Report. Suresh Mathur wanted to know what our position on the draft treaties was; having learnt through experience how to deal with erstwhile colleagues turned lobbyists I mouthed generalities though by then the CCEA had approved the negotiating mandate for the Indian delegation to DipCon and it was not unlikely that the high-profile visitor could not have found out what was the Indian government's position. It is not Washington, D.C. alone which leaks like a sieve. An incident in my early days of service disabused me of the belief that deliberations within the government, particularly on contentious issues, would be kept under wraps. Back in 1983, I returned from a meeting of Committee of Secretaries, presided over by the Cabinet Secretary, which deliberated over a new pharmaceutical policy; that policy was highly contentious, and the government wanted in-house deliberations on the policy to be kept 'top secret'. My friend G. Narendra Reddy, a senior journalist, turned up in my room after the meeting to find out what transpired at the meeting. When I told him that I could not disclose he smiled and asked me whether he could make a telephonic call from my phone, rung up the Cabinet Secretary himself and got the details! Be that as it may, I thought that it was more prudent to mouth generalities than to take him into confidence and blandly told him that we were keen to have provisions which balanced all interests. Mathur then asked what my advice to AT & T was; I told him that AT & T better focus on the U.S. Department of Commerce because that was where action lay. Mathur did follow that advice and sent later in the day a document which brought out that the House of Representatives called upon the Department of Commerce to have negotiations with all interest groups so that a 'marked-up' bill<sup>322</sup> based on the negotiations could be introduced. I was to be flooded by a deluge of such documents at Chiang Mai and later at DipCon; delegations of interest groups even gave presentations to groups of countries like the Asian

---

322 'Markup' is the process by which congressional committees and subcommittees debate, amend, and rewrite proposed legislation.

group. Almost all the lobbying hovered round three elements of the ‘digital agenda’ of the Internet Treaties (right of reproduction, right of communication and technology protection measures) and the *sui generis* database right. Only a few academics opposed the right management system the fourth element of the digital agenda. Almost all lobbying groups opposed the *sui generis* database right; that right had only a few feeble supporters. The information provided by competing lobbies was invaluable for delegations which had ‘an information deficit’ compared to the delegations of developed countries. The information that a lobby provides is no doubt strategic in the sense that the information provided is selective and designed to embellish the merit of one’s preference and tarnish the appeal of the competing preferences. Exaggeration, misrepresentation and ‘negative advertising’ cannot be discounted; however, it was not difficult to evaluate the information received because of the voluminous information received for diverse sources. There was such intense competition among lobbies that analogous to the pursuit of self-interest in competitive markets promoting social good, the information that competing lobbies was an invaluable input for delegations like the Indian delegation to size up the issue and refine one’s stand.

All in all, the sharp adversarial advocacy of interest groups illuminated the finer aspects of the digital agenda in a manner that staid academic prose could not.

#### **9.4 Digital Agenda’s Interest Politics: IFPI Lobbies**

The very next day after Mathur met me I had another high-profile visitor who was as different from Mathur as chalk was from cheese and who lobbied for exactly the opposite position on the three contentious elements of the digital agenda giving chapter and verse. A few days earlier, I was surprised to receive a call from London; the caller spoke in a husky voice and introduced himself as Denis de Freitas and sought an appointment a few days later. Shahid Alikhan turned up the next day to reinforce the request of Denis for appointment; he reverentially referred to Denis as Chairman of the British Copyright Council. It was only two decades later, in 2004 to be precise, when I read the obituary of Denis in British newspapers that I found out that the reverence of Shahid Alikhan was not misplaced. A native of Barbados and alumnus of Oxford, Denis had been Solicitor-General of West Indian Federation (1958-62), an artificial entity formed by the British as an alternative to the independence of twelve island Caribbean colonies. His moving to the copyright arena was fortuitous; once the Federation broke up, he moved to Britain and ‘while qualifying as a solicitor, he wrote 500 letters of application before being offered

a job with the Performing Right Society. This led to his transition to the complexities of copyright law, then regarded as an arcane and opaque field'. He went on to be a 'master of the world of copyright law' as the obituary of *The Guardian* noted.<sup>323</sup> He represented his employer Performer Rights Society in the British Copyright Council, went on to be Chairman of that Council for thirteen years (1973-89), and even after retirement he continued his association with that Council first as honorary legal adviser and later as Honorary President till 2000. He played a leading role in the establishment of national collecting societies in many countries including the Copyright Licensing Agency and the Authors' Licensing and Collecting Society in United Kingdom. His expertise in copyright law, talent for clarity, ability for bringing together competing interests and effecting sensitive compromise were widely recognised and his expertise was sought not only by a variety of governments (the United Kingdom as well as countries in Asia, Africa and North America) but also by WIPO, European Commission and Commonwealth Secretariat. He had been Chairman of the Legal and Legislation Committee of the International Confederation of Societies of Authors and Composers and a long-time consultant to the International Federation of the Phonographic Industry (IFPI), which represents the recording industry worldwide. All in all, he was an eminent personality meeting whom was a privilege.

When Denis turned up in his office, I found him a charming man of the world; he sought the meeting to lobby on behalf of IFPI. Like a good lobbyist he did not want to leave anything to chance and met not only me but also Gangadharan and Valsala Kutty, everyone down the line, so that his pleading is registered by everyone in the Department of Education who had something to do with DipCon. He began the meeting by presenting me a copy of a study on the impact of technology on copyright commissioned by IFPI as well as IFPI's position paper on Draft WPPT<sup>324</sup>. As could be expected from a world-renowned expert on copyright he filled me in on all the provisions of Draft WPPT of immediate relevance to IFPI, the position of IFPI in respect of each such provision, and justification for that position. He outlined how the digital technologies had already begun transforming how music was created, recorded, and marketed, and observed that the next two decades would witness further transformation of the music industry. An industry built upon distributing physical copies of phonograms was becoming an industry which

---

323 Duffy (2004).

324 IFPI Position Paper (1996); IFPI Study (1996). The study was by a group of experts chaired by Denis de Freitas.

would rely on transmission of services to satisfy the public demand for music. The services would not be limited to digital delivery of recorded music; they would also offer interactive programming services enabling many to dispense with the ownership of copies of recorded music. Rights in phonograms would be administered electronically, transforming many aspects of licensing, accounting, and monitoring of usage, and distribution of income among authors, performers and producers. All in all, the new digital technologies present the recorded music industry with great opportunities and at the same time they pose great dangers which might undermine its economic viability through infringement on a scale hitherto inconceivable. It was imperative to empower the industry to curb infringement by (i) conferring exclusive rights on producers of phonograms to authorise or prohibit commercially significant uses of phonograms in the digital medium, and (ii) provide legal protection for the technological measures producers use to secure recorded music against unauthorised use, and to administer rights in phonograms. While the relevant provisions in Draft WPPT do go away a long way in enabling the industry to curb infringement in the digital medium they need to be further tightened. At the same time, it is important to realise that the full adaptation of national and international law to the opportunities and dangers of digital technologies would take time; similarly, marketplace solutions need time to adopt. And further, before they attempt wholesale reform and harmonisation Governments need greater familiarity with the social and economic impact of digital technologies, Therefore, instead of striving to achieve wholesale reform and harmonisation of copyright and neighbouring rights the DipCon should attempt to clarify the existing legal regime and moderately enhance the rights of producers of phonograms, particularly reproduction and transmission rights, and prohibit circumvention of TPMs. The DipCon should not open up the whole range of issues dealt with in the Rome and Geneva Phonograms Conventions; the treaties 'should not attempt to resolve all the disagreements of the past, but instead build upon fundamental agreements about the future'. It is neither possible nor even desirable that 'the entire question of exclusivity vs. equitable remuneration in respect of broadcasting and communication to the public under the Rome Convention can be resolved at the December Diplomatic Conference'. It was 'far more important to affirm the application of the reproduction rights and enhance transmission rights in areas unique to new digital services (specifically "on-demand" transmissions and subscription/fees services) than to contribute to a more general debate that has already gone for

over 60 years'.<sup>325</sup> The voice of moderation was also designed to ensure that the contractual arrangements whereby economic and moral rights were fully assigned in countries with 'Copyright' system were not upset, audio-visual works which the Rome Convention did not cover were not brought within the fold of WPPT, and the provisions of Article 12 of the Rome Convention in regard to remuneration in respect of broadcasting and communication to the public were not extended to subscription and fees services. All in all, IFPA was keen that the provisions relating to the digital agenda in Draft WPPT were not stalled by contentious issues which might reopen delicate balance struck in the Rome Convention between performers, phonogram producers and broadcasters lest it should lead to an outcome which could be uncertain and undesirable. That meeting with Denis was the beginning of my association with him; he used to drop in in the room at the DipCon venue which I was assigned as Chairman of the DipCon and pass on gossip about the informal negotiations between delegations and about how different lobbying groups fared. He met me last in September 1998 and presented me the British Copyright Council's guide to the law of copyright and rights in performances which was authored by him. A couple of years later he retired from active life and moved back to Barbados. Paraphrasing Dickens, it is the fate of most men who mingle with the world to make many real friends and lose them in the course of nature; lose I did of the many friends I made in the runup to and during the DipCon.

Copyright industries and their associations argued that the power of the contracting parties to grant exemptions through national legislations should be curtailed, and exemptions limited to those which strictly conform to international norms. An exactly opposite position was taken by intermediaries, computer manufacturers, fair use groups and American academics who were bitter critics of the Lehman Report and the American legislation based on that Report; they saw the Draft WCT and WPPT as being strongly influenced by Lehman and 'copyright grabbers'. The critics felt that the provisions conferring the right of reproduction (Article 7(1) of Draft WCT and the corresponding Articles 7(1) and 14(1) of Draft WPPT) were far too broad and encompassed activities which ought not be treated as within the purview of the right of reproduction. The provisions limiting the right of reproduction (Article 7(2) the corresponding Articles 7(2) and 14(2) of Draft WPPT) were too narrowly defined to allow the flexibility that countries needed to provide exceptions and limitations needed in deserving cases, and had a 'preclusionary character', that is to say they were designed to preclude parties to WCT and WPPT from

---

325 IFPI Position Paper (1996).

granting exemptions than allowing them. Intermediaries contended that communication of a work involves a series of acts of ephemeral reproduction, temporary storage and transmission, such incidental reproduction and storage being a necessary feature of the communication process. The enormous volume and speed of these communications together with technical features intrinsic to transmission (such as routing, package switching and encryption) make it well-nigh impossible for them to constantly monitor and verify whether myriads of third-party communications comprising billions of bits of data are authorised by the rightsholders or not. Even if intermediaries could screen every communication encouraging them to do so would raise serious concerns of privacy. Suffice to say, they argued forcefully that Article 7 (2) of Draft WCT and Articles 7(2) and 14(2) of Draft WPPT as drafted would make them soft targets for copyright infringement suits as rightsholders would find it more expedient to go after them than real copyright infringers. Interestingly, both sides used same arguments to justify propositions which suited their interests as if they sought to prove David Hume's famous saying 'reason is the slave of the passions'. Thus, as mentioned above Denis wanted that Contracting Parties should not be granted much flexibility to grant exemptions and limitations to the right of reproduction lest that right should be rendered nugatory; a similar argument against giving flexibility to the Contracting Parties was made by ISPs OSPs and telecommunication companies. They contended that the articles dealing with the right of reproduction as well as the right of communication (Article 10 of Draft WCT) and right of making available (Articles 11 and 18 of Draft WPPT) should specifically exempt them as 'the traditional treaty approach – to create international rights with national limitations and exceptions-is highly problematic in the seamless global society where jurisdictional boundaries are transparent'.<sup>326</sup>

Yet another line of reasoning was adopted by Nimmer, in the position paper he prepared for the U.S. Telephones Association, <sup>327</sup> against tinkering with Article 9 of the Berne Convention. The Stockholm Conference explicitly incorporated the right of reproduction in the Berne Convention without defining it. Article 7 of Draft WCT spelt out what constituted reproduction and what did not. Technology was in a state of tremendous flux so much so that Internet of 1996 was in its infancy and no one could even postulate the vaguest

---

326 Ad Hoc Coalition (1996).

327 This paper was among the documents presented to the Asian Group at the DipCon on December 13, 1996, by a delegation of interest groups comprising among others Peter Choy and Adam Eisgrau.

notion about the Internet of 2010. There was legitimate concern about the exploitation of copyrightable works on the Internet without any basis for predicting which technology would succeed in the marketplace and which would fail. The adoption of terms like ‘indirect’ or ‘temporary’ in the reproduction right would introduce unknowable distortions as ‘applied to technologies of 1998, 2003, 2010 etc.’. Going by the past practice the language adopted at the DipCon would last for 20-25 years. That being so ‘locking the various governments of the world for language designed through today’s guesswork represents a disaster of mistiming’. What Nimmer said about Article 7 of Draft WCT applied equally to the corresponding provisions of Draft WPPT. Nimmer the academic was more balanced and circumspect than Nimmer the lawyer pleading for his client. In an article he wrote at about the same time,<sup>328</sup> Nimmer conceded that crafting rules which would exempt ISPs from contributory infringement liability would no doubt safeguard ISPs but then holding that only the first person who communicated the content and infringed copyright should be liable for infringement would leave authors without a remedy; in most cases, that first person cannot be identified. He suggested empirical investigation to find out whether the ISPs could or could not undertake the responsibility of monitoring the content they carry. That investigation could form the basis for a sound legislation; that investigation would take time, and in the interim, it would be expedient not to touch Article 9 of the Berne Convention. It was expedient to wait till there was greater clarity about technological and market developments. It was premature to adapted to grasp slippery issues, lest those rules should stunt technological growth.

Yet another cluster of industries which had divergent opinions about the issue of temporary reproduction and limitations to and exceptions from the right of reproduction was the computer and software industry. First entrants had divergent interests from later entrants in the matter of inter-operability, reverse engineering and decompilation of programmes. The divergence of interests led to prolonged corporate battles between market leaders like Microsoft and later entrants like Sun Microsystems; these battles impacted on the U.S. domestic policy arena as well as in international arenas like DipCon. To jump the story, in 2004, these combatants decided to bury the hatchet and collaborate with each other so that they could compete with IBM and the vendors supporting the Eclipse open-source Java IDE.<sup>329</sup>

---

328 Nimmer (1996), pp.31-7.

329 ‘Microsoft and Sun Bury the Hatchet’ (2004).

By mid-November 1996, intermediaries, and computer and communication manufacturing companies had come up with specific treaty language to safeguard their concerns. Thus, in a position paper handed over to the delegates at the DipCon venue, the Ad Hoc Alliance for a Digital Future, comprising leading American and European telephone and high technology companies wanted Article 7 (2) of Draft WCT and corresponding provisions of Draft WPPT to be rephrased so as to grant specific exemption in case of reproductions which (i) have the purpose of making perceptible an otherwise perceptible work; (ii) are of a transient or incidental nature; or (iii) facilitate transmission of a work and have no economic value independent from facilitating transmission. They were to be declared 'special cases where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.<sup>330</sup> The concern of intermediaries about the provision in the Article 10 of Draft WCT relating to right of communication was similar to their concern regarding the right of reproduction. Copyright owners, no doubt, needed the right of communication in order to protect their rights in the digital environment. However, they wanted that Article 10 of Draft WCT itself should provide them immunity for secondary liability for infringing material they transmitted; their immunity should not be left to the vagaries of national laws. In another lobbying document distributed to delegates, the Ad Hoc Alliance contended that the combined effect of the Draft Articles 7 and 10 of WCT 'would be to create a legal regime depriving OSPs of legal security and requiring them to accept the risk that they will engage in copyright infringement with every transmission. Infrastructure providers are deciding *now* whether to invest in building the global information infrastructure and the legal uncertainty created even by the *threat* of liability for violating the rights established by Articles 7 and 10 would dramatically inhibit investment in the infrastructure...the uncertainty created by combining an absolute treaty right with unclear exceptions would harm not only infrastructure providers but also content providers and the public as a whole' (italics in original).<sup>331</sup>

The provisions of Draft WCT and WPPT relating TPMs were also enmeshed in interest group politics given that there is a sharp intrinsic conflict of interest between rightsholders on the one hand and industry groups engaged in the development and marketing of technologies like encryption and of circumvention devices which have multiple uses, computer manufacturers, and

---

330 Ad Hoc Alliance *Suggested Revisions*.

331 Ad Hoc Alliance *Towards Digital Future*.

consumer electronics manufacturers, proponents of fair use and protection of public domain on the other. The articles relating to TPMs were strongly supported by copyright industries. In fact, the position paper of IFPI given by Denis argued for further tightening the provisions. That paper contended that the test of a legal protection for TPMs is whether a proper balance is struck between two complementary interests: (i) the right of producers to have their technological means of controlling unauthorized uses of their phonograms protected against interference, and (ii) the importance of avoiding unfair and excessive restraints upon innovation by equipment manufacturers and their ability to market products. This balance would also ensure that the public garner the benefits of technological innovation and access to an expanding repertoire of recorded music. Standards would eventually emerge out of marketplace negotiations between manufacturers and rightsholders; TPMs also permit the development of new marketing, distribution, and usage models, which open up a sophisticated new range of ways of enjoying music. In the interim, the approach of Article 22 of Draft WPPT is an acceptable, limited first step. Given a requirement of knowledge, there is little reason to limit the definition of protection-defeating devices to those that circumvent TPMs as their primary purpose or primary effect. The concept of 'primary purpose or effect' should be modified to refer to 'a purpose or effect' of that device.

In contrast to the position of IFPI and associations of other copyright industries the conglomerate of interests that comprised the DFC were very critical of the obligations concerning technological provisions (Article 13 of Draft WCT and the identical Article 22 of Draft WPPT) and marshalled every conceivable argument against the Articles. Thus, computer manufacturers, businesses engaged in encryption research argued that the Draft Articles would threaten the security of computer networks by impeding encryption research, and they would also prevent legitimate reverse engineering in the development of new software and inter-operability of computer systems even though such reverse engineering was permitted by several American judgments and the EU Software Directive. The two Articles would require consumer electronics manufacturers to alter their equipment such as VCRs to function with a variety of TPMs; each TPM would require a different technical modification of the consumer electronic equipment. Adapting consumer electronic ware to TPMs would be technically and economically impossible, at least until there was standardization of TPMs. Intermediaries were worried that they would be liable for contributory infringement liability for transmitting content whose TPM was circumvented by someone else. The Articles would also frustrate efforts to enable parents to monitor and control children's online activities and threaten

personal privacy rights of consumers of electronic products by preventing them from using disabling mechanisms designed to track their online activities. The Ad Hoc Alliance for a Digital Future wondered whether the draft treaties should contain any provision on protection-defeating devices at all. Few would object to prohibiting technologies like satellite descramblers, the sole purpose of which was to facilitate infringement. But that is not the case with many technologies and devices which have dual use; therefore, the prohibition should be restricted to devices or services whose sole use is infringement. Fair use groups argued that the Articles as drafted would damage education and research by allowing rightsowners to lock up even public domain materials, and thwart the fair use privileges of information consumers, and institutions catering to such consumers such as libraries and museums. In the American context, in the debate over the Lehman Report, the American position at DipCon and subsequently over the DMCA Bill almost all academics except for a few like Jane Ginsburg were very critical of the legal provisions proscribing circumvention of TPMs. They argued that prohibition of technologies and devices with dual use would effectively overrule the landmark decision of the Supreme Court in *Sony Corp. v. Universal City Studios, Inc.*, (See Sect.4.5) wherein the Supreme Court held that the manufacturer of a device should be liable only if that device 'was incapable of substantial non-infringing uses'. And further, legal protection of access controls would create a new exclusive access right (called by some as 'paracopyright') which would upset the balance between rightsholder and users; such a right is a new concept in copyright law, and it was contended that neither the Berne Convention nor the WCT do grant an exclusive right of access to the copyright owners.<sup>332</sup> However, such a view was questioned by quite a few such as Jane Ginsburg who argued that 'in the digital environment, without an access right, it is difficult to see how authors can maintain the exclusive Right to their Writings that the Constitution authorizes Congress to secure... exclusive right today is not only a copy-right, but an access right'. Access right does not restrict fair use because fair use normally comes into play only *after* access to the copy has been lawfully obtained. It may be fair use to copy from a protected work; it is not fair use to steal the book in order to copy from it. And further, copyright balance is not immutable. The digital technologies shifted the copyright balance from copyright owners and toward end-users. There is no reason why the balance that emerges with access right should be more normative and less contingent than the balance which prevailed prior to the emergence of digital

---

332 de Werra (2002), p.15. Also see Dusollier (1999), p.291.

technologies.<sup>333</sup> Ginsburg, did recognise that prohibition of trafficking in circumventing devices was beset with problems. If the prohibition swept too broadly, ‘it may bar the manufacture and dissemination of devices or services that have legitimate uses other than to circumvent controls on access to copyrighted works’, and it might also hamper the development of useful new technologies. If, on the hand, the law provided that ‘a device may be distributed so long as it is capable of being put to use for non-infringing purposes, the prohibition would likely become meaningless’.<sup>334</sup> However, such nuanced views were lost out in the shrill outpouring of criticism.

There had not been so much controversy regarding rights management systems as with technological protection measures. However, many equipment manufacturers felt that it was premature to have a provision in the draft treaties as there was not yet a common practice or standard technology to put copyright management information, and many practical questions were yet to be resolved.

## **9.5 Japanese Show: Chiang Mai Regional Meeting**

The Regional Meeting of the Asian Group at Chiang Mai was a five-day event comprising a three-day WIPO-Asian Regional Congress on Copyright and Neighbouring Rights (hereafter referred to as the Asian Congress, November 18-20, 1996) followed by a two-day inter-governmental meeting to exchange views on the forthcoming DipCon and to forge a common position (November 21-2, 1996). Japan was the co-organiser of the Congress along with WIPO and the Thai Government, and the Agency for Cultural Affairs, Government of Japan financed the Congress. The Japanese government sent a high-level delegation comprising, among others, Akinori Shimotori, Director General, Cultural Affairs Department, Agency for Cultural Affairs, and his deputy Kaoru Okamoto both of whom were later part of the Japanese delegation to DipCon. The high-level participation and funding of the Congress were part of the Japanese strategy to cultivate ASEAN countries. Apart from the official delegates, the Japanese interest groups were in full attendance; prominent among them were the Japanese Electronic Industry Development Association (JEIDA), Recording Industry Association of Japan, the copyright and contracts division of Japan’s leading broadcaster Nippon Hōsō Kyōkai (NHK) and the Japanese Society for Authors, Composers and Publishers (JASRAC). At the

---

333 Ginsburg (2003), pp. 117, 119, 121.

334 For a brilliant outline of the challenges inherent in making of a law regarding TPMs see Ginsburg (2005), pp.2-3,9.

behest of the hosts, the Japanese officials were even allowed to participate in the first session of the inter-governmental meeting. The interventions made by Japanese official delegates and representatives of interest groups as well as small talk with them outside the conference venue brought out vividly that as in the U.S. Copyright Wars in Japan had turned nasty. The Agency for Cultural Affairs and JEIDA had sharply conflicting views on the temporary, incidental reproduction as well as TPMs; as could be expected, JEIDA was supported by its patron, the formidable Ministry of Trade and Industry (MITI). Takashi Yamamoto, a lawyer who spoke at the Asian Congress, spoke of the inter-ministerial discussions as a battle. The Asian Congress also turned into a battlefield when Kaoru Okamoto responded to the presentation by JEIDA and said he was sorry and disappointed with JEIDA's stance and presentation. He was confident that his Agency's views would be supported by the Japanese government. As an aside, the JEIDA representative asked him not to be so sure. Masahiro Kamei of Fujitsu, a member of the JEIDA delegation, who was my dinner companion on 20 November 1996, told me that Okamoto did not want JEIDA to come to the Congress with a strong delegation and expound its views.

It was at Chiang Mai that I met for the first time Sivakant Tiwari of the Singapore Legal Service. He had rich experience in international law, was the legal advisor of the Singapore government at the Uruguay Round of negotiations, and in particular, Singapore's lead negotiator at the TRIPs negotiations.<sup>335</sup> Like a seasoned lawyer he could spot traps in the offers of others and was tenacious in making his point. During the DipCon he was absent for a while as he travelled all the way to join Singapore delegation at the WTO Ministerial Conference held in Singapore (December 9-13).

As in Japan a similar *battle royale* was going on the other side of the Pacific, so much so that Ms. Shira Perlmutter, Associate Register for Policy and International Office, U.S. Copyright Office, who was scheduled to be a major speaker at the Asian Congress, did not show up. Though not as numerous as the Japanese the American interest groups were well represented e.g., BSA<sup>336</sup>

---

335 A compilation of personal narratives of key negotiators of the TRIPs agreement describes Tiwari as 'one of the central figures in the negotiations', and that he could not share his memories as he died in 2010, before the project was taken up. See Watal and Taubman (2015), p.xvii.

336 Established by Microsoft Corporation in 1988 BSA representing a number of the world's largest software makers and is a member of the International Intellectual Property Alliance (IIPA), a private sector coalition of seven trade associations representing U.S. companies that produce copyright-protected material, including computer software, films, television programs,

and Sun Microsystem<sup>337</sup>; also present were a few multinational business organisations like IFPI, International Federation of Reproduction Organisations, and International Confederation of Societies of Authors and Composers. I came to know from the Peter Choy who represented the Sun Microsystem that Lehman's game was up, and that the White House itself was seized of the DipCon; Laura Tyson, Chairman of the National Economic Council,<sup>338</sup> was entrusted with the task of reviewing U.S. positions on treaty matters in the forthcoming DipCon. The Database Treaty was the target of the most virulent attack by a variety of organisations and editorial comment.<sup>339</sup> As the *Sacramento Bee* summed it up, 'initial analysis [ of the Database Treaty] suggests the baseball leagues would own facts such as batting averages; financial markets, judicial decisions, even weather reports could be affected. A Berkeley scholar calls it "the end of the public domain"'. *Sacramento Bee* went on to say that the treaty had received almost no debate within the U.S. government, there had been no public hearings on the issue, or the companion legislation introduced into ( sic) the U.S. House last term, every major library association had asked the administration and Congress to debate this proposal, and the National Academy of Sciences, the National Academy of Engineering and the Institute of Medicine had taken the stand that a Treaty which advances the narrow commercial interest of a few should not be allowed to sneak into international law with little debate or study.<sup>340</sup> The opposition of the National Academies and the Institute of Medicine was crucial to the American stand because each of these bodies has a charter from Congress to provide advice to the federal government on matters relating to science, technology, engineering and public health issues.<sup>341</sup> In their joint letter to Michael Kantor, U.S. Secretary of Commerce, they unequivocally claimed that 'these changes to the intellectual property law would seriously undermine the ability of researchers and educators to access and use scientific data, and would have a deleterious long-term impact on our nation's research capabilities'. Jack Gibbons, President Clinton's Science Advisor, also wrote to Laura Tyson conveying concerns of the scientific community. So did the

---

music, books, and journals (electronic and print media). IIPA was established in 1984. In 2012, BSA dropped the letter 'B' standing for business and became Software Alliance.

337 Sun Microsystems was leader of computer and software manufacturers who challenged established leaders like Microsoft.

338 The National Economic Council is part of the Executive Office of the U.S. President.

339 For example, Public Data (1996); Lewis (1996).

340 'Locking up the Facts' (1996). This was one of the countless documents with which delegates were bombarded at Chiang Mai and later at the DipCon.

341 Davison (2007), p.845.

Librarian of Congress expression the concerns of the librarian and scientific communities; the Librarian's views carry considerable weight because the U.S. Copyright Office is a part of the Library of Congress and is the official agency that maintains records of copyright registration in the U.S. I also came to know from Ficsor that at their regional meetings the African Group and GRULAC felt that consideration of the Database Treaty was premature, and more study was needed. The Asian Group also shared a similar view. In keeping with the openness of the American policymaking process, PTO issued a public notice and called for comments on the three treaties which would be considered at the DipCon, and as part of the consultation process organized a briefing by Liedes. In the question- answer session, the Database Treaty came in for sharp criticism. In response to the observation of Liedes and Michael Keplinger of the Patent and Trademark Office that *sui generis* database protection had been under consideration of copyright experts in Europe and the U.S. for 3-5 years Eleanor Margolis of the American Association of Legal Publishers suggested to Liedes that in the interest of fairness the Database Treaty should be taken off the table so that the American Congress and American public had the same 3-5 years that 'insiders had to discuss this'.<sup>342</sup> Liedes replied that it was for the delegates to the DipCon to decide how many treaties were to be considered and concluded. Despite the weighty opposition to the Database Treaty, an element of suspense continued as it was officially not taken off the table at the DipCon. The continuous barrage of criticism that the Draft WCT would do away with fair use had begun to upset Liedes a great deal; in his presentation to the Asian Group on November 21, 1996, he observed that the criticism was exhausting, and that he was inundated with junk mail from librarians and researchers. From an assessment of what I heard at Chiang Mai I felt that the U.S, EC and Japan would come up with drafts which balance the different interests better. The odds against the Database Treaty were heavy; I heard Ficsor saying that there was a problem with the language of some of the key articles.

The Chiang Mai meeting also brought out that Japan was greatly upset about the case brought against it in the WTO in regard to retroactive protection of the rights of producers and phonogram producers. In 1971, neighbouring rights were introduced in the Japanese Copyright Law and the term of protection of the rights of producers and phonogram producers was fixed at twenty years. When the copyright law was amended in 1994 in order to make it compliant with the TRIPs agreement it granted retrospective protection of the

---

342 U.S. Commerce Briefing (1996), p.96.

rights of producers and phonogram producers from 1971. The U.S. and EC argued that the term of protection ought to be fifty years by virtue of Article 14 (6) of the TRIPs agreement read with Article 18 of the Berne Convention and hauled Japan before the WTO Dispute Settlement Mechanism. The dispute abated after the Japanese Copyright Law was amended to provide for a retrospective protection as sought by the U.S. and EC. At the time of the Chiang Mai meeting, the Japanese government had only decided to amend the Copyright Law and the legislative process was not complete. In the paper he presented to the Asian Congress, Kaoru Okamoto contended that the decision to amend the Copyright Law ‘has no legal relation to this international dispute, because the former is planned just to follow the practices in other developed countries, while the latter is on the “interpretation” of Article 18 of the Berne Convention which was incorporated in Article 14 of the TRIPs agreement’. What is more significant is the inference that the Agency for Cultural Affairs drew from the TRIPs dispute. Copyright protection was more and more an economic and trade issue than a cultural issue. ‘In today’s internationalized world, “an economic and industrial issue” meant at the same time “a trade and diplomatic issue”’. This in turn had been changing the essential purpose of international copyright system; pursuit of a common goal had been replaced by pursuit of different national interests of different countries. That being so, international copyright system was ‘the means by which countries can realize their own national interests, which are diverse’. Therefore, many Japanese feel that Japan should have a stronger relationship with Asian countries, ‘partly because it can no longer ignore common interests of the region and partly because some Asian countries have achieved remarkable economic development, starting to have more common interests’. It was from this perspective that the Japanese Government supported the Asian Congress.<sup>343</sup> China also attended the Asian Group meeting. However, while Japan was overly eager to identify itself with the Asian countries, China was highlighting the special status accorded it by WIPO, being one of the ‘1’ of the ‘15+15+1+1’ negotiating group that was supposed to meet just before the DipCon. All in all, it emphasised its distinctiveness.

The hosts of the Asian Congress were much taken by the Japanese point of view and indulged in strident North versus South rhetoric. Thus, in his inaugural address, Narongsak Pichayaphanich, Deputy Director General, Department of Intellectual Property, Ministry of Commerce, told the Asian Congress that it looked as though the world was divided into two groups,

---

343 Okamoto (1996), pp.7, 14-15.

developing and developed countries, with the developed countries looking for benefits at the expense of developing countries. DipCon should not be a forum for developed countries to benefit themselves; the new standards should be based on consensus of the international community 'which includes us'; he added that 'we would not stay on the side-lines'. Another Thai official Weerawit Weeraworawit, Director, Technical and Planning Division, Department of Intellectual Property, went on harping the same point again and again all the five days of the Chiang Mai event. He came up with the formula: International community  $\neq$  the West+ Japan+ Australia+ New Zealand. Surprisingly, at the DipCon, North versus South divisive rhetoric was nowhere in evidence, and the Thai delegation did not articulate the position it put forth at Chang Mai.

Among the speakers at the Asian Congress was Henry Olsson, Special Government Adviser, Ministry of Justice, Sweden; he led the Swedish delegation to the DipCon. He spoke on copyright and neighbouring rights in the TRIPs agreement, a subject of great relevance because the linkage between the TRIPs agreement and the WCT and WPPT was one of the hot button issues of the DipCon. Ficsor gave the Asian group some idea of the forthcoming DipCon. He expected an agreement on the posts would be reached in the '15+15+1+1' meeting. The DipCon would begin with adoption of the Rules of Procedure and election of office bearers like the President and Vice-presidents of the Conference, and Presidents and Vice-presidents of Main Committee-I (which would consider and finalise the substantive provisions of the treaties), Main Committee-II (which would consider and finalise the administrative and final clauses of the treaties), the Credentials Committee and the Drafting Committee. The Main Committees might constitute working groups. Ficsor expected the Main Committee-I to begin its work on the third day of the DipCon, and conclude its work by the end of the 2<sup>nd</sup> week of the DipCon or latest early third week; thereafter the Main Committee -II and Drafting Committee could complete their work and then the Plenary could adopt the treaties, and thereafter the treaties opened for signature by Member States. True to the saying that the best laid plans of men and mice often go awry the DipCon had starting trouble, got stalled in the middle when it looked as though not even a single treaty might be adopted, and had a late ending, just a few minutes before midnight on the scheduled day of closure. Ficsor said nothing about the specifics of the '15+15+1+1' meeting, and in fairness no one asked him about it. No attempt was made during the Asian Group Consultation Meeting to forge a common position on the issues which would come up in the DipCon. In an article he wrote for a compilation on WIPO completing fifty years of its existence, Ficsor wrote that 'the series of regional consultations made it

possible for the developing world to participate in the negotiations in a well-informed manner'.<sup>344</sup> He is partly correct. The Chiang Mai meeting was notable for the insights it gave on the stand of Japan and on interest group politics, particularly of the American and Japanese interest groups. However, the Chiang Mai meeting, being about ten days prior to the DipCon, was too late to However, the regional meeting, held just about ten days prior to the DipCon, provided few inputs to the Indian delegation.

## **9.6 '15+15+1+1' Non-Meeting**

*Centre International de Conférences Genève* (CICG) was the venue of the DipCon; it was a familiar place as I had attended the International Conferences on Education in the very same venue in September 1992 and again in October 1994. The DipCon was the largest ever international conference on IPRs; invitations were sent to 161 Member States of WIPO, and to the EC which would participate in the DipCon as a special delegation; Invitations were also sent to 30 Member States of the United Nations who were not members of WIPO, 25 intergovernmental organisations and 140 NGOs (most of them business interest groups) who would be attending the DipCon as observer delegations. About a thousand participants were expected; the expectation turned out to be not far off the mark. Of the 161 Member States of WIPO invited 127 were represented; in contrast, only 74 of the then 129 WIPO Member States participated during the Stockholm revision of the Berne Convention (1971). Far more significantly, EC did not participate in the Stockholm revision; EC participation made a significant difference to the dynamics of negotiations in the DipCon in that it was a strong supporter of the digital agenda spearheaded by the U.S. At the same time its differences with the U.S. over its voting rights delayed the beginning of substantive discussions, and its differences with the U.S. on the audio-visual question almost threatened to wreck the DipCon; North-North confrontation was a salient feature of the DipCon from its beginning till almost the end. Whatever, for such a mega event, the preparatory arrangements were woefully inadequate, and I was bewildered by the way the '15+15+1+1' meeting (29-30 November 1996) and the DipCon that followed the '15+15+1+1' meeting were organised; never before or after did I attend a more disorganised international conference. The '15+15+1+1' meeting was envisaged to be a closed-door meeting of representatives of thirty-two select countries. When I arrived at the conference venue, I found that the meeting was open to all the delegations

---

344 Ficsor (2020), p.82.

present, and as ever Liedes presided over the meeting, or more accurately a seminar. He began by saying that the purpose of the meeting was to exchange views on all questions relating to preparations for the DipCon, and proposed that meeting begin with reporting by the different regional groups about the conclusions they arrived at the regional meetings, followed by a 'scanning' of the substantive provisions of the treaties, article by article, and then finally take up the procedures and workplan of the DipCon such as order and sequencing of business, exchange of views on the office bearers, principles of intervention by participants, position of inter-governmental organisations and NGOs, and so on. Liedes and Ficsor made clear that there would be no written report of the meeting. There was considerable discussion as to whether groups should report about their consultations or whether such reporting should be subsumed in the scanning; some delegates like the Pakistani delegate Rashid Siddique Kaukab wanted the scanning to be dropped as there was not much time and after the regional groups made their reports the meeting should take up procedural matters. Jeffrey (Jeff) P. Kushan, Commercial Attaché, Permanent Mission of the U.S. to WTO, Geneva and chief negotiator of the American delegation, supported the proposal of Liedes by saying scanning exercise was necessary as it would reveal the general positions of the Member States and thereby the parts of the negotiating texts which require more concentration. Jörg Reinbothe, Head of Unit, Directorate General XV Internal Market and Financial Services, European Commission, Brussels, was the counterpart of Jeff Kushan on behalf of the EC. He suggested that the meeting should begin with a general discussion on the procedure, then move on to scanning to identify areas which require more time, and then move back from substance to a detailed consideration of procedural matters and workplan. In the absence of a consensus, Liedes went ahead with his proposal assuring the participants that the scanning exercise would be completed on 29<sup>th</sup> November and discussion on procedure and workplan could begin on the morning of 30<sup>th</sup>. However, it was found that only the three groups of developing countries had consultations; Group B (group of developed countries) did not. The Central European countries had no common position; despite consultations, developing countries, particularly GRULAC had differences of opinion. After a brief report by the three developing country groups the scanning exercise began in the afternoon of 29<sup>th</sup>; as soon as it began, I suggested that it would be more efficient to adopt a cluster approach whereby each of the issues common to WCT and WPPT should be discussed together; for example, the right of reproduction is common to Draft WCT and Draft WPPT, and hence the relevant articles should be discussed together, similarly TPMs and so on. Liedes saw the merit of the approach, adopted it; he even extended it to the consideration by

Main Committee-I generously acknowledging that the cluster approach was my suggestion. Lieder thereafter said that if a delegation did not expound its position on an article, he would take it that that delegation agreed with the article as drafted. Tiwari strongly opposed the view of Lieder arguing that it was the solemn prerogative of a Member State to make its views known at the DipCon, and if it felt necessary to move amendments; that prerogative could not be taken away by the '15+15+1+1' meeting. His point was conceded. I expected that the U.S. and EC might have resolved all their differences. However, they did not, and this came out during the scanning exercise. Jeff Kushan mentioned that his delegation was working on a compromise proposal on audio-visual question and would be submitting it during the DipCon; Reinbothe reciprocated Kushan's sentiment by observing that his delegation also was looking for a compromise which would suit the interests of all. The scanning exercise brought out that most African countries were in favour of including audio-visual works while the Latin American countries were divided over the issue. I intuitively guessed that any compromise would have to satisfy the interests of Hollywood which was strongly opposed to the conferment of any right on performers which was not wholly assignable to the producer through a binding contract. Given the large film industry in India and its similarity to Hollywood in the matter of engaging authors and artists the ongoing negotiations between the U.S. and the EC were of great interest to India. Over the next two weeks, I keenly followed the negotiations and kept in close touch with Jeff Kushan and Reinbothe for information about the latest developments. At the '15+15+1+1' meeting, Reinbothe said that database protection was an important issue for the EC and that the text was a fine piece of drafting and an excellent basis for negotiation. Jeff Kushan said that U.S. would bring forth amendments so as to further balance between protection on the one hand and access to information and use for scientific research and education on the other. The American position reflected an attempt to accommodate fierce domestic criticism. The Latin American countries had no position as a group and had widely divergent views on the Database Treaty. Japan and Canada had reservations. I understood from my conversation with African delegates that the African countries might extend support to the Database Treaty if a strong commitment were given to introduce *sui generis* protection of folklore.

As is customary in meetings chaired by Lieder the scanning went on and on even by lunch the next day. Basically, the scanning exercise was an encore of the General Consultations in October 1996. During the tea break and later at lunch, I lobbied many delegates to support my proposal to guillotine the scanning exercise when the meeting resumed after lunch so that the meeting

could meaningfully discuss the preparations for the DipCon and its workplan. I secured support from many regions. Rashid of Pakistan made a percipient observation that the scanning exercise may be going on and on because the developed countries might be having significant differences on procedure and workplans and did not want their differences to come out in the open. When the meeting resumed after lunch Lieder began the scanning of the Database Treaty article by article and called for comments. I interjected to say that the feeling of most countries was that the Database Treaty needed more study, and therefore rather than go article by article the general comments on the treaty could be quickly collected so that the meeting could turn its attention to the preparations and workplan of the DipCon. It was already the afternoon of November 30<sup>th</sup> and discussion of procedure and workplan was nowhere in sight. It would be odd if the DipCon were to start two days later without any schedule, without any consensus on the office bearers, and without any clarity as to whether after the adoption of Rules of Procedure and election of office bearers Member States would be called upon to make general statements in the Plenary. I reminded Lieder of his assurance that discussion on procedure and workplan would begin on the morning of 30<sup>th</sup>. I was strongly supported by many delegations. What I conveyed undiplomatically Moses Frank Ekpo, Director General, Nigerian Copyright Commission and Chairman, WIPO General Assembly said as an ace diplomat would do. Time was needed to handle procedure; the African group would not benefit from further scanning exercise as it was not able to offer any comments on the Database Treaty. Therefore, the general discussion on the Database Treaty could be regarded as the starting point of further study of that treaty. 'Let us not sacrifice two treaties for the Database Treaty'. After hearing him I felt slight remorse for being so direct; however, once I heard the Brazilian Guido Fernando Silva Soares, Minister Counsellor, Permanent Mission, Geneva my remorse vanished altogether because Soares was vehemently forthright. He said protection of investment as IPR was absurd; there were other ways of protecting investment like unfair competition and trade laws. His delegation reserved its right to oppose protection of an item which was unprotectable as IPR.

Rashid proved to be right when the discussion on preparations and workplan proved to be perfunctory and avoided important issues like Rules of Procedure and distribution of posts. The discussion was confined to a couple of issues like the delegations making a general statement after the rules were adopted. Opinion was divided, some feeling that general statements were not necessary, some taking an exactly the opposite view, and some advocating brief statements. Quite a few delegates felt that the duration of the DipCon was too

brief to consider the treaties, and therefore wanted all frills like general statements to be done away with.

# PART III: The Conference

## **Chapter 10: DipCon: Starting Trouble and Mid-Life Crisis (December 3-12, 1996)**

### **10.1 A Mega Bazaar of Vendors Hawking Their Wares**

In the familiar cavernous main hall where the Plenary of the DipCon met, I mounted the flight of steps leading to the seats assigned to India with my rather tiny delegation: Subhash Chandra Jain, Additional Secretary, Ministry of Law and Justice, Rudhra Gangadharan, Valsala Kutty, Dilip Sinha, Counsellor, Permanent Mission to WIPO and Gopalakrishnan. By happenstance, the delegation of the U.S. was seated just across the aisle; the American delegation was the largest with thirty-four members. As I espied the jumbo delegation across the aisle, I could not help feeling that the Indian delegation was David pitted against Goliath. But it did not take long to realise that Goliath was a split personality, or to mix metaphor and use the famous expression of Abraham Lincoln, the American delegation was a house divided against itself. The American delegates were drawn not only from the Executive Branch but also from the Senate Judicial Committee, and more significantly included eighteen interest groups, some of whom like the MPAA and BSA were strong supporters of Lehman and his policy initiatives at home and in DipCon, while the others were bitter critics of Lehman and everything he stood for. Few delegations of Member States had private interest groups, and the inclusion of so many interest groups with conflicting interests was a sign of American exceptionalism. Given the composition of the American delegation it was not unusual for some of the American delegates to lobby delegates of other Member States against the American official stance. The ever-witty Lewis Flacks once quipped that the whole world waited as the American delegation was negotiating with itself. Given the political dynamics of the EC prolonged and intense internal negotiations were needed for EC and its Member States to arrive at a common position. Compared to the gargantuan American delegation the tiny Indian delegation was very cohesive and functioned with a neat division of work based on specialisation. Jain had enormous experience of drafting legislation and advising government on dicey issues of law; Gopalakrishnan had extensive knowledge of copyright law. Between them, Jain and Gopalakrishnan could incisively analyse the amendments proposed, advise me on the stand to be taken and draft the amendments India proposed. Gangadharan used his excellent inter-personal skills to gather intelligence

which is a valuable input in multi-party, multi-issue negotiations, Dilip Sinha guided us on diplomatic niceties and helped lobby support of other delegations, and Valsala Kutty was the sheet anchor of the delegation, kept touch with the 'headquarters' back in New Delhi, meticulously scrutinised the proposals and never hesitated to remind the delegation of its negotiating mandate should it stray from the mandate in respect of any proposal. My colleagues from Delhi sat through the long night sessions from December 16<sup>th</sup>; I would join them when major issues as well as issues of vital importance to India were discussed. Dilip Sinha took care of Main Committee-II where the common Administrative and Final Clauses of WCT and WPPT were considered.

About 140 NGOs were accredited as observer organisations, over five times the number of such organisations which participated in the Stockholm Revision (26). Rather peculiarly, WIPO applies the term 'NGO' to 'any organisation that is independent from government, including business organisations. Unlike with UN organisations and the World Bank there is no requirement that an NGO should be non-profit or associated with public interest. The benefit of accreditation lay in the accredited interest group being entitled to receive all documents of the DipCon and to attend formal meetings of the Plenary and the two Main Committees. Observer delegations could submit written statements expounding their position; they could even ask for the floor. However, as befitting their status as observer delegations they ranked much below the Member States in the order of precedence; given the way the DipCon was stalemated again and again, and shortage of time representatives of interest groups had no opportunity to speak. Even the opportunity to observe the deliberations was lost once the Main Committee-I began meeting in informal sessions from December 15<sup>th</sup>; that Committee had a formal session only on December 19<sup>th</sup> by when a consensus was reached on most provisions of the WCT and WPPT.

The 140 interest groups were highly diversified. The interest groups which participated in the DipCon can be classified in three ways: (i) by geographic scope; (ii) by motive, and (iii) by permanence. Thus, there were interest groups which were national (eg., the American Bar Association, *Asociación Argentina de Intérpretes*, JEIDA and the U.S. Telephone Association), regional groups (eg., North American National Broadcasters Association, the Asia-Pacific Broadcasting Union, Ibero-Latin-American Federation of Performers and Federation of European Audio-visual Directors, and international groups (eg., IFPI, International Literary and Artistic Association (ALAI)). To elaborate classification by motive, industry interest groups strove to secure tangible private gains and avoid private losses through

lobbying; in contrast, user groups and organisations like Educator's Ad hoc Committee of Copyright law and World Federation of Music Schools (WFMS) did not lobby for pecuniary gain but for a cause they espoused. Thus, the cause that Educator's Ad hoc Committee of Copyright law espoused was ensuring that the fair use exceptions and limitations available in copyright laws for educational purpose were not whittled down by the treaties which would be concluded by the DipCon.

There are other ways of classifying interest groups other than by purpose. Some of the groups like IFPI were long standing organisations; many such organisations had been a permanent fixture of Berne Convention revisions. A distinguishing feature of the interest group politics of the DipCon was the presence in large numbers of *ad hoc* global alliances; to use the jargon of multilateral negotiations, they were issue-based coalitions formed in response to a specific threat or opportunity. In each such alliance the American groups formed the core. Just to give a flavour of transnational alliances, one of the groups which opposed the provisions of Draft WCT and Draft WPPT relating to the digital agenda was the Commercial Internet eXchange Association. It comprised 149 firms including 3C Europe Ltd., Advantis (IBM Global Network), AT&T, British Telecom, Bull H N, International Systems Inc., Fujitsu Ltd., Hitachi, Korea Telecom, MCI Telecommunications, NEC Corporation and Sun Microsystems. An example of a group arrayed on the other side is the Computer Industry Group consisting of 24 associations including ABES (Brazil), ANIPCO (Mexico), BSA (including Apple Computer, IBM, Intel, Lotus, Microsoft), NASSOCOM (India) and VSI (Germany). It is interesting that divisions or affiliates of the same organisation took different positions. For example, IBM Software divisions supported the Digital Agenda as drafted; however, IBM Global Networks, as an access provider, wanted the right of reproduction and right of communication to specifically exempt them from secondary liability, and IBM as a computer manufacturer opposed the obligation regarding TPMs. Newspapers were also a house divided. As providers of information, they wanted enhanced protection. On the other hand, they were keen that their access to information for reporting citations was not restricted. As is characteristic of multi-party negotiations ad-hoc coalitions of unlikely partners emerged. Thus, the Educators Committee on Copyright Law (ECLA), the International Federation for Information and Documentation (FID) and the International Federation of Libraries Associations (IFLA) banded together with the Computer and Communications Industry Association (CCIA), the European Committee for Interoperable Systems (ECIS), JEIDA and Prodigy Services Corporation to jointly lobby the regional groups of countries. Yet another distinguishing feature of the

Conference was the extensive use of Internet, websites as well as E-mail, to exchange information and to lobby. Lobbying has indeed turned global and digital.<sup>345</sup> As mentioned above, for many countries like India which had an ‘information deficit’ the lobbying by interest groups and the advocacy material they swamped the delegations with were extremely useful (See Sect.9.3). There was yet another type of information deficit caused by the fact that unlike many international conferences I attended such as the UNESCO General Conference the hosting organisation did not provide a daily account of the happenings of the previous day. The day-by-day account of Seth Greenstein who attended the DipCon as a representative of the Electronic Industries Association was an invaluable source of information for every participant.<sup>346</sup>

What was novel about the DipCon was not so much the visibility and volubility of business groups; they always played an important role in the making of national and international IP laws. It is well known that litterateurs led by Victor Hugo played a lead role in persuading leading countries of the day to adopt the first international copyright convention. Less well known is the fact that ‘the completion of the first comprehensive multilateral copyright convention, the Berne Convention in 1886, can be traced in part to a developing international market in the distribution of books’<sup>347</sup> much as the Statute of Anne was the resultant of the lobbying effort of the Stationers who argued that ‘authors would not write books without the security of an easily enforced property right’,<sup>348</sup> and going by Litman, right from the enactment of the 1909 Copyright Act, copyright laws had been the resultant of negotiations among representatives of industries with interests in the copyright law under consideration.<sup>349</sup> What distinguishes the interest group activism at DipCon from that at the TRIPs negotiations was not only the scale of participation of global and regional alliances of business

---

345 Ayyar (1998), pp.23-4.

346 The compilation of the day-to-day accounts titled ‘News from Geneva’ were uploaded on the website of HRRC. Greenstein (1996).

347 Dinwoodie (2000), p.479.

348 Goldstein (1996), p.43.

349 Litman (2006), pp.36-69. A concrete example is provided by the U.S. Audio Home Recording Act. soon after digital audio tape machines (DATs) made their appearance the leading representatives of the international recording and consumer electronics industries reached an agreement in 1989 whereby consumer electronics manufacturers agreed to install serial copy management systems in DATs; the agreement also called for legislative measures requiring SCMSs to be installed in all DATs, to prohibit any circumvention method and to provide sanctions and remedies should such prohibition be not respected. International organisations representing authors and performers supported the agreement.<sup>349</sup> the Audio Home Recording Act was based that industry agreement on DATs. Ficsor (2002), pp. 365-6. Also see Senate Subcommittee Hearing, 2020, Mark Schwartz Statement. Schwartz was counsel of HRRC which closely followed the negotiations.

groups but also the fact that while the Trilateral Group faced no opposition during the TRIPs negotiations (Sect. 3.2) the DipCon was a cockpit where global and regional alliances of business groups fought each other. What was really exceptional about the DipCon was that it was the first international copyright conference where academics specialising in copyright participated in the DipCon as part of the delegations representing NGOs in the WIPO parlance; among those present were the distinguished copyright experts David Nimmer and Jerome Reichman.<sup>350</sup> Some of the delegations of interest groups were jumbo-sized; the IFPA, for example, had nineteen delegates from ten countries. No wonder that over two hundred of the eight hundred odd participants of the DipCon were representatives of interest groups. The foyer of the Conference Venue was chock-full of representatives of interest groups who exchanged information – much of it gossip- and buttonholed any delegate who passed by to lobby.

Apart from lobbying, there are instances of interest groups coming up with provisions in treaty language which are adapted by government delegations. Thus, during the TRIPs negotiations the Trilateral Group released in June 1988 a document *Basic Framework of GATT provisions on Intellectual Property* which detailed the minimum standards of protection in the TRIPs agreement, national enforcement measures and dispute settlement mechanisms; that document became the basis for the eventual TRIPs agreement.<sup>351</sup> Likewise, the treaty drafted by the World Blind Union became the basis for the Marrakesh Agreement. In the Internet Treaties, the provisions regarding anticircumvention measure were ‘mainly drafted by the private sector and largely adopted at the government level’.<sup>352</sup> During the DipCon it was widely rumoured that the South African compromise proposal on anticircumvention measures ( Article 13 of Draft WPPT and Article 22 of Draft WWP) was the outcome of a compromise arrived at in Washington D.C. between content industries on the one hand and those opposed to TPMs such as computer manufacturers, consumer electronics manufacturers, and businesses engaged in encryption research on the other. When I asked Lewis Flacks of IFPI about the rumour he quipped good humouredly that the question was not whether it was negotiated in Washington but which part of Washington. The rumour turned out to be true and was mentioned as such by Reinbothe and Lewinski in their books on the WIPO Internet Treaties.<sup>353</sup> A short and general provision was drafted ‘mainly by the

---

350 David Nimmer was part of the delegation of the Computer & Communications Industry Association, and Jerome Reichman that of the International Council of Scientific Unions.

351 Sell (2003), pp.107-8; ‘Devereaux et al. (2006), pp.60-1.

352 von Lewinski (2008), paragraph 17.95 at p.463.

353 Reinbothe and Von Lewinski (2015), paragraph 7.11.13 at p.169.

different groups of interests stakeholders who probably had the best insight in technical and other issues. Their compromise 'was taken over by the governmental delegations who did not perceive a great manoeuvring space for modifying this proposal and, in addition had to cope with time constraints'.<sup>354</sup>

While interest groups of content providers championed the Digital Agenda and were arrayed against other interest groups, the Database Treaty was an orphan. It had only opposition, comprising fair use groups, law publishers and meteorologists, and no knights errant coming to its rescue. Among the piles and piles of lobbying papers distributed to the delegates by interest groups there was only paper by the Information Industry Association, with 550 corporate members involved in the production and distribution of databases, with the title 'Database- The Time is Now'. The paper joined the issue with the influential paper prepared by Peter Jaszi for the Association of Research Libraries. The production and maintenance of the most important and extensive databases call for heavy investment, and mechanisms to recoup the investment were threatened by the onset of digital technologies. That this is a valid point comes out from the views of Pamela Samuelson (a very prominent and persistent and sharp critic of the Lehman Report, the digital agenda of DipCon and DMCA) regarding the LEXIS and Westlaw databases of judicial opinions and texts. These databases benefit legal scholars who 'would be less capable of producing new works and making their own contributions to the public domain without access to these databases'. No firm would undertake compilations of such data bases and software tools to enable effective use of the database 'without some way to recoup these expenses, as through some exercise of exclusive control over the resource'. The American government could use exercise its eminent domain power to acquire rights to make this information freely available on the Internet. But she goes on to say that 'even if the political will could be mustered to do this (about as likely as Osama bin Laden's conversion to Christianity), would society be better off with a public domain LEXIS? Who would continue to invest in maintaining the database, extending it, and improving its tools?' She further goes on to express the view that social welfare would be enhanced 'by a mix of digital public domain and proprietary databases of legal information'; the public domain sites could provide some competition 'to hold in check the duopolistic tendencies of the market players and providing access to key information... to those who cannot afford to pay database access fees'.<sup>355</sup> Irrespective of the merits of a *sui generis*

---

354 von Lewinski (2008), paragraph 17.95 at p.463.

355 Samuelson (2003), pp.152-3.

database what doomed the Database Treaty was the fact that it was prematurely introduced without providing the time and space to debate the provisions even in the U.S., not to speak of developing countries including India which did not as yet have a significant database industry. The lack of debate spurred mighty opposition.

Before moving on, it should be said that a distinctive feature of a modern, democratic polity is the space provided for citizens and groups of all types- citizen groups, public interest group, business groups, and so on- to influence and shape policy. And further, the answer to the question whether interest group politics is good or bad depends on upon what the issue is, how evenly balanced the opposing groups are, and how well the Government manages the special interests. Or in other words, it depends on how competitive the ‘policy market’ is in a given situation. What applies to national policymaking applies also to international policymaking in forums like the DipCon. <sup>356</sup> If eventually the provisions relating to the Digital Agenda were toned down and the Database Treaty not pressed it is not a little due to interest group politics. To jump the story, before the DipCon closed the Plenary of the DipCon adopted a recommendation calling for the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of further preparatory work on a Treaty on Intellectual Property in Respect of Databases. However, the idea of such a treaty never took off; even in the E.C. the Directive on Databases came in for a scathing indictment in an internal evaluation (2005), ‘rather unusual in that evaluation reports usually praise the Commission’s progeny of Directives’. The evaluation observed that

‘From the outset, there have been problems associated with the “sui generis” right: the scope of the right is unclear; granting protection to “nonoriginal” databases is perceived as locking up information, especially data and information that are in the public domain; and *its failure to produce any measurable impact on European database production*’ [which incidentally the main objective of the Directive]. (Italics and matter in parenthesis added).<sup>357</sup>

---

<sup>356</sup> For an elaboration of interest group politics and its influence on policymaking see Ayyar (2009), pp.157-69, 235-3, 275-83. The role of interest group politics is elaborated in Dam (2001).

<sup>357</sup> DG Internal Market (2005), p.23.

One of the options which the evaluation presented was repeal of the Directive. However, the Directive was not repealed as ‘harmonization by directive is essentially an upward, one-way street’.<sup>358</sup> An external evaluation in 2018, however, struck a mildly positive note, but not so positive for the evaluators to unequivocally recommend continuance of the Directive.<sup>359</sup> It is pertinent to point out that as part of the European Database Strategy, ‘there is a flush of policy initiatives, laws and legislative proposals that either problematize or downplay the importance of intellectual property rights for data’, and that the sui generis database right might be curtailed. While the 1996 Database directive ‘would reach its 25<sup>th</sup> anniversary unscathed’, ‘this will not be true come its 30<sup>th</sup> birthday’.<sup>360</sup>

## **10.2 Fishes and Loaves**

Among the international conferences I attended the most colourful have been UNESCO General Conference. On the opening day of a General Conference, the rather small foyer of UNESCO headquarters at *Place de Fontenoy*, Paris would be choked with delegates from all over the world and delegates, particularly those from Africa, dressed in colourful native attire. As the UN agency which deals with culture it would be exceptional if some cultural programme or other were not organised for the delegates of the General Conference. Thus, a special performance of Mozart was organised in 1991, that too in an ornate auditorium in the world-famous Sorbonne University. In October 1994, at the very same conference venue of DipCon, I attended the International Conference on Education organised by UNESCO’s International Bureau of Education, where much was made of the fact that 1994 was the 300<sup>th</sup> anniversary of the birth of Voltaire. In contrast to such colourful occasions, the opening of the DipCon was a matter-of-fact affair. Bogsch, DG, WIPO presided over the opening session of the Plenary, and in his stentorian voice welcomed the delegates and hoped for the success of the DipCon. He said once the Rules of Procedure were adopted and the President of the DipCon elected he would vacate the chair in favour of the President of the DipCon. However, it was only three days later, on 5<sup>th</sup> late morning that he could do so as DipCon had to be adjourned again and again to allow intense informal discussions and lobbying over two issues: (i) the number of elective

---

358 Hugenholtz (2013), pp.512, 519.

359 JIIP and Technopolis (2018), p.vi.

360 Van Eechoud (2021).

offices and their distribution among different regions, and (ii) the competence of European Commission to vote on behalf of its Member States.

Rule 15 of the Draft Rules of Procedure <sup>361</sup> provided for ten Vice-presidents of the Conference; in retrospect that number was too inadequate to satisfy the craving for posts of different groups and Member States, particularly in the Steering Committee and Drafting Committee which unlike the Main Committees were not open to all participating Member States. The number of Vice-presidents was eventually increased to 18 in two steps, first to 14 on December 2, 1996 and finally to 18 on December 5, 1996. The importance of the post lay in the fact that a Vice-president was entitled to a seat on the Steering Committee along with the President of the Conference and Chairmen of the Main Committee-I, Main Committee-II, Credentials and Drafting Committees; Main Committee-I dealt with substantive provisions and Main Committee-II dealing with Administrative and Final clauses of the treaties which would be adopted by the DipCon). True its appellation, the Steering Commission was expected to steer the DipCon by making decisions necessary for furthering the progress of the DipCon including coordinating the meetings of the Plenary and the four Committees. All Member States were members of two Main Committees while meetings of the Credentials and Drafting Committee were open only to their members. As the work of Credentials Committee was limited to examining the documents filed in support of the eligibility of a delegation to participate in the DipCon its membership was not much coveted. Given the intense demand for membership within the group, the Asian Group proposed that the number of elected members of the Drafting Committee be increased from 10 to 19. This proposal was supported by many African and Latin Americans; however, it was opposed by some other countries on the ground that too large a membership would impede efficient functioning. Thus, Jeff Kushan argued that the purpose of the Drafting Committee was to ensure the linguistic accuracy of the texts of the treaties which were negotiated, and therefore the Committee should have only enough members to perform the straightforward technical purpose of checking languages. As the number of official languages of DipCon was six (the five UN languages of English, French, Spanish Russian, and Chinese plus Arabic) the number of elected members should be no more than twelve at the rate of two members for each language. Many members questioned the contention of Jeff Kushan on the ground that Member States whose language was not one of the six official languages were also entitled to be members of the Committee. Eventually after

---

361 WIPO, *Draft Rules* (1996).

much haggling, the number of elected members was increased to thirteen. Eventually, on December 5, 1996, the number of elected members was increased to eighteen in order to meet the aspirations of different groups for elected offices.

After the composition of the Drafting Committee was approved the Plenary turned its attention to the composition of the Steering Committee. Ranjana Nalin Abeysekera of Sri Lanka who was the coordinator of the Asian Group suggested that coordinators of groups should be invitees of the Steering Committee. In response, Bogsch observed that the position of coordinator was an informal arrangement. At that stage, Ms. Danielle Bouvet of Canada proposed suspension of the Plenary for consultations on Rule 14 dealing with Steering Committee. After recess, she proposed that the number of Vice-presidents be increased from 10 to 14, and the proposal was approved. The rules from rule 14 to 33 were quickly approved; however, once rule 33 dealing with the voting rights of the European Commission was taken for consideration Ms. Danielle Bouvet of Canada asked again for suspension of the meeting for discussion and resolution of the issue. When the meeting was resumed in the afternoon she asked for suspension for the rest of the day. No business was transacted the whole of next day, December 3, 1996, as the Plenary was suspended again and again due to the stand-off between the U.S. and the EC over the voting rights of the EC. The day saw intense lobbying by the opposing sides; Jonathon Stoodley on behalf of the EC. and Thomas Robertson on behalf of the U.S. gave presentations to the Asian Group and lobbied for the Group's support. Matters were brought to a head on the afternoon when the Plenary approved the American proposal by 40 votes in favour, 27 votes against and 8 abstentions. The rules were adopted very soon thereafter but not before the Asian Group suffered a defeat over its sponsoring the odd proposal of Sivakant Tiwari that meetings of the Drafting Committee should be open to all Member States; however, Member States which were not elected to the Drafting Committee would have no right to make oral or written statement; the withering comment of Bogsch that such participants would be condemned to silence was entirely justified. The justification for this odd proposal was that being open-ended would improve the transparency of the proceedings of the Drafting Committee. For the sake of solidarity with the Asian Group, I had to make specious pleading and seek adjournment twice to enable the Asian Group lobby support among other groups. The efforts were futile, and the proposal was voted down by 14 votes in favour, 27 against with 44 abstentions. After the rules were adopted Bogsch turned to the next item on the agenda, namely election of the President; the Plenary was adjourned twice at the request at the

request of the African Group. The whole of the third day, December 4, 1996, was spent on informal negotiations among Groups over the distribution of posts, and the Plenary transacted no business. Come December 5, 1996, soon after the Plenary convened Ms. Danielle Bouvet of Canada proposed a distribution of posts which were too much tilted in favour of Group B, and consequently opposed by the Asian Group. Ms. Danielle Bouvet again asked for adjournment for further discussions and requested the presence of DG, WIPO during the discussions. The Plenary was adjourned again, and mercifully a couple of hours later a deal brokered by DG, WIPO was approved. The Rules of Procedure were amended providing for 18 Vice-Presidents and 18 elected members of the Drafting Committee. Ms. Esther Mshai Tolle, Permanent Representative of Kenya, Geneva was chosen as President. After she took over from Bogsch and made her Presidential remarks she took up election of other office bearers which given the deal brokered was just a formality. All in all, the first three days of the DipCon were everything that a conference should not be, a complete waste of time and exasperation among the delegates. If only, the U.S. and EC sunk their differences before the DipCon and come to an understanding with other groups about the distribution of posts and the Rules of Procedure three and half days of the DipCon would not have been lost.

Apart from the delay in arriving at an agreement on the number and distribution of posts the vacillation of the African Group contributed to the delay in DipCon beginning its substantive business. Initially, the African Group was keen on the Presidency of the Conference but later it had second thoughts as it found it difficult to secure an agreement on a single candidate. On 2<sup>nd</sup> evening it looked as though the Asian Group would have presidency of the DipCon, and the consensus was that I would be a good choice. However, that opportunity slipped away next day. Eventually, three positions of Vice-president of the Conference, Chairman and two positions of member of the Drafting Committee, and one position of a member of the Credentials Committee were allocated to the Asian Group, and I was chosen to be Chairman of the Drafting Committee notwithstanding a whispering campaign by Shakil Ahmad Abbasi, Registrar of Copyright, Pakistan that I was not qualified to be Chairman. When the choice for India was between being a Vice-president of DipCon and Chairman of the Drafting Committee, Arundhati Ghosh initially thought that I should opt for the vice-presidency lest I should be lost for the delegation. However, she came to know that the Drafting Committee would begin its work only after the Main Committees concluded their work, she veered towards my accepting chairmanship. As she rightly put it the important thing was to be in the Steering Committee. While the haggling

about posts went on and on the only position of which there was near-unanimity was that of the chairmanship of Main Committee-I. Lieder had the support not only of Group B but also of many Latin American and African countries. Only the Asian Group had reservations about his objectivity. Because of the overwhelming support to Lieder his election was never in doubt. GRULAC members were keen about chairmanship of Main Committee -II and Guido Fernando Silva Soares of Brazil was chosen to chair that committee. Ms. Ndèye Abibatou Youm Diabe Siby of Senegal was chosen to chair the Credentials Committee.

### **10.3 European Community: Neither Fish, Flesh nor Good Red Herring?**

The status of European Communities (also called European Community, EC) in international law is beset with ambiguity. Begun as a customs union, the EC steadily expanded the scope of its activities as well as its competence to issue directives binding on its member states. The Treaty of Maastricht (1972, entered into force on November 1, 1993) created a new European Union (EU) which consisted of European Commission (E.C.) plus the means for a common foreign policy and cooperation in justice and police matters. Only after the Treaty of Lisbon and the Treaty of the Functioning of European Union entered into force on December 1, 2009 did EU acquire a legal persona and the competence to negotiate and conclude international treaties. For that reason, the Uruguay Round and DipCon texts use the expression 'European Community' only. The legal status of a half-way house like the EC is bound to be beset with contradictions. In an international organisation which admits only nation-states (eg., the United Nations) the EU can have only an observer status. Yet, in spite of its special observer status the EU cannot exercise voting on behalf of its members; consequently, it has to negotiate with its Member States continually to develop a common position on issues which arise from time to time and ensure that all its Member States vote for the common position. The Marrakesh Agreement resulting from the Uruguay Round of trade negotiations conferred a new status on EC. Under Article XI (1) of the Marrakesh Agreement the EC and its Member States are original members of WTO, and under Article IX (2) the EC can vote on behalf of its Member States, and when it does so it has as many votes as the number of its Member States. This was an odd arrangement bereft of any logic. Generally, decision-making in international organisations is based on the principle 'one country, one vote'. Exceptions do exist, eg., the UN Security Council where five major allied powers were vested with veto power, and the international financial institutions where voting rights are related to economic power of the member states. In

1994, when the Marrakesh Agreement was concluded the total GDP of the EC countries was less than that of the U.S. and yet E.C. was vested with fifteen votes while the U.S. had only one. If the demand of the EC that it should be permitted to cast a block vote on behalf of its 27 member states (about 17% of the 161 member states of WIPO during the DipCon) were conceded it would vest it with an extraordinary but anomalous power.

As with the Uruguay Round of negotiations the EC played an active role in the deliberations of Experts for considering the Berne Protocol Committee and the New Instrument Committee. When it was decided to convene the DipCon the EC was keen to send a delegation to that conference and accede to the treaties which would be concluded by the DipCon. At the meeting of the PrepCom in May 1996 there was no objection to a special delegation of EC; however, there was much discussion over the proposal of the EC that it be allowed to exercise the voting rights of its Member States. To make matters worse, the EC moved an amendment whereby it could exercise the voting rights of its Member States without any qualification; by implication, it could exercise its right even its Member States did not participate in the DipCon. To say the least, it was an extraordinary proposal. During the discussion on EC voting right in the Plenary on December 3, 1996 I asked the DG, WIPO to clarify past practices in WIPO. DG, WIPO replied that proxy voting was unknown in WIPO. The practice of WIPO was that a delegation had the right to vote in its own name and its own name only. He went on to say that a Delegation of the EC participated in recent Diplomatic Conferences for the Patent Law Treaty, the Trademark Law Treaty, the UPOV (International Union for the Protection of New Varieties of Plant Varieties) Treaty, and the Integrated Circuits Treaty. In all these conferences, the Delegation of the EC had no right to vote either in its own name or in the name of any of its Member States.<sup>362</sup> In the PrepCom of the DipCon the proposal of the EC was rejected by 21 votes in favour, 26 votes against and 17 abstentions. At the behest of the EC the PrepCom revisited the question to consider its revised proposal whereby the EC 'may vote in the name of, and instead of, the Member States of the European Community which are present at the Diplomatic Conference'. Even this proposal was not acceptable to the U.S. and many other delegations which insisted that the EC could exercise the proxy vote only (i) in matters that are within its competence (the so-called competency requirement), (ii) in the name of, and instead of, those Member States who would be represented at the Diplomatic Conference and whose delegations are present at the time of voting (the so-called presence

---

362 DipCon Records, Volume II, Plenary Minutes, paragraphs 151, 155 at p. 579.

requirement), and (iii) when none of its Member States participated in the vote. As suggested by the DG, WIPO the PrepCom placed the revised proposal of the EC for consideration of the DipCon.

In the period intervening between the meeting of the PrepCom in May 1996 and the DipCon in December 1996 it would appear that the U.S. and EC sought to resolve their differences; even a week before the DipCon negotiations were reportedly held in the U.S. State Department. Yet in the absence of any agreement, the question of the voting rights of the EC stalled the DipCon for a day. In a communication circulated to all delegations on December 2, 1996, the EC sought to justify its claim to vote on behalf of its Member States without any condition.<sup>363</sup> The EC cited the precedent of the Marrakesh Agreement whereby without any conditions the EC could vote on matters within its competence in the WTO. In their lobbying of Asian and other groups the American representatives rebutted the analogy of Marrakesh Agreement; EC was originally a customs union, and WTO and its predecessor GATT dealt exclusively with trade issues while WIPO had nothing to do with trade. They also explained that competency and presence requirements were needed for other Member States to be assured that the EC has the competence to accept an obligation or to take a position on behalf of its Member States, and that that the obligation that the EC took would be accepted without question by all EC Member States. The EC however, considered the competency condition onerous. In their lobbying, the representatives of the EC argued that the E.C. acquires exclusive competence if it issues a directive after following the due process; directives had already been issued on several matters covered by the treaties under consideration by the DipCon such as computer software, databases, and lending and rental rights. In matters covered by these directives, the Member States had lost competence. Hence, as of now, neither the Member States nor the EC have exclusive competence in all areas covered by the treaties under consideration by the DipCon, and if exclusive competence were insisted upon, neither its Member States nor the EC could accede to the Treaties. Further, competency was not static but evolving; E.C. intended to issue further Directives based on its Green Paper on *Copyright and Related Rights in an Information Society* (See Sect.5.5.2). The U.S. questioned the claim that EC had exclusive competence in the matters dealt with by the DipCon by citing an opinion of the Court of Justice of the European Union (CJEU, Case 1/94). The question that was put to the Court was whether the EC had exclusive competence to conclude the Agreement on Trade in Goods, the

---

363 WIPO, *Communication by EC*.

General Agreement on Trade in Services (GATS) and the TRIPs Agreement. The Court opined that the EC had the sole competence to conclude only the Agreement on Trade in Goods; however, in regard to GATS and the TRIPS agreement it had only joint competence along with its Member States. The EC also opposed the introduction of a presence requirement in an international instrument for that would question the right of the Community to act on behalf of its Member States. As a German delegate put it the presence requirement was awkward and assailed the feeling of togetherness of the EC Member States; with the directness which only Americans are capable Robertson asked in irritation, 'what sort of objection is this'. The U.S. was willing to relax the competency condition but not the presence requirement. Eventually the American amendment introduced on the morning of December 3, 1996, was approved by 40 votes in favour, 27 against and 7 abstentions. Following is Article 33 (3) as finally approved by Plenary:

'The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that

- (i) the Special Delegation shall not exercise the right to vote of the Member States of the European Community if the Member States exercise their rights to vote and vice versa, and
- (ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote'.

In regard to the eligibility of the EC to accede to the treaties which might be concluded by the DipCon, WIPO's Draft Administrative and Final Clauses of the treaties placed for consideration by the PrepCom (in its meeting of May 1996) proposed that EC may become a party to the treaty<sup>364</sup>, the justification being the ever-growing EC legislation in the field of intellectual property and the very active role EC played in the Committees of Experts.<sup>365</sup> The WIPO Draft Administrative and Final Clauses left open the question the name by which EC should be called in the treaties: the

---

364 After considering the comments made in PrepCom and WIPO Governing Bodies, WIPO prepared a single basic proposal for the final clauses.

365 WIPO, *Draft Final Clauses* (1996), pp.4-6.

European Union, or the European Community or the European Communities or something else. It also left open the question whether the EC should be eligible to become party to the Treaty only when all its Member States become parties to that Treaty and only if the Treaty obligations not covered by the legislation of the EC are covered by the national legislation of each Member State of the EC. The WIPO Draft made it clear that it was not proposing that inter-governmental organisations other than the EC should be allowed to be parties to the treaties 'since none of the existing ones showed a desire to be eligible to become party to the Treaty and since none of them seems to have even the beginning of a regional legislation in the fields that will presumably be covered by the Treaty'. The WIPO Draft Administrative and Final Clauses presumed that EC should be eligible to become a party to the Treaty; therefore, they did not propose a linkage between the WCT and the Berne Convention as only Member States of WIPO could become parties to that Convention, and not EC. It also proposed that the Treaty should have no assembly to oversee its implementation; WIPO made that proposal going by the precedent of the Trademark Law Treaty (1994). The PrepCom had elaborate discussions over the WIPO Draft Administrative and Final Clauses; it was agreeable for EC being eligible to become a party to the treaties; however, many delegates were of the view that other inter-governmental organisations should also become eligible for becoming parties to the treaties. There was, more or less, agreement on three conditions subject to which an inter-governmental organisation could become a party to a treaty: (i) the Member States of such an organisation should have transferred to it the competence to adopt measures binding on all its Member States in respect of the subject matter of the treaty, (ii) it has adopted such measures, and (iii) it has been duly authorised, in accordance with its internal procedures, to adhere to the Treaty. There was, however, disagreement over the fourth condition that any intergovernmental organisation which becomes a party to the Treaty shall, at the time of its adherence to the treaties, inform the Director General of its competence with respect to the specific matters governed by the Treaty. All the delegates who spoke at the PrepCom were in favour of establishing an Assembly adopted by the DipCon as 'such a body would make the treaty more operational and would enable the countries party to the Treaty to periodically review developments in relevant national legislation as well as to discuss possible interpretations, amendments and revisions of the treaty'. WIPO was requested to take note of the discussions and draft appropriate articles for consideration by the DipCon. At the DipCon, once the battle over the voting rights of the E.C. and the audio-visual question were over the

adoption of the final clauses by the Main Committee-II proceeded smoothly. The Final and Administrative Clauses of WCT and WPPT are identical. Among others, Article 15 of WCT and Article 24 of WPPT outline the details of the Assembly which would oversee the functioning of the treaty. They provide that 'any Contracting Party that is an intergovernmental organisation may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organisation shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*'. Article 17 of WCT and Article 26 of WPPT set out the conditions of eligibility for becoming a party to the treaty. They provide that 'the Assembly may decide to admit any intergovernmental organisation to become a party to the Treaty if it declares that it is competent in respect of, and has its own legislation binding on all its Member States on matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty'. They also declare that the E.C had made the declaration necessary to become a party to the Treaty in the DipCon and could therefore become a party to the Treaty.

#### **10.4 Rendezvous with Bruce Lehman**

It would be fair to say that the DipCon would not have been convened so soon had it not been for Lehman's efforts in getting the digital agenda rolling; figuratively, he was the architect of the DipCon while Liedes was the engineer who laboured on building the edifice of the treaties considered by the DipCon. Soon after the '15+15+15+1' meeting began on 30 November 1996 Jeff Kushan walked across to the place where the Indian delegation was seated and requested for a bilateral luncheon meeting on 3 December 1996 at *La Perle du Lac*. I proceeded to the meeting along with Dilip Sinha, and Gopalakrishnan. Situated on Lake Geneva and serving French *grande cuisine* the posh restaurant was a grand setting for the bilateral meeting. Lehman, Jeff Kushan and Keplinger were already seated at the table when we reached the restaurant. Lehman was at his evangelical best and articulated the common interest of India and the U.S. in a successful conclusion of the treaties. He elaborated the common historical legacy of India and the U.S.: they had a common colonial master and common legal and copyright traditions. He also highlighted the common interests in software and film industries. He also spoke of the special relation the U.S. wanted to have with China and India, putting forth an odd rationale of China, India and the U.S. being the most populous countries in the world. He also spoke of the emphasis attached to India by the Clinton administration. I used the brief, rather far too brief,

intermissions in his monologue to indicate that importation right was a make-or-break issue for India, and to elicit the American position on the enforcement provisions. I also sought to elicit Lehman's opinion on the treaties, whether they struck a balance between adaptation of the rights to the digital environment on the one hand and fair use on the other. I also used the occasion to probe whether an agreement could be reached in the U.S. between the content providers and other interests. Significantly, Lehman made no pitch for the Database Treaty. In his view the treaties were balanced; he conceded, however, that all the groups were not yet in favour of the treaties. He however, asserted that it was for the national legislation to accommodate diverse interests as there was only so much that an international treaty could do. Jeff Kushan intervened to ask whether American multinationals were lobbying against the treaties in India. Lehman's defence of importation right was rather feeble; he justified it on the ground that it made price differentiation and market segmentation possible, thereby benefitting the rightsholders. He clarified that the U.S. was now of the view that there was no need for enforcement provisions in the treaties. He also indicated that the U.S. was keen to meet the Europeans halfway on audio-visual works and would be presenting a text. Jeff Kushan offered to share the text and explain it. I also raised the question of decompilation of computer programmes and sought to know his views on the EC Directive on computer programmes; Lehman replied that the Japanese were raising the decompilation issue to undo the language advantage English speaking countries like the U.S. and India have. Before he rushed off for an interview with CNN, he conceded that he spoke all the time himself without giving an opportunity to his guests to put forth their point of view. In my report to Dasgupta on the Lehman meet I expressed the view that it was in Indian interest that the WIPO treaties have no enforcement provisions. I was earlier of the view that the U.S. did not wish to have enforcement provisions in the WIPO treaties as their absence could be used as an argument for assimilating these treaties into the TRIPs agreement and WTO Dispute Settlement; now I revised my views. My interaction with other delegations brought out that it would be quite some time before the treaties enter into force as many countries were not happy with the proposal in the Draft Administrative and Final Clauses that a treaty would come into force within three months of just five countries ratifying a treaty; most countries wanted that number to be far higher. Therefore, contrary to my earlier impression, it would take quite a long time before WCT and WPPT to be assimilated into the TRIPs agreement and the WTO Dispute Settlement mechanism. In the intervening period, it was not unlikely that the U.S. itself would be piqued about a few dispute resolutions within WTO and prefer dispute settlement to be

brought within the fold of WIPO, all the more so if it succeeds to have a candidate of its choice as DG, WIPO.

## **10.5 General Statements**

Once the distribution of offices of the DipCon was settled (the Plenary turned to the making of opening statements by delegations. The honour of speaking first was given to Lehman. Apart from the coordinators of the regional groups, UNESCO, ILO and E.C. about forty countries made their opening statements. Many countries spoke about the need for a balanced protection. Lehman himself spoke of the importance of a meaningful and balanced protection. Speaking on behalf of the E.C. and its Member States, Paraig Hennessey of Ireland stressed that the Conference should ensure that the rights of authors, performers in all media, and producers of phonograms and databases are fully protected, and that the right balance is maintained between the various categories of rightsholders as well as between those rightsholders and users. Asian delegates and most Latin American and African delegates emphasised the need for a balance among rightsholders, industries which would be affected by enhanced protection proposed to be provided to rightsholders in the digital environment, and public interest. Speaking on behalf of GRULAC countries, Alejandro Rogers of Chile said that the text of the Treaties should maintain a balance between the interests of those involved in the creation, dissemination and consumption of cultural goods, taking into account the general interest in promoting creativity, education and culture. Most speakers expressed the view that the Database Treaty needed more study and clarification. Opinion was divided on the coverage of audio-visual works in by WPPT, temporary reproduction and TPMs. Many delegations highlighted the importance of briskly moving ahead on a new broadcasting treaty. New Zealand and some African countries like Nigeria highlighted the importance of similarly moving forward briskly towards an instrument for the protection of folklore.

In my opening statement, among others, I set out guiding principles for a successful conclusion of the Diplomatic Conference. The treaties were to be stand-alone instruments and should be implemented as such. Where obligations under the TRIPS Agreement were proposed to be incorporated in the treaties under consideration, verbatim language of the TRIPS Agreement should be employed. Such obligations should stand alone, and the treaties should not refer to the corresponding provisions of the TRIPS Agreement. In no case should rights guaranteed in the TRIPS Agreement, such as rental, be expanded. The international regime of protection could not be too far ahead of national laws; it could not ignore the wide diversity of market structures and

technological dissemination around the world. A gradualist approach should be taken to the creation of rights in respect of digital technologies, the long-term impact of which on economy could only be guessed now, and a careful balance should be maintained between the interests of content providers, intermediaries, electronic hardware manufacturers, and the general public.. The new treaties should not impede the flow of international trade, and the proposal for a right of importation was such an impediment.

## **10. 6 Meetings of the Main Committee-I**

Participating in the DipCon was like a roller coaster ride. After the Plenary concluded on the evening of December 5<sup>th</sup>, I left the Conference venue with a sense of exhilaration. The stalemate over the distribution of offices was overcome through the deal brokered by Bogsch, and the opening statements were music to my ears. Almost everyone who spoke of the need for balance. The next morning the Main Committee began well, and it looked as though the saying well begun is half done would turn out to be true. The principles which Lieder enunciated in his introductory remarks were impeccable. Lieder gave priority to WCT and WPPT over the Database Treaty; only after the WCT and WPPT were settled would Database Treaty taken up. This prioritisation was taken by most delegates as well as the interest groups to be requiem for the Database Treaty. The understanding was made explicit five days later at the press conference held on December 11<sup>th</sup> by the President of the Conference and members of the Steering Committee. A representative of the Associated Press asked whether the Database Treaty was dead, and whether the other two treaties were also going to be altered substantially. In his usual elliptical manner, Lieder replied that the expression 'dead' used by the correspondent was too explicit. Another journalist observed that talks had only just begun and only nine days were left and wanted to know what would happen if the talks were inconclusive. Suffice to say, the Database Treaty exited from the DipCon unsung and unmourned, and at its mid-point not everyone was hopeful that the DipCon would register even partial success by adopting one or two treaties.

Turning to WCT and WPPT, Lieder suggested that substantive clauses (dealing with rights) should be discussed first followed by the framework clauses (dealing with the links between the proposed treaties and the existing treaties, clauses concerning the application, eligibility for protection, application in time) next, and lastly the preambles and titles. He accepted cluster approach suggested by me; each of the issues common to WCT and WPPT should be discussed together. He identified seven cluster issues: (i) publication and place of publication, (ii) right of reproduction; (iii) distribution

and importation rights, (iv) rental right, (v) communication right (insofar as it addresses interactive communications), (vi) technological protection measures and copyright management information, and (vii) enforcement. He was not yet clear whether exceptions and limitations should be treated as a cluster issue or treated separately. He proposed to have informal consultations as to how the deliberations over cluster issues should proceed; I stayed back in Geneva for the informal consultations next day while my Indian colleagues went to Lyons for sight-seeing over weekend much like most other delegates. After referring to informal consultations on cluster issues Liedes suggested that the Committee immediately take up for consideration the 'non-common issues' of WCT, namely computer programs (Article 4), databases (Article 5), abolition of certain nonvoluntary licenses (Article 6), and duration of protection of photographic works (Article 11). Thereafter, and in an order to be decided upon later, the cluster issues and the separate issues in the second treaty would be addressed. He as well as Bogsch requested delegations to submit amendments to the clauses of the draft treaties so that they could be translated and circulated to delegates in time for meaningful discussions.

Usually, informal negotiations among countries over the negotiating text precede most international conferences; such negotiations narrow the areas of divergence, or to use jargon, reduce the square brackets within which divergent views on the negotiating text are placed. Unlike the customary practice, DipCon was not preceded by informal negotiations with the result that the consideration of the substantive provisions by the Main Committee-I had to start from the scratch. The last two meetings of the Committees of Experts brought out sharp divergence of views on many issues including some aspects of the digital agenda, and no attempt was made during the meetings or subsequently to narrow down the divergent views; Liedes closed the May, 1996 meeting saying that 'there was no need for further conclusions or recommendations, since the preparatory work would now move into a consultative process, and then the Diplomatic Conference would have the final opportunity to shape the treaty or treaties'.<sup>366</sup> However, the consultative process was limited to consultations within each group such as the Asian Group, African Group and so on. The '15+15+1+1' forum was a washout; the treaties were 'scanned' but no negotiations, formal or informal took place. It turned out that the U.S. and EC were engaged in informal consultations, and so did some interest groups arrayed against each other. However, in the absence of informal negotiations at an international level everything relating to

---

366 Committees of Experts (May 1996), paragraph 121 at pp.36-7.

divisive issues like digital agenda , incorporation of some provisions of the TRIPs agreement in WCT and WPPT, national treatment, moral rights and equitable remuneration in WPPT had to be negotiated during the DipCon; the twenty days over which the DipCon stretched proved to be too tight a schedule, and for lack of time quite a few important issues such as the anticircumvention measures had to be couched in general terms and no agreement could be secured on the right of reproduction, which is to the digital agenda what the Prince of Denmark is to *Hamlet*. Compounding the failure to hold informal negotiations at an informal level was the failure to draw a workplan and to stipulate a deadline to submit amendments in order to avoid reopening debates once a particular subject had been closed for discussion. As days rolled by, it appeared that that Liedes was in no mood to conclude discussion on any subject; what he seemed to have in mind was a repeat of the scanning exercise of General Consultations and ‘15+15+1+1’ meetings to gauge the extent of agreement or disagreement over each article. It was clear even by the end of the first day of the scanning (December 6<sup>th</sup>) that the only article on which there was no disagreement was Article 11 dealing with the term of protection of photographic works so much as that a wit quipped that the only treaty one could be certain about was a treaty on photographs. By December 8<sup>th</sup> discontent over the inconclusive deliberations of Main Committee-I began to mount. With his stentorian voice, ready wit and body language, Bogsch was a natural actor;<sup>367</sup> at a lunch he hosted for a few heads of delegations like me on December 9, he mimicked Lehman and asked with a frown on his face, ‘when will this seminar end?’ Concerned that the conference she was presiding over might end ingloriously without concluding any treaty, the President of the Conference Ms. Tolle called for a meeting of the Steering Committee on the afternoon of December 11<sup>th</sup>. Liedes appraised the Committee of the progress of discussions so far and said good progress had been made. The Committee had received several written amendments and it had heard a series of interventions on all substantive issues and elements of WCT and WPPT, except their preambles and titles. He said that consensus could be achieved in respect of certain provisions. He could come up with a *Partly Consolidated Text* which would indicate where consensus was possible and where more intense discussion was needed. There were divergent views in the Committee about

---

367 The lunch was for ten people; the host and all the guests were seated around a round dining table. I was to the left of Bogsch and Ms. Danielle Bouvet of Canada on his right. Knowing that this was my first visit to WIPO he wanted to know who I was and where I was from. When I said I was from Hyderabad he asked me whether I knew Shahid Alikhan; he introduced me to others as the ‘Brahmin from Hyderabad’.

another text at this stage. I made a strong pitch for a crisp negotiating text clearly showing the text of the basic proposals and the alternatives which came up during the discussions as well as amendments proposed in writing in square brackets. I added in my usual undiplomatic and forthright manner that we negotiate not ideas but specific texts and words. My stand was supported by many including Lehman and Tiwari of Singapore. Pakistan too supported the idea of 'Singapore and India' leading Jeff Kushan to quip that it was a U.S.-India-Pak alliance. Those who were opposed were of the view that preparation of a text would take time, and that that time was better spent on negotiations. Lehman said that the time taken for preparation of the text was not time off with no transaction of work. That time could be used for informal consultations. Those in favour of a text prevailed over those who were not. Thereafter, EC and U.S. pleaded for Main Committee-II being convened only during the week beginning on December 16<sup>th</sup>, prodding Mansur Raza of Pakistan to wonder what the delegates should do then till the afternoon of 12<sup>th</sup> when Lieder promised to deliver his text: Sightseeing? Sightseeing the delegates did- even otherwise there were delegates who did nothing else.

### **10.7 Champagne and Broken Glass**

No one expected that the release of Lieder's *Partly Consolidated Draft of Treaty-I* <sup>368</sup>on 12<sup>th</sup> afternoon would trigger a violent, volcanic eruption of indignation.<sup>369</sup> The expectation delegates had from the Draft was summed by Alejandro Rogers of Chile who emphasised that that a consolidated text meant a text containing all the amendments submitted, without any exception. Instead, the text furnished by Lieder avowedly 'reflected only some ideas and some assessment of the Chairman'. <sup>370</sup> As summed up neatly by Seth Greenstein, 'most provisions had only minor changes. Substantive changes to several important provisions reflected only one of the possible offered alternatives. Critical provisions remained unchanged'. and 'when the floor was opened for discussion, this Diplomatic Conference shed much of its diplomacy. Delegates from all regions sharply criticized the draft for selectively including only certain proposals and failing to reflect their group's proposals and concerns'. <sup>371</sup> It was obvious that Lieder continued to handle the Main Committee-I in the same manner as he had handled the Committees of

---

368 DipCon Records, Volume I, pp.437- 444.

369 *Partly Consolidated Draft of Treaty II* was distributed later.

370 DipCon Records, Volume II, Summary Minutes of Main Committee-I, paragraph 621, p.731

371 Seth Greenstein, *WIPO Diplomatic Conference: Notes from Geneva*, December 12, 1996. It is more accurate to say that delegates from the African, Asian, and GRULAC countries were sharply critical of the *Partly Consolidated Text* that 'delegates from all regions'.

Experts, the General Consultations and the ‘15+15+1+1’ meeting oblivious to the fact that the Main Committee-I was a formal inter-governmental body, and that the delegates to the DipCon were mostly diplomats and officials who were not necessarily copyright experts and single-mindedly pursued national interests, and who would not be satisfied with subjective summation of discussions by the Chairman in a negotiating text disregarding the changes and amendments they proposed.<sup>372</sup> Lieder took great pains to explain the method underlying the *Partly Consolidated Text* he prepared, and to assert again and again that all proposals and amendments, even if not included in the *Partly Consolidated Draft* were still on the table. The German, Russian, British and American delegates did their very best to persuade the delegates that what Lieder did was in accordance with the decision of the Steering Committee, and that Lieder deserved praise rather than censure for putting in so much effort over long hours to produce a text in such a short time. The hurt feelings of the delegates from the African, Asian, and GRULAC countries were not assuaged; they remained ‘unforgiving’ and demanded that the meeting be adjourned, and the Steering Committee convened to consider the further course of action. I administered the *coup de grâce* by highlighting the fact my views on re-opening the TRIPs agreement were not fully reflected in the *Partly Consolidated Text*, and that it was a matter of concern as to how the treaty language would be established. I found the procedures of the Conference difficult to understand. Compared to many international conferences, the delegates were not being provided a daily journal or a transcript of the interventions. Consequently, it was difficult for Delegations to check whether their interventions and proposals were correctly reflected. It was not clear whether the *Partly Consolidated Text* prepared by the Chairman was in accordance with the decisions of the Steering Committee. If they were not, as it seemed to be the case, a new document should be prepared to reflect the varying shades of opinions. I suggested convening of the Steering Committee to discuss procedural problems and to establish transparent, credible, and acceptable procedures. There was pin drop silence after I spoke meeting was adjourned shortly thereafter. As we came out Jeff Kushan came over to me, threw up his hands and asked in bewilderment what I wanted.

---

<sup>372</sup>Pamela Samuelson is right on the dot when she made the percipient observation that national delegations attending the diplomatic conference in Geneva included not only officials who had previously attended the Committee of Experts meetings, but also other government officials who were not necessarily copyright specialists and were not prone to show deference to the positions of the U.S. and EC the way copyright experts were prone at the meetings of the Committees. Samuelson (1996b), pp.425-6, 433.

A comparison with the Chair's Draft produced during the TRIPs negotiations would bring out vividly why the *Partly Consolidated Text* triggered a violent volcanic eruption of indignation. In the TRIPs negotiations, the GATT Secretariat was not side-lined as the WIPO Secretariat was in the DipCon. Member Countries submitted more or less complete texts for a TRIPs agreement; they were reluctant to ask the Secretariat to put together a composite text as a basis for negotiations. It took a long time for Lars Anell, Chairman of the TRIPs Negotiating Group, to convince the delegations of the need for a composite text for carrying forward the negotiations. The composite text was agreed to only when Anell promised that nothing would be discarded, and 'literally everything that had been put on the table would be part of that composite text'. The resultant composite text, called the Chair's Draft (but prepared with the help of GATT Secretariat) was, of course, 'a rather thick document with a lot of redundancy, but all negotiators in the room now referred to the same paragraph on the same page in the same document'.<sup>373</sup> The composite Draft incorporated all the different proposed formulations, using square brackets and alternatives to set out all the differences. The continuing disagreements were described in the introduction. As a result of informal discussions, the formulations in square brackets became fewer and fewer, and after each round of discussions the Chair came up with a revised draft; in all over six months six drafts were produced. Where the Chair made a suggestion, it was incorporated as a suggestion at an appropriate place of the Draft.<sup>374</sup> The *Partly Consolidated Text* was the very antithesis of the Chair's Draft in TRIPs negotiations because the Text was a selection of some of the proposals and amendments put forth by delegates as well the assessment of Liedes what the treaty language of some provisions would look like when consensus was reached. The assurance that that all proposals and amendments, even if not included in the *Partly Consolidated Text* were still on the table, did little to soothe frayed tempers because if everything was on the table the whole exercise of preparing a *Partly Consolidated Text* made no sense. It was a short leap from indignation to imputation of motivated conduct; the fact that the U.S. and some E.C. countries defended Liedes and his text fostered the belief among most delegates that Liedes was acting at the behest of the U.S. and E.C.

## **10.8 The Aftermath**

In the Steering Committee meeting it was decided to ask the delegations to submit amendments, if any, by 1 PM on December 14<sup>th</sup>; the WIPO

---

373 Arnell (2015), p.366; also see Gervais (1999), pp.17-19.

374 Otten (2015), p.66.

Secretariat was requested to prepare a list of these amendments. The idea of a new *Partly Consolidated Text* (to be prepared by Jukka) was given up; the amendments together with the basic proposals would constitute the negotiating texts. The Russian delegate bemoaned the fact that two out of the three weeks of the Conference were already over. Hélène de Montluc of France wanted the work of Main Committee-II to start so that the negotiations of the final clauses could be taken up. She was unable to understand the delay in convening Main Committee-II as only two issues, namely the voting right of EC and the minimum number of countries which need to accede to a treaty for it to enter into force, were to be resolved. However, neither the U.S. nor the EC were ready for a meeting of the Main Committee-II; later it came out that they did not wish any discussion of the final clauses till they could resolve their differences over the audio-visual question which in turn determined whether the DipCon would adopt one or two treaties or none at all. Whatever, it was decided to convene the meeting of the Main Committee-II on 17<sup>th</sup> December. The President of the Conference Ms. Tolle wanted the Main Committee-I to meet on Monday, the December 16<sup>th</sup> but in deference to the request of the U.S. and the EC advanced it to Sunday, December the 15<sup>th</sup>.

All in all, December 12<sup>th</sup> marked the end of the steering of the Main-Committee-I by Lieder, and by extension of the U.S. and EC. In a sense, Lieder was the lightning rod for the widespread resentment among Asian and African, and to some extent GRULAC delegates against the U.S. and EC which were believed to be calling all the shots through Lieder. African delegates expected that with the election of Ms. Tolle, a fellow African, as President of the Conference they would have a major say in the conduct of the DipCon, and their aspirations like protection of folklore would get due recognition. However, the Steering Committee, contrary to the general practice in the previous diplomatic conferences held under the aegis of WIPO, did not steer the Conference, and consequently Lieder, and by extension the U.S. and EC had a free run in the vital Main Committee-I. The turn of events also delighted WIPO staffers who bitterly resented WIPO being divested of its traditional role of drafting the Basic Proposals; that even Bogsch shared this feeling came out when during the discussion in the Steering Committee he interjected in his stentorian voice 'the Chairman's texts are the Chairman's; the Secretariat does only translation'. From the Steering Committee meeting I and my fellow members of the DipCon moved to the WIPO building to attend a buffet reception hosted by DG, WIPO to commemorate the mid-point of the DipCon. Greenstein's characterisation of the day as 'broken glass and champagne' aptly captured the events of the day. After the fracas witnessed over the *Partly*

*Consolidated Texts* the delegates and WIPO staffers now savoured a gala party. The festive mood of Christmas which was around permeated the party. Abundant supply of canapes, wine, and champagne loosened tongues. Accentuating the festive mood was the feeling of *schadenfreude* widely shared among many delegates and WIPO staffers. Japan, as it came out at Chiang Mai, resented the dominance of U.S. and E.U. in the run up to the DipCon. No wonder that Akinori Shimotori sought me out and congratulated me for my intervention which administered the *coup de grâce* to the texts of Lieder. The WIPO staffers figuratively floated on the air, happy that Lieder, and by extension the U.S. and the E.C., got their just desserts. The otherwise weary looking Ficsor was figuratively levitating in the air and told me that Lieder deserved what he got and that he overestimated the forces backing him. I also heard the gossip that the European Commission wanted Lieder to play an unusually large role in the DipCon so that he could smoothly succeed Bogsch as DG, WIPO, and that today's turn of events event doomed the aspiration of Lieder to succeed Bogsch.

The next day, Ficsor turned up in my office in the Conference venue to clarify that WIPO had little to do with the organisation of the DipCon, and that WIPO was not at fault for the mess created by the *Partly Consolidated Texts*. The DG, WIPO and the Secretariat stayed clear of the DipCon as Lehman wanted the Member States to take control of the conference and prepare the draft treaties themselves instead of the Secretariat. Lehman was unhappy that for very long WIPO was headed by an 'European' and it was time for an American to head it, never mind that that European (Bogsch) got naturalised as an American citizen in the very same year as the then U.S. Secretary of State Madeleine Albright was naturalised. After DipCon was stalemated over the number and choice of office bearers Bogsch sent Ficsor to Lehman to check where it was OK for him if he brokered a deal. The role of WIPO Secretariat was limited to attending to the logistics of the DipCon, drafting the Rules of Procedure of the DipCon as well as the Administrative and Final Clauses of the three treaties. I explained to Ficsor that I had nothing against WIPO, that India was a great supporter of WIPO and that even during the TRIPs negotiations India's stand had been that IPRs should be discussed only in WIPO. I wanted to convey to him, Bogsch and WIPO that we were WIPO's well-wishers. I told him that, if need be, I can meet Bogsch and clarify. I had an occasion to do so soon thereafter at a meeting of the Steering Committee; after hearing me out Bogsch cryptically observed 'this is a very strange conference indeed'.

In retrospect, December 12<sup>th</sup> turned out to be a watershed for more than one reason. The delegates wrested control of the negotiations, and the fact that

there was no one who steered the DipCon gave the negotiations a fluid character which did not conform to any fixed pattern. The configuration of groups varied from issue to issue, and article to article, and at the end of the day the treaties which came out of the Conference were considerably different from the Basic Proposals in quite a few, major respects. The fracas over the *Partly Consolidated Texts* pushed the DipCon into a crisis which led to the prime movers of the DipCon to seriously think anew about managing the DipCon and ensuing that it does not end in failure. It is said that a crisis can also be an opportunity to usher in far-reaching changes which were hitherto unthinkable.<sup>375</sup> A good example of embracing the unthinkable is the DipCon giving up the WIPO tradition of ‘open covenants, openly arrived at’, and opting for less transparent GATT/WTO practice of brokering deals in closed, informal sessions. Hitherto negotiations in WIPO Diplomatic Conferences took place in formal meetings in the presence of all invited participants, including member delegations, observer delegations, and representatives of inter-governmental and non-governmental organisations, as observers. After the fracas over the *Partly Consolidated Texts* many delegations began to feel that agreement is better secured through informal discussions than in the formal setting of Main Committee-I. When the Main Committee resumed its work on 15<sup>th</sup> morning, the representatives of regional groups reported to the meeting the outcome of the informal consultations they had on 13<sup>th</sup> and 14<sup>th</sup> December; thereafter, Chairman Liedes ‘pointed out that, at the given stage, the Committee was only expected to reach an understanding about the nature of the next step, whether ‘there should be informal, or formal, deliberations or negotiations’, and called for the views of the delegates.<sup>376</sup> The President of the Conference Ms. Tolle suggested that the Committee should try to adopt ‘the easier articles’ and then adjourn for informal discussions. Her advice was followed; however, it soon came out that neither of the two treaties had any ‘easier article’. Even purportedly non-controversial Articles (Articles 1-6 and 11 of WCT) began to evoke intense, unending discussion; thereupon it was decided to discuss the issues in informal sessions where only delegates from Member States, and Ficsor in his capacity as Secretary of the Main Committee-I would be eligible to participate, and all others would be excluded. Thereafter from 15<sup>th</sup> to 19<sup>th</sup> Main

---

375 Thomas and Grindle document cases where a crisis facilitated far-reaching reforms as contrasted with politics-as-usual situations. They define reforms as deliberate efforts on the part of the Government to redress perceived errors in prior and existing policy and institutional arrangements. Grindle and Thomas (1991).

376 DipCon Records, Volume II, Summary Minutes of Main Committee-I, paragraph 678 at p.740.

Committee met in informal sessions without any formal notes of the proceedings being recorded, and without being 'observed' by representatives of intergovernmental and non-governmental organisations. Once the Main Committee-I began informal sittings from December 15<sup>th</sup> the representatives of interest groups scoured for information, to quote Seth Greenstein, the Chronicler of the DipCon, 'reading tea leaves and endlessly waiting'.<sup>377</sup>

The consensus that emerged during the informal sessions was reflected in two documents: (i) Draft Substantive Provisions of Treaty No. I (WCT),<sup>378</sup> and (ii) Draft Substantive Provisions of Treaty No. I (WPPT).<sup>379</sup> These draft treaties were considered in the formal meetings of the Main Committee on December 19-20, 1996. The informal sessions were so successful that for lack of consensus voting had been taken in the formal meeting only in respect of five provisions: (i) rental rights in WCT, (ii) abolition of non-voluntary licenses for broadcasting in WCT, (iii) right of reproduction in both treaties, (iv) moral rights in WPPT, and (v) National Treatment in WPPT. Based on my own personal experience I can vouch for the fact that but for the informal sessions of the Main Committee-I the DipCon could not have concluded WCT and WPPT so swiftly in just five days. The utility of informal sessions was crisply summed up by Reinbothe and Lewinski:

[informal sessions] speeded up the pace of discussions and made compromises in the short remaining time possible. Although this procedure resulted in lower degree of transparency, and thereby became more similar to the GATT/WTO practices, it was the only means to achieve the ambitious means of concluding at least two international treaties...the dynamic of this (for WIPO) then new way of (informal) procedure ... probably safeguarded the necessary momentum, thereby avoiding a deadlock in international copyright for a considerable period of time'.<sup>380</sup>

The informal sessions also decided, in a sense, 'casting' of the final formal sessions of the Main Committee-I by deciding who should propose for adoption an article, amendment or agreed statement on which a consensus was arrived at in the informal sessions. Thus, I had the privilege to propose the adoption of the fifth paragraph of the Preamble, Articles 4, 5 and 9 of the Draft

---

377 Greenstein (1996), December 15-6, 1996.

378 DipCon Records, Volume I, pp.500-506.

379 DipCon Records, Volume I, pp.517-529.

380 Reinbothe and Von Lewinski (2015), pp.20-1. For the character of informal sessions, also see Ficsor (2002), pp.46-7.

Substantive Provisions of Treaty No. I (WCT) dated 18 December 1996, fourth paragraph of the Preamble to WPPT, and the agreed statements in respect of Articles 4 and 5 of WCT.

# Chapter 11: Two Treaties, One Treaty or None? (December 13-17, 1996)

## 11.1 Competing Stands on Audio-visual Performances

To recapitulate the deliberations of the meetings of the New Instrument Committee and of the General Consultations, the U.S. preferred that, like the Rome Convention and the TRIPs agreement, WPPT should exclude audio-visual performances from its purview. In respect of sound recordings, it did not mind the establishment of equal and independent economic rights for performers and producers of phonograms. That is to say, it would not mind exclusive economic rights being explicitly conferred on performers instead of elliptically providing 'minimum protection' like the Article 7 of the Rome Convention and Article 14 (1) of the TRIPs agreement. It would not mind vesting performers even with moral rights as proposed by Article 5 of Draft WPPT did because Article 5 was modelled after Article 6bis of Berne Convention, and the language of Article 5 did not preclude alienability or *inter vivos* transfer of these rights, or the option to waive moral rights and not exercise them.<sup>381</sup> The American stand that audio-visual performances should be excluded from WPPT appeared illogical and self-serving to the EC and its Member States, particularly France. A major objective of the New Instrument exercise was to expand the rights of performers and bring them on par with authors' rights. Just as it was illogical and invidious to discriminate between different types of authors it was equally illogical and invidious to discriminate between performers solely based on fixation. The U.S. countered the argument by contending that the sound recording and film producing businesses were organised differently, and that in recognition of these fundamental differences Article 14bis of the Berne Convention made special provisions for cinematographic works and gave a special status to authors of cinematographic works. In short, the U.S. did not want any international treaty to upset its domestic legal and contractual arrangements relating to film business.

The alternative proposals in Draft WPPT regarding audio-visual performers were for the first and last time formally discussed in Main

---

381 WIPO, Draft WPPT, paragraph 5.07 of Notes of Article 5, p.34. The transferability of rights was a key issue for the U.S.

Committee-I on the afternoon of 10 May 2019.<sup>382</sup> The deliberations of that session of the Main Committee-I demonstrated once again the yawning gap between the positions of the U.S. and the EC despite U.S. signifying its willingness to give up its implacable opposition to the inclusion of audio-visual performances in WPPT. The U.S. expressed its willingness to work out a compromise solution, and to that end let audio-visual performances be included in WPPT provided an alternative approach was developed which would 'permit the existing different systems to coexist'. In the meeting of the Main Committee-I on 10 December 1996, Jeff Kushan outlined the formulation the U.S. had in mind which would allow co-existence of differences among countries in the way (i) cinematographic works and performers were protected, (ii) the contractual arrangements through which performers and director were engaged for film production, and (iii) the rights of the performers and the director assigned to the producer. The next day, the U.S. formally submitted its proposal which had five elements: (i) Rights granted, (ii) Free transferability; (iii) Implementation, (iv) National treatment and (v) exclusion of extras and supers from the definition of performers. What was really striking and unusual was the proposal to have 'one country, two systems of protection of performers' in the U.S. whereby only foreign performers would be granted statutory economic rights of fixation, reproduction, distribution, and 'making available' in respect of all kinds of performances while American performers would continue to be governed by the prevailing copyright and contractual arrangements. The American proposal has five elements. First, it proposed that WPPT should grant economic rights of fixation, reproduction, distribution, and making available for all kinds of performances, and to that end opted for Alternative B in Articles 2(c), 2(h), 6, 7, 9(1), 10, 11 and 21(1) of the Draft WPPT. It also sought to limit the right to rental to phonograms. It also sought to omit from WPPT moral rights (Article 5 of Draft WPPT) and right of modification for performers (Article 8 of Draft WPPT) and for producers of phonograms (Article 15 of Draft WPPT). Secondly, WPPT should have a specific provision, analogous to the American proposal during the GATS negotiations, regarding transferability of rights and choice of law. Under Article 13bis proposed by the U.S., 'once a performer has consented to the fixation of his performance in an audio-visual fixation, he shall be presumed to have transferred all rights granted under this Treaty to the producer of the fixation, subject to contractual clauses to the contrary'. In addition to a mandatory presumption of transfer of rights Article 13bis also permitted Contracting Parties to provide that the presumption of transfer is

---

382 DipCon Records, Volume II, paragraphs 464-83, pp.699-703.

irrebuttable. In addition to laying down a provision regarding presumption of transfer Article 13bis also provided that in the absence of agreement by the parties on the applicable rule, contracts concerning the rights granted by the new treaty were to be governed by the law of the Contracting Party that was most closely connected to the contract. The third element of the American proposal (referred to as the implementation clause) was the flexibility to a Contracting Party to implement the treaty obligations in a manner that would be consistent with its own existing system. Article 26bis proposed by the U.S. gave a Contracting party the flexibility to give effect to the provisions of WPPT by granting copyright or related rights, and in respect of performers who are its nationals or whose performance is fixed by a national of the Contracting Party by the application of collective bargaining agreements. The fourth element comprised a broad national element clause along the lines of Article 5 of the Berne Convention. However, the national treatment obligation would not apply in case of a Contracting Party which makes a reservation in respect of the rights of remuneration in respect of broadcasting and communication to the public (Article 12(3) for performers and Article 19(3) for producers of phonograms). In other words, the U.S. accepted material reciprocity only about broadcasting right. Fifthly, the U.S. proposal also excluded from the definition of performers in Article 2 of Draft WPPT so called film extras and supers; to that end it proposed the following addition to the definition of performers: 'but with respect to audio-visual fixations does not include background performers who do not speak words of scripted dialogue'. While outlining the proposal, Jeff Kushan told the Main Committee-I that the willingness of his delegation to put forth the proposal represented a major shift in the position of his country. He highlighted the fact that it was for the first time that the U.S. was prepared to provide specific statutory rights to performers from other countries. The proposal would also significantly increase the likelihood that the U.S. would be able to join the Treaty. He ruled out a compromise involving reservations as the U.S. would find it impossible to accept and ratify a treaty which requires it to take reservations on the audio-visual question. <sup>383</sup>

Even while offering to study the American proposal, the response of EC indicated that it would not like move much beyond the Draft WPPT proposals as it went on stressing the reservation 'mode' despite Kushan ruling out that mode. Speaking on behalf of EC, Reinbothe noted that some of the provisions of the American proposal were floated during the TRIPs negotiations but not

---

383 DipCon Records, Volume I, pp.416-7. Also see DipCon Records, Volume II, paragraphs 465-68, pp.699-700.

accepted. The ideas in the American proposal were never discussed in the New Instrument; nor were they included in Draft WPPT. Taking reservations as envisaged by Article 25 was the right direction. The EC did not like reservations in treaties but would make an exception in regard to WPPT as resorting to reservation in regard to audio-visual fixations was the most flexible and pragmatic means of compromise. The EC was also willing to make reservation more flexible by turning it into an *a la carte* system whereby a Contracting State could pick and choose Articles to which it proposes to make a reservation instead of making a reservation for audio-visual fixations as a whole. Thus, Contracting States would be free to decide whether they would apply a reservation to one or more of the Articles 7, 8, 9, 10, 11 and Article 21 (1), and possibly also to Article 5. Such a flexible reservation could be used by each Contracting State in a different way, in a manner that is in harmony with its copyright and neighbouring right laws and business practices of its film industry. Reinbothe wanted to make it clear that a Contracting State that would apply such a reservation would not be entitled to national treatment for those rights upon which it had invoked the reservation.<sup>384</sup>

Speaking after Reinbothe, I strongly rebutted the implication of Reinbothe's averment that only proposals which were considered by the Committee of Experts or included in the Draft WPPT should be considered by the DipCon. I said that 'a distinction should be drawn between the work of the Committee of Experts and the work being done in the Diplomatic Conference. The Committee of Experts was a committee of experts and no more; it had no political mandate. Nothing precluded a Delegation to introduce at the Diplomatic Conference new proposals or to raise issues connected with the subject of discussions'. I added that, 'when one talked of cinema, there was no single cinema, but rather there were in fact many different types of cinema'. In India, the obligations, and liabilities in the world of commercial cinema were handled mostly by contractual relationships, and it would be extremely difficult to replace such contractual relationships by legislative regulations.<sup>385</sup> France pleaded for 'homogenisation' of rights at the international level and asserted that 'the proposal in the Basic Texts, which represented the outcome of work done in the past, constituted the point of departure for discussions within the Committee'. Hungary speaking on behalf of the Central and East European

---

384 DipCon Records, Volume II, paragraphs 469-72, pp.700-1. The amendment proposed by the E.C. permitting greater flexibility in Article 25 dealing with reservations is at DipCon Records, Volume I, p.414.

385 DipCon Records, Volume II, paragraphs 473-75 at pp.701-2.

countries supported the EC stand. The delegate of Colombia supported the views of EC and France and stressed that 'not only large markets but also developing countries had a genuine interest in giving their artists and audio-visual productions effective protection'. The delegate of Cote d'Ivoire was in favour of recognising the rights of audio-visual performers but reserved his right to make comments on the American proposal subsequently. Ecuador also pleaded for time to consider the American proposal. Okamoto said Japan would be willing to extend rights to audio-visual performers, but not to fixations, and said it would be willing to accept Article 25 with respect to reservations. Michael Ophir of Israel underscored the point that that making of a Treaty to which the U.S. could not accede would be a mistake. Chairman Liedes concluded the session remarking that written proposals should be submitted, and that Main Committee-I would take up the issue after conclusion of informal consultations.<sup>386</sup>

### **11.2 Bilateral Discussions between the U.S. and EC**

The informal consultations turned out to be mainly bilateral discussions between the U.S. on one hand and EC and its Member States on the other; no other delegation was associated. I kept in close touch with the American and EC delegations as India, as one of the world's major producer of films, had a vital stake in the outcome of the negotiations. I sent the American proposal to T.C. James in Department of Education to share it with the Indian film industry associations and ascertain their reaction. The feedback I got was that the Indian film industry was comfortable with the American proposal. I was certain that the American delegation would do nothing which Hollywood did not like and given the congruence of the business practices of Hollywood and Indian film industry I need not be overly worried about the negotiations. The good relations I built with Jeff Kushan and Shira Perlmutter of the U.S. delegation, Reinbothe of the EC delegation and Denis de Freitas and Lewis Flacks of IFPA came in very handy to be *au courant* with what was happening. I was appraised by all of them from time to time of what was happening. From my conversation with Reinbothe I understood why he complained about the U.S. coming up with a proposal which was not discussed in the Committee of Experts, and which did not figure in the Draft WPPT. I came to know from Reinbothe that before the DipCon the U.S. and EC were in continuous dialogue about the Basic Proposals of the three treaties, and that the differences accentuated as the DipCon approached. It is common knowledge that in

---

386 For comments of delegates other than those of the U.S., E.C. and India, and Chairman's concluding remarks see DipCon Records, Volume II, paragraphs 476-83, pp.702-3.

drafting the Basic Proposals Lieder was eager to accommodate the views of the U.S. and EC. That being so, EC had the impression that the U.S. had agreed for the reservation alternative that Draft WPPT put forth as it would fulfil its objective of including only sound recordings in WPPT. That being so, EC was upset that the U.S. reneged on its agreement. The reason why the U.S. would have reneged its agreement, if there were one, might be that as it was, Lehman was facing visceral opposition from several groups opposed to the Digital Agenda and the Database Treaty, and he would not have like to add the formidable Jack Valenti of MPAA to the league of enemies.<sup>387</sup> A bitter long-standing complaint of Hollywood had been that American film producers were being unjustly denied a due share of the proceeds of levies by European countries on private copying even though most of the films copied were American. Worse, the proceeds were used by countries like France to subsidise competitors, namely French films. Exercise of reservation by the U.S. would let the Europeans continue the practice detested by Hollywood. Hence, it was quite plausible that just as the Database Treaty was quietly dropped because of the enormous opposition the agreement with EC might have been dropped as it failed to pass muster with Hollywood. The American perceptions came out during the lunch I hosted for Lehman on 16<sup>th</sup>. During the lunch Lehman was bitter about the Telecom companies using the Conference to push through their domestic agenda and was resentful of the hordes of lobbyists hovering over the conference venue. Even those part of the delegation did not hesitate to lobby even though they were told that they could not lobby as members of the Americans delegation. He was equally bitter about the French. The French were using the EC to pursue their nationalist agenda and preserve its past glory. Lehman's views about the French were widely shared by the Washington establishment, American experts in international relations and Hollywood. The standoff between the U.S. and France was not an isolated event. 1996 began with the standoff between France and the U.S. over succession to Boutros Boutros-Ghali as Secretary General, United Nations. France could successfully isolate the U.S. over continuance of the French speaking Boutros Boutros-Ghali so much so that the U.S. had to exercise its veto in the Security Council, about ten days before the commencement of DipCon, thereby denying a second

---

387 Jack Valenti of MPAA could be a formidable opponent. So influential was MPAA that it was known as the 'Little State Department'. Lee (2008). During the GATS negotiations Valenti made it clear that should the U.S. backs down on audio-visual services, and quotas it would be 'Armageddon time', and that he would be 'on the Hill with every Patriot Missile and every F-16 in our armory, leading whatever legions we can find to oppose the agreement'. Bruce Stokes cited in Devereaux et al.(2006). p.71.

term to Boutros Boutros-Ghali, and in retaliation France was opposing Kofi Anan, the American nominee. When I discussed with Arundhati Ghosh the standoff over the audio-visual question, she narrated an incident which created ripples in the diplomatic community. On December 10, 1996, French Foreign Minister Herve de Charette had snubbed his American counterpart, Warren Christopher, at NATO headquarters when he deliberately walked out of a luncheon toast in honour of the outgoing US Secretary of State.<sup>388</sup> Suffice to say, the Americans saw the worst in the standoff over the audio-visual question, and linked it with French not missing an opportunity to cock a snook at the U.S.

Most of the EC Member States had a problem with every element of the U.S. proposal.<sup>389</sup> Thus, the American proposal that it would treat foreign performers differently from American performers and grant them economic rights did not seem sufficiently clear to quite a few Member States. Most of them did not see any justification for the implementation clause as the 'the proposed Treaty would not in any way envisage affecting the domestic law but would rather establish protection at the international level'. To say the least, the ground adduced for opposing the implementation clause was strange for a Contracting Party would be required to transpose a right provided by WPPT into their national laws if its copyright law does not provide such a right. The refusal to provide flexibility in implementation was contrary to the Berne Convention tradition which allowed parties to the Convention to implement the Convention in a manner consistent with its own existent system (See Sect.2.2.1). The choice-of-law clause was considered to be a matter of private international law and hence was considered to have no place in an intellectual property treaty. Further acceptance of such a clause would result in an even larger 'exportation' of the U.S. domestic law to the rest of the world. Transfer of rights had been a contentious issue in the TRIPs negotiations. Its resolution was not possible for sixteen years after the DipCon; it wrecked the Diplomatic Conference on Audio-visual Performances in 2000. Further, most governments 'did not want to be obliged internationally to continue to provide for presumption of transfer of rights, especially if not accompanied by certain safeguards in favour of performers'. Most E.C. countries were also opposed to the exclusion of moral rights and the amendment to the definition of

---

388 'US-France 'Toast-Flap' (1996).

389 Reinbothe and von Lewinski (2015), paragraphs 5.0.19 to 5.0.25 pp.28-29; von Lewinski (2008), paragraphs 18.02 to 18.07 at pp.498-501; For details of the U.S. and E.C. proposals and differences see Ficsor (2002), paragraph 2.44-7 , pp.70-4; von Lewinski (2008), , paragraph 18.02- at p.499-501.

performers as it would exclude ‘dancers, performers of non-scripted dialogue or monologue, such as performers in improvisation or performers of folklore, mime artists, and other non-verbal roles’. All in all, the EC countries were opposed to a WPPT which would recognise the long-standing American film business practices; ‘compromise’ would ‘result in a treaty for film producers rather than performers’.<sup>390</sup> Truth to be told, they failed to recognise that a WPPT which covers audio-visual fixations as proposed in the Basic Proposal would obligate only countries like the U.S. and India to make changes to their domestic law and business practices while it would be business as usual in the EC countries. Reservation was not a real option as it would deny countries which make the reservation forgo national treatment in countries which acceded to WPPT without any reservation. The sharp difference of opinion between the U.S. and the EC over the U.S. proposal in respect of transfer of rights and of an irrebuttable presumption of transfer of rights to the producer is largely ideological. While countries with the ‘Copyright’ system expect the author to take care of his interests in a negotiation (as the *caveat emptor* principle expects a buyer to do) the authors’ right system implicitly consider authors to be ‘helpless, unworldly *Luftmenschen*, unable to defend themselves’,<sup>391</sup> and regulate copyright contracts to ensure a fair deal to authors and artists.<sup>392</sup> An example of the government regulating contracts is the dramatic and as yet unparalleled copyright law reform in Germany (2002 which regulated even international licenses so as to benefit authors and performing artists; the law aims to secure equitable remuneration, continued profit participation, as well as the non-circumvention (by choice of law) of these objectives in the international licensing arena.<sup>393</sup>

The audio-visual question was pushed to the background temporarily because of the fracas over Chairman Liedes’s Partly Consolidated Text. From December 15<sup>th</sup> the stand-off between the U.S. and the EC over the audio-visual question hovered over the DipCon like a Damocles’ sword. The considerable progress being made in informal sessions of Main Committee-I did little to

---

390 von Lewinski (2008), paragraphs 18.06-7 at pp.500-1.

391 Baldwin (2014), pp.25-6. The image of artist being an unworldly, helpless person was invoked by France in the campaign for strong protection of authors’ rights in the Universal Declaration of Human Rights. Like all stereotypes, the stereotype of an author or artist being an unworldly and helpless person is a sweeping generalization; authors like William Wordsworth, Victor Hugo and Mark Twain (who was in the forefront of the demand in the U.S. for a strong copyright protection) were by no means unworldly and helpless.

392 For legal framework applicable to copyright contracts as well as the practices in artistic sectors in eight Member States of EU see Dusollier et al, EU (2014).

393 Neu (2018).

dispel the thick fog of angst which enveloped the DipCon venue. The feeling of many was articulated by Werner Rumphorst of European Broadcasting Union when he told me that the DipCon was reduced to a sideshow; the outcome of the bilateral negotiations between the U.S. and the E.C. would determine whether there would be one treaty or two treaties or no treaty. As the suspense continued and hard facts were difficult to come by speculation had a field day. The odds in favour of EC and U.S. reaching an agreement were put at 50-60 percent. Some felt that if an agreement were not reached even WCT might not go through; not everyone was so pessimistic. It was widely talked that Lehman could not return without a treaty and knowing that EC was insisting that if its formulation on the audio-visual question was not accepted it would try to block WCT as well. But then, for the sake of WCT Lehman could not alienate Hollywood and expose both the treaties to the danger of rejection by the Senate because of the extraordinary clout of MPAA. Suddenly, many Francophone African countries turned out to be vehement champions of audio-visual performers, though many of them had no film industry worth the name. They linked the audio-visual question with protection of folklore, their most precious treasure, which in the absence of protection was being commercialised without due respect for the cultural and economic interests of the communities in which it originated; worse, folklore was often being distorted and mutilated in order to better adapt it to the needs of the market. The general perception among delegates and representatives of NGOs was that France was whipping up Francophone and some Latin American countries to put pressure on the Americans. President Clinton was scheduled to meet Jacques Santer, President of the EU, on 16<sup>th</sup> December, and the corridor gossip was that after that meeting the standoff would be lifted.

### **11.3 U.S. and E.C. Agree to Take out Audio-visual Performances from WPPT**

On the afternoon of 16<sup>th</sup>, I came to know from Reinbothe that the negotiations had failed, and that the EC was planning to brief the delegations next morning of that failure. Later in the day, Ms. Tolle, President of the Conference had a meeting with the Coordinators of the Groups; she was greatly upset that the EC planned to inform the delegations of the failure of negotiations without keeping the Steering Committee in picture. She threatened to resign if the briefing was not withdrawn. Next day, on the 17<sup>th</sup>, Lehman told the Steering Committee that there had been extensive discussions on the audio-visual question; however, it became clear in the last 24 hours that 'we would not be in a position to settle our differences during the DipCon. It would be a pity if because of differences performers and producers of sound

recordings should be denied the extra protection which WPPT would offer. It was the joint recommendation of the U.S. and the EC that audio-visual fixations be excluded from WPPT, and that discussions should continue in WIPO over the audio-visual question'. Ronald Long of Ireland, speaking on behalf of EC echoed the views of Lehman; it was not possible to settle during the DipCon the new points which the U.S. raised. It would be a shame 'if we go back without a treaty'. Half a cake is better than no cake. Discussions should continue in WIPO so that a treaty on audio-visual fixations could be concluded at the very earliest. Then followed what was described by a participant in *sotto voce* as eulogies in a funeral. France expressed great anguish at the exclusion of audio-visual fixations. Performers had great expectations from the DipCon and would feel a strong sense of betrayal at the dénouement. The views of France were supported by Ghana, Senegal, Switzerland, and Mexico. In response to these feelings, it was decided that the Plenary should adopt an appropriate resolution to hasten the process of consultations on audio-visual fixations so that a diplomatic conference could be held in about a year to conclude a treaty on audio-visual performances. Interestingly, the meeting concluded with a paean to WIPO by Lehman, an extraordinary *volte face* given his bitter criticism of WIPO. He said with a great amount of feeling that 'We are blessed with a great organization like WIPO. Not all organizations are like this'. In my daily journal I observed: 'Was the volte face just politeness at the funeral of the audio-visual or did Bogsch at Tolle's insistence broker the outcome? No idea'. Whatever, during the informal session of Main Committee-I on the night of 18<sup>th</sup> there was an outburst of indignation at the exclusion of audio-visual performances by quite a few African and Latin American countries. They were assuaged by an assurance that the DipCon would pass a resolution stating that in spite of the efforts made by most delegations the WPPT did not cover the rights of performers in the audio-visual fixations of their performance, and that WIPO should take all steps necessary for the adoption, before the end of 1998, of a Protocol to WPPT so as to cover audio-visual performances. On 20<sup>th</sup> evening the Plenary adopted such a resolution.<sup>394</sup>

---

394 Available at DipCon Records, Volume I at p.93.

# **Chapter 12: Endgame- I-Incorporation of Berne Plus and Rome Plus Provisions of TRIPS Agreement**

## **12.1 Introductory**

In all, three provisions of the TRIPs agreement needed to be incorporated in the WCT, they being the protection of computer programmes, protection of compilations of data, and rental rights for computer programmes and cinematographic works. Similarly, three provisions of the TRIPs agreement needed to be incorporated in the WPPT, they being a rental right for producers of phonograms, a longer term of protection for performers and producers of phonograms (50 years) than that provided by the Rome Convention (20 years) and 'application in time' of the extended term of protection on similar lines as the TRIPs agreement. As set out earlier (See Sections 8.3, 10.5), the Indian stand had been that where an obligation under the TRIPS Agreement was proposed to be incorporated in WCT or WPPT, it should be incorporated *as it is* in the treaty in question, without any modification of the scope or level of protection, and without any change in language lest the difference in language should lead to divergent interpretations of a TRIPs provision and its corresponding WCT or WPPT provision. It is also appurtenant to mention that soon after the TRIPs agreement was concluded and the Committees of Experts were about to resume their work in December 1994, Lehman wrote to DG, WIPO that 'as a general matter, we do not believe that it is necessary to duplicate TRIPs achievements in the Berne Protocol and New Instrument. We believe that it would be unnecessary, time-consuming and a potentially dangerous activity. We are seriously concerned that such an attempt could result in standards in WIPO that are different from those adopted in the GATT. Therefore, we prefer no inclusion of TRIPS standards in the Protocol and New Instrument, but if they are included, they should be unmodified so as to cause no confusion'.<sup>395</sup> But then, statements of statesmen are always contingent, and once the U.S. and EC ensured that Liedes was entrusted with the drafting of the Basic Proposals in departure of the custom of entrusting the International Bureau of WIPO with the drafting of treaties, and the Basic Proposals drafted reflected their points of view, the U.S. strongly supported the Basic Proposals

---

<sup>395</sup> Lehman's letter dated September 19, 1994, is in Annex II of Berne Protocol Questions (1994).

even when the scope of protection, not to speak of, the language of some of the provisions differed from that of the corresponding TRIPs provision as well as TRIPs plus provisions.

The provisions which caused the least problems were the provisions in Draft WPPT relating to the term of protection for phonograms, and ‘application in time’. In contrast, the provision which proved to be most contentious was the rental right in Draft WCT; the provisions relating to computer programs and collections of data lay in between the term of protection for phonograms and rental right. The term of protection provided to performers by Article 21 (1) of Draft WPPT practically corresponded to that of Article 14 (5) of the TRIPs agreement. The term of protection provided to producers of phonograms by Article 21 (2) of Draft WPPT was the same as that of Article 14 (5); however, Article 21 (2) differed from Article 14 (5) of the TRIPs agreement in that it proposed that the term of protection should be calculated with reference to the year in which the phonogram had been published instead of the year in which the phonogram was fixed. Only in the event of a phonogram being not published would the term be calculated with reference to the end of the year in which it is was fixed. This modification took note of the possibility that publication might not be co-eval with fixation.

Regarding ‘application in time’, Article 20.2 of the Rome Convention provides that no Contracting State is bound to apply the provisions of the Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State. In contrast to Article 20.2 of the Rome Convention Article 14 (6) the TRIPs agreement laid down that Article 18 of the Berne Convention would apply, *mutatis mutandis*, to the rights of performers and producers of phonograms. Consequent to Article 14 (6) a party to the TRIPs agreement is obligated to protect producers of phonograms and the and the performances fixed in phonograms existing at the moment of the entry into force of that agreement for a Member of WTO, exceptions being performances or phonograms which were earlier protected but such protection had lapsed because of the expiry of the term of protection. Article 26 of Draft WPPT sought to incorporate the TRIPs provision in regard to ‘application of time’.

## **12.2 Article 4 WCT (Computer Programmes)**

The proposals of Draft WCT in respect of computer programmes (Article 4) and compilations of databases (Article 5) differed from the corresponding provisions of TRIPs (Article 10 (1) and 10 (2)) in the language used, and as could be expected the difference in language gave rise to conflicting

interpretations. Articles 4 and 5 were first discussed in a formal session of the Main Committee I on 6<sup>th</sup> December; a consensus was reached in the informal session on 15<sup>th</sup> December and that consensus was formally approved in the formal session on 19<sup>th</sup> December.

Article 4 of Draft WCT read as ‘Computer programs *are* protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to *the expression of a computer program in any form*’ while Article 10 (1) of TRIPs agreement reads as ‘Computer programs, *whether in source or object code, shall be* protected as literary works under the Berne Convention (1971)’, (italics added to highlight the expression which came in for much discussion in the Main Committee-I).

Two issues loomed large in the discussions on computer programmes on 6<sup>th</sup> and 15<sup>th</sup> December. The first issue related to the scope of protection provided by Article 4 as compared Article 10 (1) of the TRIPs agreement as a result of the replacement of the clause ‘computer programs, whether in source code or object code’ in the TRIPs agreement by the clause ‘expressions of computer programs in any form’ in Article 4 of draft WCT. Lieder explained that that ‘it had not been the intention to differ in the substance from the corresponding provisions in the TRIPs Agreement, but rather to modernize the language in line with traditional copyright language’.<sup>396</sup> Quite a few agreed with this view and wondered why those insisting on the retention of the language of the TRIPs provision like me were making so much fuss. Ficsor justified the change of language by pointing out that the clause ‘in any form of’ in Article 4 of Draft WCT was taken word by word from Article 2(1) of the Berne Convention. Further, the clause ‘in any form’ would cover the possibility that, in the future, the source code/object code categorisation might become obsolete.<sup>397</sup> The ability of the clause ‘in any form’ to cope with future changes appealed to the U.S. There was yet another point of view, articulated by Tewari of Singapore, that that the scope of Article 4 was far too wide, and could be interpreted to include non-literal aspects of computer programs such as structure and organization, and that such aspects should be excluded from protection as they are akin to ideas; mathematical expressions should also be specifically excluded as they were outside the purview of copyright protection. Such an interpretation was all the more possible because there was no provision in the Draft WCT corresponding to that of Article 9 (2) of the TRIPs agreement which specified that ‘copyright protection shall extend to

---

<sup>396</sup> DipCon Records, Volume II, paragraph 82 at p. 646.

<sup>397</sup> Ficsor (2002), paragraph 4.18, p.475.

expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. Tewari's point of view was questioned by many who argued that a provision similar to that of Article 9 (2) of the TRIPs agreement would be redundant in WCT as WCT is a special agreement under Article 20 of the Berne Convention, and that the principle stated in Article 9 (2) of the TRIPs agreement 'had always been recognized and unquestionably applied in the Berne Convention as part of the concept of [literary] 'work', without any separate statement in the text of the Convention'.

Yet another issue which cropped up in the meeting of the Main Committee-I on 6<sup>th</sup> December revolved round the relative merit of the words 'are' and 'shall be' to be used in connection with the protection of computer programmes as literary works. The TRIPs agreement used the word 'shall be' while Article 4 of Draft WCT used 'are'. Those who preferred 'are' strongly believed that the definition of literary works in Article 2 of the Berne Convention, namely 'every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression' encompassed computer programmes. Therefore, they believed that a mandatory obligation that computer programmes shall be interpreted as a literary work was uncalled for and might give rise to an *contrario* interpretation that the Berne Convention did not protect computer programmes as literary works. Such an interpretation would be to the detriment of existing protection of computer programmes in countries which are party to the Berne Convention. Those who preferred 'shall be' were of the view that rather than rely on an extended interpretation of the definition of literary works it is better to explicitly state that. The latter view did not prevail. In the face of an unending debate on words, I could not help recalling the famous reply of Hamlet to the question of Polonius what he was reading: 'words, words, words'. Keeping in mind that words by themselves are meaningless I expressed the view, not in one go, but through a series of interventions during the discussions that what mattered to me was securing a political agreement first on what an article should convey, and once an agreement was reached an appropriate treaty language could be developed. If need be, the treaty language could be supplemented by an agreed statement which would indicate how the treaty language should be interpreted. I adopted a commonsensical approach to move forward in a seemingly theological debate<sup>398</sup> where divergent viewpoints emerged from divergent conceptions of copyright and national interest. If the intention was not to modify the scope and level of protection provided by TRIPs agreement that

---

398 Copyright has been called the area of law closest to theology, and an agonizing puzzle. Even the most basic issue of copyright remains a matter of fierce debate. Clark (1996) p.989.

intention could be made explicit through an agreed statement, even if the language in Article 4 was modified so as to use the normal copyright language. I found later that a similar commonsensical approach was used in the TRIPs negotiations to break impasses<sup>399</sup>. Whatever, I heard from my colleagues in the Indian delegation that my approach was greeted with jubilation by Group B country delegates as it indicated that I would not carry-on TRIPs *jihad* and might agree with the language of the Basic Proposals. Their jubilation was because any understanding or statement would be forgotten while the treaty language would remain forever and that it was that language which would be interpreted. S.C. Jain initially expressed scepticism about agreed statements but later complimented me for showing a way out of unending arguments on language. Mansur Raza of Pakistan ridiculed my approach and contended that trust in agreed statements instead of insisting on treaty language was rather naïve. The information conveyed by my colleagues proved to be right as at the end of the day when we were leaving the venue of the Main Committee-I, Jeff Kushan buttonholed me and asked me whether I would go by the language of Article 4 of Draft WCT if there were an understanding on the lines proposed by me. I told Kushan that I had not studied with Raymond Vernon for nothing; there was something like obsolescing bargain, the bargain struck today might fade away unless it is firmly secured against the possibility of obsolescence, against the possibility of the actors involved in negotiations fading away from the scene and their tacit understandings forgotten. The method of agreed statements would not work unless agreed statements were approved by the DipCon and become a part of the treaty just as the agreed notes of the TRIPs agreement are.<sup>400</sup> I pursued my idea with Ficsor; he was also sceptical initially but later warmed up to the idea. It was decided that the agreed statements would be formally adopted by the Main Committee-I and as well as by the Plenary and the agreed statements printed along with the text of the treaties. The value of agreed statements in

---

399 A case in point was the lengthy ‘theological’ discussions on enforcement provisions based on one’s own judicial systems. Lengthy discourses on the benefits of civil law versus common law, and vice versa could not yield negotiated solutions. Ultimately, the simple solutions that were found were based on the common principles underlying both types of law. See Gero (2015) p.97. Gero was a Canadian negotiator for TRIPs in the Uruguay Round.

400 Raymond Vernon was a professor in Harvard University renowned for his pioneering work on multinational corporations and their impact on national sovereignty. He developed the concept of *obsolescing bargaining* to explain the shift in the relationship between a multinational corporation (MNC) and the host country in the case of investment in natural resources like minerals and hydrocarbons. Once a MNC invests heavily in a country, its fixed assets become hostage to the host country. The latter can renege on contractual obligations and alter to its advantage the terms and conditions of the agreement subject to which the MNC invested in the country. He was also a member of the group that developed **the** Marshall Plan after World War II and later played a role in the development of the IMF and GATT.

cutting short unending arguments over the language of a provision was appreciated much once the informal sessions began and time was of the essence; an agreed statement came to be a useful way of building consensus and was widely resorted to. Except the agreed statements on the right of reproduction (Article 1 (4) of WCT and Articles 7, 11 and 16 of WPPT) every other agreed statement was unanimously agreed to in the Main Committee. No wonder that Ficsor called DipCon the 'Diplomatic Conference of Agreed Statements'. Agreed statements were resorted to by subsequent treaties like the BATP and Marrakesh Treaty. On the night of 20<sup>th</sup> December when the debate on the agreed statements on the right to reproduction went on and on, the interpretative value of an agreed statement, particularly of a statement approved by majority vote, was raised in the Plenary. In his authoritative commentary on the WIPO Treaties, Ficsor, after considering Article 31.2 (a) of the Vienna Convention on the Law of Treaties and the 1966 Yearbook of the International Law Commission, came to the conclusion that 'the agreed statements should be regarded to be quite strong and decisive sources of interpretation...it seems that the intention of the Diplomatic Conference was to make them [agreed statements] as formal as possible , since it followed practically the same method in their preparation and adoption as in the case of the provisions of the treaties. This certainly increases their interpretative value'. He also put forth the view that the interpretative value of even the agreed statements on the right to reproduction which were approved by voting is no less than that of other agreed statements which were unanimously adopted because: (i) Article 31.2 (a) of the Vienna Convention does not require consensus for the validity of agreed statements, and (ii) the majority by which the agreed statements on the right of reproduction were adopted was much larger than two thirds of the States presenting and voting , as required for such decisions under Article 9 of the Vienna Convention and by Rule 34(29)(iii) of the Rules of Procedure of the DipCon'.<sup>401</sup>

On December 11, 2019 India submitted a formal amendment to Article 4; the amendment suggested that Article 4 be reworded as 'Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies only to expressions of a computer program in source or object code'; in short, the reworded Article 4 was closer to Article 10 (1) of the TRIPs agreement. India was supported by Jordan, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka and Thailand.<sup>402</sup> On the very same day, I received a fax from NASSCOM stating that they came

---

401 Ficsor (2002), paragraphs 2.31-2.34 at pp. 61-4.

402 DipCon Records, Volume I, p.404.

to know from their American and EC counterparts that India was seeking to limit the protection to programmes 'in source or object code'. Limiting the protection to 'source or object code' would hurt the Indian software industry as there would be new forms of computer software which might not be encompassed by the expression 'source or object code'. Article 4 as drafted reflected the current state of Indian Copyright Law which made no reference to source or object code and should therefore supported. While I did feel that NASSCOM had a point I thought it prudent not to accept the proposal of NASSCOM as any departure from the TRIPs was figuratively a kiss of death which would jeopardise the acceptability of WCT back home. While India and some Asian countries moved an amendment to move Article 4 of Draft WCT closer to the TRIPs agreement Colombia and twenty other GRULAC countries moved an amendment to Draft Article 4 suggesting the replacement of the word 'are' by 'shall be' but retaining the clause 'expression of a computer program in any way'.<sup>403</sup> During the informal discussions U.S. suggested the addition of a new article (eventually named as Article 2) to make clear that protection would not extend to functional aspects of computer programmes, the article being 'copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such'. Along with the addition of such an article the U.S. suggested reformulation of the clause '*the expression of a computer program in any form*' by 'computer programs, whatever may be the mode or form of their expressions'.

After the fracas over the Partly Consolidated Texts on December 12<sup>th</sup>, the Main Committee-I resumed its work on December 15<sup>th</sup>. With just five days for the DipCon to conclude there was an all-round sense of urgency. Unless brisk progress was made in the Main Committee-I the DipCon would end in failure even if the standoff between the U.S. and E.C. over the audio-visual question ends in an agreement. It is recognition of this fact by all delegations which explains why minor differences such as those over the language of Article 4 were quickly resolved so that there could be greater attention to major issues like the digital agenda. In the informal session on December 15<sup>th</sup> a consensus was reached on the package which comprised:

- (i) Article 4 to read as, "Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression".

---

403 DipCon Records, Volume I, p.433.

(ii) A new article, Article 1bis (renumbered as Article 2 in the final text of WCT) to be inserted which read as, 'Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such', and

(iii) An Agreed Statement suggested by me was to be adopted, the Statement being 'the scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement'.

While a consensus was indeed reached a few Latin American countries like Ecuador objected to Article 1bis adopting the language of Article 9 (2) of the TRIPs agreement thereby establishing a linkage between WCT and the TRIPs agreement. While they had reservations about the Article, they did not wish to create any obstacles to the consensus on Article 4. Proaño Maya (Ecuador) went on record in the formal session of the Main Committee-I which approved Articles 1bis and 4 on 19<sup>th</sup> December by making the same point made in the informal session. Ecuador's stand is of a piece with the amendment to Article 1(1) of Draft WCT moved by Colombia and twenty other GRULAC countries seeking to emphasise that WCT was a special agreement under Article 20 of the Berne Convention and that it 'shall have no connection, either explicit or implicit, with other treaties or conventions that are directly or indirectly concerned with the same subject matter'.<sup>404</sup> Through this amendment these countries wanted to ensure that the enforcement provisions of the TRIPs, agreement and WTO DSM were not extended to WCT. Divergent opinions were expressed on the amendment in the formal meeting of the Main Committee-I. Kushan of the U.S. did not see the need for referring to other treaties; Gyertyánfy of Hungary felt that the apparent fear of linkage of the Treaty with the TRIPs Agreement was unfounded. During the informal discussions, there was consensus to simplify the language of the amendment moved by Colombia and adopt it along with a rider proposed by the U.S. that to the effect that the rights and obligations under other treaties would not be prejudiced. The consensus is reflected in the second sentence in Article 1(1) of WCT which reads, "this Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties'. It is difficult not to agree with Ficsor's comment in his treatise on the Internet Treaties that the Colombian

---

404 DipCon Records, Volume I, p.410.

amendment seemed to be unnecessary for in the absence of an explicit provision of WCT establishing a connection between WCT and the TRIPs agreement a relationship between WCT and the TRIPs agreement does not exist in law, and ‘no negative statement is needed for confirming a non-existing relationship’. That apart, TRIPs norms had been the starting point of developing some of the provisions of WCT and WPPT, Article 4 of Draft WCT being a good example.<sup>405</sup> On the flip side, a logical corollary of the stand that the WCT ought to have nothing to do with the TRIPs agreement was that the level of protection, of say rental right, could be fixed without reference to the TRIPs agreement, and at a higher level.

### **12.3 Article 5 WCT (Databases)**

The debate on Article 5 resembled that of Article 4. In the formal meeting of the Main Committee on 6<sup>th</sup> December,<sup>406</sup> Senegal, Nigeria, U.S., E.C., Israel, Russian Federation, Rumania, Switzerland, Venezuela, Hungary, Uruguay, Tunisia, Argentina, Cameroon and Poland supported the Article as drafted while India, Pakistan, Brazil, Thailand, Philippines, Indonesia and Tanzania preferred adoption of the TRIPs wording. The delegations favouring the TRIPs wording highlighted the differences between Article 5 and Article 10(2) TRIPs: (i) ‘collections’ of data instead of ‘compilations’ of data, (ii) ‘in any form’ instead of ‘whether machine readable or other form’, (iii) the use of the present tense ‘are’ as opposed to “shall be”, and (iv) any ‘rights’ as opposed to ‘copyright’. In my intervention, I said that the expression ‘in any form’ would give rise to possible ambiguity and felt that what is protected should be spelt out more specifically. I also asked for an interpretative statement that Article 5 intended to establish the same levels of protection for databases, no more and no less, than the TRIPs Agreement. Reinbothe of the EC stated that his Delegation favoured use of the word ‘right’ in Article 5 as opposed to the word ‘copyright’ used in the TRIPs Agreement, as the former was more consistent with the approach of the EC directive on the protection of databases under which rights other than copyright might apply to a collection of data. In a riposte to Reinbothe, I wondered if the Conference should work based on a Directive which applied only in a specific region of the world. Lieder clarified that as with Article 4 dealing with computer programmes that it had not been the intention to differ in the substance from the corresponding provision in the TRIPs Agreement, but rather to modernise the language in line with traditional copyright language. In

---

405 Ficsor (2002), paragraphs C 1.01-1.09 at pp. 418-20.

406 DipCon Records, Volume II, paragraphs 48-81 at pp.642-6.

the informal session on 15<sup>th</sup> December, a consensus was arrived at to replace ‘collection’ by ‘compilation’ and ‘rights’ by ‘copyright’, and to approve the agreed statement drafted by me. The Agreed Statement read, “the scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement’. In the formal meeting of the Main Committee-I I proposed that Article 5 and the Agreed Statement as agreed to in the informal session be approved, and they were.

## **12.4 Rental Right (Article 9 Draft WCT and Articles 10 & 17 Draft WPPT)**

Compared to the long, arduous battle I had to wage over the rental right, the skirmishes over Articles 4 and 5 were child’s play for what was at stake with the rental right was not a minor variation from the TRIPs provision because of changed wording but thwarting a long yearning of copyright experts for a full-fledged rental right. To recapitulate what was elaborated above, (See Sect. 7.2.2.3) the only feature common to the Article 9 of Draft WCT and Article 11 TRIPs agreement was the rental right in respect of cinematographic works; both of them waive the obligation of a Contracting Party to provide a rental right in respect of cinematographic works if the rental of such works does not lead to widespread copying that materially impairs the exclusive right of reproduction. There were three salient differences between Draft WCT and the TRIPs agreement provisions in respect of the rental right. First, unlike Article 11 of TRIPs agreement Article 9 of Draft WCT did not qualify the word ‘rental’ by ‘commercial’. Secondly, Article 9 (1) conferred on authors of literary and artistic works the exclusive right of authorising the rental of the original and copies of their works subject two conditions: (a) Contracting Parties may except specific types of works unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction, and (b) Contracting Parties may provide in their national legislation that the rental right does not apply in respect of architectural works or works of applied art. Thirdly, Article 9 imposed an obligation on Contracting Parties to provide a mandatory rental right not only in respect of computer programs (as Article 11 TRIPs agreement did) but also machine-readable compilations of data and other material, and musical works embodied in phonograms; the rental right in respect of these works was not subject to impairment test. The compilations of data covered by Article 9 included both intellectual creations entitled to be protected by Article 5 of Draft WCT but also compilations off data which were not intellectual creations and would be protected by the proposed Database Treaty, and unlike Article 11 of the TRIPs agreement Article 9 of Draft WCT did

not exclude from the purview of rental right a computer programme which was not the essential object of the rental.

Turning to Draft WPPT, there were two differences in the rental right conferred on performers (Article 10 of Draft WPPT) and producers of phonograms (Article 17 of Draft WPPT) on the one hand and Article 14 (4) of the TRIPs agreement on the other. First, unlike Article 14(4) of TRIPs agreement Articles 10 and 18 of Draft WPPT did not qualify the word 'rental' by 'commercial'. Secondly and most importantly, Article 14 (4) of the TRIPs agreement allows a Member Country to retain a system of equitable remuneration indefinitely subject to a material impairment test while Articles 10 (2) and 17 (2) of Draft WPPT allowed a Contracting Party with a system of equitable remuneration of performers to maintain the system only *for a period of three years* from the date of entry into force of WPPT (Italics added).

The provisions of Draft WCT and WPPT relating to rental right were first discussed in the formal session of the Main Committee-I on 9<sup>th</sup> December 1996.<sup>407</sup> A measure of the uphill task that countries which wanted the scope and rental rights to be the same in TRIPs agreement can be gauged by the fact that out of the 26 delegates who spoke only four- all Asian countries (India, Tewari of Singapore, Thailand and the Philippines)- expressed themselves in favour of the position: 'TRIPs and no further'. Banphot Hongthong of Thailand who often lightened up the proceedings of the Main Committee-I jocularly remarked that his country was still in the honeymoon period with the TRIPs agreement, and as such not eager to scout for other partners. Speaking on behalf of the GRULAC countries Fernando Zapata López of Colombia expressed support to the broad principles of rental right set out in Draft WCT and WPPT. Reinbothe of EC supported by Hungary, Albania, the Czech Republic, Romania, Slovenia, the former Yugoslav Republic of Macedonia, Norway, Switzerland, Burkina Faso and Cote d'Ivoire went one step further and proposed conferring a mandatory rental right in respect of *all* literary and artistic works other than architectural works and works of applied by amending Article 9 (2) so as to remove the power of Contracting Parties to except specific types of works subject to an impairment test , and including *all* works embedded in phonograms instead of musical works only. Only through such an amendment would the objective of increasing the protection of authors achieved. Ms. Bouvet of Canada, Andrew Wierzbicki of New Zealand and Kushan of the U.S. opposed the proposal of the EC to include *all* works

---

407 DipCon Records, Volume II, paragraphs 172-212, pp. 657-61

embedded in phonograms instead of only musical works on the ground that most of the works embedded in phonographs would be musical works, and that if all works embedded in phonograms are covered there might be conflict between the rights given to copyright owners and the rights given to producers of phonograms. Australia, however, would not mind literary works embedded in phonograms being covered.

While Draft WPPT defined 'rental of any phonogram' to be 'any transfer of the possession of a copy of a phonogram for consideration for a limited period of time', Draft WCT had no definition of 'rental'. Many suggested insertions of a definition of 'rental' in Draft WCT; when Creswell of Australia pointed out that the lack of definitions in Draft WCT was in keeping with the tradition of the Berne Convention not to have definitions, most of the delegates suggested qualifying 'rental' by 'commercial'. Ms. Bouvet of Canada opposed the extension of the rental right to collections of data or other material in machine-readable form while Kushan and Creswell of Australia wanted only databases which are intellectual creations and would be protected by Article 5 of Draft WCT should be covered. Creswell made the valid point that when there was no consensus on the consideration by the DipCon of the Database Treaty, it would be premature to extend the mandatory rental right to databases which would be protected by that treaty.

Quite a few such as Creswell of Australia and Zapata López of Colombia wanted that Article 9 should specifically spell out that a computer programme which itself was not the object of rental was outside the purview of the rental right. Okamoto of Japan said Japan could be flexible regarding the works which would be covered by WCT. However, in regard to Draft WPPT, he opposed the proposal for the elimination of the system of equitable remuneration within three years of entering into force of WPPT because the TRIPs agreement allowed countries having a system of equitable remuneration to continue it indefinitely subject to impairment test. Further, elimination of the system of equitable remuneration would seriously upset the existing balance between neighbouring rights owners and rental businesses and would create problems.

In keeping with the diverse views expressed in meeting of the Main Committee-I (including the diverse views on the audio-visual question), nine amendments were moved for Article 9 of Draft WCT including the Indian amendment (to replace Article 9 by a provision based on Article 11 of the TRIPs

agreement),<sup>408</sup> eight for Article 10 of Draft WPPT<sup>409</sup> and five for Article 17 of Draft WPPT<sup>410</sup>. Two amendments stand out among the panoply of amendments. First, the amendment of Cameroon, Mali, Morocco, Niger, Senegal and Tunisia (CRNR/DC/78) went even further than the EC in extending the rental right beyond what Article 9 of Draft WCT envisaged; it proposed doing away with clauses (2) and (3) of Article 9 so that all literary and artistic works including architectural works and works of applied art would be covered by a rental right without any qualification. Maybe it was a negotiation ploy to knock out the 'TRIPs and no more' position; to mix the metaphor, if you try shoot at the sky, you may hit the bird on the tree. Secondly, the U.S. proposed that the copies referred to Article 9 (1) of Draft WCT are permanent copies. The American amendment was in keeping with the fact that rental right is an exception to the doctrine that the distribution right is exhausted after the first sale; consequently, rental right like distribution right applies only to fixed copies that can be put in circulation as tangible objects. To jump the story, the Main Committee-I and later the Plenary of the DipCon adopted an Agreed Statement concerning Article 6 (Distribution Right) and Article 7 (Rental Right) of WCT as adopted by the DipCon clarifying that 'copies' and 'original and copies' mentioned to in those two articles 'refer exclusively to fixed copies that can be put into circulation as tangible objects'. A similar agreed statement was adopted in respect of the rental right under WPPT.

The rental right was discussed in the informal session of the Main Committee-I first on 16<sup>th</sup> December, and again on 17<sup>th</sup> December. The broad consensus reached in the second informal session was considered by the formal session of the Main Committee-I on 19<sup>th</sup> December- not once but thrice as the consensus was questioned by Peru, and eventually Article 7 of the final version of WCT<sup>411</sup> which offered the same protection as Article 11 of the TRIPs agreement was adopted by overwhelming vote. To elaborate, I had been in continual contact with the American and E.C. delegations, and sometimes participated in the informal discussions between them over contentious issues like the right of reproduction. On every possible occasion, I conveyed to Kushan and Reinbothe that the rental right was a make-or-break issue for India, and that it would be impossible for India to accede to a WCT with a

---

408 DipCon Records, Volume I, pp.411,418,424,433,465,484,487,496.

409 DipCon Records, Volume I, pp.398,399,414, 416,435,466,490,494.

410 DipCon Records, Volume I, pp.398, 435, 466, 490, 494.

411 Article 9 of Draft WCT (dealing with rental rights) was renumbered as Article 7 following the decision to drop Articles 6 (non-voluntary licenses) and 7 (dealing with reproduction) of Draft WCT.

rental right whose scope goes beyond that in the TRIPs agreement. On 16<sup>th</sup> December, when I reached the Conference Venue, after the lunch I hosted for Lehman at Forum Hotel, I ran into Reinbothe; he gave me the latest version of the American proposal on the audio-visual question, and said it was unacceptable to EC and that if there were no further concessions the EC would force a vote. He asked me about my preference. I told him that I hoped that a compromise acceptable to all would be reached, and if that a compromise could not regretfully be reached out, we would carefully weigh all the alternatives on the table. We would not summarily rule out any alternative including the alternative of reservations suggested by EC. As I moved out and was moving around in the foyer, I bumped into Kushan; he pulled me aside, and told me that the U.S. would stand aside on the rental right, and he would also speak to Ms. Bouvet of Canada. I was thrilled and took it, wrongly as it turned out, strong American support for Indian position on the rental right. When the discussions on the rental right began later in the night, I made a strong pitch for not going beyond what the TRIPs agreement.

Even during the TRIPs agreement an attempt was made to introduce a general rental right; however, that attempt failed, and the TRIPs agreement limited the rental right to computer programmes, cinematographic works, and phonograms. The TRIPs agreement was scheduled to be reviewed only in 2000; if the DipCon introduced a general rental right it would eliminate the additional transition period of four years which the TRIPs agreement had provided to the developing countries. International agreements are negotiated in good faith; to use the WIPO forum to enhance an obligation under the TRIPS Agreement before the period set in that Agreement for transition and review would be an act of bad faith. There is also the related and larger question of the role of WIPO in the post-TRIPs era. WIPO and WTO have overlapping jurisdiction over IPRs, and unless each one of them respect the law and understandings arrived at in the other organisation the field of IPRs would descend into anarchy. The impairment test which figured in Article 11 of the TRIPs agreement was nowhere as yet tested, and to introduce it for almost all literary and artistic works as Article 9 of Draft WCT proposed would be a leap in dark. The attempt to introduce a near-general rental right which covers most of literary and artistic works would go against the tradition of Berne Convention; it had been the convention to revise the Berne Convention once in twenty years, and slowly expand the scope of a provision from convention to convention rather than precipitately expand the scope in one go. The Berne Convention does not have a rental right. A very limited rental right was introduced for the first time in an international treaty only about two years ago, and to put in place a near-

universal right was a precipitate move contrary to the tradition of the Berne Convention. In developing countries like India, the TRIPS agreement is extremely controversial, and that being so there is no way that India and quite a few other developing countries would find it possible to accede to a treaty which imposed obligations higher than those of TRIPs agreement. I also made the point that a week was lost on procedural wrangling and distribution of posts; time left was rather short and the agenda rather vast. Rather than reopen the TRIPs negotiation the scarce time was better utilised to discuss and secure a consensus on agenda not covered by the TRIPs agreement such as the digital agenda and expansion of performers' rights. I was strongly supported by Tiwari of Singapore and Jaime Yambao of the Philippines. I was not surprised by the strong pitch for a near-general rental right made by Gyertyánfy of Hungary or Youm Diabe Siby of Senegal ; I was in for a shock when, rather than extend support to the Indian position as I thought Kushan told me, Ms. Bouvet of Canada began by saying it is difficult to disagree with the plea of three countries, and then went on to reiterate her stand that Article 9 of Draft WCT was acceptable if collections of data or other material in machine readable form were excluded. Worse, Kushan said that the U.S. noted the concern expressed by India and others about going beyond the TRIPs agreement and felt that it would be expedient and efficient to go by the Canadian proposal. I was greatly upset by what Kushan said; in retrospect, I misunderstood our conversation earlier in the day to mean that the U.S. would not only support us but get the Canadians also to support us. I could understand the Francophone proposal to have a general rental right, but it made no sense to me why databases should be excluded as proposed by Canada. Whatever, I sought several clarifications: what was the rationale for excluding databases? WIPO had no DSM; nor did the treaties under consideration propose one. Who was to decide how the impairment test was to be administered and whether the results of the impairment test justified the provision of a rental right? Lieder suggested a way out: there could be two levels of rental right, one for countries which wished to adhere to the TRIPs agreement and a higher level for others. He suggested that India, U.S., and African countries meet and reach a compromise. I shot back acidly saying that before it took up the rental rights issue Main Committee-I spent full four hours over the rights management information, but a short shrift was being given to a subject of interest to Asian developing countries. The underlying question is whether the treaties should be universal or not, and that question ought to be discussed by the full house. Lieder then offered another suggestion, namely introducing the option of reservation for countries which do not wish to opt for the larger scope of rental right provided by WCT. Ficsor interjected to say that it was not desirable to

have two levels of rental rights, and Kushan observed that the suggestions made by the Chairman were dangerous. Lieder moved to the next item, namely the right of communication, saying that we should keep the issue pending. The battle was over for the day. The only silver lining in that rather depressing session was the unexpected support of the Indian position by Wael Aboulmagd of Egypt; he told the Main Committee-I clearly that he had no mandate to go beyond the TRIPs provision. As we came out after a while Valsala Kutty told me that my performance reminded her of *Velichappadu* –ferocious oracles in Kerala who flaunt sharp swords and strike terror. She told me of what Mary Ann Richards of Trinidad told her: your leader goes on changing arguments but steadfastly pursues the objective. We ran into Ficsor as we were leaving; he asked me to keep fighting and said that reservation was a last option.

The battle was resumed next morning. I had long realised that in international conferences what matters is not the logic of one's case or passionate presentation but the ability to influence other delegates through courting, offer of quid pro quid or subtle and sometimes not-so-subtle display of power to hurt and harm. I ran into Abeysekera of Sri Lanka who was coordinator of the Asian Group and sought his help as the rental right issue was delicately perched. He began talking to his counterparts in the African Group and GRULAC; I too joined them; Coenraad Johannes Visser of South Africa who had been speaking for the African Group in the Main Committee-I also joined us. Then I buttonholed Kushan and Reinbothe and told them I expected a quid pro quid as we fully cooperated with them on the digital agenda even though we could have argued that developing countries have no experience of the new digital technologies and that therefore the DipCon was premature. Reinbothe agreed that he was prepared to go along with the TRIPs position so long as 'works embedded in phonograms' was covered by the rental right; removal of the qualifier 'musical' before 'works' was, however, opposed by the U.S. Lieder, as usual, opened the discussion on rental rights in the informal session by saying there were two schools of thought one advocating adherence to the TRIPs agreement, and the other a rental right with a larger scope. There was also the question whether two levels could co-exist. He wanted to know whether there were further reactions. I decided to respond but with a changed tack. I began by bantering that I had a very simple solution: just accept my plea and we can move on. The house burst into laughter. I went on to say I mulled over other suggestions, woke up bosses back home out of their beds, and consulted them on the various suggestions only to be told bluntly nothing but adherence to TRIPs provision could be 'sold' back home. This was X-mas season; that being so, we should understand each other's concerns, and

should not return home with treaties which were. Nothing prevents a Contracting Party to provide a right with vaster scope or higher level of protection. The TRIPs agreement was negotiated and concluded recently; it was too early to revise the provisions through another treaty in another forum. I referred to the cartoons which were brought out recently by the Japanese Compact Disc Rental Commerce Association and widely circulated among the delegates; these cartoons vividly brought out the iniquity of the TRIPs provision about the system of equitable remuneration being retracted by the Draft WPPT. A cartoon character was bewildered why an agreement reached two years ago was being retracted. I went on to say that this was not the last diplomatic conference where everything ought to be settled for eternity. The fast changing technological and commercial practices of the digital age would necessitate more frequent diplomatic conferences. If a harmonious solution was not possible the Asian group would not keep quiet but carry the battle to the formal session of the Main Committee-I and the Plenary so that our views were on record. We would not let our voices be silenced.

To my great surprise, but like manna from heaven, Visser spoke on behalf of the countries of the African group except the five Francophone countries which moved an amendment to delete 9(2) and 9(3) and thereby confer a general rental right covering all literary and artistic works without exception and without any condition ; he said that the African countries realised the concern of India, and it would be a great pity if the rental rights issue was to become a barrier to the successful conclusion of the DipCon. Then it was the turn of China to accept the standpoint of India and Singapore. Tiwari interjected to say that those who negotiated the TRIPs would be shocked to learn that the package on rental rights they developed was being thrown overboard. The bandwagon of support to India was suddenly halted by a counterattack by the Zapata López of Colombia and Carlos Teysera Rouco of Uruguay who argued that the TRIPs agreement was an irrelevant consideration because in contrast to TRIPs agreement which was specific and limited to trade WCT was about strengthening the rights of authors. A general rental right had been a long-standing demand of authors, and hence WCT should fulfil that demand., Truth to be told, I could not understand how delegates to an international conference could have a narrow, tunnel vision, not looking beyond enhancing authors' rights.

As the ding-dong went on, Ficsor suddenly gave the Committee a piece of his mind. Throwing up his hands and raising his voice he wondered what was going on; Africa, Asia and China were against a rental right different from the TRIPs provision. The treaty would not go through over their opposition; while in

Main Committee-I a simple majority was enough the adoption of a treaty in the Plenary would require a majority of two-thirds of the Member Delegations present and voting. The countries opposing a rental right different from the TRIPs provision had enough votes to block a treaty. If they block a treaty 1.5 million Swiss Francs spent on organising the DipCon would go down the drain. There should be some priorities. The TRIPs agreement could not be reopened. The intervention by Ficsor was manna from heaven; many delegates give considerable weight to the opinion of WIPO Secretariat. Yambao of the Philippines agreed with Ficsor and added that 'it is one third trying to insist its will on two-thirds'. Silva Soares of Brazil said that Brazil's copyright law provided a rental right with vast scope; however, he was willing to accept the scope provided by TRIPs in a spirit of compromise. Reinbothe came in saying that problems ahead were much bigger than rental right; he added to say that Article 9 of Draft WCT provided a mandatory rental right for '*musical works embedded in phonograms*', and he wanted all works and not merely musical works to be covered and claimed that provision was not TRIPs plus in that Article 14 of the TRIPs agreement specifically provided that '*other right holders*' along with producers of phonograms a rental right in respect of phonograms '*as determined in Member's law*' (italics added). The Indian amendment to Article 9 was drafted by S.C. Jain and Gopalakrishnan, and the drafting of the amendment came in for praise from Creswell and Ficsor. Ficsor confirmed that the provision regarding phonograms in Article 9 of Draft WCT was not TRIPs plus. However, Kushan objected to the deletion of 'musical' from 'musical works'. Neither Reinbothe nor Kushan would give in, and after a while I suggested that the clause 'as determined in the national law of Contracting Parties', which is analogous to 'as determined in Member's law' of the TRIPs agreement, be added. My suggestion was appreciated by Lieder and Kushan as helpful, and that was it. The approval of the 'TRIPs and no further' automatically applied to the Japanese demand for retention of the system of equitable remuneration for rightsholders subject to an impairment test. In order to satisfy Kushan the Committee also approved an agreed statement to the effect that the national law of a Contracting Party may choose not to offer the exclusive right of rental to authors in respect of their works embedded in phonograms. This agreed statement has the clause 'as determined in the national law of Contracting Parties' in Article 9 (1) (iii).

I was recipient of congratulations from many, and I left the Committee venue in a jubilant mood. However, it turned out that only the battle was over but not the war. Unexpectedly, to everyone's surprise, when the Main Committee formally met on December 19<sup>th</sup> to approve the consensual decisions

of its informal sessions and took up Article 9 Rubén Ugarteche Villacorta of Peru demanded that Article 9 of Draft WCT be retained and added that the Peruvian legislation did not discriminate among works in any way.<sup>412</sup> Thereupon, Lieder deferred the discussion on the Article for further negotiations to reach a consensus.<sup>413</sup> When consideration of the rental right was again taken up in the afternoon.<sup>414</sup> Carlo Govoni of Switzerland expressed his concern at the wording ‘as determined in the national law’, which led to different interpretations. Lieder adjourned the meeting again stating that there was no consensus on Article 9 yet, and that, if that remained the case a vote would be needed. Later in the day the Main Committee-I formally approved Articles 10 and 17 of Draft WPPT with the modification that as in Article 14 of TRIPs agreement a Contracting Party ‘that, on April 15, 1994, had and continues to have in force a system of equitable remuneration could continue the system’ subject to an impairment test<sup>415</sup>. When later, Article 9 of Draft WCT was taken up Proaño Maya of Ecuador proposed that the words ‘as determined’ in the expression ‘as determined in the national law of Contracting Parties’ be preceded by the word ‘or’ so that national legislation was given a certain degree of freedom to specify the categories of work covered by the right of rental. Lieder clarified that Article 9 reflected the common denominator for the majority of Delegations and that it could not be expected that a higher level of protection would be internationally acceptable. Ugarteche Villacorta of Peru said that he recognised that the objective was to reach agreement on minimum rights, but he nevertheless preferred the text of the Basic Proposal on the right of rental be maintained. He demanded that any other proposal should be put to the vote as an amendment. When Lieder called for a vote Zapata López of Colombia asked for an adjournment of five minutes for consultation; Lieder responded by saying that according to the Rules of Procedure once the procedure for voting was initiated it could not be interrupted. The Indian text with the editorial modifications made by Lieder won overwhelmingly with sixty-six votes in favour and six against. Those who voted in favour included China, the Asian and African Groups and all the developed countries, including the U.S. and the EC. It was on this occasion that in the DipCon the EC first exercised its proxy vote on behalf of its Member-States. Eighteen Latin American countries abstained rather than disturb the consensus and vote with

---

412 DipCon Records, Volume II, paragraphs 805-8, p. 757.

413 DipCon Records, Volume II, paragraphs 840- 846, pp.761-2.

414 DipCon Records, Volume II, paragraphs 854-860, pp.761-2.

415 DipCon Records, Volume II, paragraph 854-61, pp.761-2.

dissenters from their region. The war over the position TRIPs and no further was handsomely won.

Appendix II presents at a glance Article 9 of Draft WCT, the article as finally approved (Article 7 of WCT) and the Agreed Statement concerning that Article; Appendix III is a similar presentation in respect of the rental right of performers and producers of phonograms.

## **Appendix II: Rental Right of Authors- Proposal, Final Text and Agreed Statement**

### **Basic Proposal (Draft WCT)**

#### **Article 9**

#### **Right of Rental**

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs, collections of data or other material in machine readable form, and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art’.

### **Final Text: Article 7 WCT**

#### **Right of Rental**

(1) Authors of

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, *as determined in the national law of Contracting Parties*,<sup>416</sup> shall enjoy the exclusive right of authorizing *commercial* rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

---

416 Suggested by me to resolve the difference in the positions of the U.S. and E.C. regarding works embedded in phonograms

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.'

### **Agreed Statements**

Concerning Articles 6 and 7: '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 objects'.

'Concerning Article 7: 'It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement'.

## **Appendix III: Rental Right of Performers and Producers of Phonograms- Proposal, Final Text and Agreed Statement**

### **Basic Proposal (Draft) WPPT**

#### **Article 10**

#### **Right of Rental**

‘(1) Performers shall enjoy the exclusive right of authorizing the rental of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium, even after distribution of them by or pursuant to authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms, may *maintain that system for a period of 3 years from the entry into force of this Treaty*.<sup>417</sup> (Italics added)

N.B.: Article 17 relating to the right of rental of producers of phonograms is similar to Article 10.

### **Final Text: Article 9, WPPT**

#### **Right of Rental**

‘(1) Performers shall enjoy the exclusive right of authorizing the *commercial* rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, *may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers*.<sup>418</sup> (Italics added)

---

417 Difference from Article 14(4) of TRIPs agreement.

418 Change as compared to Draft 10 of WPPT so as to incorporate the condition stipulated by Article 14(4) the Trips provision

N.B.: Article 13 relating to the right of rental of producers of phonograms is similar to Article 9.

**Agreed Statement**

**‘Concerning Articles 2(e), 8, 9, 12, and 13:** 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 objects’.

# **Chapter 13: Endgame-II-Provisions Other than TRIPs Incorporation & Digital Agenda**

## **13.1 Provisions Common to WCT and WPPT**

### **13.1.1 Right of Distribution (Article 8, Draft WCT and Articles 9 and 16, Draft WPPT)**

The right of distribution figured in the DipCon in two contexts: the first the attempt to introduce a general distribution right in both Berne and Rome Conventions, and the second digital transmission. The proposal to introduce a general distribution right would be discussed in this Chapter and digital transmission in the next Chapter. The introduction of a general distribution right is inextricably intertwined with the highly contentious issue of exhaustion. (See Sect. 7.2.3.1). The Main Committee-I discussed the Articles dealing with right of distribution in Draft WCT and WPPT together on 6 December 1996;<sup>419</sup> the discussion and the arguments adduced for and against international exhaustion were a rehash of what had gone by during the TRIPs negotiations and meetings of the Committees of Experts. In my intervention, I made it crystal clear that the Indian Government could not be a party to any treaty which contained the importation right. I followed up the strong statement with a formal proposal to amend the articles so as to delete the alternatives proposing national exhaustion and an importation right. Singapore proposed a similar amendment. Australia, Canada, and New Zealand went one step further and sought amendment proposing a deletion altogether of the articles dealing with the right of distribution in both treaties. The American amendments proposed to clarify that the distribution of copied mentioned in articles dealing with the distribution right were permanent copies; this amendment sought to ensure that the distribution right did not extend to temporary copies of digitalised works which might be made in the storage of computers or those made during the course of digital transmission.<sup>420</sup>

The delegations were sharply divided between those who favoured international exhaustion and those who favoured national/ regional

---

419 DipCon Records, Volume II, paragraphs 130-163 at pp.652-655.

420 The Indian amendment (p.485) covered Article 8 of Draft WCT and Articles 9 and 16 of Draft WPPT; so, did the amendment of Australia, Canada and New Zealand (p.495). Singapore (p.395-7) and the U.S. (465-6) proposed separate amendments for WCT and WPPT) even though their import was same. Page number mentioned in the parentheses is the page where the amendment can be found in DipCon Records, Volume I.

exhaustion. The U.S. and some GRULAC countries like Brazil, Uruguay and Venezuela and some African countries like Cameroon, Kenya, Mali, Morocco and Tunisia favoured national exhaustion. EC and its Member States favoured regional exhaustion, and Asian countries, Australia, Canada, New Zealand, Argentina, Mexico, Colombia, Tanzania international exhaustion. The American preference for national exhaustion and the EC preference for regional exhaustion can readily be explained in terms of their economic interest. Thus, U.S. was a leading exporter of cultural products like films and recorded music, and national exhaustion would allow American firm to profitably practice price discrimination and set prices in different national markets according to the principle of what the traffic can bear; parallel imports permitted by international exhaustion would thwart efforts to practice price discrimination. Regional exhaustion would facilitate EC function as a single economic entity tweaking international trade in cultural goods to its advantage. Preference for national or international exhaustion by countries which are not important players in international trade in cultural goods can only be ascribed to their copyright philosophy. Thus, those who opted for national exhaustion believe that copyright being a territorial right exhaustion also should be by national territory.

With the audio-visual question having been taken out of the agenda of DipCon on 17 December 1996, the informal session of Main Committee-I on 18 December 1996 was devoted to find a treaty language on exhaustion with which the delegations as a whole would be comfortable with. The treaty language had to be different from that of Article 6 of the TRIPs agreement which excluded the issue of exhaustion from the purview of dispute settlement because unlike the TRIPs agreement WCT and WPPT provided a distribution right. The treaty language developed in the informal consultations was generally acceptable to all and found a place in the WCT and WPPT adopted by the plenary of the DipCon. Thus, Clause 2 of Article 6 of WCT (dealing with right of distribution) provides that:

‘Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the (distribution) right ... applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author’.

This clause was incorporated *mutatis mutandis* in the articles dealing with the distribution right of performers (Article 8, WPPT) and of producers of phonograms (Article 12, WPPT).

During the informal session of the Main Committee-I on 18 December 1996. Lieder made an ex-officio statement regarding Articles 8 (distribution right) and 9 (rental right) of WCT: 'As used in these Articles, the expression 'copies and originals' being subject to the right of distribution and the right of rental, refer exclusively to fixed copies that can be put into circulation as tangible objects'. As there was no objection to the Chairman's statement it was adopted as an agreed statement in relation to Articles 8 and 9 of WCT. A similar statement was made regarding Articles 2(e) [definition of publication], 8 [right of distribution in respect of performers], 9 [right of rental in respect of performers], 12 [right of distribution in respect of producers of phonograms], and 13 [right of rental in respect of producers of phonograms] of WPPT.<sup>421</sup>

In spite of the consensus when the Main Committee was considering the Agreed Statements relating to WPPT Australia, Brazil, New Zealand and Singapore went on record to assert that Article 8 of WCT and Articles 9 and 16 of WPPT would not in any way affect the conditions which national legislation might provide for in respect of the right of distribution provided for in those Articles.

### **13.1.2 Enforcement Provisions (Article 16, Draft WCT and Article 27, Draft WPPT)**

Article 16 of the Draft WCT and Article 27 of the Draft WPPT presented two alternatives (See Sect. 7.2.3.2). The first made no reference to the TRIPs agreement, listed the enforcement provisions of the TRIPs agreement in an Annex to the treaty and declared that that Annex was an integral part of the Treaty. The second alternative specifically referred to the enforcement provisions of the TRIPs agreement and obligated the parties to apply *mutatis mutandis* the enforcement provisions of the TRIPs agreement. Many countries opposed any reference to the TRIPs in any form even though they became parties to the TRIPs agreement and had accepted the obligations on enforcement imposed by that TRIPs agreement. The U.S. did not want any obligations to be imposed by WCT and WPPT as it believed that any new rights created by the Treaties would be subject to the same enforcement regimes that had been or would have been created by the WTO Members, and that a significant risk of creating confusion in the development and interpretation of the TRIPs provisions on enforcement, even if identical provisions were incorporated, *mutatis mutandis*, into WCT and WPPT. A number of developing countries wanted enforcement to be dealt with at national level while a number

---

421 DipCon Records, Volume II, paragraphs 992 and 1014, pp.777 and 780.

of countries such as the GRULAC countries and the EC were particular that the treaties should have basic enforcement provisions as without such provisions modern IPR treaties would be incomplete. As a general compromise it was eventually agreed to introduce a provision similar to Article 41(1) of the TRIPs agreement without making any reference to the TRIPs agreement.

## **13.2 Provisions Specific to WCT**

### **13.2.1 Non-voluntary Licenses (Article 6, Draft WCT)**

Article 6 (1) of Draft WCT proposed to do away within a period of three years non-voluntary licenses permitted for broadcasting and rebroadcasting under Article 11bis of the Berne Convention; Article 6(2) was a similar provision in respect of sound recordings permitted under Article 13(1) of the Berne Convention (See Sect. 7.3.1). In her opening address to the Plenary on 5<sup>th</sup> December Ms. Teresa Drozdowska of Poland expressed reservations about the abolition of certain non-voluntary licenses proposed by Article 6 of the Draft WCT. She stated that there was a need to maintain the general possibility of non-voluntary licensing under Article 11bis (2) of the Berne Convention, which entitled national legislators to determine the conditions under which the broadcasting and rebroadcasting rights of authors might be exercised. She stated that it had always been understood that non-voluntary licensing would only be introduced if necessary and only in exceptional cases, and that the author's right to obtain equitable remuneration in such cases was expressly guaranteed.<sup>422</sup> In his opening address to the Plenary on 5<sup>th</sup> December Salah Abada, Chief Copyright Section, UNESCO stated that Article 6 of the Draft WCT on the abolition of the system of compulsory licenses for recording musical works was satisfactory from the point of view of legal orthodoxy. However, those involved in administering rights were well aware of cases in which such an abolition could have the opposite effect on the protection of the legitimate rights of authors. If there was no effective collective administration of rights, the abolition of compulsory licenses in connection with broadcasting rights, might also lead to practical difficulties in exercising recognised rights.<sup>423</sup>

Article 6 of Draft WCT came up for consideration in the formal meeting of the Main Committee-I on 6<sup>th</sup> December 1996.<sup>424</sup> Support for the Article as drafted was feeble being limited to EC and Chile; Norway was supportive but at the same time would not mind a longer transition time for abolition of non-

---

422 DipCon Records, Volume II, paragraphs 456-7, p.622.

423 DipCon Records, Volume II, paragraph 463, p. 623.

424 DipCon Records, Volume II, paragraphs 84-115, pp. 647-650.

voluntary licenses. Mexico was supportive because the limitations contained in Mexican legislation were based on Articles 9(2) and 10 of the Berne Convention and not on Articles 11 bis (2) and Article 13. China, India, Pakistan, Poland, Former Yugoslav Republic of Macedonia, and Singapore expressed the view that Article 6 as a whole should be deleted. Tiwari of Singapore put forth the interesting legal point that Article 6 was violative of Article 1(4) of Draft WCT which required even Contracting Parties that did not accede to the Berne Convention to comply with Articles 1 to 21 (excepting Article 6bis) and the Appendix of the Berne Convention; the obligation so cast included Articles 11bis and 13 of the Berne Convention which permitted compulsory licenses. Albania, Australia, Colombia, Hungary, Morocco, Senegal, and the U.S. supported Article 6 (1) relating to non-voluntary licenses in respect of broadcasting. Except the few who supported both Articles as a whole no country supported Article 6 (2). In fact, Article 6 (2) was vehemently opposed by Albania, Australia, Colombia, Egypt, Hungary, and the U.S. Creswell of Australia and Kushan made the point that neither sound recording producers, nor authors, nor the music publishing industry nor any other interest demanded the abolition of non-voluntary licenses for the recording of musical works. Ms. Luljeta Metohu of Albania argued that maintenance of non-voluntary licenses was the only way for authors to obtain equitable remuneration if negotiations with producers of phonograms were unsuccessful. Many countries such as Egypt, Israel, Mali, Morocco, Republic of Korea, and Singapore pleaded for a longer transition period. Lieder correctly summed up the mood of the Committee by saying that there seemed to be broad support for deletion of paragraph (2) of Article 6, but there was also some support for deletion of paragraph (1). He went on to say that as 'Article 6 related to a bedrock principle of copyright, the principle that copyright is a bunch of exclusive rights', he favoured leaving the Article aside for a later decision of the Committee, to permit informal negotiations among Delegations in an effort to find consensus. The Partly Consolidated Text of Treaty No.1 dated 12 December 1996, prepared by Lieder, reflected the mood of the Committee. It deleted Article 6(2) of the Draft WCT and extended the transitional period for the abolition of non-voluntary licenses in respect of broadcasting right from three to five years.<sup>425</sup>

In all five amendments were proposed to Article 6 of the Partly Consolidated Text of Treaty No.1.<sup>426</sup> The amendment proposed by Israel

---

425 DipCon Records, Volume I, p.440.

426 DipCon Records, Volume I, pp.395-6, 398, 465, 485, 497-8.

suggested that at the time of accession to WCT a country may declare that it would not apply the provisions of Article 6. The amendment proposed by China proposed deletion of Article 6, failing which a Contracting Party may, as suggested by Israel, declare at the time of accession to WCT that it would not apply the provisions of Article 6. The Singapore amendment also suggested deletion of Article 6, and in the alternative extending the transitory period to seven years. The Korean amendment suggested that at the time of accessing to WCT a Contracting Party may declare that it would delay the implementation of Article 6 by four more years. The American amendment suggested deletion of Article 6. During the informal session of the Main Committee these countries pressed for their amendments, and countries like India pressed for the deletion of Article 6 altogether. No consensus emerged in the informal consultations of the Main Committee-I

Article 6 came up for discussion in the formal session of Main Committee-I on December 19<sup>th</sup>. Shen Rengan reiterated China's demand for deletion of Article 6 altogether. He recalled that in the informal consultations his Delegation, supported by several other Delegations, had pleaded for deletion of the entire Article 6. He pointed out that in many developing countries broadcasting was a popular and important form of dissemination of information and means of enjoyment of literature and art, and that non-voluntary licenses for broadcasting, as established in the legislation of his country, were helpful in that respect and even beneficial to the fair remuneration of authors and other concerned parties. Thereupon, Lieder adjourned consideration for building consensus. The next day morning, Article 6 was again taken up for consideration. Portugal strongly supported the Chinese demand. As there was no consensus, Lieder put the Article to voted, and with 54 votes in favour, 8 votes against and with 9 abstentions, the Committee approved the deletion of Article 6 altogether.<sup>427</sup>

### **13.2.2 Term of Protection for Photographic Works (Article 11, Draft WCT)**

Article 11 of Draft WCT proposed that the minimum term of protection of photos would be the lifetime of the author and fifty years after his death, and fifty years from making available of the work in case of anonymous or pseudonymous photographic work (Article 7.3.2). Article 11 of the Draft WCT was first considered by the formal session of the Main Committee on 6<sup>th</sup> December 1996. EC, Hungary, Albania, Bulgaria, Croatia, the Czech Republic,

---

427 DipCon Records, Volume II, paragraphs 872-876, p.763.

Poland, Slovenia, and the former Yugoslav Republic of Macedonia, Kenya, New Zealand, Nigeria, Norway, Thailand, the Philippines, and the U.S. supported Article 11 as drafted. Silva Soares of Brazil, however, wanted a reference to the Berne Convention be deleted, and Article 11 be reworded as ‘in respect of photographic works, the term of protection granted under this Treaty shall be, at least, the life of the author, and 50 years after his death’. Tanzania also expressed its preference for a freestanding provision applying the life-plus-50-years formula. Liederer correctly summed up the discussion saying there was general agreement on the content of Article 11; however, an alternative construction was suggested by two delegations. The exact wording could be settled later. After a brief discussion in an informal session the text was simplified, and the simplified text was approved unanimously in the formal session of the Main Committee on December 19<sup>th</sup>, 1996.

### **13.3 Provisions specific to WPPT**

#### **13.3.1 Moral Rights**

All the issues that came up for consideration in the Committee of Experts (See Sect. 7.4.2) came up again *de novo* in the deliberations of the Main Committee.

In the formal session of the Main Committee-I on December 10, 1996,<sup>428</sup> the interventions of Startup of the United Kingdom and Ophir of Israel were the most cogent and reasoned among those opposed to moral rights. Startup said his Delegation was in favour of performers achieving appropriate recognition for their work; however, recognition could better be guaranteed through the exercise of economic rights, and through contractual arrangements than through moral rights. Moral rights as set forth by Article 5 of Draft WPPT were very wide in their scope, and their implementation would be impractical. Even in those countries where moral rights were granted to performers, their application was often limited by practical considerations, an example being the impossibility of identifying many performers in an orchestra whose performance was included in a broadcast. In countries where moral rights were not granted, such as the United Kingdom, there was appropriate recognition of performers. He expressed his Delegation's belief that the Treaty should not include a right which could not be strictly applied in practice. For all these reasons, moral rights should not be included in the Treaty. Ophir said that WPPT was concerned with granting certain minimum rights of which the most

---

428 DipCon Records, Volume II, paragraphs 403-51, pp.691-7.

important were the economic rights of performers. Introduction of moral rights into WPPT would 'cloud or even confuse the dominant issue of performers' economic rights'. A clear distinction must be maintained between authors' rights in the area of copyright to which moral rights might properly pertain, and of neighbouring rights, such as performers' rights, where such rights were not relevant. It would be a mistake to treat moral rights as one of the minimum requirements of WPPT, and therefore Article 5 should be removed in its entirety. Singapore argued that the Rome Convention did not recognize moral rights, Article 6bis was excluded from the provisions of the Berne Convention which the Member Countries were obliged to fulfil under the TRIPs agreement, and there was no discussion during the TRIPs negotiations for conferring moral rights on performers. That being so, it was premature to reopen the TRIPs agreement hardly two years after it was concluded. In fact, Singapore formally moved an amendment proposing deletion of Article 5 in its entirety.<sup>429</sup> GRULAC countries supported a proposal of Argentina which was similar to that it proposed in the Committee of Experts. The Argentine proposal was based on four principles. First, the right of a performer to demand that his name be mentioned should be reaffirmed and this right should exist even after the death of the performer. Secondly, where omission of a performer's name was dictated by the manner of use of the performance the performer could not demand that his name be mentioned. Thirdly, in the case of orchestras, choirs or groups with a collective designation, the collective name could be indicated on the copies of the fixation of their performances; however, for the purposes of collective administration or collective bargains identification of the names of performers omitted should be made available by other means. Lastly, artists should be given the right to oppose any type of unauthorised distortion, mutilation or other modification *only if the modification was seriously* prejudicial to the performer's reputation.<sup>430</sup> Canada proposed an amendment to Article 26 of Draft WPPT (relating to application in time) whereby Contracting Parties might limit the application of Article 5 to performances which occurred after the coming into force of this Treaty in that Contracting Party.<sup>431</sup>

A substantial majority of delegations supported Article 5 of Draft WPPT; those who supported contended that there were still many performers who attached much greater importance to their honour and reputation than to

---

429 Apart from the amendments of Argentina and Singapore there were quite a few amendments proposed to Article 5; however, all these relate to the issue of audiovisual performances.

430 Argentina formally proposed an amendment. DipCon Records Volume I, pp.413-4.

431 DipCon Records, Volume I, p.425.

purely material considerations, and that moral rights created a climate of respect for the work of performers, which was even more necessary in the digital environment. Finland, Norway, and Sweden sought to allay doubts about the practicality of moral rights by referring to their long experience with moral rights. The national law in Sweden, for example, provided moral rights for performers for thirty-five years; that provision was found to be useful and did not give rise to any problems. However, even among those who were in favour of Article 5 there were quite a few like Belgium and the Netherlands which were particular that ‘moral rights protection should exist, however, only under the condition that the exercise of those rights should not be unreasonable, and that such conditions would be a matter for national legislation’. New Zealand was not opposed to Article 5; however, it sought a possibility of making a reservation to Article 5 as a whole in view of the fact that it introduced moral rights only recently for authors and directors, and did not as yet have ‘a sufficient period of experience to know how well the new provisions were functioning’. As ever the issue of waivability and inalienability of moral rights proved to be controversial, and sharply divided the delegations.

In the informal sessions of the Main Committee-I <sup>432</sup> full agreement could not be reached. The support for Article 5 was so overwhelming and any restrictions on the rights of paternity and integrity so vehemently opposed that the Argentine proposal was rejected in all respects but one, namely that mention of name may be omitted where omission is dictated by the manner of use of the performance. The Argentine proposal to limit the right of integrity to changes which seriously prejudiced the reputation of the performer was rejected and so was the proposed condition of a possible prejudice to the honour of the performer. The rejection of the Argentine proposal meant that the predominant number of delegations wanted the basic structure of Article of Draft WPPT to be retained and at best a few changes by way of additions and omissions be made. Views were divided over the question whether moral rights should be limited to musical performances or extended to all ‘aural’ performances. The proposal of New Zealand to make a reservation in respect of the whole Article 5 was rejected. There was sharp division over the waivability and inalienability of moral rights; as a compromise it was decided to not to specifically address the issue of waivability and inalienability in Article 5; however, given that Article 5 of Draft WPPT was modelled after Article 6bis of the Berne Convention, Article 5 had to be interpreted using the established

---

432 A crisp account is provided by Reinbothe and von Lewinski (2015), paragraph 8.5.9, pp.304-5.

interpretation of Article 6bis. Going by the established interpretation of Article 6bis, a performer may choose to waive those rights and even chose not to exercise his moral rights. And further, a Contracting Party has complete freedom of choice as to the means used to implement Article 5 of Draft WPPT so long as the scope and level of protection are not lower than those provided by Article 5. The Canadian amendment to allow a Contracting Party to limit the application of moral rights to performances which occurred after the entry into force for that party was accepted. (Article 22 (2) of final text of WPPT)

Disagreements continued even after the negotiations in the informal meetings of the Main Committee-I with the result that in the Draft WPPT which emerged from the informal meetings there were two alternate formulations of Article 5(1) and the entire Article 5 was placed within 'brackets'. Informal negotiations continued till the last minute; it was only on the last day of the DipCon that Article 5 was taken up for consideration in the formal session of Main Committee-I.<sup>433</sup> In that session, Startup of United Kingdom said his delegation took note of the strong desire of other Delegations to see an international treaty for the first time which provided for the moral rights of performers, and, therefore, after intensive informal discussions with other Delegations, his Delegation, in a spirit of compromise, was prepared to lift its reservation on Article 5, subject to the scope of moral rights be expanded from musical performances to 'live aural performances or performances fixed in phonograms' and the Canadian amendment to Article 26 (application in time) accepted. The British proposal was accepted by consensus, and so was Article 5 with the appropriate changes suggested by the United Kingdom. After Article 5 was approved Kemper of Germany sought to reopen the issue and sought an amendment to Article 3 (national treatment) so that the obligation to grant moral rights was not dependent on the nationality of a performer. As a matter of procedure Kushan objected to the German proposal; Md. de Montluc of France supported the proposal made by the German Delegation; however, what was proposed was not a basic provision she suggested that it be embodied in a simple statement. The German proposal was put to vote, and the Main Committee decided not to reopen Article 5 as approved by 21 votes in favour and 37 votes against and with 10 abstentions.

Appendix IV presents at a glance the Basic proposal and the text finally adopted

---

433 DipCon Records, Volume II, paragraphs 893-7, pp.765-6.

### **13.3.2 Right of Modification (Articles 8 and 15 of Draft WPPT)**

In the meeting of the Main Committee-I on December 9, 1996, the right of Modification was taken up (See Sect. 7.4.3.2) <sup>434</sup>. Australia, Austria, Germany, Hungary, Ireland, Japan, Pakistan, Senegal, Singapore, Thailand and the United Kingdom) spoke against a separate right of modification as that right duplicated the right of reproduction because phonogram cannot be modified without its reproduction. Hence modification of a phonogram was different from translation or adaptation of works for which the Berne Convention provided rights in Articles 8 and 12 respectively. The right of reproduction was probably a better vehicle to protect the rights of performers and producers of phonograms against modifications. Startup of United Kingdom vehemently argued against a right of modification because 'of its uncertain scope and the unclear relationship with the right of reproduction'. To the extent that the new right went beyond the scope of the reproduction right, 'it would extend rights into areas covering very much less substantial parts of works than were usually considered to be covered by existing rights'. Further, the new right would also seem to have implications for the field of copyright and would risk creating an imbalance (between copyright and performers' rights). However, Belgium, France, Italy, Luxembourg, Norway, Romania, Spain and Sweden spoke in favour of providing for a right of modification in order to cover any possible situation in which digital or other technological manipulation might be used to circumvent traditional notions of reproduction. Kushan said his Delegation 'could accept deletion of the proposed right of modification provided it was clearly understood that an active sampling or modifying of a portion of a sound recording would constitute an act that fell within the scope of the reproduction right'. In response to a doubt expressed by Youm Diabe Siby of Senegal Chairman Liedes drew a distinction between the rights of modification, reproduction, and integrity. The rights of modification and reproduction were a part of the economic rights for performers and producers of phonograms while the right of integrity was a moral right of performers. However, there might be, cases where the right of modification could and should be considered separately, for example, 'where a live performance was modified without fixation while still being performed, since the right of reproduction would not apply in such a case'. In contrast to the

---

434 DipCon Records, Volume II, paragraphs 221-45, pp. 664-6.

rights of modification and reproduction the right of integrity was not an economic but moral right.

During the informal sessions of the Main Committee a consensus gradually grew in favour of deleting the right of modification, and in the formal session of the Main Committee on December 20<sup>th</sup> Articles 8 and 15 were deleted with the understanding that the right of reproduction met the need that would be provided by a right of modification.<sup>435</sup>

### **13.3.3 Right to Single Equitable Remuneration (Articles 12 and 19, Draft WPPT)**

Article 12 of the Rome Convention grants to performers and to producers of phonograms the right to a single equitable remuneration if their phonogram is published for commercial purposes or if a reproduction of such phonogram is used for broadcasting or any communication to the public. Articles 12 and 19 Articles of Draft WPPT are corresponding provisions with the difference that while Article 12 of the Rome Convention deals with both performers and producers of phonograms Article 12 of Draft WPPT deals with performers only and Article 19 with producers of phonograms. On 10<sup>th</sup> December 1996, the Main Committee-I discussed the articles of Draft WPPT dealing with single equitable remuneration.<sup>436</sup> Basically, there were five strands of thought. The first was the proposal of Switzerland to grant a right of single equitable remuneration right for commercially published videograms; however, given that audio-visual fixations were excluded for the scope of WPPT the proposal fell through. The second strand was a proposal made, among others by the EC and Australia that Article 12 and 19 should be merged as in Article 12 of the Rome Convention; a right to single equitable remuneration separately for performers and producers of phonograms made no sense. This was accepted by Chairman who acted upon the suggestion and provided for a single article dealing with the right to single equitable remuneration (Article 20a) in the *Partially Consolidated Draft* for WPPT. The third strand was a suggestion by Australia that the right should not be limited to phonograms published for commercial purposes. This suggestion was also in line with the demand of African countries that folklore should be protected. Folklore was being exploited on a large scale by broadcasting organisations based on non-commercial recordings. The African countries were keen to ensure that such use of folklore by broadcasting organisations should be covered by a right to equitable

---

435 DipCon Records, Volume II, paragraphs 918-21, 925-6, p.767-8.

436 DipCon Records, Volume II, paragraphs 359-402, pp.684-91.

remuneration. The Australian suggestion of not limiting the right to single equitable remuneration to commercially published phonograms would have met the African demand in respect of folklore. However, few delegations were willing to accept an increase in the Rome Convention's scope of the right to single equitable remuneration. In the informal sessions of the Main Committee, it was decided to meet the demand by adopting an Agreed Statement in regard to Article 15 of the final text of WPPT<sup>437</sup> which clarified that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain. It may also be mentioned that as compared to the Rome Convention WPPT expanded the scope of the definition of performers so as to bring in expressions of folklore. The fourth strand was the question as to whether the right to single equitable remuneration should be an exclusive right without any provision for reservations. Many delegations such as the EC, Hungary and Switzerland wanted to do away with reservations; however, many countries such as Australia, Canada, Singapore, and the U.S. strongly demanded the retention of the provision for reservations. The fifth strand was the question of conferring an exclusive right on near-demand subscription services as with on-demand services. The fourth paragraph of Articles 12 and 19 of Draft WPPT excluded from the scope of reservation "any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee". The American delegation which was the delegation most keen on conferring an exclusive right on near-demand subscription services as with on-demand services felt that the provision relating to subscription services (Articles 12 (4) and 19(4)) was at the same time over-inclusive and under-inclusive, over-inclusive in that "it did not permit sufficient flexibility for countries to provide appropriate exemptions to the right of remuneration with respect to certain types of subscriptions", and under-inclusive in that "it failed to give adequate protection for those types of subscription services which, by nature of their programming structure, warranted exclusive rights".<sup>438</sup> The U.S. submitted a detailed proposal in lieu of paragraph (4) in Articles 12 and 19.<sup>439</sup> The American proposal seemed to be

---

437 The *Partly Consolidated Draft of WPPT* merged Article 12 and 19, merged the articles dealing with the right to single equitable remuneration in Draft WPPT; the merged article was Article 20a. In the final text of WPPT Article 15 dealt with the right to single equitable remuneration of performers and producers of phonograms.

438 DipCon Records, Volume II, paragraph 365, p.685.

439 DipCon Records, Volume I, pp.428-9.

more tailored to the American situation, and was not comprehensible to most delegations which had no idea of different types of subscription services. Most delegations also felt that the U.S. was too country-specific for an international instrument. As a result of informal negotiations, the U.S. agreed to drop its proposal if an agreed statement relating to Article 15 (the article in the final text of WPPT which combined the right of single equitable right for performers and producers of phonogram) were adopted. The Agreed Statement adopted by the DipCon stated that 'Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations and have therefore left the issue to future resolution'. Implicit in this agreed statement is the fact that WPPT only provides provide for a minimum level of protection, and, therefore, Contracting Parties may grant more extensive rights to performers and producers of phonograms (or the same rights in a broader field. It follows that the absence of provision regarding subscription services does not prevent the U.S. to cover those services in domestic legislation.

All in all, Article 15 of WPPT (final text) is broadly similar to the proposals made in the Basic Proposal (See Sect.13.3.3) as well as Article 12 of Rome Convention; however, there are noteworthy differences between Article 15 of WPPT and Article 12 of Rome Convention. It is a common element of Article 12 of Rome Convention and Article 15 of the WPPT that they apply to phonograms published for commercial purposes, and both do provide for reservation. Both the Rome Convention and the WPPT speak about broadcasting and communication to the public, but the concepts of broadcasting and communication to the public are not the same in the two instruments. The Rome Convention defines 'broadcasting' and 'rebroadcasting' separately in Article 3(f) and (g)); the definition of 'broadcasting' under Article 2(f) of the WPPT includes rebroadcasting. Thus, while Article 12 of the Rome Convention does not include re-broadcasting Article 15 of WPPT does. Article 15(1) of the WPPT strikes a blow for performers by categorically specifically providing that both performers and producers of phonograms must be beneficiaries of the single equitable remuneration; unlike Article 12 of Rome Convention, it does not leave to national legislation or contract whether the performer or producer of phonograms or both are entitled to single equitable remuneration. It is appurtenant to mention that Article 4(2) of WPPT allows Contracting Parties to

apply material reciprocity towards another Contracting Party that has made reservation under Article 15(3).

It may be recalled (See Sect.13.3.3) that the issue of single equitable remuneration was a contentious issue in the Rome and Brussels Conference for revision of the Berne Convention as well as the adoption of the Rome Convention. History repeated itself in the DipCon even though thirty-five years had passed since the Rome Diplomatic Conference. Reinbothe and von Lewinski aptly concluded that ‘the right to remuneration, is in economic terms, among the most important economic rights of performers and producers and phonograms’ and yet ‘on the international level, it was not yet possible to provide this right as a minimum right without the possibility of reservation’.<sup>440</sup>

### **13.3.4 National Treatment**

The scope of national treatment obligation under Rome Convention is limited to the minimum rights provided by the Convention (See Sect. 2.4). Hence, a Contracting State is not obliged to extend to performers, producers of phonograms and broadcasting organisations of other Contracting States any of the rights or levels of protection it offers over and above the rights provided by the Rome Convention. This interpretation of the obligations under the Rome Convention was followed in the TRIPs agreement (in respect of the rights of performers, producers of phonograms and broadcasting organisations) as well as WPPT (See Sect. 3.4).

It may be recalled, (See Sect. 7.4.5) that so sharp were the difference of opinion in the Committee of Experts over the issue of national treatment that the Committee shied away from discussion, and concluded that the degree of agreement reached on the substantive provisions of the New Instrument was not yet sufficient to tackle the issue of national treatment, and the Chairman of the Committee proposed that national treatment could be discussed at the next level of preparatory work. Given the way informal consultations before the DipCon such as the ‘15+15+1+1’ consultations were organised there was no discussion at all of the extremely contentious issue of national treatment issue in WPPT, not to speak of informal negotiations and attempts to build consensus.

At the DipCon, a *battle royale* flared up between the U.S. on the one hand and EC and its Member States and Switzerland on the other over the specifics of national treatment under WPPT. The U.S. fought for full national

---

<sup>440</sup> Reinbothe and von Lewinski (2015), paragraph 8.5.14, p.393.

treatment while the opposite side wanted the narrower scope of national protection obligations under the Rome Convention to be left intact. While the U.S. argued that WPPT being a new treaty it was not necessary to go by the Rome Convention with which WPPT was not linked the opposite side made much of the fact the national laws dealing with the rights of performers, producers of phonograms and broadcasting organisations were more heterogenous than national copyright laws; thus, some covered phonograms under copyright while others under related rights and there was a great deal of variation in the scope and levels of protection. In short, copyright laws are distinct from laws dealing with performers, producers of phonograms and broadcasting organisations. That being so, unlike should not be treated alike. To treat national treatment obligations under Rome Convention and WPPT on par with those under Berne Convention was illogical. Discussions and negotiations in the informal setting of Main Committee-I failed to generate a consensus. Consequently, the matter was considered again on the last day and resolved by voting

In the formal meeting of the Main Committee on 20<sup>th</sup> December 1996, <sup>441</sup> Reinbothe unequivocally put across the E.C. position. The scope of the national treatment in WPPT should be different from the that in WCT. The national treatment obligation under Article 4 of Draft WPPT corresponded to national treatment obligation under the Rome Convention and the TRIPS agreement; only the rights explicitly provided for in Draft WPPT should be covered by national treatment. National treatment should not, extend to, for example, remuneration schemes for private copying and other features not expressly guaranteed in Draft WPPT. E.C. was particular that material reciprocity should apply to the scope of protection going beyond the level stated in Draft WPPT. Those who were opposed national treatment in WPPT going beyond that in the Rome Convention and the TRIPs agreement made much of the fact that national laws dealing with the rights of performers, producers of phonograms and broadcasting organisations were more heterogenous than national copyright laws; thus, some covered phonograms under copyright while others under related rights and there was a great deal of variation in the scope and levels of protection. In short, copyright laws are distinct from laws dealing with performers, producers of phonograms and broadcasting organisations. That being so, unlike should not be treated alike. To treat national treatment

---

441 DipCon Records, Volume II, paragraphs 593-614 at p.725-30. The observation of Reinbothe of E.C. is at paragraph 609, p. 730, and that of Kushan of the U.S. at paragraphs 601 and 613, pp. 728 and 730 respectively

obligations under Rome Convention and WPPT on par with those under Berne Convention was illogical.

Kushan put forth the American position equally unequivocally. The national treatment in WPPT should be cast in very general terms along the lines of the Berne Convention. Article 4 of the Draft WPPT did in fact impose a broader obligation about national treatment than what was assumed by the E.C. delegation. As WPPT was a new treaty it was not necessary to go by the Rome Convention; further, WPPT was not linked with the Rome Convention the way WCT was with the Berne Convention. It was very important, especially in a treaty like the one under consideration, to have a forward-looking and expansive provision on national treatment. As it was impossible to foresee technological developments and to know what kind of protection schemes might have to be offered in the future to ensure the interests of right holders, the most appropriate formulation for national treatment in WPPT was an expansive and inclusive concept of national treatment. He rejected any solution confined to material reciprocity.

The U.S and EC formally proposed amendments outlining their positions. The underlying dispute' between the U.S. and the EC in respect of rights not conferred by WPPT such as remuneration right for private copying, 'reflected the economic interests of the respective parties' See Sect. 4.4). The U.S. position of 'unrestricted scope of national treatment...corresponded to the interests of the U.S. as a major music exporter' while the Member States of the E.C. import more musical recordings than they export, and 'had an interest in restricting the scope of national interest as far as possible'.<sup>442</sup> The Swiss proposal was a rewording of the amendment proposed by EC in order to state the import of the amendment more clearly. Switzerland proposed replacement of Article 14 (National Treatment) by the following Article:

(1) Each Contracting Party shall accord to nationals of other Contracting Parties as defined in Article 3(2) the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and to the right to equitable remuneration provided for in Article 20a of this Treaty.

(2) The obligation provided under paragraph ( 1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 20a(3) of this Treaty'.

---

442 von Lewinski (2008), paragraph 17.44, p.445.

Kushan moved an amendment to the Swiss proposal inserting the following paragraph, after paragraph (1):

'The obligation of paragraph (1) shall extend to remuneration systems for private copying of phonograms in a digital form, except that Contracting Parties shall only be required to extend protection to nationals of another Contracting Party to the degree that the other Contracting Party has established such a remuneration system'.

Procedural wrangling was witnessed in the matter of voting also, not surprising that the question of national treatment was inextricably linked with the perennial of the remuneration right for private copying (See Sect.3.4; Sect. 4.4; Sect. 7.4.5). As the American proposal was the farthest from Article 4 of draft WPPT, it was put to vote, and the proposal was overwhelmingly defeated with 4 votes in favour, 60 votes against and with 17 abstentions. The Swiss proposal was then put to vote, and it was overwhelmingly approved with 88 votes in favour, 2 votes against and with 4 abstentions. Between themselves, the TRIPs agreement and WPPT put their official imprimatur on the interpretation that the national treatment obligation with related rights is narrower than that with copyright.

Appendix V presents at a glance the proposals, key amendments regarding national treatment in WPPT.

### **13.3.5 Limitations and Exceptions**

As mentioned above, (See Sect. 7.2.1.6) Articles 13 and 20 of Draft WPPT allowed a Contracting State to provide limitations it provides in its copyright law; however, they did away with listing specific exemptions and subjected the limitations to and exceptions from rights granted to performers and producers to the Three-Step test. As with single equitable remuneration the Main Committee suggested that separate articles dealing with performers' rights and producers of phonograms should be replaced by a single Article dealing with the rights of performers and producers of phonograms. Accordingly, in his *Partly Consolidated Text for WPPT* Liedes combined Articles 13 and 20 and replaced them by Article 20b. When Article 20b was adopted it was and renumbered as Article 16. However, two agreed statements were approved both in respect of limitations and exceptions in digital media. These are dealt with in the next Chapter on the endgame in respect of digital agenda.

## **Appendix IV: Moral Rights: Proposal and Final Text**

### **Basic Proposal (Draft WPPT)**

#### **Article 5**

#### **Moral Rights of Performers**

'(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall

*Alternative A:* , as regards his musical performances, have the right

*Alternative B:* have the right

to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed'.

### **Final Text: Article 5, WPPT**

#### **Moral Rights of Performers**

'(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his *live aural performances or performances fixed in phonograms*, have the right to claim to be identified as the performer of his performances, *except where omission is dictated by the manner of the use of the performance*, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his ~~honour or reputation~~'. (Text struck through- Article 5 **Draft** WPPT was deleted in the final text; text in italics addition to the text in Article 5 Draft WPPT)

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed’.

**Article 22 (Corresponding to Article 26 of Draft WPPT)**  
**Application in Time**

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party’.

## **Appendix V: National Treatment in WPPT: Proposals, Key Amendments and Final Text**

### **Basic Proposal (Draft WPPT)**

#### **Article 4**

#### **National Treatment**

‘(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2)<sup>443</sup>, the treatment it accords to its own nationals with regard to the *protection provided for by this Treaty*’ (Italics added).

‘(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty’.

#### **Swiss Proposal**

‘(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to *exclusive rights specifically* granted in this Treaty and to the *right to equitable remuneration* provided for in Article 20a of this Treaty (emphasis added).

(2) The obligation provided under paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 20a(3)<sup>444</sup> of this Treaty.

In addition, Article 20a(3), second sentence, should be deleted’.

#### **Final American Proposal**

In Swiss Proposal:

---

443 Article 3(2) defines nationals of other Contracting Parties of WPPT who are eligible for national treatment. Nationals of other Contracting Parties are ‘those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention’.

444 Article 20a of the *Partly Consolidated Text of WPPT* confers on performers and producers of phonograms a right to single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. Article 20a(3) allows a Contracting Party to make a reservation and declare that it would apply Article 20a(1) in respect of certain uses, or that it would limit their application in some other way, or that it would not apply these provisions at all. The sentence that Switzerland proposed to delete in Article 20a(3) stated that in availing the facility of reservation a Contracting Party may apply the provisions of Article 16(1) (a)(iv) of the Rome Convention. Reference to Rome Convention was no longer necessary as WPPT came to be self-contained.

(1) Insert between paragraphs (1) and (2) a new :

The obligation of paragraph (1) shall extend to remuneration systems for private copying of phonograms in a digital form, except that Contracting Parties shall only be required to extend protection to nationals of another Contracting Party to the degree that the other Contracting Party has established such a remuneration system

(2) Renumber paragraph (2) as (3)'.

**Final Text: WPPT**  
**Article 4**  
**National Treatment**

'(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty'.

## Chapter 14: Endgame-III- Digital Agenda

### 14.1 Digital Transmission

Article 10 of Draft WCT and Articles 11 and 18 of Draft WPPT (See 7.2.1.3) were discussed by the formal session of the Main Committee-I on December 9, 1996.<sup>445</sup> Four main points were made during the discussion. First, Kushan of the U.S. stressed the understanding ‘which had never been questioned during the preparatory work and would certainly not be questioned by any Delegation participating in the Diplomatic Conference that [the rights of communication to the public, and the making available right] might be implemented in national legislation through application of any particular exclusive right, also other than the right of communication to the public or the right of making available to the public, or combination of exclusive rights, as long as the acts described in those Articles were covered by such rights’.<sup>446</sup> In other words, Article 10 should be interpreted as if it offered a full umbrella solution (See Sect. 7.2.1.3) even though the provision as such offered only a half-umbrella solution. The discussions over the digital transmission in both the formal and informal sessions of the Main Committee-I in the informal session of the Main Committee-I (December 18, 1996) were not as contentious as those on rental right and the right of reproduction. As the American interpretation was not questioned by any delegation in effect Article 8 of WCT (as Article 10 of the Draft WCT became after deletion of a few articles and renumbering) offered an ‘umbrella solution’. Thus, in the U.S. the right of reproduction and the right of public performance (corresponding to the right of communication to the public under Article 8 of WCT) are applied in a combined way to cover digital, interactive transmission.<sup>447</sup> Secondly, Creswell pointed out that Article 10 of Draft WCT had two objectives: first, provide for a general right of communication thereby filling the gaps in the coverage of the right of communication by Berne Convention, and secondly provide a making available right to cover interactive, on-demand transmissions. He proposed a rewording of Article 10 to clearly bring out the two objectives; Australia also proposed a formal amendment to that effect.<sup>448</sup> During the discussions in the informal session the Australian amendment was widely and successfully opposed

---

445 DipCon Records, Volume II, paragraphs 299-324, p.675-9.

446 DipCon Records, Volume II, paragraph 301 at p.675.

447 Ficsor (2002), paragraph C 8.15, p.503.

448 DipCon Records, Volume I, p.434.

because many delegations considered making available to be an aspect of the communication right.<sup>449</sup> The third major point made by Kim of Korea was the need to clarify that what counted for interactive on-demand transmissions was the initial act of the making available of a work, not the mere provision of server space, communication connections or facilities for the carriage and routing of signals. The African Group and Singapore formally submitted amendments to Article 10 of Draft WCT and Article 11 and 18 of Draft WPPT to that effect.<sup>450</sup> As mentioned above there was hectic lobbying by intermediaries to ensure that there were not fastened with liability for contributory infringement if they are used by an infringer to transmit the infringed material (See Sect. 9.4). During the discussions on digital transmission in the informal sessions of Main Committee-I it was agreed to adopt an Agreed Statement in respect of Article 10 of Draft WCT (Article 8 of final text of WCT) in lieu of specific provision in the Articles. The first sentence of the Agreed Statement stated, 'It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention'. This sentence was incorporated because of the intense lobbying by interest groups representing intermediaries; however, it did not directly address the issue of secondary liability<sup>451</sup> as during the informal discussions it was felt that the issue of liability should be dealt with by separate laws rather than by WCT and WPPT. The fourth point made by Gyertyánfy of Hungary was that the element of choice by the receiver was central to interactive, on-demand transmission, and where there was no element of choice making available right did not apply. The Notes to Article 10 of Draft WCT made it clear that the second part of Article 10 of Draft WCT dealing with making available right did not apply to broadcasting. Gyertyánfy argued that a similar interpretation should be made in respect of the corresponding provisions, Articles 11 and 18 of Draft WPPT; Pay-Tv and Pay-Radio programmes do not have an element of choice and therefore should not be covered by the making available right provided by Articles 11 and 18 of Draft WPPT. The interpretation put forth by Gyertyánfy was taken to be correct; the making available right does not cover 'webcasting or simulcasting of predetermined programs over the Internet, be it

---

449 Reinbothe and von Lewinski (2015), para 7.8.8 at p.127.

450 DipCon Records, Volume I, pp.445-6. The Singapore amendment (is at p.396.

451 Ficsor (2002), paragraph 8.24 at pp. 509-10; WIPO Guide (2003), paragraphs 8.19-21 at p.211. It should be mentioned, however, that Pamela Samuelson expressed the view that 'this Agreed Statement was the normative foundation for subsequent legislative limitations on ISP liability for infringing acts of their users about which they lacked knowledge and over which they had no control'. See Senate Committee Hearings, 2020-Pamela Samuelson Statement, p.2.

as original programmes or as unchanged retransmissions of traditional broadcast programmes over the digital network; Pay-Tv or pay-radio, pay-per-use services; multi-channel services; and near-on-demand services that repeatedly and in regular intervals broadcast particular works or recordings'.<sup>452</sup>

The provision of a general communication right proposed in Article 8 of the final text WCT is without prejudice to the existing rights and obligations under Articles 11(1)(ii), 11 *bis*(1)(i) and (ii), 11 *ter*(1)(ii), 14(1)(ii) and 14 *bis* (1) of the Berne Convention. It follows that WCT could not be interpreted so as to preclude the possibility of non-voluntary licenses being granted in respect of broadcasting. In order to put the matter beyond doubt, when the Main Committee-I took up for consideration the Agreed Statements in respect of WCT Visser of South Africa insisted that the Chairman make a declaration to the effect that the right of communication would have no application to the possibility of making statutory licenses with regard to rebroadcasting of the broadcast of the work; this was because Article 11 *bis* (1) (ii) provides for non-voluntary, statutory licenses being in respect of re-broadcasting. Creswell pointed out that in fact, Australia had agreed to drop a proposal to have an Agreed Statement to that effect on the understanding that the Chairman would make a declaration.<sup>453</sup> Lieder accepted that proposal, and consequently, the agreed statement in respect of Article 8 of WCT has a second sentence reading 'It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11 *bis* (2)'. It follows that non-voluntary licenses cannot be issued in respect of the making available right covering interactive on-demand transmissions. But for the Agreed Statement Article 10 of Draft WCT was adopted as it is as Article 8 of WCT; Articles 11 and 18 of Draft WPPT were adopted as they were as Articles 10 and 14 of WPPT.

All in all, the making available right in WCT and WPPT is futuristic in that while it was designed for network transmissions, being not technology-specific it may apply to future communication technologies.

## **14.2 Technological Protection Measures**

To recapitulate, with the advent of digital technologies 'legal protection *simpliciter* was inadequate'<sup>454</sup> and adding a layer of technological protection to the protection offered by copyright and related right laws became imperative. However, legal provisions for prohibiting TPMs turned out to be highly

---

452 von Lewinski (2008), paragraph 17.76 at p.457.

453 DipCon Records, Volume II, paragraphs 1002-3, p.778-9.

454 Ginsburg (2005), pp.2-3,9.

controversial and triggered a firestorm of protest from most academics and a host of business and public interest groups (See Sect. 9.4). To further recapitulate, divergent views were expressed in the meetings of the Committees of Experts in February and May 1996, and it was expected that the differences would be narrowed down in the consultation process in the period between May 1996 and the commencement of the DipCon. (See Sect. 7.2.1.4). However, no such consultations took place at the international level. As no efforts were earlier made to forge a consensus the points made in the DipCon were a rehash of those made in the Committees of Experts. In their opening statements in the Plenary on 5<sup>th</sup> December, Chile, Indonesia, Israel, Pakistan, and Singapore referred to the obligations in the Basic Proposals relating TPMs. While Chile expressed support, Ophir of Israel observed that said that the language in the Basic Proposals was overly broad, and suggested consideration of a separate treaty dealing solely with the question of technological measures of protection. Tiwari of Singapore argued that the provisions, as drafted, could prohibit a protection defeating device for *bona fide* use. Munir Akram of Pakistan wanted the specific problems relating to the obligations concerning technological measures should be addressed in a clear and balanced manner so that no unintended consequences would result. Indonesia wanted the proposals to be studied further. Kim of Korea cautioned against TPMs being used to prohibit manufacture, importation or distribution of protection-defeating devices used within the permitted range of limitations on rights or in respect of non-copyrightable or public-domain materials<sup>455</sup>

The Articles of both treaties relating to TPMs ( Article 13 of Draft WCT and Article 22 of Draft WPPT See Sect.7.2.1.4) were first discussed in the formal meeting of the Main Committee on 10<sup>th</sup> December wherein nineteen delegations spoke.<sup>456</sup> While everyone was agreed that, in the words of Startup of United Kingdom, ‘ the provisions on technological measures were an essential underpinning of copyright and neighbouring rights in the digital age’ only the United States and the GRULAC countries supported Article 13 of Draft WCT and Article 22 of Draft WPPT as they stood. ‘Without the safeguards of such provisions’, Kushan asserted ‘right holders would make neither their works nor their phonograms available on the Internet. Those provisions were critical if the Internet were to develop into a fully mature and truly global

---

455 DipCon Records, Volume II, paragraphs 336,388, 390, 408, 421,425, pp.600, 601, 613, 616-7.

456 DipCon Records, Volume II, paragraphs 515- 541, p.710-6. The Main Committee discussed the obligations regarding TPMs and rights management information systems together.

marketplace for information and entertainment products for consumers in countries around the world'. The EC was less forthcoming in its support. Reinbothe underlined the importance of the element of knowledge, and of its link to an infringement of the rights concerned. Moreover, when seeking the right balance in those provisions, the elements of primary purpose and primary effect needed to be carefully assessed, and the provisions should possibly be simplified, without undermining their efficiency. Almost everyone else who spoke was critical. A number of delegations, including Australia, Canada, New Zealand and South Africa, expressed concern with the language of the articles; many were concerned that the articles as they stood would deny access to protected content even when that access was permitted because of limitations and exceptions; Canada highlighted the fact that the articles as they stood would cause a problem for manufacturers and sellers of devices which might have significant non-infringing uses; quite a few like Singapore favoured the replacement of the expressions 'primary purpose' and 'primary effect' by terms 'sole intended purpose'; many including Norway favoured a narrowing of the scope of the provision, and ; New Zealand and Germany wanted that the choice of sanctions against unauthorised circumvention of protected content should be left to the Contracting Parties and not limited to criminal law. Kim of Korea reiterated once again the objections he raised in the Committees of Experts and in his opening statement in the Plenary. Ms. Betty Nah-Akuyea Mould-Iddrisu of Ghana referred to the strong objection African countries raised against the U.S. and EC proposals in the joint meetings of the Committees of Experts and said that the African Group and her delegation wished to register most strongly their protest against the inclusion of the two Articles in their present form. The Articles were vague and would lead to confusion; further, developing countries would be unable to implement such provisions. In a more diplomatic language, Visser of South Africa echoed her views. He said that even though the Articles addressed a real problem, there was a danger that no provision relating to technological measures would be adopted because of the difficulties with the current wording of the Articles. For that reason, he would propose in writing that the obligation should simply be that Contracting Parties must provide adequate legal protection and effective remedies against the circumvention of certain technological measures, which should have three characteristics; first, they should be effective technological measures; second, they should be used by rightsholders in connection with the exercise of their rights under the Treaties; and, third, they should restrict acts which were not authorized by the rightsholders or not permitted by law. Ms. Bouvet of Canada gave a tip whose significance could be deciphered by those 'outside the loop' only a few days later. She said that her Delegation was aware

that several Delegations and nongovernmental organisations were working on language which would greatly reduce the problems she had mentioned, and some of the language looked very promising. As mentioned above, (See Sect. 10.1) the African amendment which was eventually adopted by the DipCon was a compromise which was arrived through negotiations between copyright industries on the one hand and those opposed to Article 13 of Draft WCT and Article 22 of Draft WPPT such as Intermediaries, computer manufacturers, consumer electronics manufacturers, and businesses engaged in encryption research on the other. The expert lawyer he was Tiwari raised the subtle question whether the Three-Step test could be applicable to the limitations on the protection of technological measures.<sup>457</sup> The Chairman summed up the discussions and said that there were several Delegations which considered that the provisions regarding technological measures should not be included in the Treaties in the present form. In contrast, there were also several Delegations which supported the essence of the principles of those provisions, and both groups of Delegations offered useful advice concerning drafting in order to make them internationally acceptable.

Algeria and twenty-nine other African countries, China, Jamaica, and Korea submitted similar amendments to Article 13 of Draft WCT and Article 22 of Draft WPPT; Singapore submitted an amendment to Article 13 of Draft WCT only. In all, five amendments were proposed to Article 13 of Draft WCT. China proposed deletion of both articles. Jamaica suggested minor verbal changes. The amendments proposed by Korea were identical to those it proposed during the joint meetings of the Committees of Experts (See Sect. 7.2.1.4). The amendment proposed by the African Group formulated in treaty language the principles Visser expounded before the Main Committee-I. The amendment required Contracting Parties to 'provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by rightsholders in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their works, which are not authorized by the rightsholders concerned or permitted by law'. Singapore proposed replacement in the definition of protection defeating devices (Article 13(3)) of 'primary purpose or effect' by 'sole intended effect'.<sup>458</sup>

---

457 Sun (2007), pp.277-8. Tiwari's question was missed by other participants with the result that it elicited no answer.

458 Africa and 29 other countries, China and Republic of Korea proposed amendments to Article 13 of Draft WCT. Africa and 29 other countries, China and Republic of Korea proposed amendments to Article 22 of Draft WPPT. Jamaica proposed a common amendment to Article

On December 16<sup>th</sup>, the Main Committee-I adopted in its informal session the African amendment rather quickly. The African proposal, it may be recalled represented a compromise which representatives of private sector, particularly from the U.S., had arrived at. 'The maneuvering space for modifying this proposal in any respect turned out to be very limited', and while its general wording left open many questions, 'it was sufficiently flexible to obtain eventually the approval of all delegations'. Because of time constraints at the DipCon continuous controversies about a number of elements in Article 13 Basic Proposal could not be settled. The proposal submitted by African countries 'was finally adopted subject to two minor changes: the term 'right holders' was replaced by 'authors', and the link between technological measures and the exercise of rights under WCT was extended to the rights under the Berne Convention'.<sup>459</sup> The minor changes effected with respect to WPPT were similar in that the term 'right holders' was replaced by 'performers and producers of phonograms'. However, as WPPT was not connected with the Rome Convention the way WCT was with the Berne Convention the obligations regarding technological measures were limited to the rights conferred by WPPT and not extended to those conferred by the Rome Convention. On December 19<sup>th</sup>, the Main Committee-I approved in its formal session the text as approved in its informal session, and the next day the Plenary approved them, and with that they became part of WCT and WPPT as adopted by the DipCon.

On 19<sup>th</sup> December after the provisions relating to technological measures were formally adopted by the Main Committee-I and all the Agreed Statements agreed to in the informal sessions were taken up for adoption Korea proposed adoption of an agreed statement on Article 13 of Draft WCT which would have vested the Contracting Parties with a discretionary power 'to make materials or works which are not original nor protected by law, and those in which the exclusive rights of authors are limited by law, to be used freely or against equitable remuneration'. Korea found no support. Visser of South Africa said he gave up a similar idea as it Article 13 'was a new provision which created a very delicate balance between the various interested parties', and as a consequence, it was 'dangerous at the given stage to try and freeze certain positions in respect of that Article'. He was supported by Olsson of Sweden and Kushan of the U.S.<sup>460</sup> And what was adopted in the informal session was

---

13 of Draft WCT and Article 22 of Draft WPPT. DipCon Records, Volume I, pp.397, 408, 419,445, 447,485,491.

459 Reinbothe and von Lewinski (2015), paragraph 7.1.13, p.167.

460 DipCon Records, Volume II, paragraphs 1006-11 at pp.779-80.

formally adopted with minor change in wording by the Main Committee-I on December 19<sup>th</sup> and later by the Plenary. Appendix VI presents the proposals and final text of obligations regarding technological measures in WCT as well as WPPT.

Article 11 of WCT and Article 18 of WPPT <sup>461</sup> are yet another good example of *constructive ambiguity*, a device often resorted to in multilateral negotiations when full agreement could not be secured and yet parties to negotiations are keen that the negotiations do not end in failure. Thus, Article 11 of WCT and Article 18 of WPPT cast an obligation on the Contracting Parties 'to provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures' but did not define the terms 'adequate', 'effective' and 'legal remedies'; unlike TRIPs, the Internet Treaties do not envisage review of the national implementation laws, and consequently, it was for each Contracting Party to decide what constitutes adequacy and effectiveness, and to choose the legal remedy against circumvention. By helping parties to negotiation to skirt around divisive issues constructive ambiguity helps parties to secure a passable agreement, declare victory and close the negotiation with a feeling of achievement. The U.S. and EC could feel happy that an obligation to legally protect technological measures was incorporated in an international copyright treaty for the first time, and that Article 11 of WCT and Article 18 of WPPT did not constrict their choice to opt for a more stringent protection of technological measures. Countries like India which traditionally attempted to balance protection of rights on the one hand and public interest on the other were happy that the Articles only laid down a general framework with minimum protection, and further, they provided them with lot of flexibility in transposing the obligation imposed by the Articles into national legislation. Interest groups and academics opposed to the U.S. proposal for legally protecting TPMs could savour a sense of victory, and they did. WCT was good because, among other things, the proposals of the maximalists which would 'have virtually eliminated fair-use rights in the digital environment' were rejected. <sup>462</sup>

### **14.3 Rights Management Information**

On the afternoon of December 10<sup>th</sup>, the Main Committee-I took up for consideration Article 14 of Draft WCT and the corresponding Article 23 of Draft

---

<sup>461</sup> Following the deletion of some articles and renumbering of the remaining articles Article 13 of Draft WCT became Article 11 of WCT and Article 22 of Draft WPPT Article 18 of WPPT.

<sup>462</sup> Samuelson (1997). Samuelson (1999, p.528) opined that the WIPO treaties as being good for the 'new economy' as well as for users of Internet.

WPPT dealing with obligations regarding rights management information (See Sect.7.2.1.5). Visser of South Africa suggested that the scope of Article 14 should not be limited to electronic rights management information; it should cover all rights management information. Rights management information should be linked to limitations and exceptions. Ms. Youm Diabe Siby of Senegal supported Visser's proposal. Ms. Bouvet of Canada strongly pleaded that the rights information systems should be wholly voluntary; they should not impose unreasonable burdens or technical problems for intermediaries like broadcasters. Kushan told the Committee that his delegation would propose amendments, among others, to ensure that (i) correction of inaccurate information by a right holder would not be treated as a prohibited act and (ii) to address the problem of filing fraudulent rights management information with a public authority. Tiwari of Singapore expressed concern over the broad scope of the Article 14 of Draft WCT and Article 23 of Draft WPPT. He suggested that the scope of liability created by the first paragraph of the two articles was too broad; liability should only attach to those who transmitted such information in furtherance of actual copyright infringement. Reinbothe of EC concurred with the views of Tiwari. Startup of United Kingdom supported the EC proposal and said that the scope of the Articles should be narrowed by establishing an explicit linkage with infringement of rights. New Zealand was particular that, as with obligations regarding technological measures, the liability for tampering with rights management information, and trading in protected content with tempered right management information should be a civil and not criminal liability. Lieder concluded the discussions by observing that there was clear support for the suggestion that the provisions on rights management information should be narrowed down by linking them with infringing acts. He also mentioned about the suggestion that rights management information should not be limited to electronic rights management information but all types of rights management information.

In all, six amendments were proposed to Article 14 of the draft WCT and five to Article 23 of Draft WPPT.<sup>463</sup> Of these the most important amendments were by the Republic of Korea, the U.S. and the EC. The novelty of the Korean

---

463 Singapore (p.397) and EC and its Member States (pp.491-2) proposed amendments to Article 14 of Draft WCT only. GRULAC countries (p.421) proposed amendments to Article 23 of Draft WPPT only. Hungary (p.421) proposed the same amendment to Articles 14 of Draft WCT and Article 23 of Draft WPPT. The U.S. (pp.427-8, 429-30) Republic of Korea (pp.431-2) and African Group (pp.445-8) proposed separate but similar amendments to Articles 14 of Draft WCT and Article 23 of Draft WPPT. Page number mentioned in the parentheses is the page where the amendment can be found in DipCon Records, Volume I. For a crisp summary of the amendments see Ficsor (2002), paragraphs 6.68 to 6.72, pp.400-3.

amendment lay in its requirement of standardisation of right management information either by national authorities or by an international body; Korea figuratively ploughed a lonely plough in that everyone else favoured that it should be optional for the right holders to go in for TPMs and right management information, and that standards should evolve through voluntary action by the parties concerned. The U.S. amendment simultaneously broadened as well as narrowed the scope of the articles. The proposal broadened the scope in that (i) the right management information was not limited to the electronic form, (ii) licensing information would also be covered, and (iii) fraudulent filing of information with a public authority would be held an unlawful act. At the same time, the proposal narrowed the scope and made the provisions more precise in three respects: (i) only those acts would be covered which induce, enable or facilitate infringement or avoidance of payment to a right holder, (ii) a knowledge element was included, and (iii) voluntary nature of rights management information was specifically incorporated in the Articles. The amendment of EC was similar to that part of the American amendment which narrowed the scope of the Articles.

The Articles and the amendments proposed were discussed by the Main Committee-I in its informal session on the evening of December 16<sup>th</sup> for full four hours fully compensating for the cursory discussions in the joint meetings of the Committees of Experts and the formal session of the Main Committee on December 10<sup>th</sup>. It was decided to limit the purview of the Articles to electronic right management information. There was a suggestion that the scope of Article 14 should not be limited to copies of works only and should be extended to original works also as rights management information could be attached to works also; the suggestion was accepted. Similarly, it was suggested that broadcasting without authority works or copies of works knowing that electronic rights management information has been removed or altered without authority should be declared an unlawful act. This proposal was accepted. As desired by all delegations a strong link was established between the act sanctioned and the infringement of rights. Flexibility was given to the Contracting Parties to choose the sanction to be applied; it could be civil, criminal, or even administrative remedies. The knowledge requirement was further specified in respect of civil remedies, for which it would be sufficient that the person had reasonable grounds to know, as opposed to having full knowledge. Two American amendments were not acceptable to most of the delegations. The first was proposal to make filing of fraudulent rights management information with a public authority unlawful. The second was the proposal to declare tampering with right management information for the sake

of avoiding legal obligation to pay remuneration in respect of any right covered by the Treaty. The U.S. stressed that right management information was particularly important in the context of collective administration of rights as a basis for calculating the amount to be paid for the use of a particular kind of work. Most delegations were of the view that the American proposal was designed for the enforcement of contractual obligations rather than of statutory remuneration rights, such as those based Articles 11 bis (2), or 13(1) of the Berne Convention. As ever, an agreed statement served the purpose of reconciling the differences. While the American proposal was not incorporated in the Articles an Agreed Statement to the effect that the infringement of any right under WCT or the Berne Convention includes both exclusive rights and rights of remuneration. A similar statement was adopted in respect of Article 23 of Draft WPPT.

On December 19<sup>th</sup> the Main Committee-I approved Article 12 of WCT and Article 19 of WPPT, and the Agreed Statements.<sup>464</sup> They were approved by the Plenary on December 20<sup>th</sup>. Appendix VII presents at a glance the proposals, final text and Agreed Statements relating to the rights management system in both the Treaties.

#### **14.4 Striking a Balance: Limitations and Exceptions (Article 12 of Draft WCT, and Articles 13 and 20 of Draft WPPT)**

As mentioned above, I was pleasantly surprised to notice that in their opening statements, the heads of many delegations including Bruce Lehman laid emphasis on balanced protection (See Sect. 10.5), though it should be said that perceptions among delegations about what constituted meaningful and balanced protection varied considerably. A constant refrain of interest groups opposed to Lehman was that fair use would be done away with if the Basic Proposals relating to the digital agenda, which were drafted in accordance with the wishes of the U.S. and EC, were accepted as they were. Given the real possibility that fair use could be extinguished in the digital medium it was imperative that the adaptation of the exclusive rights of the analogue world to the digital medium and introduction of new rights should go hand in hand with the specification of limitations and exceptions. It is apposite to mention that a school of copyright scholars contend that this is the Age of Exceptions and

---

<sup>464</sup> Following deletion of some articles and renumbering of the remaining articles Article 14 of Draft WCT became Article 12 of WCT; similarly, Article 23 of Draft WPPT became Article 19 of WPPT.

Limitations in which limitations and exceptions are more important than rights; <sup>465</sup> exclusive rights were consolidated over a century and therefore limitations and exceptions had become the main instrument to determine the exact scope of copyright; in other words, the centrepiece of copyright system <sup>466</sup>

In the DipCon negotiations over WCT and WPPT limitations and exceptions arose in three contexts: right of reproduction, obligations regarding TPMs, and general limitations and exceptions set out in Article 12 of Draft WCT, and the corresponding provisions of Draft WPPT (Articles 13 and 20). The deliberations and negotiations over Article 12 of Draft WCT and the corresponding provisions of WPPT are discussed here.

The first part of Article 12 of Draft WCT applied to the new rights proposed to be granted by WCT, namely the rights of distribution (Article 6, WCT adopted by the DipCon), rental (Article 7) and communication to the public (Article 8); it permitted Contracting Parties to provide for limitations of or exceptions to the rights granted by WCT to authors subject to the Three-Step test. The second part sought to extend the Three-Step test to limitations on and exceptions to all the rights conferred by the Berne Convention even though the Convention stipulated the Three-Step test only for limitations and exceptions to the right of reproduction (Article 9(2)). The notes accompanying Article 12 referred to the fact that Three-Step test was incorporated in Article 13 of the TRIPS Agreement as a general principle governing limitation on and exceptions to rights. The new result, as the notes of Liedes accompanying Draft Article 12 put it ‘not all limitations currently included in the various national legislations would correspond to the conditions now being proposed...the proposed provisions of Article 12 are applicable to *any* limitation. No limitations, not even limitations that belong to the category of minor reservations,<sup>467</sup> may exceed the limits set by the Three-Step test’ (italics added). In effect, the Draft WCT expanded the rights of ‘authors’ and yet the same time considerably narrowed the flexibility available to Contracting Parties to provide for limitations and exceptions. That apart, though Draft Article 12 was based on Article 9(2) of the Berne Convention it did not totally replicate the language of Article 9(2) with the result that it was more restrictive and pre-emptive than Article 9(2). Draft Article 12(2) appeared to have repealed other articles of the

---

465 Okediji (2017).

466 Dreier (2010), p.50.

467 Minor reservations cover such things as religious ceremonies and public performances military bands at public fêtes. These are treated as exceptions to Article 11 (Right of Public Performance), Berne Convention. WIPO. 1978, paragraph 11.6, p.65.

Berne Convention which have long been understood to permit some national exceptions and limitations based on their consistency with national custom and 'fair practice'. Further, proponents of fair use expressed the view that adoption of Draft Article 12 might influence the interpretation of Article 13 of the TRIPs agreement (limitations and exceptions) to the detriment of the flexibility of Member countries to provide for limitations and exceptions in public interest. Suffice to say, critics like Pamela Samuelson had a point when they said that Draft Article 12 intended to lay the groundwork for elimination or a substantial curtailment of exceptions and limitations, such as the U.S. fair use doctrine.<sup>468</sup>

Turning to WPPT, as it is, Article 15(2) of the Rome Convention sought to align the limitations on the rights granted to performers, producers of phonograms and broadcasting organisations with the limitations on the rights granted to 'authors'. Articles 13 and 20 of Draft WPPT carry forward further the alignment. The first part of these two articles reproduces the main principle of Article 15 (2) of the Rome Convention and the second parts incorporate the Three-Step test to test the validity of a limitation proposed to be granted by a Contracting Party.

In their opening statements in the Plenary on 6<sup>th</sup> December a few delegations emphasised that limitations and exceptions should follow the traditions of Berne and Rome Conventions. I observed that balance was the ethos of intellectual property rights, and that the new treaties should not whittle away fair use and dilute the applicability of all the limitations and exceptions contemplated by the Berne Convention. Abada of UNESCO made the significant observation that under the Berne Convention authors' rights in original creations had always been accompanied by limitations justified by social requirements.

Article 12 of Draft WCT and Articles 13 and 20 of Draft WPPT (See Sect.7.2.1.6) were first discussed in the formal meeting of the Main Committee on 10<sup>th</sup> December.<sup>469</sup> There was some ambivalence in the introductory remarks of Lieder. On the one hand, he made it clear that all limitations and exceptions had to pass the Three-Step test, and yet the same time he indicated that 'there was ...no intention in the draft Treaty that the so-called minor exceptions should be excluded'. Generally speaking, the important limitations

---

<sup>468</sup> See Samuelson (1996b), pp.398 –409 for a critique of Draft Article 12 and the deliberations in the DipCon over Article 12.

<sup>469</sup>DipCon Records, Volume II, paragraphs 484-514, pp. 703-709.

and exceptions that were considered permitted under the Berne Convention would still be permissible under the new Treaty.<sup>470</sup>

Broadly speaking, three points of view were expressed during the interventions by the delegations. The first point of view articulated the concern, expressed with clarity by Nørup-Nielsen of Denmark, that the new rules should not be a ‘straight jacket’ for existing exceptions in areas that were essential for society such as education, scientific research, library activities and the interest of persons with disabilities. Not to speak of the new rights proposed to be conferred by WCT and WPPT, Draft Article 12(2) ruled out even long-standing limitations and exceptions under the Berne Convention unless they stood the scrutiny of the Three-Step test. In keeping with the eagerness of the Clinton Administration to assuage the domestic concerns about fair use being virtually eliminated by the efforts to expand the rights of rightsholders in the digital environment Kushan strongly contended that the Treaties should permit application of the evolving doctrine of fair use, which was recognised in the American laws, and which was also applicable in the digital environment. In particular, he stressed that the provisions of Draft Article 12 should be so understood as to permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which were considered acceptable under the Berne Convention. Those provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. He proposed verbal changes to both clauses of Article 12 so as to bring it closer to the language of Article 9(2) of the Berne Convention and provide greater flexibility to the Contracting Parties to provide for limitations and exceptions. In my intervention I contended that the change from a physical format to a digital format should not in any way curtail the various limitations applicable to science, research, education, public interest, public lending, and that there should be scope for national legislation to make such alterations as might be necessary. Many delegations shared the concern of the U.S. and India that WCT and WPPT should not whittle down the various limitations provided by national legislations in public interest. Many delegations including Australia, Hungary, Norway, Philippines, Republic of Korea, Singapore, Thailand demanded deletion of Draft Article 12 (2) of Draft WCT. Some countries, including Australia, South Africa, and Tanzania, suggested that DipCon should consider adopting mandatory exceptions. Nørup-Nielsen expressed doubt about the relevance in the digital world of the Three-Step test,

---

470DipCon Records, Volume II, paragraphs 484-7, pp. 703-704.

a test that originated during the Stockholm Revision in 1967 mainly in response to the emerging phenomena of photocopying. Tiwari argued that the Berne Convention itself limited the Three-Step test to the right of reproduction, and that being so the Three-Step test could not be extended to other rights conferred by the Berne Convention. Article 12 (2) might be contrary to Article 20 of the Berne Convention which prohibited provisions in the special agreements which were contrary to the Berne Convention. Nørup-Nielsen, Kim of Korea and Tiwari contended that the simultaneous expansion of rights and curtailment of limitations and exceptions was inconsistent with the principle that copyright laws should be balanced. Nørup-Nielsen suggested that the Conference adopt an agreed statement to clarify the need for and importance of the limitations and exceptions essential for society such as examples education, scientific research, library activities and the interest of persons with disabilities. He was supported, among others, by Olsson of Sweden. In his concluding remarks, Liedes observed that that there were elements in many interventions from which an agreed statement could be made.

The second point of view was supportive of Draft Article 12. This point of view was cogently articulated by Startup of United Kingdom and Menno Bouwes of Netherlands. In the digital environment, what might formerly have been minor reservations might in reality undermine important aspects of protection. The contrary might also be true, namely that, in the digital environment, some acts might prove to be of no economic significance and would, therefore, meet the conditions of the Three-Step test. It was too early to determine in detail the specific exceptions and limitations which were needed in the digital environment, and Draft Article 12(1) provided the necessary framework to provide the limitations needed.

The third point of view put forth by delegates of GRULAC countries started from the legalistic premise that WCT was a special agreement under Article 20 of the Berne Convention, and that as per the provisions of that article WCT should grant to authors more extensive rights than those granted by the Berne Convention. Therefore, WCT should not allow the inclusion of new limitations or exceptions not to be found in the Berne Convention concerning rights laid down in that Convention. These delegates were the strongest supporters of Article 12 as drafted and of the application of the Three-Step test to all limitations and exceptions.

There was little discussion of Articles 13 and 20 of Draft WPPT; Creswell of Australia suggested merger of those two articles into one common provision; the *Partly Consolidated Text of WPPT* as well as the final version of WPPT which was adopted by the DipCon acted on the suggestion of Creswell. *The Partly*

*Consolidated Text of WCT* went whole hog in responding to the critical observations of many delegations in the Main Committee-I. It deleted Article 12 (2) of Draft WCT altogether, thereby dropping the proposal to subject all limitations and exceptions under the Berne Convention to the Three- Step test. It also modified the language of Draft Article 12(1) so as to make it less restrictive. Israel, Singapore, and the U.S. submitted amendments to Draft Article 12 of Draft WCT, and strangely none of them proposed deletion of Draft Article 12 (2). The amendments only suggested verbal changes so as to bring Draft Article 12 closer to Article 9(2) of the Berne Convention. Therefore, during the informal discussions concerns about Draft Article 12 (2) were revived, and the verbal changes proposed by the U.S. were agreed. The suggestion for an agreed statement was acted upon. The Agreed Statement in respect of Article 10 of WCT (Article 12 of Draft WCT<sup>471</sup>) clarified that Contracting Parties could carry forward and *appropriately* extend into the digital environment limitations and exceptions in their national laws which have been considered *acceptable* under the Berne Convention, and to devise new exceptions and limitations that are *appropriate* in the digital network environment. An agreement relating to WPPT stated that the agreed statement concerning Article 10 (on Limitations and Exceptions) of the WCT is applicable *mutatis mutandis* also to Article 16<sup>472</sup> (on Limitations and Exceptions) of WPPT. The agreed statements are yet another example of *constructive ambiguity*, a device often resorted to in multilateral negotiations when full agreement could not be secured and yet parties to negotiations are keen that the negotiations do not end in failure. The crux of the matter in the deliberations over Article 12 of Draft WCT is this: digital technologies stretched the limits of private copying and dissemination beyond the limits of *de minimis*, and reconstruction of limitations and exceptions is a key aspect of reconstruction of copyright in the digital age. Such reconstruction requires addressing upfront the question whether the fair use practice of the pre-digital (classical) copyright age could be extrapolated *as it is* into the digital era, and if not what the appropriate use is. As outlined the way the Diplomatic Conference was organised in a hurry left little scope to explore the question which use was appropriate in digital environment; in such a situation, delegations like that of India had little option but to ensure acceptance of the principle that fair use as appropriate would continue in the digital environment without striving to get a more specific provision. Be that as it may, by mouthing generalities, WCT and WPPT shelved the question and

---

471 Following the decision to delete Article 6 dealing with non-voluntary licenses and Articles 7 dealing with the right of reproduction Article 12 was renumbered as Article 10.

472 Article 16 of WPPT corresponds to Article 20b of the *Partly Consolidated Text of WPPT*.

shifted the burden to national legislation; the absence of a strong enforcement mechanism analogous to the TRIPs agreement give the Contracting Parties considerable flexibility. The comment of Sam Ricketson on the second sentence of the agreed statement relating to Article 10 of WCT that ‘if a distinct regime for new limitations and exceptions is envisaged under the WCT, this would need to be the subject of an express provision of that treaty’ is very apt.<sup>473</sup>

The Main Committee-I adopted the articles and agreed statements relating to limitations and exceptions only on the very last day as they were linked with the contentious right of reproduction. However, they were adopted by consensus and without any discussion. Appendix VIII and Appendix IX present at a glance the proposals, final text and Agreed Statements of the provisions relating to limitations and exceptions of WCT and WPPT respectively.

## **14.5 Striking a Balance: Indian Amendments to Preambles of WCT & WPPT**

As a part of its efforts to ensure that WCT and WPPT strike a balance between right holders and larger public interest India moved an amendment<sup>474</sup> proposing an additional recital to the Preambles of WCT and WPPT. The proposed addition to the Preamble of WCT read as follows:

‘Recognising the need to maintain a balance between the interests of authors and the larger public interest, particularly education, research and access to information’.

A similar amendment was proposed for the Preamble of WPPT which substituted ‘performers and producers of phonograms’ for ‘authors’ in the amendment relating to WCT. Given my experience of my being subjected to intense lobbying by interest groups during policymaking in India I was prone to view the rightsholders, be they authors or performers or producers, and their business adversaries (eg., intermediaries, and consumer electronics and computer manufacturers) who subjected delegates to intense lobbying in the runup to and during the DipCon, as interest groups. Hence it was but natural for me to use the expression ‘interests of authors’. However, the use of the expression ‘interests of authors’ struck a raw nerve among many copyright experts who were strongly attached to the tenets of the authors’ right system of copyright. It is appurtenant to point out that the Indian amendment unwittingly anticipated the change in the vocabulary of discourse whereby

---

473 WIPO (2003), p.63.

474 DipCon Records, Volume I, p.415.

expressions like ‘users’ rights’ and ‘authors’ interests’ came into vogue. To illustrate, Thomas Dreier wrote in 2010 that, ‘limitations and exceptions balance the interests of authors, rightsholders, competitors, and end-users in a quadrupolar copyright system. This is all the more true in the digital and networked information society, where copyrighted information is not only created and consumed, but constantly extracted, regrouped, repackaged, recombined, abstracted, and interpreted’.<sup>475</sup> It is also pertinent to point out that the formulation in the amendment of a balance between the interests of authors and access to information unwittingly anticipated the Access to Knowledge movement that emerged as a major force on the international copyright landscape.

The amendments came in for extensive discussions in the informal night session of the Main Committee-I on 18<sup>th</sup>; I was quite surprised to note the passionate opposition the amendments proposed by India in spite of the fact that many delegates spoke both in the Opening Statements in the Plenary as well as in the Main Committee-I about the imperative of striking a balance. In the forefront of those opposed to the Indian amendment were GRULAC and European countries like France and Hungary, strong believers in the authors’ right system of copyright. In all, there were two objections. The first found the use of the word ‘interests’ in relation to authors extremely objectionable. In their view, there is a difference between the status of authors who were granted rights, and the status of general public, ‘who do not enjoy rights, under any treaty, but whose interests were to be taken into account in the treaty as defences, in particular as exceptions to, and limitations of the rights, of authors’.<sup>476</sup> Further, WCT was a special agreement under Article 20 of the Berne Convention, and a special agreement would have to grant to authors more extensive rights than those granted by the Convention’. Yet, contrary to the letter and spirit of Article 20, the Indian amendment sought to reduce the rights of authors to an interest and equate that interest with the interest of the larger public. With a view to secure a consensus and have the idea underlying the Preambles incorporated in the two treaties I agreed to slight rewording of the Preambles so that the balance which was sought was between the rights of the authors (performers and producers of phonograms in respect of the Preamble to WPPT) and the larger public interest. Those who raised this objection proposed another recital to the Preamble in WCT and insisted that that recital should precede the recital proposed by India. The recital proposed

---

475 Dreier (2010), p.50.

476 Reinbothe and von Lewinski (2015), p.52.

was ‘emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation’. The second objection related to the expression ‘access to information’ in the Preambles; it was thought to be too broad. The objection was withdrawn when it was pointed out that Article 10bis of the Berne Convention allowed ‘informational needs’ as a justification for the limitations on rights, and a qualifier ‘as reflected under the Berne Convention’ was included at the end of the recital proposed to be added to the Preamble. The recital proposed by India with the modification indicated above as well as the additional recital were adopted by the formal session of the Main Committee on December 19<sup>th</sup>. Ficsor and Liedes strongly supported the Indian proposal and played an important role in crafting a consensus. The recital in the Preamble to WCT as finally agreed read as follows:

‘Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention’.

The additional recital of WPPT was similar with ‘the rights of authors’ being replaced by ‘the rights of performers and producers of phonograms. However, it is significant those who opposed the Indian amendments to the Preambles of WCT and WPPT did not propose an additional amendment to the Preamble of WPPT as they did with WCT; there was no WPPT equivalent of the WCT Preamble “emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation’. Therefore, the anachronistic view of treating a performance as artistically less creative than that of a work still ruled roost.

From a historical perspective, the Indian amendment to the Preamble marks a continuity of its stand in the Stockholm Revision Convention (1967) that ‘the protection of authors’ rights could not be considered apart from the rights of users’.<sup>477</sup> Ficsor contended that the additional recital to the Preamble to WCT proposed by India ‘introduced no new element in international copyright law’, and quoted Numa Droz, the chairman of the Conference which concluded the Berne Convention, in support of his contention. Droz stated that ‘consideration should be given to the fact that limitations on absolute rights are dictated by public interest’.<sup>478</sup> Ficsor further pointed out that the public

---

477 Sher Singh, Leader of the Indian Delegation in the Third Meeting of the plenary of the Stockholm Conference, July 11, 1967, WIPO (1971), Volume II, paragraph 136.10,p. 807.

478 Ficsor (2002), paragraph 5.06, p.258.

interests referred to in the Indian amendment, namely education, research, and access to information, were exactly those interests for which the Berne Convention provides for certain specific limitations and exceptions.<sup>479</sup> While there is indeed nothing new under the sun one cannot miss out the fact that the observation of Numa Droz was an obiter which did not figure in the Berne Convention, and that the stand taken by those opposed to the Preamble proposed by the Indian amendment represents a significant aspect of the Berne Convention tradition. Further, it is important to bear in mind the salience of the contextual backdrop against which the Indian amendment was moved. The Internet Treaties proposed to reconstruct copyright and related rights at a historic moment when the world was on the threshold of a digital era, and in the run up to the DipCon many believed that the long tradition of balance in copyright laws was under threat from ‘the overzealousness, not to say overreaching, expressed by authors ( or more accurately, copyright owners) at the prospect of being able to charge for every conceivable digital use of copyrighted works’.<sup>480</sup> Reiteration of what Numa Droz, one of the founding father of the Berne Convention, said ,though not strictly novel from a historical perspective, was very timely. That explains why Pamela Samuelson, a trenchant critic of the Lehman Report and the Congressional bills based on the Lehman Report , described the paragraph added to the Preamble of WCT as representing a major development in international copyright policy.<sup>481</sup> Similarly, across the Atlantic, in Oxford, Graeme Dinwoodie observed that the WCT made ‘the most explicit acknowledgment of the concept ( of balance) on its own terms then found in a global copyright agreement’, and that ‘the language in question was first advanced by India during the discussions in Geneva’. Dinwoodie pointed out that ‘this reference has been celebrated by many commentators as a change in the tone of international copyright law’, and ‘it certainly reads quite differently from the language in the documents that had been produced early in the process leading up’ to WCT. He illustrated the point he made by referring to the document, *Setting Norms in the Field of Intellectual Property Particularly Under the Paris and Berne Conventions*, prepared by WIPO for the 1988-89 programme and budget. The objective of norm setting, the document declared, was ‘to make the protection of intellectual rights more effective throughout the world’; the document went on to clarify that ‘“more effective” means that the norms ( standards) of protection was raised , where necessary to the required level and that the enforcement of IPRs will be easier

---

479 WIPO Guide (2003), CT-Pr.7- to 10, pp.187-8.

480 Ginsburg (1997), p.4.

481 Samuelson (1996b), pp.408-9.

and the sanctions for infringement stricter'.<sup>482</sup> According to Ficsor, 'this document was an important step towards the new treaty making efforts under the aegis of WIPO which culminated in the reparation and adoption of the "Internet Treaties"'.<sup>483</sup> All in all, the WCT represented a watershed moment in international copyright to law, a possible transition to the future of copyright.<sup>484</sup> Hugenholtz and Okediji put forth a similar view: the importance of retaining a balance in copyright set out in the Preamble to WCT 'may serve as a guideline to interpretation of the norms of the WCT, and arguably the Berne Convention as well'.<sup>485</sup> The importance of retaining a balance in copyright set out in the Preamble to WCT also found its way in the Preamble to the BATP and Marrakesh Treaty, the two treaties relating to copyright and related rights adopted since the DipCon.<sup>486</sup> Without undue modesty, I can claim to be the 'father' of the additional recital of the Preamble to WCT and WPPT that highlights the importance of balance.

#### **14. 6 Enforcement Provisions (Article 16 of the Draft WCT and Article 27 of the Draft WPPT)**

It may be recalled, (See Sect. 7.2.3.2) that Article 16 of the Draft WCT and Article 27 of the Draft WPPT presented two alternatives. The first alternative (Alternative A) makes no reference to the TRIPs agreement, listed the enforcement provisions of the TRIPs agreement in an Annex to the treaty and declared that that Annex was an integral part of the Treaty. The second alternative (Alternative B) specifically referred to the enforcement provisions of the TRIPs agreement and obligated the parties to apply *mutatis mutandis* the enforcement provisions of the TRIPs agreement.

On December 11, 1996, in its formal session, Main Committee-I<sup>487</sup> discussed Draft 16 of WCT and Article 27 of the Draft WPPT. A preponderant majority of delegates who spoke preferred Alternative A. Kushan of the U.S. expressed the view that the U.S. did not believe that there was a need to include specific provisions on enforcement in the Treaties. The provisions of the

---

482 WIPO Document CE/MPC/III/2, paragraph 3. e

483 Ficsor (2002), paragraph 1.15 at p.11.

484 Dinwoodie (2007), pp.751-2, 754-5.

485 Hugenholtz and Okediji (2008), p.16.

486 The relevant recital of the Preamble to the Marrakesh Treaty reads 'recognizing the need to maintain a balance between the effective protection of the rights of authors and the larger public interest, particularly education, research and access to information, and that such a balance must facilitate effective and timely access to works for the benefit of persons with visual impairments or with other print disabilities'.

487 DipCon Records, Volume II, paragraphs 542-575, pp. 716-721.

TRIPS Agreement regarding enforcement were very satisfactory and balanced, and many countries had been, or were in the process of, implementing those provisions, and setting up enforcement regimes in sync with the TRIPS provisions. The new rights created by the Treaties would be subject to the same enforcement regimes that had been or would have been created by the WTO Members. He also referred to the discussions in the WIPO Committees of Experts on the Settlement of Disputes and underscored the significant risk of creating confusion in the development and interpretation of the TRIPS provisions on enforcement, even if identical provisions were incorporated, *mutatis mutandis*, into the Treaties. In sum, the most appropriate course of action would be to omit provisions on enforcement in WCT and WPPT. In contrast to the views of the U.S., Reinbothe of EC made a strong pitch for WCT and WPPT having provisions for enforcement. First, the modern approach to the protection of intellectual property worldwide required that both rights and enforcement measures should be provided for in national legislation as well as international instruments. Secondly, WCT and WPPT would be self-standing treaties, independent from the TRIPS Agreement. Thirdly, the enforcement provisions in the TRIPS Agreement did not cover the new elements of protection which would be incorporated in the new Treaties. On the whole, his delegation preferred Alternative-A. Jamaica proposed an alternate formulation to the alternatives in the Article 16 of Draft WCT and Article 27 of the Draft WPPT. That formulation obligated the Contracting Parties to 'ensure that enforcement procedures are available under their laws so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements'. Quite a few delegations supported the Jamaican proposal. In my intervention, I took the same position, making it absolutely clear that India could not be a party to Alternative B; the idea underlying Alternative B to bring WCT and WPPT within the fold of the TRIPS Agreement and the WTO. I expressed concern about the larger question of two international organizations, both based in Geneva, simultaneously engaged in intellectual property matters with overlapping jurisdictions, and the interplay of the processes in those organizations being used to continuously reopen and revise treaties. I observed that the Jamaican proposal was very interesting.

Eventually, after discussions in the informal sessions of the Main Committee, the Jamaican proposal was approved with the addition of a clause which preceded the clause incorporating the Jamaican proposal. Article 14 of WCT and Article 23 dealing with enforcement of rights are identical and reads as follows:

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

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

## **14.7 Nail-biting Battle over the Reproduction Right**

To briefly recapitulate what was outlined above, the divergence of views about the precise characterisation of the right to reproduction cast a long shadow over the deliberations of the Committees of Experts (See Sect. 7.2.1.2). As the process adopted did not provide for divergence of views to be narrowed down in the period intervening between May 1996 when the Committees of Experts concluded their work and the commencement of the DipCon the divergence of views came out sharply during the deliberation of the right of reproduction during the DipCon. In the DipCon, discussion of the right of reproduction set out in Draft WCT and WPPT took place in three stages: (i) discussion in the formal meeting of Main Committee-I on December 9<sup>th</sup>; (ii) discussion and informal negotiations in informal sessions of Main Committee-I as well in ad hoc groups of delegates, and (iii) heated discussions and voting on the agreed statements in the Main Committee-I and Plenary on the last day of the DipCon (December 20<sup>th</sup>). No other issue took so much of the Conference time and aroused so much passion as the right to reproduction; the audio-visual question was a far distant second. The right of reproduction turned into a Gordian knot because of the intermeshing of (i) doctrinal differences which bordered on theological differences, (ii) strong conflict of interest between the rightsholders on the one hand and the intermediaries on the other ( See Sect.9.4) , (iii) and the strong apprehension of fair use proponents that vesting a sweeping reproduction right would transform the emerging information superhighway into a rightsowner-dominated toll road and extinguish fair use turned; the Gordian knot could be cut only through voting, not once but twice, first in the Main Committee-I and then in the Plenary.

The unending argument was about recrafting a right of reproduction suitable for the digital era:

- i. which would balance the interests of different stakeholders,

- ii. which would provide the content providers a meaningful right of reproduction and yet at the same time would exempt
  - a. temporary reproduction of works when the reproduction would merely make perceptible works which would otherwise be imperceptible, and
  - b. reproduction which was of a transient or incidental nature such as when it facilitated transmission of a work and had no economic value independent from facilitating transmission, and
- iii. which would not unduly curb fair use particularly for education, research and access to information.

As a keen participant in all the deliberations over the right of reproduction I could not help feeling that I was in the midst of a sharply contested metaphysical debate, an argument without an end. The unending debate in the DipCon in various settings proved wrong the contention of some delegates at the Stockholm Conference (1967) that there was no need to define 'reproduction' as the meaning of the term 'reproduction' was self-evident, or at least it was unlikely to give rise to confusion.<sup>488</sup> It is apposite to point out that there is one significant difference between the debate on the reproduction right in the Stockholm Revision Conference and the DipCon. The contest at the Stockholm Conference centred round the scope of exemptions and the challenge lay finding 'a formula wide enough to cover all reasonable exceptions but not so wide as to make the right illusory.'<sup>489</sup> In contrast, at the DipCon the contest was more about the scope of reproduction right conferred by Article 9(1) of the Berne Convention and what exactly the reproduction right should be in the digital medium.

Initiating the discussion on Article 7 of Draft WCT and the corresponding provisions of Draft WPPT ( Article 7 and 14) in the formal meeting of the Main Committee on December 9<sup>th</sup>,<sup>490</sup> Liedes observed that the objective of including provisions on the right of reproduction in the draft treaties was to ensure that the right would be interpreted fairly and in reasonable uniformity in all important aspects; uniform interpretation would

---

488 WIPO (1971), Volume II, paragraphs 652 (Kenji Adachi of Japan) ,662 (Lindsay James Curtis of Australia) , pp. 852-3. 652 ADACHI (Japan)

489 WIPO (1978) , paragraph 9.01 at p.95.

490 DipCon Records, Volume II, paragraphs 247-298, pp. 667-675.

contribute to legal certainty and predictability in the application of laws. The second paragraphs of these Articles contained certain permissible exceptions to or limitations on the right of reproduction; the purpose of these limitations and exceptions was to make it possible to exclude from the scope of the right of reproduction acts of reproduction which were not relevant in economic terms, that is, cases of reproduction that had no independent function as an exploitation of the work. He emphasised that Article 7(2) of Draft WCT and the corresponding Articles of Draft WPPT were not intended to limit in any sense the application of the general provisions on limitations and exceptions found in Article 12 of Draft WCT, the corresponding Articles 13 and 20 of Draft WPPT (and 20b of the Partly Consolidated Text of WPPT which was formed by merging Articles 13 and 20) and Article 9(2) of the Berne Convention.

As many as thirty-four delegates spoke during the formal session of the Main Committee-I, and widely divergent views were expressed. Broadly speaking, the delegations which spoke can be classified into three categories: (i) China which wanted more study, particularly whether the reproduction right covered temporary or transient reproduction, (ii) countries which believed that Article 9(1) of the Berne Convention was all embracing and covered all types of reproduction, including 'processes yet to be discovered'<sup>491</sup>, and (iii) countries which believed that Article 9(1) of Berne Convention was not all embracing and did not cover temporary and incidental reproduction; consequently, Article 7(1) of Draft WCT expanded the scope of the reproduction right, and likewise Articles 7(1) and 14(1) of Draft WPPT expanded the reproduction right set out in the Rome Convention.

Even though countries belonging to the second category believed that Article 9(1) of the Berne Convention was all embracing they differed on the question whether or not there was need to clarify, in the interest of legal certainty in the digital era, that the right of reproduction included direct and indirect reproduction, whether permanent or temporary, in any manner or form. Canada, Japan and Tanzania were among the countries which took the view that the reproduction right was better left to national legislation as it was not desirable to mark out the territory covered by Article 9(1) of the Berne Convention with greater precision than its existing terms. In contrast, Lieder while drafting the Basic Proposals, the EC and countries like Croatia, Colombia, France, the Philippines, United Kingdom and U.S. preferred the WCT and WPPT to clarify and thereby provide legal certainty. A logical corollary of

---

491 WIPO (1978), p.54.

such a clarification was to complement Article 7(1) by a provision that allowed Contracting Parties to make national legislation to provide for limitations and exceptions in regard to temporary and incidental reproductions. Some delegations which supported Article 7 as drafted called for improvement in wording. Reinbothe of E.C., for example, pointed out that Article 7 (1) was a clarification only, and said that this fact might be better reflected by replacing 'shall include' in the clause 'shall include direct or indirect reproduction of their works' by 'includes'. That change, and corresponding changes in the related provisions of draft, would make clear that the right of reproduction did not prevent activities without any economic significance. As would be elaborated below, contrary to Reinbothe's views Ficsor strongly argued that 'shall' language could be used in a legal provision of clarificatory nature. Be it may, Lieder acted upon Reinbothe's views and replaced the 'shall' language in his *Partly Consolidate Draft of Treaty-I* dated December 12<sup>th</sup>.

The proposal in Article 7(2) to leave it national legislation to provide for limitations with regard to temporary reproductions elicited the strong opposition of countries like South Africa, Morocco, Mexico and New Zealand; like the intermediaries ( See Sect. 9.4) they were of the view that the limitations from and exceptions to the right of reproduction should not be left to national legislation but should be clearly specified in the treaties in view of the fact that digital technologies do not respect national boundaries and conflict of national laws would emerge if limitations and exceptions are not provided uniformly. In fact, Singapore suggested that Article 7(2) of Draft WCT be replaced by a provision which clearly set out that it was permissible to make:

Temporary reproductions of works where such reproductions-

- (a) have the purpose of making perceptible an otherwise imperceptible work; or
- (b) are of a transient or incidental nature; or
- (c) facilitate transmission of a work and have no economic value independent from facilitating transmission; these being special cases where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author'.

The group of countries which believed that Article 7(1) expanded the scope of the reproduction right set out by Article 9(1) of the Berne Convention argued that it would be much more elegant to exclude temporary and

incidental reproduction from the purview of Article 7 (1) rather than expanding the scope of reproduction right in Article 7(1) and then permitting Contracting Parties, in Article 7(2), to provide for limitations and exceptions which would exempt temporary and incidental reproduction. At one point during the discussion there was a suggestion to drop Article 7 (2) altogether without any change to Article 7(1). I intervened and said that that Article 7(2) could not be deleted unless Article 7(1) was also deleted because once the import of Article 9(1) of the Berne Convention was clarified through Article 7(1) it would also be necessary to clarify the scope of limitations under Article 7(2). I went on to say that national legislators should have flexibility to craft limitations from and exceptions to rights once the marketplace effects of digital technologies became clear.

During the deliberations Ficsor mounted a strong defence of the articles as drafted.<sup>492</sup> Right from 1990 when the WIPO model provisions on the electronic storage of works (1990) were drafted the consensus among experts was that the right of reproduction included a work or part of it in either the internal storage unit or an external storage unit of a computer. Article 7(2) of Draft WCT was also nothing more than the identification of some special cases of exceptions, which were also covered by the general provisions of Article 9(2) of the Berne Convention. Providing for such specific exceptions seemed appropriate; on the contrary, any interpretation that certain reproductions were not recognised as reproductions would be in obvious conflict with Article 9(1) of the Berne Convention. Despite the learned defence of Article 7 by Ficsor many delegations were uncomfortable with the articles dealing with the right of reproduction as drafted and did not believe that the right of reproduction set out by Article 9(1) of the Berne Convention was all embracing. On his part, in his magisterial survey of the Internet Treaties, Ficsor observed that the position set out in the WIPO model provisions was never questioned, and hence it was ‘an unpleasant surprise when the copyright status of works and objects of related rights in computer memories emerged as a question on the last night of the Diplomatic Conference and what is more, due to the apparent and hardly understandable disagreement about it, it became the last obstacle to be done way with before the adoption of the “Internet treaties”’.<sup>493</sup>

Liedes summed up and concluded the discussion in the formal session of the Main Committee-I by saying that consensus should be built up through

---

<sup>492</sup> Elaborated in Ficsor (2002), paragraphs 3.33-5, pp.101-2; WIPO Guide (2003), CT-1.40-2, pp.194-5.

<sup>493</sup> Ficsor (2002), paragraph 3.35, p.102.

informal consultations. In accordance with the views set out in the Main Committee seven amendments were proposed for Article 7 of Draft WCT, five amendments each were proposed for Articles 7 and Article 14 of Draft WPPT.<sup>494</sup> The amendments fall into three categories: (i) the Singapore and GRULAC amendments which left Article 7(1) of Draft WCT dealing with right of reproduction intact and untouched but modified Article 7(2); (ii) the Israeli amendment which was similar to that of Singapore in retaining Article 7(1) but deleted Article 7 (2) and shifted the delimiting of exceptions covered by Article 7(2) to Article 12, the article which generally dealt with limitations and exceptions, and; (iii) amendments of the African Group, Australia and Norway which modified the right of reproduction set out in Article 7(1) in order to set out that indirect or temporary reproductions that have the sole purpose of making a work perceptible or which are of a purely transient or incidental character as part of a technical process do not constitute reproduction.<sup>495</sup> The amendments submitted by Australia, Israel, Norway, and the African Group in respect of Articles 7 and 14 of Draft WPPT were similar to those submitted by them in respect of Article 7 of Draft WCT.

The informal consultations in the Main Committee-I went on and on. GRULAC countries excepting Brazil strongly believed that the right of reproduction set out by Article 9(1) of Berne Convention was all embracing while Australia, Denmark, Norway, Sweden and South Africa did not. Greenstein's chronicle crisply brings out a flavour of the meandering discussions:

The discussion on Article 7, reproduction rights, reached no definite conclusion... From all reports, new language for Article 7(2) was floated about by many delegations, including the United Kingdom. The U.S. before the dinner break announced that any acceptable proposal for limiting the scope of the reproduction right with respect to temporary reproductions in Article 7(2) must

---

494 Amendments to Article 7 of Draft WCT: Singapore, (p.395); Israel (p.405); Norway (p.407); Australia (p.433); Algeria and 29 other countries ( p.445); Israel ( p.487); Colombia and 19 other countries (p.492).

Amendments to Article 7 of Draft WPPT: Israel (p.488); Norway (p.407); Australia (p.435); Algeria and 29 other countries p.446); 5. CRNR/DC/69 (Israel, p.488).

Amendments to Article 14 of Draft WPPT: Norway (p.407); Israel (p.407); Australia (p.435); Algeria and 29 other countries (p.446); Israel(p.488).

Page number mentioned in the parentheses is the page where the amendment can be found in DipCon Records, Volume I.

495 For a critique of these amendments see Ficsor (2002), paragraphs 3.105-10, pp.133-5.

contain four key elements: (1) it would be subject to Article 9(2) of the Berne Convention; (2) it would be a limitation on rights, not a limitation on the scope of a reproduction; (3) it would be tied to the technology used; and, (4) it would be permitted if the temporary reproduction was in the course of use of a work that was authorized by the author or permitted by law.

When the group returned from dinner, the U.S. apparently distributed a proposal embodying these key elements. However, no consensus could be reached. Some delegations supported proposals by Norway, Australia and Africa on Article 7. Some delegations proposed simply deleting Article 7(2) since it seemed so controversial and keeping 7(1). Others noted that the only reason 7(2) was so controversial was because 7(1) was so broad. So, they recommended fixing 7(2) and eliminating 7(1). Chairman Lieder announced around 9 pm that the debate would be closed at 10 pm. Toward the end, another concept was raised: if Article 7(1) is intended merely as a clarification or confirmation of existing reproduction rights under Article 9(1) of the Berne Convention, then maybe Article 7 is unnecessary and so should simply be deleted. When no clear consensus view was attained, the group agreed to continue the debate today'.<sup>496</sup>

On the morning of December 19, 1996, I had a small chat with Professor Reichman, and during the course of that chat he informed me that Lehman told a group of NGOs that the U.S. might have no objection to Article 7 being dropped. Reichman proved to be right. Ironically it was Visser of South Africa who made the proposal to delete Article 7 altogether even though he forcefully argued in the Main Committee-I on December 9<sup>th</sup> that limitations and exceptions in regard to the right of reproduction should not be left to national legislation but should be clearly specified in the treaties in view of the fact that digital technologies do not respect national boundaries and that conflict of national laws would emerge if limitations and exceptions are not provided uniformly. The shift in the stand of Visser should not be construed as inconsistency but as the trait of a superb negotiator who was willing to take note of other views and to work out a formulation likely to be accepted by all. Visser's formulation gained ground subject to an agreed statement being adopted. During the course of the day, Visser's formulation that Article 7 of

---

496 Greenstein (1996), December 17-8, 1996.

WCT should be dropped subject to an agreed statement being adopted gained ground, and Kushan agreed to develop an agreed statement in consultation with other delegations. Not every delegation was happy with this dénouement. When the consensus began to gain ground Zapata López of Colombia gave vent to the agony of GRULAC delegates by saying that ‘we lost much: rental right, importation right, communication right’, and ‘we should ask for more time’. In fact, there was much speculation that as many issues were yet to be settled even by December 19, 1996 the DipCon might be extended by a day or two. Whatever, the consensus to drop Article 7 was formalised in the formal meeting of the Main Committee-I on the morning of December 20<sup>th</sup>. Visser proposed deletion of Article 7 of Draft WCT saying that ‘the right of reproduction could be left subject to Article 9 of the Berne Convention and the well-established and flexible principles developed thereunder’. That Article ‘had coped admirably with every technical development’, and ‘he was confident that it would continue to do so’. Kushan supported the deletion of Article 7 subject to the condition of acceptance of an appropriate agreed statement for the Records of the Diplomatic Conference. Johannes Nørup-Nielsen of Denmark accepted the deletion of Article 7 and thought that Article 9 of the Berne Convention could be applied with its normal flexibility in the digital situation. With these interventions the Main Committee-I approved by consensus the deletion of Article 7.<sup>497</sup>

In contrast to WCT which was a special agreement under Article 20 of the Berne Convention WPPT was not a special agreement under Article 22 of the Rome Convention. Further, in contrast to WCT which requires Contracting Parties to comply with Articles 1-21 and Appendix of the Berne Convention (even though they are not parties to the Berne Convention) the WPPT does not require Contracting Parties to comply with any provision of the Rome Convention. In short, while WPPT extends the scope and level of protection offered by Rome Convention it is not anchored in the Rome Convention the way that WCT is in the Berne Convention. Consequently Articles 7 and 14 of Draft WPPT dealing with the right of reproduction could not be wholly deleted the way Article 7 of Draft WCT was. Hence, a consensus grew around the proposition that the phrase ‘whether permanent or temporary’ in Articles 7 and 14 of Draft WPPT be deleted and limitations and exceptions left to Article 20 b of the *Partly Consolidated Text of Treaty of WPPT* which merged Articles 13 and 20 of Draft WPPT into a single Article 20b dealing with limitations and exceptions in respect of performers and producers of phonograms. As Article

---

497 DipCon Records, Volume II, paragraphs 877-81, p. 764.

20b subjected limitations and exceptions to the Three-Step test, Articles 7 and 14 of Draft WPPT read with Article 20b would be, *mutatis mutandis*, the same as Article 7 of Draft WCT. At the same time a consensus grew that as with the reproduction right in WCT an agreed statement would be approved by the DipCon spelling out the understanding accompanying the modifications to Article 7 and 14 of Draft WPPT. The modifications to Articles 7 and 14 of Draft WPPT were formally approved by a formal meeting of the Main Committee-I on December 20, 1996,<sup>498</sup>

There is a famous American saying that ‘it ain’t over till it is over’; true to that saying the adoption of the agreed statements on the right of reproduction in WCT and WPPT turned out to be a prolonged, excruciating process which lasted nearly two hours and twenty minutes of the three hours left in which to complete the Diplomatic Conference, and turned the closure of the DipCon into a nail-biting suspense.<sup>499</sup> Lieder began the last session of Main Committee on the evening of 20<sup>th</sup> December saying that deletion of Article 7 of Draft WCT had been subject to the approval of an agreed statement on the same question. Kushan said that the U.S. had been working with a number of other Delegations to try to fashion a statement that was to be created as part of the understanding through which Article 7 was deleted. The statement he was proposing represented a composite of the views of a number of Delegations which had expressed varying perspectives on the issues raised by the deleted Article 7. The first sentence of the Agreed Statement stated that the reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully applied in the digital environment, in particular to the use of works in digital form. The second sentence of the agreed statement stated that storage of protected works in digital form in an electronic medium constituted reproduction within the meaning of Article 9 of the Berne Convention. As Article 7 of Draft WCT was deleted, the Agreed Statement was tagged on to Article 1(4) which obligates Contracting Parties to comply with Articles 1-20 and the Appendix to the Berne Convention. The import of the Agreed Statement regarding the right of protection in WPPT was identical to that of WCT; the language, however, was slightly different as WPPT, unlike WCT, is not a special agreement under Article 20 of the Berne Convention. Kushan added that it was his understanding that the import of the second sentence of the statements, namely that storage of protected works in digital form in an electronic medium constituted reproduction within the

---

498 DipCon Records, Volume II, paragraphs 909-17, p. 767.

499 DipCon Records, Volume II, paragraphs 1047-1152 ,pp. 784-98.

meaning of Article 9 of the Berne Convention, had been accepted in substance for a fairly long time and requested the Secretariat to confirm his understanding. Ficsor confirmed that Kushan's understanding reflected what was an agreement in the copyright community for nearly fifteen years; that agreement arose from the study by a Committee of Experts jointly convened by WIPO and UNESCO in 1980. E.C. and its Member States, GRULAC countries except Brazil and Canada supported the statement.

The chorus of support to the Agreed Statements was interrupted by Silva Soares of Brazil and Kim of the Republic of Korea. Soares expressed the view that the second sentence 'storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention' conflicted with their technical understanding and legal analysis that browsing to make a work perceptible, and digital transmission did not implicate the reproduction right. Kim of Korea favoured deletion of the second sentence as it was a one-sided expansion of rights. He later amplified the ground for his opposition in the Plenary when the Agreed Statements approved for the Main Committee-I came up for adoption. Reproductions which were not relevant in economic terms should not be considered as reproductions at all. The acts of browsing had an economic value in some cases. It was, however, difficult to distinguish acts which had an economic significance from those which had not. That being so, acts of browsing should not be covered by the exclusive right of reproduction at all.<sup>500</sup>

At that stage I made a forceful intervention urging acceptance of the agreed statement. I began by saying that it would be extremely strange if the Diplomatic Conference concluded without at least some sort of statement concerning the core of the digital agenda. Unfortunately, there was not sufficient time for the Conference to fully analyse, discuss and reach agreement on the issues involved. Given that digital technologies were new there had not been as yet a definitive understanding of their implications; consequently, it was not possible to come to agreement on treaty language. However, there was a consensus in the informal consultations that Article 7 should be dropped, but an appropriate statement should be agreed upon for approval by the Plenary. That understanding should be respected; even among thieves there is honour. The agreements might not be perfect; however, they have the merit of allowing Contracting Parties flexibility in interpreting the statements and thereby legally cope with a variety of situations in which temporary storage was

---

500 DipCon Records, Volume II, paragraph 501,p.628.

integral to a technical process. It was understood that there was no reduction in the discretion of any country to provide limitations and exceptions permitted under the Berne Convention. Clearly there was a need to address the liability of online service providers; the liability should be treated as a larger issue, not just of copyright law. With that understanding, I said that India was able to support the statement as drafted. The statement was much appreciated; Kushan supported it, and in his journal, Greenstein called my statement thoughtful. Abbasi of Pakistan who followed me said he had a problem with the statement as it had no consensus and a statement without consensus could not be given the same status as a statement adopted by consensus by all Delegations which were present in the Conference. He was supported by Soares of Brazil. Lieder once again clarified that Article 7 of Draft WCT was deleted on the condition that there would be an agreed statement on the subject matter dealt with in that deleted Article.

Discussion on the second sentence continued after the first sentence was adopted by consensus. Apart from voicing disagreement on the content of the second question the dissenters brought in procedural questions and sought to stall the Agreed Statement through procedural wrangling. Marc Georges Séry of Côte d'Ivoire wondered whether a statement about which some delegations had reservations could be considered a Conference document and wanted that the principles for adopting an agreed agreement and the interpretative value of agreed statements decided through voting should be settled first. Alfons Schäfers of Germany stated that the question raised by Séry had to be seen in the context of the Vienna Law of Treaties. Agreed statements could be adopted by majority, if necessary. He also pointed out that adoption by majority was the established practice in all the conferences under the aegis of WIPO Kushan pressed for voting if consensus was not possible. Ficsor made a last-minute fervent plea for a consensus. He began by saying that this was the last issue to be discussed by the Main Committee-I, and that it was preferable to achieve an agreement based on consensus. He noted that the first sentence of the proposed statement had been approved by consensus. With regard to the second sentence, he felt that it had been a clearly established principle, since the early 1980's, that storage of protected works in digital form in an electronic medium was to be considered reproduction, and that principle could hardly be questioned. He felt that the problem was rather about the interpretation of the word 'storage'. He suggested that a possible solution was that the second sentence might also be agreed upon by consensus, not excluding, however, the possibility of differing interpretations at the national level, which otherwise could not be fully excluded even in respect of certain aspects of the texts of the

Treaties themselves. He added that it was another matter that some interpretations could be accepted as valid while some others not. Even as his plea was sinking in, Bogsch turned up in the Conference Hall and suggested that the second sentence be followed by a third sentence which could be something like 'it is further understood that the interpretation of the term "storage" is to be done in the light of the discussions of Main Committee I'. His suggestion was supported by Soares of Brazil. Kushan strongly objected to the suggestion of Bogsch and said that most of the discussions of the Main Committee-I on the reproduction right took place in the informal sessions, and those discussions would not be reflected in the Records of the DipCon. That being so, the second sentence could not be interpreted thought the discussions of the Main Committee-I on the reproduction right. Bogsch thereupon withdrew his suggestion; however, his idea had by then gained traction, and Séry of Côte d'Ivoire proposed that the interpretation of the term 'storage' is to be understood in the light of the discussions of Main Committee I. François-Xavier Ngoubeyou of Cameroon insisted on a roll call vote to avoid any misunderstandings regarding the number of States which approved or rejected the second part of the proposal by the U.S. Even as Kushan pressed for a vote Séry of Côte d'Ivoire sought the adjournment of the meeting so that his group could have consultations. Hardly 40 minutes were left for the midnight, and unless a formal resolution was adopted by the Plenary to extend it the DipCon would have ended without concluding any treaty. Khlestov of Russia brusquely said that the Committee should stop going around in circles and should proceed to take up voting. The amendment to the second sentence moved by Cameroon was first put to vote. Lieder drew lots to decide who should be selected and by happenstance India was chosen; I voted against the amendment, and I explained later why I did so. The whole course of the debate had gone on the premise that agreed statements had interpretational value, and that Contracting Parties would have flexibility in interpreting the statements and thereby legally cope with a variety of situations in which temporary storage was integral to a technical process. I emphasised that there was an assumption of flexibility in the Berne and Rome Conventions for availing exceptions and limitations. The third sentence proposed by Cameroon took away that flexibility as interpretation was to be based on the discussions of the Main Committee-I which were not fully recorded. The amendment moved by Cameroon was rejected with 46 votes against, 23 votes in favour and 23 abstentions. Thereupon the second sentence was put to vote; it was approved with 49 votes in favour, 13 against and 23 abstentions. As soon as the voting was completed Main Committee-I concluded its work and passed into history.

In regard to contentious issues ‘it ain’t over even after it is over’. One would have expected that the Agreed Statement having been approved by the Main-Committee-I it would have a smooth passage in the Plenary. It did not. With about forty minutes left for the scheduled closure of the DipCon no sooner did the Main Committee finished its business when the Plenary met and Ms. Tolle, the Chairman of the DipCon, rushed through the proceedings. When she sought the approval of the Plenary for the Agreed Statements of WCT Soares rose to demand separate voting on Agreed Statements approved by consensus and those which were not.<sup>501</sup> Kim of Korea seconded the proposal of Brazil. On being put to vote, the Agreed Statement on reproduction right was adopted with 51 votes in favour, 5 votes against, and with 30 abstentions. Before Ms. Tolle could move to the next subject, Yambao of Philippines raised a point of order to say that he had no objection to the Agreed Statement relating to the reproduction right being a statement of the Conference but would like to place on record that ‘nevertheless that statement could not be dealt with as an agreement of all the parties in accordance with Article 31(2)(a) of the Vienna Convention on the Law of Treaties’. Only about ten odd minutes were left before the clock struck midnight after the voting and statements by a few delegations explained their reasons for voting against the Agreed Statement. The resolution on audio-visual performances and the recommendation regarding the future work on databases were approved in a trice, and the DipCon having completed its work, a few delegations commended the officers of the Conference, WIPO and all delegates for their hard work and cooperation.

Appendix X and Appendix XI present at a glance the proposals, final text and Agreed Statements of the provisions relating to right of reproduction of WCT and WPPT respectively

Before moving, it should be said that ironically, the right of reproduction which caused so much ruckus during the DipCon was hardly heard thereafter-during the transposition of the Internet treaties into national Legislations.

What remains etched in my memory of the rushed closing session of the Plenary was the reaction of Lehman to the vote on the adoption of the Agreed Statement on the right of reproduction in WCT. When in response to the President’s call to those in favour of the Agreed Statement to raise their hand and in response to that call as many as fifty-one delegates raised their hands and it became obvious that the motion was carried Lehman gave vent to his jubilation boisterously. He went on vigorously waving the name board of the

---

501 DipCon Records, Volume II, paragraphs 489-503, pp.627-8.

U.S.; his torso also moved briskly in unison with his arm, and he went on waving his nameboard even when the President called upon those opposed to the statement to raise their hands. From the Conference Venue the delegates walked across to the WIPO building nearby to attend the signing ceremony and a farewell reception. Bolivia, Burkina Faso, Chile, Germany, Indonesia, Italy, Kenya, Mongolia, Namibia, Spain, Togo, Venezuela and the E.C. signed the WCT and WPPT. As champagne flowed freely at the Last Supper as the reception came to be called by some delegates the delegates complimented each and bade bon voyage and goodbye. Jerome Reichman, Professor of Law, Vanderbilt University who attended the DipCon as a representative of the International Council of Science Union, and the Norwegian delegation complimented me for my intervention on the Agreed Statement relating to the right of reproduction, Kushan turned emotional at the reception. He said he was indeed wonder struck at the cordial relation that India and the U.S. developed at the DipCon. He had come to realise that during the TRIPs negotiations U.S. wanted more than what was necessary, and India offered less than it could. The reception came to an end around 2 AM. Except for a few whom I met in Geneva in March 1997 at the meeting of the WIPO General Bodies, where Kamil Idris was elected as successor to Bogsch, I never saw any of the delegates again, the reason being that I moved out from the Department of Education in August 1997 and never again dealt with copyright. Some civil servant careers are marked by an eternal recurrence with an officer returning to the same area of administration again and again; in contrast, my career was a perennial voyage of discovery in which I never returned to an earlier port, and once I left an area of specialisation, I moved on to a new area, a new unexpected destination. Even though I moved to Department of Culture as Secretary, I had the pleasure of meeting Kushan in mid-January 1999. He wrote to me ahead of his visit, and at the lunch I hosted we were in a reminiscent mood, and he spoke of the challenges he had to face in championing American interests and positions; he had almost sewed up a compromise on Article 7 of Draft WCT; before it could be formalised Lehman agreed to delete that article as suggested by Visser of South Africa. That was the last I met Kushan. All in all, I could not escape the 'fate of most men who mingle with the world, and attain even the prime of life, to make many real friends, and lose them in the course of nature'.<sup>502</sup>

---

502 Charles Dickens, *The Pickwick Papers*, Chapter 57.

## **Appendix VI: Obligations regarding Technological Measures: Proposals and Final Text**

### **Basic Proposal (WCT)**

#### **Article 13**

##### **Obligations concerning Technological Measures**

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty'.

N.B: Article 22, the corresponding provisions of WPPT, is *mutatis mutandis* identical

##### **Amendment Proposed by African Group of Countries**

Replace the current draft Article 13 with the following text:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by ~~rights holders~~ in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their works, which are not authorized by the ~~rights holders~~ concerned or permitted by law'. (Strikethrough added) .

##### **Final Text: Article 11, WCT**

##### **Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by *authors* in connection with the exercise of their rights under this Treaty *or the Berne Convention* and that restrict acts, in respect of their works,

which are not authorized by the *authors* concerned or permitted by law'.<sup>503</sup>  
(Italics added)

N.B: Article 18, WPPT is identical to Article 11, WCT except that the expression 'performers ' or 'producers of phonograms' replaces the expression 'authors'.

---

<sup>503</sup> Compared to the amendment by the African Group 'rights holders' replaced by authors, and 'or the Berne Convention added)

## **Appendix VII: Rights Management Information- Proposals, Final Text & Agreed Statements**

### **Basic Proposals ( Draft WCT)**

#### **Article 14**

##### **Obligations concerning Rights Management Information**

‘(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies *the work, the author of the work, the owner of any right in the work*, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public’.

N.B: Article 23 of Draft WPPT is identical to Article 14 of Draft WCT except that the second paragraph was mutatis mutandis adapted to phonograms; in that paragraph the expression ‘the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram’ replaced the expression ‘the work, the author of the work, the owner of any right in the work’ in Article 14 (2) of Draft WCT.

#### **Final Text :Article 12, WCT**

##### **Obligations concerning Rights Management Information**

‘ (1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts *knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention*:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, *or information about the terms and conditions of use of the work, and any numbers or codes that represent such information*, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public’. (Text in italics addition to the Basic Proposal)

N.B: Article 19 of WPPT is *mutatis mutandis* the same as Article 12 of WCT

### **Agreed Statement Concerning Article 12**

‘It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty’.

### **Agreed Statement Concerning Article 19, WPPT**

‘The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on Obligations concerning Rights Management Information) of the WIPO Performances and Phonograms Treaty’.

## **Appendix VIII: Limitations and Exceptions- Proposals, Final Text & Agreed Statements (WCT)**

### **Basic Proposals (Draft WCT)**

#### **Article 12**

#### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty *only* in certain special cases that do not conflict with *the* normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with *the* normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author’.

### **Final Text: Article 10 WCT**

#### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with *a* normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with *a* normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author’.

N.B: The word ‘only’ in Article 12(1) of Draft WCT deleted in Article 10(1) WCT; the word ‘the’ in both paragraphs of Article 12 of Draft WCT replaced by the word ‘a’ in Article 10 of WCT.

### **Agreed Statement Concerning Article 10**

‘It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment’.

## **Appendix IX: Limitations and Exceptions: Proposals, Final Text & Agreed Statements (WPPT)**

### **Basic Proposals (Draft WPPT)**

#### **Articles 13**

#### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer’.

N.B: (1) The wording in the two articles is identical except that the expressions ‘performer’, ‘performers and ‘performance’ in Article 13 are replaced by ‘producer of phonogram’, ‘producers of phonogram’ and ‘phonogram’ in Article 20.

(2) Articles 13(2) and 20(2) of Draft WPPT are, *mutatis mutandis*, identical to Article 12(2) of Draft 12 of WCT.

(3) *Partly Consolidated Text of Treaty of WPPT* merged Articles 13 and 20 of Draft WPPT into a single Article 20b.

### **Final Text: WPPT**

#### **Article 16**

#### **Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram’.

N.B: (1) The only change in Article 16 of WPPT as compared to Article 20b of *Partly Consolidated Text of Treaty of WPPT* is substitution of the word ‘a’ for ‘the’.

(2) Article 16 (2) is *mutatis mutandis*, identical to Article 10(2) of WCT.

**Agreed Statement Concerning Article 16**

‘The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty’.

## **Appendix X: Right of Reproduction- Proposals, Final Text and Agreed Statements (WCT)**

### **Basic Proposals (Draft WCT)**

#### **Article 7**

##### **Scope of the Right of Reproduction**

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law’.

#### **Final Text: WCT**

Article 7 of Draft WCT deleted

#### **Agreed Statement Concerning Article 1(4)**

‘The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form.

It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention’.

# **Appendix XI: Right of Reproduction- Proposals, Final Text and Agreed Statements (WPPT)**

## **Basic Proposals (Draft WPPT)**

### **Article 7 & 14**

Articles 7 and 14 of Draft WPPT dealing with the reproduction rights of performers and producers of phonograms were, *mutatis mutandis*, the same as Article 7 of Draft WCT.

#### **Article 7 of Draft WPPT**

##### **Right of Reproduction**

‘(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their

*Alternative A:* musical performances fixed in phonograms,

*Alternative B:* performances fixed in any medium, in any manner or form.

(2) Subject to the provisions of Article 13(2), it shall be a matter for legislation in Contracting

Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the fixed performance perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the fixed performance that is authorized by the performer or permitted by law’.

#### **Article 14 of Draft WPPT**

##### **Right of Reproduction**

‘(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

(2) Subject to the provisions of Article 20(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the phonogram audible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law’.

**Final Text: Article 7, WPPT**  
**Right of Reproduction**

‘Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form’.

N.B.: (1) Article 11 dealing with the right of reproduction of producers of phonograms is, *mutatis mutandis*, the same as Article 7.

**Agreed Statement Concerning Articles 7, 11 and 16**

The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, 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’.

N.B: The Agreed Statement is, *mutatis mutandis*, the same as the Agreed Statement concerning Article 1(4) of WCT.

## Chapter 15: What Good Came of It?

“Now tell us all about the war.  
And what they fought each other for’...  
‘And everybody praised the Duke  
Who this great fight did win’.  
‘But what good came of it at last?’  
Quoth little Peterkin.  
‘Why that I cannot tell’, said he,  
‘But ’twas a famous victory’.  
-----Robert Southey, *The Battle of Blenheim*

This Chapter tries to take stock of the DipCon negotiations and assess (i) what it accomplished and (ii) whether the Internet Treaties do indeed mark a transition to the future of international copyright lawmaking. To that end, the Chapter (i) presents an overview of ‘what they fought each other for’ and why, (ii) compares the Internet Treaties with each other, and with the Berne and Rome Conventions and the TRIPs agreement,<sup>504</sup> (iii) looks at the reaction of senior WIPO functionaries, bitter opponents of the Lehman Report, important countries like the U.S., EC, and India, interest groups to the outcomes of the DipCon, and (iv) compares the making of the Internet Treaties with the making of treaties related to copyright and related rights before and after the DipCon.

### 15.1 Comparative Overview of Internet Treaties <sup>505</sup>

#### 15.1.1 Preambles

The Preambles of both Internet Treaties are broadly similar and differ only in two respects. Both take note of ‘the profound impact of the development and convergence of information and communication technologies on the production and use of works (performances and phonograms)’ and seek to introduce ‘new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments’. However, unlike WCT, WPPT does not propose to ‘clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments’ because while WCT is a special agreement of the Berne Convention WPPT has no such relationship with any other international instrument. To illustrate the

---

504 For an excellent comparative account see von Lewinski (2008), paragraphs 17.165-180, pp.491-6.

505 For an excellent overview see Ficsor (2005).

interpretation of certain existing rules, Article 7 of Draft WCT wanted to clarify how the right of reproduction conferred by Article 9 of the Berne Convention should be interpreted in the digital medium. After it was decided to delete Article 7 the Agreed Statement relating to Article 1(4) attempted to interpret the way Article 7 sought to do.

For the first time ever for an international IPR treaty, both the treaties have a recital in the Preamble, introduced at the behest of India, which recognises ‘the need to maintain a balance between the rights of authors (performers and producers of phonograms) and the larger public interest, particularly education, research and access to information’). The significance of this recital and the reasons why WPPT does not have a recital in the Preamble corresponding to that in WCT which emphasises the outstanding significance of copyright protection as an incentive for literary and artistic creation were explained above. The paragraph added to the Preamble of WCT, at the behest of India was hailed as representing ‘a major development in international copyright policy’, and signified ‘the most explicit acknowledgment of the concept (of balance) on its own terms then found in a global copyright agreement’ (See 14.5). Like every historical development the paragraph had elicited revisionist criticism.

### **15.1.2 Provisions**

WCT applies to authors in regard to all protected works falling within the scope of Article 2 of the Berne Convention; in contrast, the scope of WPPT is limited to the rights of performers in regard to only aural performances (and not to audio-visual performances) and to the rights of producers of phonograms.

Unlike WPPT which has legally no nexus with any other treaty the WCT is a special agreement under Article 20 of the Berne Convention. As Article 20 specifies that a special agreement should be between the countries of the Berne Union, *ipso facto*, such countries are bound to comply with the obligations under the Berne Convention. By mandating that all Contracting Parties should comply with the provisions of Articles 1 to 21 and the Appendix I of the Berne Convention (Paris Act of 1971), Article 1(4) of WCT opens up the possibility that any WIPO Member State can become a party to WCT even though it is not a party to the Berne Convention. The compliance clause of WCT (Article 1(4)) differs from that of the TRIPs agreement (Article 9(1)) in that it includes Article 6bis (moral rights) among the provisions which have to be complied with by Contracting parties. Unlike the obligation under the WCT to comply with all the substantive provisions of Berne Convention, WPPT does not impose an

obligation on the Contracting Parties to comply with all the substantial provisions of the Rome Convention. Only a few provisions of the Rome Convention were included in WPPT by reference (Articles 3(2) and 3(3) on the criteria of eligibility for protection). However, analogous to Article 2.2 of the TRIPs Agreement Article 1(2) of WPPT is a non-derogatory clause; nothing in WPPT derogates from the existing obligations that Contracting Parties have to each other under the Rome Convention.

GRULAC countries were very particular that WCT should have no nexus whatsoever with any other treaty, the exception being the nexus between the Berne Convention and WCT; this was conceded and brought out in Article 1(1) of WCT. The insistence of GRULAC countries arose from their meticulous adherence to the copyright doctrine they believed in as well as their belief that WCT can have no nexus whatsoever with the trade related TRIPs agreement. It may be recalled that while pitching for a rental right which went beyond that provided by the TRIPs agreement Zapata López of Colombia and Carlos Teysera Rouco of Uruguay argued that the TRIPs agreement was an irrelevant consideration because in contrast to TRIPs agreement which was limited to trade WCT was about strengthening the rights of authors (See Sect. 12.4). Because of the fact that Internet Treaties have legally no nexus with the TRIPs agreement the Berne Plus and Rome Plus provisions of the TRIPs agreement were incorporated in Internet Treaties respectively without any reference to the TRIPs agreement. Unlike WCT, WPPT has a few definitions as it was necessary to redefine key concepts like fixation and phonogram to take note of the new possibilities of fixation in the digital medium.

The WCT contains the most up to date international copyright norms since, in addition to the obligation to apply the substantive norms of the Berne Convention, it (i) also includes the Berne Plus provisions of the TRIPs Agreement; (ii) assimilates the term of protection of photographic works to the term of other works; (iii) explicitly recognises a right of distribution of copies in respect of all categories of works in contrast to the Berne Convention which provided a distribution right explicitly only for cinematographic works (Article 14 (i) and Article 14bis(1)); (iv) leaves the issue of exhaustion of distribution right to national legislation while recognising a right of distribution of physical copies in respect of all categories of works ; (v) tidies up Berne Convention's 'tangle of occasionally redundant or self-contradictory provisions on "public performance;" "communication to the public," "public communication,"

“broadcasting,” and other forms of transmission<sup>506</sup> (See Sect. 7.2.1.3) and extends the communication right to all types of works; and, (vi) offers appropriate response to the challenges of digital technology and particularly the Internet by clarifying the application of the existing norms of the Berne Convention, and by adapting the international system of copyright protection to the conditions and requirements of the digital environment. The new provisions introduced to adapt copyright protection to the digital environment comprise (i) digital transmission, (ii) obligations concerning technological measures and right management information, and (iii) limitations and exceptions. An ‘umbrella solution’ was put in place to cover digital transmission whereby digital transmission could be covered either through a distribution right or a communication right (See Sect. 7.2.1.3 and Sect. 14.1). The umbrella solution included an exclusive right of making available works on the Internet and similar networks. WCT also imposed on the Contracting Parties obligations concerning technological measures and right management information. The Agreed Statement concerning Article 1(4) confirms the full application of the right of reproduction to the digital environment, including storage in the digital medium.

Unlike WCT, WPPT did not go the whole hog and update fully the rights of performers, producers of phonograms and broadcasters. However, compared to the Rome Convention, a Convention of Reservations and Compromises, (See Sect.2.4) WPPT made remarkable progress in advancing the rights of performers and producers of phonograms in the analogue as well as digital media. WPPT could not resolve the audio-visual conundrum, and purposively left out the rights of broadcasting organisations lest the as-it-is acute conflict of interest among authors, performers and producers of phonograms should be further aggravated by bringing in the broadcasters, thereby slowing down, perhaps even undermining, the conclusion of the New Instrument (See Sect. 3.6). Be that as it may, within the limited scope it had purposively chosen WPPT vastly improved the protection of performers and producers of phonograms as compared to the Rome Convention. Rather than resort to circumlocution as the Rome Convention did and leave the performers with no option but resort to criminal law or other means if they are short-changed by say unauthorized fixation, broadcasting or communication to the public of their performances, WPPT explicitly conferred the rights of fixation and broadcasting or communication to the public of their performances. It also

---

506 Ginsburg (2004), p.2.

conferred the exclusive right of distribution and making available of fixed performances as well as the moral rights of attribution and integrity.

The conferment of moral rights on performers was hailed as ‘boldly extending moral rights where they had never gone before’ and inaugurating a new status for performers by ‘recognising that they may, in fact, be as deeply implicated in their work as authors’. Traditionally, performers were understood to be engaged in the dissemination of information or culture, rather than creating works of art in their own right. As a consequence, the status of performers as well as the rights conferred on them were distinctly inferior to those of authors. That tradition was uprooted. Moral rights for performers suggest a recognition of the growing cultural importance of performers and their creative activities in our digital age. In many situations involving the communication of performances through digital technology, a moral rights dimension could now be involved. However, the conferment of moral rights on performers might give rise to some practical concerns. Moral rights have the potential for antagonism between the performers and those involved in its exploitation or adaptation.<sup>507</sup>

Further, the Rome Plus provisions of the TRIPs agreement were introduced in WPPT. As compared to Article 12 of the Rome Convention, Article 15 of WPPT extends the remuneration right for secondary uses of phonogram to indirect uses such as rebroadcasting, and phonograms published exclusively online. While Article 12 of the Rome Convention gives the option to national laws to provide for the single equitable remuneration to be paid either to the performer or producer of phonogram or both Article 15 of WPPT stipulates that single equitable remuneration should be paid to both the performer and producer of phonogram. Yet as in the Rome Convention WPPT permits different reservations to be made in respect of the single equitable remuneration right. In fact, the reservations under Article 15(3) are the only reservations permitted under WPPT (Article 21); incidentally, WCT does not permit any reservation. Compared to the rights they have under the Rome Convention producers of phonograms have the additional rights of distribution, making available a phonogram and the extended right of remuneration under Article 15 of WPPT. The provisions incorporated in WPPT in response to the digital environment are similar to those in WCT. The Agreed Statement on the right of reproduction confirms the full application of the right of reproduction to the digital environment, including storage in the digital medium. WPPT went beyond

---

507 Sundara Rajan (2016), p.774-5.

Article 11 of the Rome Convention and fully introduced the principle of no formalities (Article 20 of WPPT).

Compared to the Rome Convention, WPPT updated the definitions. Performers of folklore were included in the definition of performers. The possibility of fixing not only sounds but also digital and other representations of sounds were taken into account in the definitions of 'fixation', 'phonogram' 'producer of phonogram' and 'communication to public'. The definition of 'publication' was enlarged so as to be par with Article 3 of the Berne Convention. The definition of 'broadcasting' made it explicit that it included transmission by satellite and transmissions of encrypted signals.

The provisions of Internet Treaties in regard to enforcement are identical, and those relating to limitations and exceptions are similar; the import of the Agreed Statements concerning limitations and exceptions is the same. The provisions of Berne and Rome Convention in regard to enforcement are ineffectual; in contrast, the enforcement provisions of WCT (Article 14) and WPPT (Article 23 of) incorporate the language of Article 41(1) of the TRIPs agreement. However, unlike Article 41(1) of the TRIPs agreement lack 'teeth' and are of symbolic value only. Article 10 of the WCT and Article 16 of the WPPT incorporated the Three-Step test to determine limitations and exceptions, as provided for in Article 9(2) of the Berne Convention and extended the application of the Three-Step test to all rights conferred by them. The Agreed Statement accompanying Article 10 of WCT permits Contracting Parties to carry forward and *appropriately* extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Further, Contracting States may devise new exceptions and limitations *appropriate* to the digital environment. The extension of existing limitations and exceptions or the creation of new limitations and exceptions is allowed if the conditions of the Three-Step test are met. The Agreed Statement accompanying Article 16 of WPPT states that the Agreed Statement accompanying Article 10 of WCT applies *mutatis mutandis* to Article 16 of WPPT. The preponderant opinion holds that the TRIPs agreement had extended the scope of the Three-Step test beyond the right of reproduction, and that Three-Step test had come to be a general test for all copyright limitations and exceptions. (See Sect.3.4). WCT reiterated this interpretation about the scope of the Three-Step test. Further, WPPT extended the Three-Step Test to limitations and exceptions in regard to performances and phonograms, and in doing so carried forward the process which began in the TRIPs agreement of subjecting all limitations on and exceptions to the total bundle of rights which go under the rubric of copyright. To jump the story, BTAP and the

Marrakesh Treaties also subject all limitations and exceptions to the Three-Step test. Thus, ‘the “three-step test”, for the first time introduced by the TRIPs agreement as a general test for all copyright exceptions ‘has now become the international standard’.<sup>508</sup>

### **15.1.3 Framework Clauses**

The principles and provisions of the Berne Convention regarding the works to be protected, the ‘country of origin’ and the criteria of eligibility (Articles 2-6) were applied by analogy to WCT (Article 3). Similarly, Article 3 of WPPT took over the criteria of eligibility from the Rome Convention. WPPT defined the principle of national treatment in a clearer way than Article 2(2) of the Rome Convention. Analogous to the TRIPs agreement the scope of national treatment provided by WPPT is limited to the exclusive rights and the remuneration right conferred by WPPT; consequently, WPPT’s scope of national treatment is narrower than that of WCT. Thus, WPPT’s national treatment does not cover private copying; consequently, the vexatious issue of private copying remains even after the DipCon. WCT does not permit reservation; however, Article 21 of WPPT permits reservations in respect of Article 15 dealing with the right of remuneration for broadcasting and communication to the public. Of course, the obligation to make national treatment does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3).

### **15.1.4 Administrative and Financial Clauses**

The Administrative and Final Clauses of both the Treaties are identical as those clauses were drafted for all the three treaties to be considered by the DipCon. Each of the two Internet Treaties establishes an Assembly of the Contracting Parties whose main task is to address matters concerning the maintenance and development of the Treaty. It entrusts to the Secretariat of WIPO the administrative tasks concerning the Treaty. As earlier mentioned, (See Sect.2.4) a State cannot join the Rome Convention without being a party to the Berne Convention or UCC (Articles 23 and 24 of the Rome Convention). However, any Member State of WIPO can become a party to the WPPT without acceding to the WCT or for that matter to the Berne Union or the UCC. Any Member State of WIPO can become a party to the WCT without acceding to the Berne Union or the UCC. Similarly, Internet Treaties are the first treaties on copyright and related rights which allow intergovernmental organisations like the European Union to become a party subject to such an organisation

---

508 Reinbothe (2015), p. 198.

declaring that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by the Treaty and that it has been duly authorised, in accordance with its internal procedures, to become party to this Treaty (See Sect.10.3). The Draft Administrative and Financial Clauses of Internet Treaties provided that the treaties would enter into force three months after five instruments of ratification or accession by States were deposited with the DG, WIPO. Developing countries thought that the five instruments of ratification or accession was too low and the DipCon raised the number to thirty.

## **15.2 Proposals which did not go through at DipCon**

These include (i) the Database Treaty (See Sect.10.6) (ii) Article 6 of Draft WCT dealing with the abolition of non-voluntary rights in respect of mechanical recording and broadcasting (See Sect. 13.2.1); and Article 7 of Draft WCT dealing with the right of reproduction (See Sect.14.7). and (iii) the right of modification (Article 8) proposed by Draft WPPT (See Sect.13.3.2).

## **15.3 Reaction to Internet Treaties**

### **15.3.1 WIPO and Its Functionaries**

Among those who reacted to the DipCon outcomes the most jubilantly were senior WIPO functionaries. The last revision of Berne Convention was done in 1971; after a gap of a quarter of a century, WCT, a far-reaching copyright treaty was negotiated under the aegis of WIPO. No less importantly, a treaty covering related rights was never before negotiated solely under the aegis of WIPO. Till the adoption of WPPT in 1996, the only comprehensive related rights treaty was the Rome Convention which was negotiated under the joint aegis of ILO, UNESCO and WIPO. The Phonogram Treaty (1974) and the Satellite Convention (1974) were negotiated under the joint aegis of UNESCO and WIPO. Many experts saw in the conclusion of the TRIPs agreement the dawn of a brave new world where old fashioned copyright no longer existed, IPRs became a branch of international trade law and WIPO would be reduced to being a poor cousin of WTO (See Sect. 3.5). The adoption of Internet Treaties signified that the obituary of the old-fashioned copyright was premature, and that WIPO had recovered the turf it seemingly lost to GATT forever when disenchanted with WIPO as a forum for strengthening the protection and enforcement of IPRs developed countries led by U.S. moved to GATT for laying down binding global IPR norms and put in place a strong enforcement mechanism. But for the contingent nature of history and the sudden ascension of digital agenda to the top of the policy agenda in the U.S., EC, Japan and

Australia, and it being too late for the digital agenda to be considered in the TRIPs negotiations, WIPO would not have recovered the turf it lost so soon. Like the return of the prodigal son, the U.S. and the EC returned to WIPO for considering a treaty on digital agenda; even then, the U.S. and EC kept the process leading to the DipCon under their direct control, and succeeded in breaking with the tradition of entrusting drafting the treaties to be considered by a diplomatic conference to the agency under which organises that Conference, and entrusting the drafting to Jukka Liedes from Finland, a Member State of EC. But again, due to the contingent nature of history, the DipCon did not proceed the way the U.S. and the EC wished. On December 12<sup>th</sup>, the ‘Day of Champagne and Broken Glass’, Main Committee-I witnessed sharp protests at the way that Committee was functioning. (See Sect. 10.7) Delegations other than the American and EC delegations began to assert, and the role of the International Bureau was no more limited to logistical support. Ficsor began to play a very important role, and at the meeting of the Steering Committee on 17<sup>th</sup> December, when the Damocles’ Sword hanging on the DipCon moved aside with the abandonment of the audio-visual fixations Lehman surprised everyone present by saying with a great amount of feeling that ‘We are blessed with a great organization like WIPO. Not all organizations are like this’ (See Sect. 11.3). With the success of DipCon and adoption of the more comprehensive and forward-looking Internet Treaties, WIPO was ahead of competition; competition from WTO was at best limited to the rights of the pre-digital age. What could not be foreseen in 1996 was that WTO would cease to be competition at all. Once again due to the contingent nature of history, the Doha Trade Round continues to be stalled and the expectation that the Uruguay Trade Round would be followed by a series of trade rounds as in the past was unfulfilled. Further, a major plank of the strong patent regime put in place by the TRIP agreement was broken when the Doha Declaration on Public Health (2001) allowed compulsory licenses for pharmaceuticals in order to overcome a public health crisis. Suffice to say, WTO lost the pre-eminent leadership role it was expected to acquire in the field of IPRs when the TRIPs agreement was concluded, and WIPO once again was the forum where new norms for international copyright and related rights would be set up. The way WIPO could ward off is the challenge from WTO is a good illustration of WIPO’s ‘incredibly strong ability to adapt and persevere when confronted with major institutional challenges and potential marginalization in the international community’.<sup>509</sup>

---

509. Yu (2020), p.375.

### 15.3.2 Opponents of the Lehman Report

It may be recalled that many academics and public interest organisations like the American Library Association were bitterly opposed to the Lehman Report and the Bills based on that Report and believed that the Clinton Administration worked overtime to get DipCon to adopt a treaty in synch with the Lehman Report and use the treaties adopted by the DipCon to steamroll through the Congress the domestic legislation which the Lehman Report had recommended (See Sect. 5.5.1). They were delighted with the outcome of the DipCon and savoured a feeling of victory because, to quote Pamela Samuelson, 'the Clinton administration's agenda - an agenda that Hollywood and other major copyright industries lobbied hard for - was resoundingly defeated in the international forum'. By end of August 1996, the maximalist agenda of the Clinton administration 'appeared to be well on its way to victory' with the Committee of Experts recommending proposals which would have substantially implemented the maximalist agenda, the Basic Proposals of WCT, WPPT and Database Treaty putting forth in a treaty language the maximalist agenda and senior WIPO officials and EC approving the maximalist agenda. The opponents of the Lehman Report and the initial American stance at the DipCon were happy that their fear that the rightsowners would acquire an explicit right to control browsing the Internet or every transmission of works over digital networks did not materialise. They were particularly pleased that (i) Article 7 of WCT (dealing with reproduction right) was rejected, that Article 13 of WCT (obligation regarding technological measures) considerably toned down, and that the Agreed Statement concerning Article 10 of WCT explicitly stated that Contracting Parties could 'carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention', and that they could devise 'new exceptions and limitations that are appropriate in the digital network environment'. All in all, 'as regards digital agenda issues', Pamela Samuelson wrote, WCT is 'about as balanced and sensible a copyright agreement as it was conceivable to get', and that 'someday, the Geneva conference may be seen as a turning point - the time when copyright law began to take its place as one of the fundamental building blocks of a new world economy'.<sup>510</sup> A few months later, she conveyed a similar assessment, in a detailed article published in a scholarly journal, on the outcomes of the DipCon.<sup>511</sup> John Browning described the outcome of the DipCon as Africa 1

---

510 Samuelson and Browning (1997).

511 Samuelson (1996b), pp.434-9.

Hollywood 0 because it the African compromise proposal for Article 11 of WCT (anti-circumvention measures) that was adopted by the DipCon.<sup>512</sup> In the copyright wars over the enactment of DMCA, the American follow-up legislation, those opposed to DMCA faulted DMCA for going beyond WCT and upsetting the balance between copyright protection and public interests that WCT struck.<sup>513</sup>

The exultation of ‘copyright maximalists’ losing out the DipCon was, however, short lived; WCT gave enough flexibility for the U.S. to incorporate in DMCA anticircumvention provisions that proscribed circumvention of access controls and trafficking in circumvention devices and services whose primary purpose was enabling circumvention of TPMs. Further, while the anticircumvention provisions of DMCA achieved a balance of sorts between content industries and competing industrial and institutional interests they gave short shrift to ‘public interest uses’, comprising fair uses, privileged uses, and other non-infringing uses of copyrighted works, even though WCT and WPPT obligated such a balance to be incorporated in implementation legislation. The position in EC was no different.<sup>514</sup> In fact, the anticircumvention provision of the EUCD (European Union Copyright Directive, 2001) went one step further than the corresponding provision in that it proscribed circumvention of use controls also.

### **15.3.3 Private Interest Groups**

On the whole, private interest groups had reason to be satisfied. As mentioned already, the obligations on technological measures (Article 13 of WCT and Article 18 of WPPT) were based on an agreement arrived through negotiations between content industries on the one hand and those opposed to Article 13 of Draft WCT and Article 22 of Draft WPPT such as OSPs and ISPs, computer manufacturers, consumer electronics manufacturers, and businesses engaged in encryption research. (See Sect.10.1). Intermediaries had less reason to be satisfied in respect of the issue of liability for contributory infringement. The Agreed Statement in respect of Article 8 of final text of WCT only partly met their concerns and did not directly address the issue of contributory infringement liability as during the informal discussions it was felt that the issue of liability should be dealt with by separate laws rather than by Internet Treaties (See Sect.14.1). Broadcasting organizations were disappointed

---

512 Browning (1997).

513 Samuelson (1999), pp.528-33.

514 Samuelson et al (2008), p.21

with their exclusion from WPPT; however, in deference to the wishes of countries who strongly pleaded in the Committees of Experts for inclusion of the rights of broadcasting organisations in the New Instrument (that became WPPT) moves for better international protection of broadcasting organizations was launched at the WIPO international symposia in Manila (April 1997).

WPPT was a mixed fare for interest groups representing performers, mixed because WPPT excluded audio-visual performances but within the limited scope it had purposively chosen WPPT vastly improved the protection of performers and producers of phonograms as compared to the Rome Convention. (Sect.15.1.2); in short, their long-cherished objective of bringing on par the rights of authors and performers continued to be a work in progress.

### **15.3.4 The U.S. and the EC**

Even though the U.S. and the EC did not get what all they wanted with the digital agenda they were happy with the outcome as the Internet Treaties provided a broad legal framework for the reconstruction of copyright and related rights in the digital age, and further, that that the Treaties allowed the Contracting Parties to provide for greater protection in the digital environment. As mentioned just above (Sect. 15.2.2), the Internet Treaties provided Contracting Parties sufficient flexibility and consequently the U.S. and EC and its Member States could put in place strong legislation that protected copyright and related rights in the digital medium. For the U.S. a strong multilateral treaty was not the only string in the American bow. Once it joined the Berne Convention, the U.S., with the zeal of a new convert, began to use its clout to promote emerged strong IPR regimes all over the world; bilateral trade agreements came in handy to pursue its strategic objective of strengthening IPR regimes. A good example is the trade agreement between Australia and the U.S. The Australian Digital Agenda Act,2000 (DAA), enacted to implement the Internet Treaties, prohibited only the business of providing the means for circumvention; the act of circumvention itself was not prohibited. The prohibition applied to devices and devices (i) whose *sole* purpose was circumvention of TPMs or (ii) had limited commercial significance or purpose other than circumvention. Further, instead of an absolute ban on circumvention devices and services, the DAA set up an administrative process, whereby circumvention devices or services could be supplied to 'qualified persons' for circumventing TPMs and make a use permitted by law. If need be, a circumventing device could be made or imported for supply to a qualified

person.<sup>515</sup> Consequent to the U.S.-Australia Free Trade Agreement (2004), Australia had to replace DAA by a Copyright Amendment Act modelled on the DMCA.<sup>516</sup>

France, and many African and GRULAC countries were unhappy that audio-visual performances were excluded from the WPPT; many African countries were also unhappy WPPT did not consider the protection of folklore. However, their feelings were assuaged by a resolution of the DipCon calling upon the WIPO to take all the necessary steps for the adoption of a protocol to WPPT dealing with audio-visual performances not later than in 1998, and the decision of WIPO to organise a forum on folklore in Phuket in association with UNESCO in April 1997, and thereby hasten the process for organising an instrument for the protection of folklore. However, BATP, a treaty covering audio-visual performances, was adopted only in 2012, sixteen years after the DipCon; a multilateral instrument extending protection to folklore is still a work in progress.

### **15.3.5 India**

I had every reason to be happy for every element of the negotiating mandate given to my delegation by the Indian Government was fulfilled (See Sect.8.3). As reported to the Cabinet Secretary after returning from DipCon, India prevailed with overwhelming support, including support from the U.S., and EC, that the TRIPs agreement should not be re-opened before the stipulated period for its review; among others, the rental right continued to be the same as in the TRIPs agreement and it was decided not to reopen the TRIPs provision regarding exhaustion and parallel imports. The Internet Treaties had no legal nexus with the TRIPs agreement. India was in the forefront of the move to ensure that Internet Treaties strike an appropriate balance between rights of authors, performers and producers of phonograms on the one hand and public interest on the other; it could successfully get the DipCon to adopt a preambular clause and with the help of other countries it could ensure that Agreed Statements were adopted whereby that Contracting Parties could carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention, and to devise new exceptions and limitations that are appropriate in the digital network environment. I proceeded from the premise that adequate protection of works, performances and producers of phonograms

---

515 de Werra (2002), pp.33-9.

516 Hinze (2006), p.815-6.

in the digital environment was in the interest of India, in view of its strong film industry and it begin to emerge as a leading exporter of software services. Whatever agreement could be reached on the digital agenda would accommodate our interests, provided it was not too restrictive. Digital technologies were still in the initial stages, and no one knew how exactly they would evolve and what their impact would be; it was therefore imperative that the treaties provide parties to treaties sufficient flexibility to cope with unforeseen developments. Flexibility was all the more necessary because international treaties are not revised often. Thus, the flexibility provided in the matter of digital transmission and obligations concerning technological measures and rights management information suited the Indian position. In the letter to the Cabinet Secretary, I also highlighted the fact that the Indian delegation established special working relations with a number of countries including the U.S., and EC, and was part of Group of Seven countries/EC (colloquially called Big Boys) comprising the U.S., EC, Australia, South Africa, Columbia, Singapore and India which had a major say in shaping the outcomes of the DipCon. Further, personally I had the gratification that I could contribute to the hastening of negotiations in the Main Committee-I by coming with the idea of taking up clusters of near-identical articles of WCT and WPPT, and more importantly the idea of agreed statements to bring to a closure unending argument about the wording of contentious articles. I can say with confidence that but for the decision to opt for negotiations in closed sessions of the Main Committee-I and my idea of agreed statements, the Internet treaties could not have been concluded within the stipulated duration of the DipCon.

## **15.4 Overall Assessment**

The overall assessment of the DipCon by the participants as well as others present was aptly summed up by Seth Greenstein, the chronicler of the Conference. The treaties to be considered by the DipCon were intended to cover rights and obligations basic to the electronic networked environment. Even though the future of the digital technologies was not known WIPO and its Member States leapt ahead 'in a matter of months, not decades'. It was inevitable that 'tomorrow overtakes today'; however, today we 'hope (against hope) that the clarity of principled thought and well-intentioned action still may create structure and meaning for decades to come'; over the last three weeks, we had reached 'a higher promontory from which to view the future, and that our efforts secured treaties flexible enough to carry us forward into the next decades'. It was gratifying that in the end reality and reason prevailed, and overly restrictive aspects of the proposed rights under these treaties 'were forsaken instead for a righteous balance among rights and the many

technological and societal realities'.<sup>517</sup> To jump the story, Greenstein's hope as fulfilled in that even after nearly a quarter century the structure and meaning of the Internet treaties continue to be valid.

## **15.5 Internet Treaties: Do They Mark a Transition to the Future of International Copyright Lawmaking?**

It was mentioned earlier, (See Sect.3.5) that (i) after the conclusion of the TRIPs agreement it was widely believed that the entry into force of the TRIPs agreement on January 1, 1995 marked the end of the international era and the beginning of a new global era in the history of intellectual property, and (ii) that unlike in the international era, global era instruments like the TRIPs agreement do not aim at harmonisation but lay down binding minimal norms of IP protection. Neither WCT nor WPPT, nor for that matter the two multilateral instruments related to copyright and related rights adopted after Internet Treaties -the BTAP (2012), and the Marrakesh Treaty (2013) lay down inflexible binding norms. The Internet Treaties provisions relating to digital transmission, technological measures and rights management systems are good examples of the flexibility given to Contracting Parties, and they follow the time honoured principle of 'freedom of legal characterisation' whereby Members of the Berne Union are given the flexibility to characterise the acts and rights in a way different from those set out in the Berne Convention and to discharge the obligations under the Berne Convention in the way they thought fit so long as the scope and level of protection are not lower than those provided by the Berne Convention (See Sect.2.2.1). Suffice to say, WCT, WPPT, Beijing and Marrakesh Treaties are a category distinct from the TRIPs agreement. Looking back at the TRIPs negotiations a quarter of a century of the conclusion of the TRIPs negotiations, TRIPs agreement did not mark the end of the international era and the beginning of a new global era in the history of intellectual property. The TRIPs agreement was an aberration in that neither before the TRIPs agreement nor after it did any multilateral copyright and related rights instruments lay down binding, inflexible standards of protection. The lasting novelty of the TRIPs negotiations lay in linking negotiations over standards of IPR protection and enforcement with multilateral trade negotiations which spanned a vast range of trade issues covering many sectors. The precedent set by the TRIPs negotiations was followed in bilateral and regional trade agreements concluded by the U.S. the EC and Japan. As years rolled by, the great expectations aroused by the TRIPs agreement among rightsholders of

---

517 Greenstein (1996), 'The Final Day'.

developed countries turned sour; <sup>518</sup> the enforcement provisions displayed the characteristics of a difficult compromise reached during the Uruguay Round negotiations <sup>519</sup>.

In an article with the title *The WIPO Copyright Treaty: A Transition to the Future of Copyright Lawmaking?*, Graeme Dinwoodie put forth the view that it is the making of the Internet Treaties ‘which represented a watershed moment in international copyright law’ and not the TRIPs agreement’. It was a watershed moment in that ‘*the process* that led up to the conclusion of the two Internet treaties and the *conduct of the diplomatic conference* at which they were considered were quite different in several respects from that which had been seen heretofore’ (italics in original).<sup>520</sup> In discussing Dinwoodie’s characterisation of the Internet Treaties it is analytically useful to distinguish between the provisions of those treaties relating to the digital agenda from those relating to updating the long overdue minimum standards of protection of the Berne and Rome Conventions. Dinwoodie’s characterisation applies *only* to the provisions relating to digital agenda. The non-digital agenda sought to make up for the fact that the Rome Convention was never revised, the Berne Convention was not revised from 1971 and that the TRIPs negotiations could not fully update the Rome and Berne Conventions. Much thinking, some of which went back to 1980s, were behind the proposals relating to non-digital agenda considered by the DipCon; in fact, quite a few countries had already legislated on these proposals.

The making of Internet Treaties relating to the digital agenda differed from every other international instrument dealing with copyright and related rights, be it before or after them Treaties, in the speed with which they were concluded. It took nearly three odd decades for the idea of an international copyright convention to fructify as the Berne Convention, and about half a century for the idea of an international law for protecting performers and producers of phonograms to fructify as the Rome Convention. It took eight years of negotiations for the TRIPs agreement to be concluded- or a little over four years, if one takes into the account the fact that the final agreement only marginally differed from the Dunkel Draft of December 1991. Or to give another example which would prove the point that the process which culminated in the Internet treaties was pretty fast, the 1976 American

---

518 The shifting perceptions about the TRIPs agreement are brought out by Yu (2006); Yu (2011a); Yu (2015a); Yu (2020).

519 Matthews (2002), p.66.

520 Dinwoodie (2007), pp.751-3.

Copyright Act, 'which almost completely revised existing copyright law, was the product of two decades of negotiation by representatives of creators and copyright-using industries, supervised by Congress and, to a lesser extent, by the Copyright Office'.<sup>521</sup> Compared to the TRIPs negotiations, not to speak of the Berne and Rome Conventions, the Internet Treaties were concluded, figuratively with the speed of thought. It was only in April 1993, three years before the DipCon, that WIPO held its first worldwide symposium on the impact of digital technologies on copyright at the Harvard University; at about the same time that the Lehman Working Group was constituted in the U.S. Australia followed suit in 1994, and Japan and the EC in 1995. For the first time, the term 'digital agenda' was mentioned in the Berne Protocol Committee in December 1994; the first serious deliberation took place in September 1995, and deliberations were completed in three sittings spread over the period September 1995-May 1996. Treaty language proposals were introduced for the first time in the meeting in February 1996. Even though most countries had no exposure whatsoever to the digital technologies and had no clear idea about how these technologies would impact on copyright and related rights, and even before digital agenda was deliberated upon by the Committees of Experts for the first time only in September 1995, WIPO Governing Bodies planned and budgeted for a diplomatic conference to be held in 1996. The Basic Proposals (Negotiating Texts) for the three treaties to be considered by the DipCon were received by India in the third week of September 1996; other countries would also have received at about the same time. The DipCon started less than two months later on December 2<sup>nd</sup>; nine days later, on December 11<sup>th</sup>, it was decided to drop the Database Treaty. Internet Treaties were settled in informal negotiations in just about five days from December 15<sup>th</sup> to 20<sup>th</sup>. There is no precedent in international treaty making for the speed with which Internet Treaties were negotiated and concluded.

The second distinguishing character of the Internet Treaties that the provisions in Internet Treaties relating to the digital agenda were not 'received wisdom', and did not codify 'commonly held, and already nationally implemented laws';<sup>522</sup> unlike the provisions of the Berne Convention the digital provisions of Internet Treaties were prospective solutions to new problems; they should be 'seen as an attempt to create an international norm that would then be used to structure then-nascent national models (particularly with regard to

---

521 U.S. Supreme Court, *Cmtty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 743 (1989), cited in Dinwoodie (2000), p.486.

522 Dinwoodie (2000), p.493.

prohibitions on circumvention of technological protection measures)<sup>523</sup> Even the TRIPs agreement, in spite of its much-vaunted distinctiveness, was in large part backward looking constructed on the Berne Convention model of minimum standards and national treatment. All in all, the digital provisions of the Internet Treaties differed from classical copyright conventions in three respects: (i) the speed with which they were negotiated, (ii) they laid down a legal frame for national legislations to be enacted instead of harmonising national laws, and (iii) they were anticipatory in that they sought to adapt copyright and related rights in the nascent stage of the development of new technologies abandoning the tradition of waiting to see how the new technology would evolve, and then adapt copyright and related rights. However, in so far as they provided flexibility by following the principle of ‘freedom of legal characterisation’ they adhered to the tradition of the classical Berne Convention. Hence it may be more apt to characterise the Internet Treaties as ‘Neo-classical’.

The distinctive characteristics of the Internet Treaties were missing in the subsequent two multilateral treaties BAP and Marrakesh Treaties. Within four years of the adoption of the Internet Treaties the international policy environment for copyright and related rights had relapsed to that which prevailed during and after the Stockholm Conference, so much so that only two multilateral treaties relating to copyright and related rights were concluded in the nearly twenty-five years after the DipCon: the BAP (2012), and the Marrakesh Treaty (2013). BAP was sixteen years in the making if takes note of the fact that the issue of audio-visual performances was an unfinished agenda of that Conference, and that no consensus could be reached in the Diplomatic Conference of 2000. The Marrakesh Treaty was in the making for nine years if one takes note of the fact that WIPO’s Standing Committee on Copyright and Related Rights (SCCR) began to informally discuss enhancing the access to printed material by visually impaired persons from 2004, and five years if one factors in the fact that it was only in 2008 that SCCR began to formally discuss a treaty for the an agreement for VIP access of visually impaired persons to information in useable formats and technologies;<sup>524</sup> it was also from 2008 that the World Blind Union and Knowledge Ecology International arranged for an expert group to propose a treaty to address access to copyrighted material for those with reading disabilities.<sup>525</sup> Suffice to say, neither before the Internet

---

523 Dinwoodie (2007), p. 759.

524 Scheinwald (2012), pp.449-50.

525 Yap (2017), p.360-2.

treaties nor later was any treaty concluded with the speed with which the Internet Treaties were concluded. And further, many countries had many provisions similar to those in the Beijing and Marrakesh Treaties; thus, a WIPO study brought out that fewer than half the Member States of WIPO had created specific exceptions and limitations to copyright for the benefit of the visually impaired.<sup>526</sup> To sum up, while the making of the Internet Treaties had distinctive features which separated it not only from the previous treaties on copyright and related rights but also from those concluded later; the Internet Treaties did not in any way mark the transition to a new way of making treaties on copyright and related rights; in short, it was no watershed.

Before moving on, it would be appropriate to comment about the observation of Pamela Samuelson that ‘in Geneva the division was not between haves and have-nots but between go-slows and go-fasters’.<sup>527</sup> It is no doubt true that the strident North-South Confrontation which was a major feature of the TRIPs negotiations till September 1989 was conspicuous by its absence, all the more surprising that at the Asian Regional Meeting at Chiang Mai the two Thai officials who spoke asserted again and again that DipCon should not be a forum for developed countries to benefit themselves, and that the new standards should be based on consensus of the international community ‘which includes us’; he added that ‘we would not stay on the side-lines’. Neither in the Plenary nor the Main Committee-I did the Thai delegates articulate the point of view articulated at Chiang Mai. Coming to the point that the division was between go-slows and go-fasters, rightsowners and to a considerable extent the U.S. and EC preferred a definitive legal framework that would be uniformly transposed in national legislations, and the digital provisions of the Internet treaties as finally adopted offered more flexibility to Contracting Parties. Perhaps, the tussle between ‘go-slows and go-fasters’ is better characterised as the age-old tussle between uniform and flexible norms witnessed during the Conference which adopted the Berne Convention and successive Revision Conferences of the Berne Convention (See Sect. 2.2.2). As if to illustrate Faulkner’s famous adage that the Past is not dead and that it is not over the contest over the reproduction right in Draft WCT hovered over the interpretation of Article 9(1) of the Berne Convention and the scope of the reproduction right set out by it.

North-South was Confrontation missing during the DipCon, and so was Group solidarity. As in some multilateral negotiations the negotiations were not

---

526 WIPO Study (2007), paragraph 2.1.

527 Samuelson and Browning (1997).

between groups, either regional groups or issue-based *ad hoc* groups. The configuration of groups varied from issue to issue, and article to article. Thus, in respect of a TRIPs plus rental right the Asian Group and some African countries like Egypt opposed any move to go beyond the TRIPs provisions while many Latin American countries preferred a general rental right to be provided. However, eventually a consensus was reached that the scope of the rental right should not be expanded beyond that provided by the TRIPs agreement. When Peru insisted on reopening in the formal session of the Main Committee-I the consensus arrived at during the informal sessions and the matter being put to vote, eighteen Latin American countries chose to remain absent rather than support the stand of Peru. If there were a fault line that ran across and divided delegations it was the schism between the two systems of copyright and related rights, the 'Copyright' system and the authors' right system. In general, most GRULAC countries whose copyright system was close to the authors' right system and the Continental European countries which constitute the heartland of the authors' right system were strong proponents of strengthening protection. The strong attachment to further strengthening the copyright and related rights regime comes out from the agony of Zapata López of Colombia when consensus began to build up in favour of dropping Article 7 of WCT (right of reproduction): 'we lost much: rental right, importation right, communication right', and 'we should ask for more time'. It is again adherence to doctrinal purity that motivated many GRULC delegations not to bring the national treatment in WPPT on par with that in the Berne Convention; in their view, authors' rights and performers' rights were two different species. The strong support extended by the EC and its Member States to limit the national treatment in WPPT to the rights conferred by WPPT was driven by strong economic interest: not to further deepen penetration by U.S. firms of the market for recorded films and not to let the U.S. firms have a share in the proceeds of the levies on recording equipment and media to compensate rightsowners for private copying (See Sections 4.4 and 13.3.4). In short, the battle over national treatment in WPPT was a continuation of previous battles. Suffice to say, as far as the politics of treaty-making was concerned it was no different from the TRIPs negotiations after resistance from developing countries to the consideration of IP in the Uruguay Round ceased in September 1989. As would be elaborated in the Postscript which follows, during the period from September 1989 to the end of the 20<sup>th</sup> century, a narrow window of opportunity was open allowing the adoption of TRIPs and the Internet Treaties without the opposition of developing countries, thereby strengthening the copyright and related rights regime.



# Epilogue

# Epilogue

A retrospective not only looks back at the making of the Internet Treaties but also at the manner in which the Treaties fared over the last quarter of a century; this is all the more so as the present-day Internet and digital technologies are light years away from those at the time of the DipCon. This Postscript presents a brief overview of how the Internet Treaties had fared since the DipCon. Those who wish to have a more detailed account may browse my book, *WIPO Internet Treaties at 25*.

## 1. Entry into Force of the Internet Treaties

With thirty States ratifying or acceding to it WCT entered into force on March 6, 2002, and WPPT on 20 May 2002. Interestingly, even though the EC was a major player at the DipCon next only to the U.S., the EC and its Member States ratified WCT only in December 2009 and WPPT in March 2010, about thirteen years after the DipCon and over seven years after the treaties entered into force. This delay, was due to (i) the complex decision making process of EC, (ii) the making of the EUCD stretching up to 2001 because it went beyond mere implementation of the Internet Treaties and took up the herculean task of harmonising limitations and exceptions among the copyright laws of the Member States with a view to hasten the achievement of a single market , (iii) the long time it took for the EUCD (2001) to be transposed into national legislations, and (iv) the consensual decision that EC and its Member States would not ratify the Internet Treaties till all the Member States transposed the Internet Treaties into national laws. Many Member States of the EC transposed EUCD into national laws only in 2005, and the transposition process in all Member States was completed only in 2006. Canada took even longer time to enact the implementation legislation<sup>528</sup> (2012) and ratify the Treaties (2014) because of political instability and consequent quick turnover of governments, and a strong grassroots movement of users. India is rather *sui generis*; even though India took a very active part in the DipCon the implementation legislation was enacted only in 2012, and it acceded to the Internet Treaties only six years later in 2018. The extraordinary delay in the enactment of implementation was due to lack of an effective demand from copyright

---

528 The term 'implementation legislation' is legislation enacted by Contracting Parties in order to fulfill the obligations imposed by the Internet Treaties.

industries for an implementation legislation because of low Internet penetration in the country even in 2012.

Though nearly a quarter of a century had elapsed after the DipCon, to date the Contracting Parties of WCT and WPPT are only 110 and 109 respectively though WIPO has as many as 193 Member States. To date, Kenya, Brazil and South Africa are yet to be parties to the Internet Treaties even though Ms. Esther Mshai Tolle of Kenya was the President of the DipCon, Guido Fernando Silva Soares of Brazil and Coenraad Johannes Visser of South Africa played a very active role in the DipCon, the reason perhaps being a revisionist perception of the Internet treaties coming to the fore after the advent of the 21<sup>st</sup> century.

## **2. Constructive Ambiguity Shifts the Locus of Conflict**

Key provisions relating to the digital agenda like the obligations concerning technological measures were couched in constructive ambiguity and offered a great deal of flexibility to the Contracting Parties. Thus, as with Article 6bis of the Berne Convention (moral rights), a Contracting Party could take the view that its existing civil or criminal law or both provided adequate legal protection and effective legal remedies against the circumvention of effective TPMs, and therefore no change in copyright law was necessary to fulfil the obligations concerning technological provisions. If it chose to amend its copyright law, there was more than one way by which such an amendment could be made. It could (i) prohibit the act of circumvention alone whereby the person circumventing would be liable or (ii) prohibit the business of providing circumvention devices and services (in jargon, referred to as ‘preparatory steps’) whereby the person providing the circumventing means would be liable, or (iii) both. In turn, prohibiting the act of circumvention could comprise (i) prohibiting access controls, or (ii) prohibiting use/right controls, or (iii) prohibiting both. The same alternatives apply in respect of the business of providing circumvention devices.

In the U.S., the process of transposition of WCT into national legislation, was as acrimonious as the earlier battles of the Copyright Wars which began with the publication of the Green Paper. Even in the EC, the adoption of EUCD, which provided a framework for the implementation of WCT and WPPT by its Member States, was preceded by ‘unprecedented lobbying, bloodshed, vilification, media propaganda, the constant hounding of EC and government

officials'.<sup>529</sup> The transposition of the anticircumvention provisions of EUCD into national legislations of quite a few Member States was controversial, and 'evolved into a fierce political battleground in several European countries such as Germany ... and France'.<sup>530</sup> The enactment of the implementation legislation in Canada took eleven long years and three failed attempts, and the opponents of the legislation dubbed the bills introduced in the Canadian Parliament as being 'born in the U.S.' and demanded a 'Made in Canada' Bill which, among others, would adopt 'a Canadian way to anti-circumvention legislation'.<sup>531</sup> The opposition to the making of the implementation bill sparked the world's first Facebook Uprising.<sup>532</sup> In spite of the strong opposition to the transposition of the Internet Treaties in countries with deep penetration of high speed Internet, a few exceptions and variations apart, implementations laws regarding secondary liability of intermediaries, TPMs and rights management systems show considerable convergence.

### **3. Prolonged Time of Troubles**

The history of the years since the DipCon is a chronicle of the copyright and related rights system being engulfed in crisis after crisis as digital networks and technologies threw challenge after challenge in rapid fire succession. The Internet treaties were about two years old when the Napster peer-to-peer (P2P) file sharing system made its appearance. The copyright storm that Napster brought in its wake unfolded 'over more than a decade as copyright owners sought to protect their works amidst the battering waves of a dynamic of promiscuous distribution platforms unlike anything seen before or anticipated'. All the pre-emptive action that went into the Internet Treaties and implementation legislation like the DMCA were of no avail and much of the music copyright system was knocked out 'in one fell swoop'.<sup>533</sup> As bandwidth, storage capacity, and computer speed continued to improve, and technological developments like the interactive Web 2.0, social media (Facebook, Twitter and so on) and online video sharing platforms like YouTube made their appearance the technological challenges of enforcing copyright law continued to grow manifold. The technological challenged was compounded by the challenge of societal acceptance. In an environment in which there was hardly any teenager in the U.S., Canada and Western Europe who was not using the Internet to

---

529 P Hugenholtz (2000), p.501.

530 Breindl and Briatte (2013), p.30.

531 Geist (2005), pp.211-250.

532 Haggart (2013), p.842.

533 Menell (2014), pp.218, 279.

access copyrighted content in violation of copyright law, efforts by rightsowners to enforce their rights through litigation gave the content industries a bad name and resulted in a normative backlash against copyright. The policy environment for copyright and related rights became more complex with (i) Internet activists and civil society groups committed to privacy, and digital and user rights coming to be important players in the making of copyright policy, and (ii) social media facilitating policy activism immensely by facilitating the formation of social groups, their political mobilisation, online advocacy and carpet bombing of legislators with thousands of representations opposing any policy that is disliked. A classic example of the policy environment becoming utterly unpropitious for strengthening copyright law and its enforcement is the abandonment of the *Preventing Real Online Threats to Economic Creativity and Theft of Intellectual Property Act* (PIPA) and the *Stop Online Piracy Act* (SOPA). The Bills triggered an 'Internet Insurgency', the climacteric event of which was on January 18, 2012, a week before the Senate was scheduled to vote on PIPA. On that day, which went down in the activist folklore as the that day when Internet 'went dark', massive online protests against the Bills erupted with 115,000 sites participating in the protest, 50,000 sites including Wikipedia, Mozilla and Reddit blacking out all or part of the site, and a hundred million users blocked from the sites. The intensity of the carpet-bombing Congressmen comes out from the fact that during the Internet blackout ten million petitions were submitted, eight million calls were attempted, four million emails sent. This spectacular protest was very timely in that in Washington it was already the election season; presidential and congressional elections loomed large on the political horizon. No wonder, the Bills were quietly abandoned. It is, however, important to note the asymmetry of power wielded by the rightsholders and their opponents. There are enough examples which show that in the new policy environment, while it would be an uphill task to strengthen copyright and its enforcement it is well-nigh impossible to roll back enactments like DMCA detested by copyright activists.<sup>534</sup>

#### **4. Paradigm Shift in the Way Academics Look at Copyright**

As the new millennium began to unfold a far-reaching change took place in the way most of the American copyright scholars began to think about copyright. Even earlier, alternative conceptions of copyright were mooted; just

---

534 Haggart (2013), p.856.

to give two examples, as early as 1981, David Lange wrote about intellectual property having grown ‘uncontrolled to the point of recklessness’ and the imperative of ‘new intellectual property interests’ being offset ‘by equally deliberate recognition of individual rights in the public domain’.<sup>535</sup> However, Lange’s thinking was much ahead of its time, and consequently the article ‘sunk without a trace’.<sup>536</sup> About a decade later, Jessica Litman brilliantly and vividly brought out the linkage between public domain and the actual process of creating works. Contrary to the conception of authorship in copyright doctrine, ‘the very act of authorship in *any* medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea’ (italics in original). She pointed out that ‘composers recombine sounds they have heard before; playwrights base their characters on bits and pieces drawn from real human beings and other playwrights’ characters’. This act of drawing upon the work of any other and creating another work ‘is not parasitism’; it is the ‘essence of authorship’, and ‘in the absence of a vigorous public domain, much of it would be illegal’.<sup>537</sup> The second example relates to users’ rights propagated by Ray Patterson who ‘spent much of his scholarly life explaining that copyright was most properly understood as a “law of users’ rights”’.<sup>538</sup> The title of the book he co-authored with Stanley Lindberg, *The Nature of Copyright: A Law of Users’ Rights* (1991),<sup>539</sup> was a defiant challenge to the centrality of author in copyright act. Due to a confluence of events, these alternate conceptions of copyright became ideas whose time had come in the first decade of the 21<sup>st</sup> century. The enactment of the DMCA, and worse of the Sonny Bono Copyright Term Extension Act,<sup>540</sup> which extended the term of protection by another twenty years, and the normative backlash against copyright law because of the attempts by the MPPA and RIAA to take civil action against thousands of purported infringers of copyright radically altered the public perception of copyright. Once Web 2.0, YouTube and social media, and User Generated Content became widely popular the perception that laws made by government should not be allowed to endanger the fundamental and attractive aspects of digital technologies such as access to a cornucopia of information

---

535 Lange (1981).

536 Bollier (2009), p.56.

537 Litman (1990), p.966-7.

538 Litman (2011), p.326.

539 Ray Patterson and Lindberg (1991).

540 The Act was named for Musician Sonny Bono who was its original sponsor who died in a skiing accident that year. The Act is popularly known as the Sonny Bono Act, or derisively the Mickey Mouse Protection Act as the Walt Disney Company lobbied for the copyright extension and the Sonny Bono Act delayed the entry into the public domain of the earliest Mickey Mouse movies by twenty years.

and awakening the innate creativity of ordinary users of Internet began to spread widely. Figuratively, academic activism during the Copyright Wars focussed on the theme of fair use being extinguished if the recommendations of the Lehman Report were approved and the DMCA enacted; during the 2000s and 2010s academic activism had an additional theme: the creativity of ordinary Internet users should not be smothered by senseless laws put in place at the behest of corporate interests. The change in the academic way of thinking brought about a far-reaching change in the way limitations and exceptions were conceived. As Boyle put it vividly limitations and exceptions are not just ‘narrow and grudging defense against an otherwise valid case for copyright infringement’; they are ‘uses that were never within the copyright holder’s power to prohibit’, and when ‘society hands out the right to the copyright holder, it carves out certain areas of use and refuses to hand over control of them’.<sup>541</sup> Once so conceived, it is just but one short leap from fair use to users’ rights which exist independently of author’s rights. Along with users’ rights, public domain had come to be ‘the cause célèbre among progressive intellectual property and cyberlaw scholars’,<sup>542</sup> Yet another reason for the challenge to the of copyright doctrine was the new modes of production of content such as UGC, and collaborative efforts by a multitude of individuals interacting and communicating with one another through Internet (social or distributed production such as Wikipedia and open-source software). The economic incentive that copyright offers is of no relevance to creators of UGC or participants in social production; creations of collaborative efforts do not fit the personalist copyright doctrine of authors’ right system. The new way of thinking about copyright spread rapidly from the U.S. to the rest of the world including the European heartland of the authors’ right conception of copyright. However, copyright commentary by most academics got more scholarly and independent of the industries it studied, and a group of progressive copyright scholars were ‘constructing a new narrative of what copyright policy should be’.<sup>543</sup> Consequently, the new way of thinking about copyright had little impact on real world policymaking, copyright practice and jurisprudence. <sup>544</sup> Further, much of the academic commentary was not immune from the inclination of advocacy to exaggerate and indulge in polemics, to embellish facts and

---

541 Boyle (2008), p.66

542 Chander and Sunder (2004), pp.1333-4.

543 Bollier (2009), pp. 42, 53.

544 The Canadian Supreme Court is an exception; its ‘pentology’ of judgments formally endorsed users’ rights. For a crisp account of the jurisprudential revolution see Craig (2017), pp.20-7; for more detailed treatment see Geist (2013).

reasoning which were favourable to one's point of view and conversely tone down those which were unfavourable, a fact captured by the observation of Jessica Litman that 'we've all become too accustomed to feverish overstatements in the course of the continuing copyright wars. It becomes easy to forget that some things we say are exaggerations amplified for rhetorical effect'.<sup>545</sup> Be that as it may, the new way of thinking enhanced the firepower of groups opposing legislative proposals for strengthening copyright protection and enforcement and gave an impetus to the Access to Knowledge (A2K) movement which had considerable salience in the mid-2000s.

## **5. Paradigm Shift in WIPO's Policy Environment**

WIPO's policy environment changed in early 2000s very dramatically, and WIPO was figuratively transported on a Time Machine back to the period from 1960s to 1989 when North-South confrontation almost wrecked the Stockholm Revision Conference and WIPO suspended efforts to revise the Berne Convention. During the TRIPs negotiations, the Trilateral Group of industrial interests ( See Sect.3.2) had a free run unhampered by civil society groups; however, after the TRIPs agreement entered into force a strong civil society movement for affordable medicines emerged from 'the crucible of the global HIV/AIDS pandemic'.<sup>546</sup> At the same time, the bargaining power of the developing countries increased enormously because of the desperation of developed countries led by the U.S., after the 9/11 terrorist attacks on the World Trade Towers, New York, to ensure the success of the forthcoming Doha Conference and launch of a new trade round. As a result of these developments the TRIPs provisions in respect of pharmaceutical patents and public health emerged, to quote Michael Moore, DG WTO, as 'a deal-breaker for a new trade round'.<sup>547</sup> The patent provisions of the TRIPs agreement proceed from the premise that compulsory licenses were an unwarranted curtailment of IPRs; in a stark departure from that premise the Doha Declaration on the TRIPs agreement and Public Health highlighted the right of Contracting Parties to grant compulsory licences in order to deal with public health emergencies, and to determine what constitutes a public health emergency, The success of the Access to Medicines campaign at Doha encouraged activists to replicate that success in 'other substantive areas where global intellectual property rules had a significant impact on public policy objectives of importance to developing countries such as access to educational

---

545 Litman (2005), p.919.

546 Kapczynski (2010), p.37.

547 't Hoen (2002), p.42.

material and scientific knowledge',<sup>548</sup> and the result was a strong A2K movement which went hand in hand with the resurgence of the demand that the development needs of developing countries need deserve special consideration in the praxis of intellectual property and functioning of WIPO. the A2K movement had both positive and negative agenda. The positive agenda was to secure recognition of user rights in international copyright law and expanding access to works in digital as well as analogue medium by expanding the scope of limitations and exceptions through a multilateral A2K treaty. The negative agenda comprised stopping further strengthening the standards and enforcement of copyright and related rights. Argentina and Brazil led the demand of many, but not all developing countries, for a development agenda for WIPO which would transform WIPO into a development agency instead of being a champion of IPRs. Among others, the Argentine-Brazilian proposal was critical of norm setting activities that WIPO was engaged which 'would have developing countries and LDCs agree to IP protection standards that largely exceed existing obligations under the WTO's TRIPs agreement', examples being the Substantive Patent Law Treaty and the Broadcasting Treaty. It demanded that new layers of IP protection in the digital environment should not be added as such layers would obstruct the free flow of information and scuttle efforts to set up new arrangements for promoting innovation and creativity, , and that IP enforcement approached in the context of broader societal interests and development-related concern, and that the rights of countries to implement their international obligations in accordance with their own legal systems and practice should be safeguarded. All in all, it appeared as though the international copyright system broke down; developed countries, frustrated by having an earnest discussion in WIPO and WTO of their concerns about enforcement, moved away from multilateralism to negotiate a plurilateral treaty ACTA (Anti-Counterfeiting Trade Agreement), and many developing countries sought to depart from copyright tradition and have a treaty exclusively on limitations and exceptions. ACTA was stalled by large scale protests in Central and East European Member States of EU, and multilateral treaties like a broadcasting treaty as well as a treaty of limitations and exceptions ground to a halt. Paraphrasing what Ricketson and Ginsburg wrote about the Berne Convention in its centenary year (1986),<sup>549</sup> WIPO appeared to be a static institution; to be sure, it had an interesting and illuminating past, but its future prospects were less than exciting.

---

548 Latif (2010), p.103.

549 Ricketson and Ginsburg (2006), p. viii.

## 6. Revisionist Perception of Internet Treaties

It is rare that historic personalities and events are not subjected to revisionism. As far-reaching changes took place in the way many copyright scholars began to think about copyright and as many scholars began to visualise copyright as user's right the fifth paragraph in the Preamble to WCT, introduced at India's behest, turned out to be 'a bad joke', and not the major development in international copyright policy hailed by Pamela Samuelson and Dinwoodie. It was a poor joke because if WCT were to really balance the rights of the authors and those of the users the triple gauntlet (the Three-Step test as labelled by Vaver) would have been replaced by a Three-Step test which would allow an owner right to be enacted or enforced (i) only in certain special cases that (a) demonstrably encourages the production of the work, and (b) does not unreasonable prejudice the legitimate interests of users'.<sup>550</sup>

A censorious attitude was not limited to the additional paragraph introduced in the Preamble to WCT; for the true believers of the A2K movement and WIPO Development Agenda, the TRIPs agreement was itself an abomination, and any international or regional or bilateral instrument which expanded the scope and level of protection of copyright beyond what the TRIPs agreement provided was TRIPs-plus and *per se* worse than the abomination of a TRIPs agreement.<sup>551</sup> Thus, a Commission on Intellectual Property Rights, commissioned by the U.K. Government, cautioned the developing countries against giving in to pressure 'to accede to the WIPO Copyright treaty, or even to adopt stricter prohibitions against circumvention of technological protection systems and effectively thereby reducing the scope of traditional "fair use" in digital media'.<sup>552</sup> At the Beijing Diplomatic Conference (2012) many developing countries 'wanted to be sure that there would not be an obligation to adhere to the WPPT, even if a country wanted to adhere to the BTAP. They wanted to clearly establish the BTAP as a separate, self-standing treaty, though this may seem unnecessary'.<sup>553</sup> The demand for such an Agreed Statement was accepted. The Agreed Statement concerning Article 1 (dealing with the relationship of the BTAP to other conventions and treaties) made it clear that 'nothing in this Treaty affects any rights or obligations under the WIPO Performances and Phonograms Treaty (WPPT) or their interpretation and it is further understood that paragraph 3 does not create any obligations for a

---

550 Vaver (2007), pp.735-6.

551 ICTSD-UNCTAD Dialogue (2003), p.2.

552 U.K. IP Commission (2002), pp.106-7, 109. See also Tellez and Musungu (2010), pp.186-7.

553 von Lewinski (2012), p.10.

Contracting Party to this Treaty to ratify or accede to the WPPT or to comply with any of its provisions'. The Agreed Statement concerning Article 5 (4) of the Marrakesh Treaty is similar except that it refers to WCT in place of WPPT. It would appear that the revisionist perception did slow down many developing countries from becoming parties to the Internet Treaties. Thus, Brazil, which along with Argentina spearheaded the proposal for a Development Agenda for WIPO is not a Contracting Party<sup>554</sup>; Kenya and South Africa are signatories to the Internet Treaties but to date had not ratified the Treaties.

## **7. BTAP, the Third of the Troika of Internet Treaties**

It may be recalled that one of the last acts of the DipCon (See Sect.11.3) was to adopt a resolution to take all the steps necessary for the adoption of a Protocol to WPPT so as to cover audio-visual performances before the end of 1998. In March 1997, three months after the DipCon, WIPO did constitute a Committee of Experts to examine all aspects of audio-visual performances. However, no headway could be made in deliberations in the Committee and the SCCR,<sup>555</sup> regarding either the substantive issues or the question whether a Protocol to the WPPT or a standalone treaty should be adopted. European countries, the African Group and GRULAC, in other words, countries which during the DipCon favoured inclusion of audio-visual performances in WPPT, were in favour of a Protocol to WPPT as such a protocol would extend the provisions of WPPT *mutatis mutandis* to audio-visual performers. The U.S. and several Asian countries including India were in favour of a standalone treaty so that key provisions such as those relating to moral rights, transfer of rights and national treatment can depart significantly from the corresponding provisions in WPPT. Even though there was no agreement on key issues, sufficient clarity was attained on all the relevant issues for the SCCR to recommend that a Diplomatic Conference might be convened so that the unresolved issues could be resolved, and a treaty adopted. WIPO General Assembly decided in April 2000 that a Diplomatic Conference be convened from 7 to 20 December 2000. Jukka Liedes, who had become Chairman of the SCCR, drafted the Basic Proposals to be considered by the Diplomatic Conference. The Basic Proposals had alternate proposals in respect of unresolved issues including the legal nature of the instrument. After the circulation of the Basic Proposals, WIPO organised the customary regional

---

<sup>554</sup> Argentina is a party to the Internet Treaties.

<sup>555</sup> SCCR was set up in 1998, as part of the reforms of the WIPO governance structure; it subsumed the work of the Committee of Experts. Member States of WIPO. WIPO (1998). The Committee of Experts had two sessions and the SCCR three.

meetings; it also operationalised the idea underlying the ‘15+15+1+1’ consultations proposed during the DipCon (See Sect. 6.3) by constituting a Working Group with limited membership from each region to accelerate negotiations. Representatives of a region in the Working Committee had to continuously apprise other delegations of the region and elicit their views in order to arrive at a common position of the region. This institutional innovation was perhaps responsible for the considerable progress made at the Diplomatic Conference; after heated discussions, a provisional compromise was reached on (i) the treaty being a standalone treaty, and (ii) almost all substantive provisions (nineteen in number) along with some Agreed Statements. The nineteen articles covered (i) minimum rights of audio-visual performers (moral rights, exclusive rights in unfixed performances {rights of fixation, broadcasting and communication to the public}, rights of reproduction, distribution, rental, and making available, broadcasting and communication to the public, (ii) limitations and exceptions, (iii) term of protection, (iv) technological measures, (v) rights management information, and (vi) enforcement. A Contracting Party may, if it so chose, provide statutory equitable remuneration to the performers for any use of an audio-visual performance. All these articles were modelled after the corresponding provisions of WPPT.

An agreement was reached even in respect of the highly controversial moral rights (See Sect.4.2). The only noteworthy deviation from the moral rights conferred by WPPT was in respect of the integrity right of performers, understandable given that moral rights were anathema to Hollywood. Like a performer under WPPT an audio-visual performer was proposed to be vested with the right to ‘object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation’. However, an audio-visual performer’s right would be qualified by the clause ‘taking due account of the nature of audio-visual fixations’. The import of that clause was elaborated through an Agreed Statement. The only substantive provision which could not be resolved in the 2000 Diplomatic Conference was the key question of transfer of the rights of performers to producers which was unique to audio-visual performances. Unless the question of transfer of rights was resolved to the satisfaction of all parties there was no way that a Diplomatic Conference could adopt by consensus a treaty.

In spite of the considerable progress the Diplomatic Conference was collapsed over the prickly issue of transfer of rights to producers. The prospects for a treaty on audio-visual performances brightened when in 2010, the U.S., India, and Mexico finally worked out a compromise with the EU. The compromise language provided that parties “‘may” provide by law that, after a

performer has consented to the recordation (in Beijing Treaty parlance, “audiovisual fixation”) of his or her work, it is the producer that owns and exercises the exclusive authorization rights, subject to any contrary contract between the performer and producer’. The compromise language allowed parties to maintain divergent provisions on whether exclusive authorisation rights.<sup>556</sup> However, one more hurdle had to be crossed before a Diplomatic Conference, and that was the objection by the group of countries led by Brazil that the nineteen articles, regarding which a provisional compromise was reached in 2000, should be renegotiated in view of WIPO adopting the Development Agenda ; they also demanded a new recital in the Preamble to the Treaty referring to the recommendations of the Development Agenda so that that reference would act as a precedent to future work of WIPO in the area of norm-setting. After considerable haggling, it was agreed that the nineteen articles would not be renegotiated, and that (i) a recital in the Preamble would recall ‘the importance of the Development Agenda recommendations, adopted in 2007 by the General Assembly ... which aim to ensure that development considerations form an integral part of the Organization’s work’, and (ii) that recital would be inserted not at the end of the preamble but as the second recital. The recital by itself is of little consequence.<sup>557</sup> Yet another contentious issue arose from the demand of Brazil and India that even though the Treaty had nothing to do with the TRIPs agreement there should be at least an Agreed Statement which would highlight the TRIPs obligations regarding objectives, principles, and competition policy (Articles 7, 8 and 40 of the TRIPs Agreement) in view of the fact that Articles 7 and 8 came in handy during the negotiations of the Doha Declaration on the TRIPs agreement and Public Health and reference to competition policy could be used as an argument that grant of IP is an exception to freedom of competition that must be economically justified, and that excessive rights would promote monopolistic behaviour. As could be expected, developed countries opposed reference only to those obligations in the TRIPs agreement which restrict protection of IPRs. After cumbersome negotiations it was agreed that Article 1(3) would make it explicit that BTAP ‘shall not have any connection with treaties other than the WPPT, nor shall it prejudice any rights and obligations under any other treaties’, and an Agreed Statement concerning Article 1(3) would state that Contracting Parties acknowledge *all* the principles and objectives of the TRIPs agreement and not

---

556 Fellmeth (2012), p.1212.

557 von Lewinski (2012), p.4. Ficsor (2012, pp.18-21) elaborates this point at quite some length why the Recital is only of a descriptive nature about the general importance of the Development Agenda.

just Articles 7 and 8, and that nothing in the BTAP would affect the provisions of the TRIPs agreement and illustrated that position with reference to anti-competitive practices.

The most striking difference between WPPT and BTAP is Article 12 of BTAP dealing with transfer of rights; WPPT does not have a similar article, understandable in that transfer of rights was not an issue in the making of WPPT. Article 12 of BTAP explicitly left open the possibility of a Contracting Party to regulate in its national law the relationship between a performer and a film producer in respect of the exclusive rights under the Treaty.<sup>558</sup>

The new policy environment of WIPO impacted on the provisions of BTAP in three respects: (i) a recital in the Preamble referring to the WIPO Development Agenda, (ii) an Agreed Statement concerning Article 1(3) acknowledging *all* the principles and objectives of the TRIPs, and (iii) an Agreed Statement concerning Article 15 of BTAP (obligations concerning technological measures) which but for the Agreed Statement is the same as the corresponding provisions of WCT and WPPT. The Agreed Statement concerning Article 15 of BTAP has two parts: the first makes it clear that a Contracting Party is entitled to adopt effective and necessary measures to ensure that a beneficiary of a limitation or exception is not denied access to the performance concerned through a technological measure, and the second reiterates that the obligation under Article 15 does not extend to audio-visual performances which are unprotected or whose term of protection had expired. A contentious issue concerning the first part of the Agreed Statement was whether a Contracting Party was entitled to take such measures only in the event of the rightsholder and the beneficiary of limitation or exemption failing to reach a voluntary agreement on access to the performance. After protracted negotiations, an ambiguous compromise was adopted which conferred flexibility on a Contracting Party to decide the circumstances under which it could adopt effective and adequate measures to ensure that beneficiary of a limitation or exception has access to the performance protected by a technological measure.

## **8. Time of Troubles Over for WIPO?**

Even though WIPO appeared to be a static institution and its treaty making activity in hibernation, not every treaty making was in deep freeze. In November 2003, prospects for a treaty brightened when the U.S. Screen Actors Guild broke ranks with Hollywood producers and reported that it would

---

558 von Lewinski (2012), p.5.

support the demand of actors in many other countries for the adoption of a treaty without a provision for transfer of rights to producers. However, seven more years passed by before negotiations began between the representatives of performers and producers as well as between various governments. Eventually, in 2012, the BTAP was adopted, and with that the seemingly never-ending story<sup>559</sup> of the full recognition of performer's rights in international copyright and related rights law came to an end. Similarly, once it was clear that a treaty on limitations and exceptions had little prospects of being adopted in the near future, the World Blind Union began to campaign for a treaty designed to enhance the access of the visually impaired persons to reading material. That was a politically astute move as compassion could trump strong opposition in a way that logic and forceful arguments would not; after all, who can say no to help blind have better access to reading material. Even then it took over four years of negotiation before the Marrakesh Treaty was adopted in 2013.

The adoption of two treaties gave rise to hope among functionaries of WIPO, past (like Ficsor) and present (Francis Gurry, the then DG, WIPO<sup>560</sup>) that the Time of Troubles was over. Ficsor opined that the adoption of two multilateral treaties marked the end of the period of 'disruption', and the beginning of a period of 'consolidation'.<sup>561</sup> The criticism of WIPO's activities was ill-informed. WIPO was wrongly faulted for not balancing interests, for concentrating on the protection of rights, for not allowing the application of adequate exceptions and limitations in recognition of important public and private interests, and for being an obstacle to due access to works. The successful adoption of BTAP and the Marrakesh Treaty hopefully eliminated 'the unnecessary extraneous agendas based on the above-mentioned badly-founded legends about the international copyright system'. BTAP and Marrakesh Treaties had confirmed and maintained the principles and basic provisions of the Internet Treaties which were attacked, among others, by the proposal on WIPO Development Agenda sponsored by Argentina and Brazil. The Three-Step test and provision regarding TPMs were the most important of the principles and provisions so confirmed and maintained. Ficsor expressed the hope that the Broadcasting Treaty, the missing link of WCT, WPPT and BTAP, would be adopted 'in the relatively near future', and that adoption would be followed a much-needed 'new period of guided development with possible

---

559 von Lewinski (2001).

560 Gurry hailed the adoption of the Marrakesh Treaty was a victory not only for the print disabled population of the world but also for the multilateral system. Gurry Speech (2013).

561 Ficsor (2020), pp.84-5.

soft law solutions'. As of now, the adoption of a Broadcasting Treaty is nowhere in sight. One is not sure whether after the adoption of BTAP and Marrakesh Treaty augurs well for resumption of norm-setting by WIPO; the treaties should perhaps be seen as international instruments which subserve the social policy objective of eliminating unjust discrimination (discrimination against audio-visual performers in the case of BTAP and the print disabled in the case of the Marrakesh Treaty) rather than a signal notifying the end of a period of disruption; this is all the more so as the Marrakesh Treaty belongs to the genre of limitations and exceptions treaties, though with a limited but focussed coverage.

Be that as it may, it would be fair to say that the period from September 1989 when opposition to the consideration of IP in the Uruguay Round ceased to the end of the 20<sup>th</sup> century a narrow window of opportunity was open permitting the adoption of TRIPs and the Internet Treaties; the window of opportunity was shut from the Paris Revision Conference (1971) to 1989 when no new multilateral instruments dealing with substantive provisions of copyright and related rights could be adopted. After the Internet Treaties were adopted the window of opportunity closed again. Reinbothe, Ficsor and many other experts who participated at a panel discussion on 23<sup>rd</sup> April 2003 at the 11<sup>th</sup> International Intellectual Property Law and Policy Conference at Fordham Law School, New York are reported to have opined that in the changed policy environment 'it might have been difficult, if not impossible to adopt treaties with the contents of the WIPO Treaties of 1996'.<sup>562</sup> Their assessment seems to be right on the dot.

## **9. Digital Renaissance**

Given that online infringement continues to be considerable and the environment for copyright and copyright policy environment adverse, one would have expected that the investment in and revenues from copyright industries would shrink and the copyright industries trapped in irretrievable decay. However, the evidence is to the contrary and many have spoken of the phenomenal growth of the variety and volume of digital content so much, so it is said that we are in the midst of a digital renaissance<sup>563</sup>. Thus, a study by the U.S. Copyright Office had stated:

At the time of the enactment of DMCA, DVDs were not yet the "predominant medium" for the distribution of motion pictures

---

<sup>562</sup> von Lewinski (2008), paragraph 17.168, p.492.

<sup>563</sup> Waldfoegel (2018).

in the home video market, and the first iPod would not be invented for three more years. Today, DVDs, Blu-ray, and 4K Ultra HD Blu-ray discs compete with streaming services such as Hulu, Netflix, Amazon Instant Video, and Google Play, while millions of consumers have “cut the cord” with traditional cable services in favour of over-the-top subscription services. In the music industry, the majority of revenues now come from streaming services like Spotify, Pandora, and Apple Music, displacing download revenues, which in turn previously displaced compact disc revenues. Likewise, cloud computing has become standard, and software as a service is now a leading licensing and delivery model for businesses and individuals.<sup>564</sup>

All in all, there had been a spectacular increase in the choice available for consumers to savour content. It is pertinent to mention that Pamela Samuelson, among the most prominent critics of the Lehman Report and the DMCA, had stated in her testimony before the Intellectual Property Subcommittee of the Senate Judicial Committee that “there is an immensely greater availability of online content today via legitimate online streaming and download services, as compared with 1998. These services have drawn large audiences of subscribers in the US and abroad, and copyright industries are generally thriving as never before... The upshot is that hundreds of millions of users now have lawful access to an almost unimaginably rich array of digital music through these licensed services’.<sup>565</sup>

*The Sky is Rising* is an apt title for an annual report on the state of entertainment industry which brings out that we are not only ‘living in a true era of content abundance, largely made possible by the Internet’ but also ‘that in the aggregate the entertainment industry has been experiencing ‘an unprecedented, growth in both earnings and creative output’.<sup>566</sup> How does one explain this dénouement in spite of haemorrhage of revenues because of online infringement? Two reasons account for this anomalous dénouement. First, the perspicacity of business leaders like Steve Jobs, the visionary who launched revolutionary products like iTunes and iPod, that infringement is a chronic condition and do what you might infringement could never be done away with, and that the first line of defence against ‘pirates’ may as well be sensible business models which offer a better experience than the infringed content they

---

564 U.S. Copyright Office (2017), p. ii.

565 Senate Subcommittee Hearing, 2020, Pamela Samuelson Statement, p.6.

566 Masnick and Beadon (2019), pp.2,4.

can obtain via darknet channels<sup>567</sup> for the same or less cost (that is to say, cost measured in search costs, download times, monetary outlay). Secondly, many new business models which enhance the consumers' experiencing of audio and audio-visual works depend on TPMs and DRMs.<sup>568</sup> Thus Netflix, the most successful company offering videos through streaming, is a subscription service with a digital lock which prevents unauthorised access; the content it streams is encrypted in order to prevent the subscriber from downloading and communicating content to others. Suffice to say, the anticircumvention provisions in the early implementation legislation were controversial in many countries such as the U.S. as well as EC because as it was apprehended that they would extinguish fair use. However, over time, opposition died down and there was increasing realisation that the anticircumvention provisions 'undergirds much of [today's] Internet economy'.<sup>569</sup> Even Pamela Samuelson, who had been in the forefront of the opposition to anticircumvention provisions of DMCA (S.1201), had conceded that 'Barlow's prediction that crypto bottles<sup>570</sup> would fail was, it seems, off the mark', and that consumers had 'adjusted to TPMs more than might have seemed likely in 1994'.<sup>571</sup>

Ironically, while the controversial anticircumvention provisions of the early implementation legislation had secured acquiescence, if not approval, with the passage the reverse has been the case with the provisions providing safe harbour status to intermediaries so that they are not fastened with secondary liability. The 'notice and take down' put in place by S.512 of DMCA came to be an accepted norm over most of the world; it provided a 'safe harbour' to intermediaries, in other words, immunity from secondary liability subject to fulfilment of conditions such as lack of knowledge about the content entrusted by clients of the intermediaries. The appearance of interactive Web 2.0 in 2004 facilitated the emergence of new intermediaries such as Facebook and other social media and sharing platforms like YouTube which are a species apart from the intermediaries for which safe harbour was provided in the early implementation legislations. In many countries, the propriety of granting the safe harbour status to social media when they disseminate hate speech and of allowing sharing platforms like YouTube and news aggregators like Google

---

567 'Darknet' is the collection of networks and technologies used to share 'pirated' digital content.

568 Ginsburg (2007), pp.24-5. Reinbothe and Silke von Lewinski hold a similar view. Reinbothe and von Lewinski (2015), paragraph 7.11.45 at pp.175-6.

569 Hughes (2020), p.14.

570 See Appendix I, A.2.

571 Samuelson and Hashimoto (2019), pp.113-4, 116-9.

News to profiteer at the expense of content providers like producers of music and audio-visual content and newspapers has come to be hot button issue. The most comprehensive legislation so far to address the problems arising from the new intermediaries is the highly contentious EU's Single Digital Market Directive (2019) which did away with the safe harbour status of platforms like YouTube. Along with the EU, Australia had put in place a law to prevent free riding by online news aggregators, and the Indian Information Technology (Guidelines for Intermediaries and Digital Media Ethics Code) Rules, 2021 laid down stringent conditions for 'significant social media intermediaries' like Twitter and Facebook for being eligible for safe harbour status. What comes out from a survey of the new legislative initiatives is that the Internet Treaties can subsume changes needed in safe harbour provisions. Whatever changes are needed in national and regional (eg., EU) copyright laws could be made within the broad framework that the Internet Treaties put in place. Therefore, all in all, the digital provisions of the Internet Treaties have withstood the technological gales of creative destruction and phenomenal changes in the marketing and consumption of digital content.

# Select Bibliography

# Select Bibliography

## A. WIPO Diplomatic Conference (1996) Documents

Link to All Conference Documents:

[https://www.wipo.int/meetings/en/details.jsp?meeting\\_id=3010](https://www.wipo.int/meetings/en/details.jsp?meeting_id=3010)

Link to Negotiation Texts:

Basic Proposal for the Administrative and Final Clauses of the Treaty to be Considered by the Diplomatic Conference, CRNR/DC/3 dated August 30, 1996. Available at

[https://www.wipo.int/edocs/mdocs/diplconf/en/crn\\_r\\_dc/crn\\_r\\_dc\\_3.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_3.pdf)

Draft WCT. Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, CRNR/DC/4 dated August 30, 1996. Available at

[https://www.wipo.int/edocs/mdocs/diplconf/en/crn\\_r\\_dc/crn\\_r\\_dc\\_4.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_4.pdf)

Draft WPPT. Basic Proposal for the Substantive Provisions of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works to be Considered by the Diplomatic Conference, CRNR/DC/4 dated August 30, 1996. Available at

[https://www.wipo.int/edocs/mdocs/diplconf/en/crn\\_r\\_dc/crn\\_r\\_dc\\_5.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_5.pdf)

Draft Database Treaty. WIPO, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, CRNR/DC/6 dated August 30, 1996. Available at

[https://www.wipo.int/edocs/mdocs/diplconf/en/crn\\_r\\_dc/crn\\_r\\_dc\\_6.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crn_r_dc/crn_r_dc_6.pdf)

DipCon Records. Records of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Geneva, 1996. Two Volumes, WIPO Publication No.348E, 1999.

Volume I has all the amendments proposed to the substantive provisions of Draft WCT and Draft WPPT, Agreed Statements, Final Act of the Diplomatic Conference, Resolution and Recommendation adopted by the Diplomatic Conference. Available at

[https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_348\\_vol\\_i.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_348_vol_i.pdf)

Volume II has summary minutes of the Plenary, Main Committee-I and Main Committee-II of the Diplomatic Conference. Available at [https://www.wipo.int/edocs/pubdocs/en/wipo\\_pub\\_348\\_vol\\_ii.pdf](https://www.wipo.int/edocs/pubdocs/en/wipo_pub_348_vol_ii.pdf)

Final Text of WCT and WPPT

WCT: CRNR/DC/94 dated December 23, 1996. Available at [https://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr\\_dc/crnrcr\\_dc\\_94.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr_dc/crnrcr_dc_94.pdf)

WPPT: CRNR/DC/95 dated December 23, 1996. Available at [https://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr\\_dc/crnrcr\\_dc\\_95.pdf](https://www.wipo.int/edocs/mdocs/diplconf/en/crnrcr_dc/crnrcr_dc_95.pdf)

## **B. Articles,<sup>572</sup> Working Papers<sup>573</sup> and Book Chapters**

Ad Hoc Alliance for a Digital Future. Suggested Revisions to the Chairman's Basic Proposal for the Treaty Formerly Known as the Berne Protocol, October 31, 1996.

Ad Hoc Coalition. 1996. What is the Ad Hoc Copyright Coalition? 15 November 1996.

Altbach, Philip G. 1995. 'Subtle Inequalities of Copyright', in Altbach (1995b), pp.1-9.

Anon. 2008. 'The Principles for User Generated Content Services: A Middle-Ground Approach to Cyber-Governance', Harvard Law Review, 121:1387-1408.

Ayyar, Vaidyanatha R. V. 1998. 'Interest or Right: The Process and Politics of a Diplomatic Conference on Copyright', Journal of World International Property, 1(1):3-35.

Bannerman, Sara. 2010. 'Copyright: Characteristics of Canadian Reform, in Geist (2010), pp.17-44.

Barlow, John Perry. 1996. A Declaration of the Independence of Cyberspace. Electronic Frontier Foundation, February 8, 1996. Reprinted in Boyle (2019), pp.5-7.

Barlow, John Perry. 2010. 'The Next Economy of Idea', Wired, 10 January 2000.

---

572 Most articles are available on the Web.

573 The documents listed here include position papers, manifestos, declarations and papers distributed by lobbies

Barlow, John Perry. 2019. 'Selling Wine Without Bottles: The Economy of Mind on the Global Net' in Boyle (2019), pp.8-31. First Published as 'The Economy of Ideas', WIRED, March 1, 1994

Bentley, Lionel. 2007. 'Copyright, Translations, and Relations between Britain and India in the Nineteenth and Early Twentieth Centuries', *Chicago-Kent Law Review*, 82(3):1181-1240.

Bentley, Lionel and Tanya Aplin. 2018. *Displacing the Dominance of The Three-Step Test: The Role of Global, Mandatory Fair Use*, University of Cambridge, Legal Studies Research Paper Series, Number 33/2018.

Bhaskar, Udaya C. 2016. 'Arundhati Ghosh (1940-2016): India's CTBT "Durga"', *Indian Express*, July 28, 2016.

Boyle, James. ed., 2019. 'The Past and Future of Internet: A Symposium for John Perry Barlow', *Duke Law and Technology Review*, Special Symposium Issue, 18:1-175.

Boyle, James. 2019a. 'Is the Internet Over?! (Again?)' in Boyle (2019), pp.32-60.

Bernard, Adler. 2002. 'The Proposed New WIPO Treaty for Increased Protection for Audiovisual Performers: Its Provisions and its Domestic and International Implications', *Fordham Intellectual Property, Media and Entertainment Law Journal*, 12(4): 1098-1118.

Breindl, Yana and François Briatte. 2013. 'Digital Protest Skills and Online Activism Against Copyright Reform in France and the European Union', *Policy and Internet*, 5(1): 27-55.

Brown, Ian. 2006. 'The Evolution of Anti-circumvention Law', *International Review of Law Computers and Technology*, 20(3): 239-260.

Browning, John. 1997. 'Africa 1 Hollywood 0', *Wired*, March 1997.

Butalia, Urvashi. 1995. 'The Issues at Stake: An Indian Perspective on Copyright' in Altbach (1995), pp.43-61.

Chander, Anupam and Madhavi Sunder. 2004. 'The Romance of the Public Domain', *California Law Review*, 92:1331-73.

Chander, Anupam and Madhavi Sunder. 'Dancing on the Grave of Copyright' in Boyle (2019), pp.143- 61.

Cohen, Julie F. 1999. 'WIPO Copyright Treaty Implementation in the United States: Will Fair Use Survive?', *European Intellectual Property Review*, 21: 236-40.

Cohen, Julie F. 2019. 'Internet Utopianism and the Practical Inevitability of Law' in Boyle (2019), pp.85-96.

Craig, Carys. 2017. 'Globalizing User Rights-Talk: On Copyright Limits and Rhetorical Risks', *American University International Law Review* , 33(1):1-73.

Davison, Mark. 2007. 'Database Protection: Lessons from Europe, Congress, and WIPO', *Case Western Reserve Law Review*, 57(4): 829-54.

de Werra, Jacques. 2002. 'The Legal System of Technological Protection Measures under the WIPO Treaties, the Digital Millennium Copyright Act, the European Union Directives and other National Laws (Japan, Australia)', in Ginsburg and Besek (2002).

Dinwoodie, Graeme B. 2000. 'A New Copyright Order: Why National Courts Should Create Global Norms', *University of Pennsylvania Law Review*, 149:469-580.

Dinwoodie, Graeme B. 2007. 'The WIPO Copyright Treaty: A Transition to the Future of International Copyright Lawmaking', *Case Western Reserve Law Review*, 57: 751-66.

Dnes, Antony. 2013. 'Should the UK Move to a Fair-Use Copyright Exception?', *International Review of Intellectual Property and Competition Law*, 44:418-44.

Drahos, Peter. 2002. 'Developing Countries and International Property Standard-Setting', *Journal of World Intellectual Property*, 5: 765-789.

Dreier, Thomas. 2010. 'Limitations: The Centerpiece of Copyright in Distress – An Introduction', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1(2):50-5.

Dreyfuss, Rochelle Cooper and Jerome H. Reichman. 2020. 'WIPO's Role in Procedural and Substantive Patent Law Harmonization' in Ricketson (2020), pp.108-30.

Duffy, Maureen. 2004. 'Denis de Freitas: Master of the Copyright World', *The Guardian*, 24 January 2004.

Dusollier, Séverine. 1999. 'Electrifying the Fence: The Legal Protection of Technological Protection Measures for Protecting Copyright', *European Intellectual Property Review*, 21: 285-297.

Dusollier, Séverine. 2002. 'General Report, Situating Legal Protections for Copyright-Related Technological Measures in the Broader Legal Landscape: Anti Circumvention Protection Outside Copyright', in Ginsburg and Besek (2002).

Dusollier, Séverine. 2006. 'The Master's Tools V. The Master's House: Creative Commons V. Copyright', *Columbia Journal of Law and the Arts* 29(3):271-93.

Edelman, Benjamin. 2019. 'Revisiting Barlow's Misplaced Optimism' in Boyle (2019), pp.97-102.

Fernandez-Molina, J. Carlos. 2003. 'Laws against the Circumvention of Copyright Technological Protection', *Journal of Documentation*, 59(1): 41-68.

Ficsor, Mihály. 2005. Copyright in the Digital Environment: The WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), WIPO National Seminar on Copyright, Related Rights, and Collective Management, Khartoum, Sudan, February 29-March 5, 2005, Document Number WIPO/CR/KRT/05/7.

Ficsor, Mihály. 2006. "The WIPO Internet Treaties": The U.S. as Driver: The United States as the Main Source of Obstruction – As Seen by an Anti-Revolutionary Central European', *John Marshall Review of Intellectual Property Law*, 17(6):16-39.

Ficsor, Mihály J. 2012. 'Beijing Treaty on Audiovisual Performances (BTAP): First Assessment of the Third WIPO "Internet Treaty', *Copyright Seesaw*, July 2012, pp.1-25.

Ficsor, Mihály J. 2020. 'WIPO: A View from Inside and Outside the Tent' in Ricketson (2020), pp.68-86.

Ganesan, A.V. 2015. 'Negotiating for India', in Watal and Taubman (2015), pp.211-238.

Geiger, Christophe. 2020. ' "Fair Use" through Fundamental Rights in Europe: When Freedom of Artistic Expression allows Creative Appropriations and Opens up Statutory Copyright Limitations', *PIJIP/ TLS Research Paper Series no. 63*.

Geiger, Christophe, Giancarlo Frosio and Oleksandr Bulayenko. 2018. 'The EU Commission's Proposal to Reform Copyright Limitations: A Good but Far Too Timid Step in the Right Direction', *European Intellectual Property Review*, 40(1): 4-15.

Geist, Michael. 2005, 'Anti-circumvention Legislation and Competition Policy: Defining a Canadian Way?' in Geist (2005), pp.211-250.

Geist, Michael. 2010. 'The Case for Flexibility in Implementing the WIPO Internet Treaties: An Examination of the Anti-Circumvention Requirements', in Geist, (2010), pp.204-46.

Gero, John.2015. 'Why We Managed to Succeed in TRIPs' in Watal and Taubman (2015), pp.95-8.

Ginsburg, Jane C.1997. 'Authors and Users in Copyright', *Journal of the Copyright Society of the USA*, 45(1):1-20.

Ginsburg, Jane C. 2000. 'International Copyright: From a "Bundle" of National Copyright Laws to a Supranational Code?', *Journal of the Copyright Society of the USA*, 47: 265-89.

Ginsburg, Jane C. 2001. 'Can Copyright Become User-Friendly? Essay Review of Jessica Litman, *Digital Copyright* (Prometheus Books 2001)', *Columbia-VLA Journal of Law and the Arts*, 25(1): 71-25.

Ginsburg, Jane C. 2004. 'The (New?) Right of Making Available to the Public', *Columbia Public Law & Legal Theory Working Papers*, 04-78, pp.1-13.

Ginsburg, Jane C. 2005. 'Legal Protection of Technological Measures Protecting Works of Authorship: International Obligations and the U.S. Experience', *Columbia Public Law Research Paper No. 05-93*.

Ginsburg Jane C. and Pierre Sirinelli. 1991. 'Authors and Exploitations in International Private Law: The French Supreme Court and the Huston Film Colorization Controversy', *Columbia- VLA Journal of Law and Arts*, 15(2): 135-159.

Goldsmith, Jack L. 1998. 'The Internet and the Abiding Significance of Territorial Sovereignty', *Indiana Journal of Global Legal Studies*, 5(2): 475-91.

Gooch, Richard. 2003. 'Requirements of DRM Systems', in Becker et al., (2003), pp.16-25.

Haggart, Blayne. 2013. 'Fair Copyright for Canada: Lessons for Online Social Movements from the First Canadian Facebook Uprising', *Canadian Journal of Political Science*, 46(4): 841-861.

Hansen, Hugh C. 2013. 'International Copyright: An Unorthodox Analysis, Fordham Intellectual Property, Media and Entertainment Law Journal, 23(2):447 -463.

Helfer, Laurence R. 2004. Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking, Yale Journal of International Law, 29(1):1-83.

Hilty, Reto M. 2010. 'Declaration on the "Three-Step Test": Where Do We Go from Here?', Journal of Intellectual Property, Information Technology and Electronic Commerce Law, 1(2):83-6.

Hinze, Gwen. 2006. 'Brave New World, Ten Years Later: Reviewing the Impact of Policy Choices in the Implementation of the WIPO Internet Treaties' Technological Protection Measure Provisions', Case Western Reserve Law Review, 57(4): 779-821.

Horowitz, D.1989. 'Is there a Third-World Policy Process', Policy Sciences,22:197-212.

Hugenholtz, Bernt P. 2000. 'Why the Copyright is Unimportant, and Possibly Invalid', European Intellectual Property Review, 11: 501-2.

Hugenholtz, Bernt P. and Martin Senftleben. 2011. Fair Use in Europe: In Search of Flexibilities, Amsterdam: Instituut voor Informatierecht.

Hughes, Justin. 2003. 'The Internet and the Persistence of Law', Boston College Law Review, 44(2): 359-96.

Hummungs Wirtèn, Eve. 2011. Cosmopolitan Copyright: Law and Language in the Translation Zone, Uppsala: Uppsala University Press.

Hugenholtz, Bernt P. 2013. 'Copyright in Europe: Twenty Years Ago, Today and What the Future Holds', Fordham Intellectual Property, Media and Entertainment Law Journal, 23(2): pp.503-24.

Hugenholtz Bernt, P. 2016. 'Flexible Copyright: Can EU Authors' Rights Accommodate Fair Use?', in Irini Stamatoudi, ed., 2016. New Developments in EU and International Copyright Law, Leiden: Kluwer Law International, pp.417-433.

Jaszi, Peter. 'What didn't Happen: An Essay in Speculation' in Boyle (2019), pp.162-73.

Kapczynski, Amy.2010. 'Access to Knowledge: A Conceptual Genealogy' in Krikorian and Kapczynski (2010), pp.17-56.

Keller, Daphne. 2019. 'Build Your Own Intermediary Liability Law: A Kit for Policy Wonks of All Ages', The Center for Internet and Society, Stanford University, August 2019.

Kessler, Kirsten L. 1995. 'Protecting Free Trade in Audiovisual Entertainment: A Proposal for Counteracting the European Union's Trade Barriers to the U.S. Entertainment Industry's Exports', *Law and Policy in International Business*, 26(2):563-611.

Koelman, K.J. and N.Helberger. 2000. 'Protection of Technological Measures', in P.B. Hugenholtz, ed., 2000. *Copyright and Electronic Commerce: Legal Aspects of Electronic Copyright Management*, Alphen aan den Rijn, the Netherlands: Kluwer Law International, pp. 165-227.

Lange, David L. 1981. 'Recognizing the Public Domain', *Law and Contemporary Problems*, 44(4):147-178.

Latif, Ahmed Abdel. 2010. 'The Emergence of the A2K Movement: Reminiscences and Reflections of a Developing-Country Delegate' in Krikorian and Kapczynski (2010), pp.99-126.

Lee, Kevin. 2008. "'The Little State Department": Hollywood and the MPAA's Influence on U.S. Trade Relations', *Northwestern Journal of International Law and Business*, 28(2):371-97.

Lewis, Peter H. 1966. 'World Panel Meets to Revise Copyright Laws', *New York Times*, Dec. 2, 1966.

Liedes, Jukka. 1997. *New WIPO Treaties: Evolution of the International Copyright System*, Seminar Organised by the Government of India in collaboration with the National Law School of India University, Bangalore and the Indian Institute of Technology, New Delhi, February 7-8, 1997.

Litman, Jessica. 1990. 'The Public Domain', *Emory Law Journal*, 39: 965-1023.

Litman, Jessica. 1992. 'Copyright and Information Policy', *Law and Contemporary Problems*, 55(2):185-209.

Litman, Jessica. 2005. 'The Sony Paradox', *Case Western Reserve Law Review*, 55(4): 917-61.

Litman, Jessica. 2011. 'Reader's Copyright', *Journal of Copyright Society of USA*, 58: 325-53.

Litman, Jessica. 'Imaginary Bottles' in Boyle (2019), pp.127-36.

- 'Locking up the Facts'. 1996. The Sacramento Bee, November 17, 1996.
- Manchanda, Usha. 1998. 'Invasion from the Skies: The Impact of Foreign Television on India', *Australian Studies in Journalism* 7: 136-163.
- McGeady, Steven. 1996. 'The Digital Reformation: Total Freedom, Risk and Responsibility', *Harvard Journal of Technology*, 10(1): 137-48.
- Menell, Peter S. 2002-2003. 'Envisioning Copyright Law's Digital Future', *New York Law School Law Review*, 46:63-199.
- Menell, Peter S. 2014. 'This American Copyright Life: Reflections on Re-Equilibrating Copyright for the Internet Age', *Journal of the Copyright Society of the U.S.A.*, 61: 201 -337.
- 'Microsoft and Sun Bury the Hatchet'. 2004. *ADT Magazine*, 4 February 2004.
- Mogens Peter Carl, 1995. 'Evaluating the TRIPS Negotiations: A Plea for Substantial Review of the Agreement', in *WTO, Watal and Taubman (2015)*, pp.321-340.
- Moody, Glenna. 2018. 'Interview with Pamela Samuelson', *Copybuzz*, November 14, 2018.
- Mulraine, Loren E. 2019. 'A Global Perspective on Digital Sampling', *Akron Law Review*, 52(3): pp.687-738.
- Neu, Tim. 'The Fair Pay Revolution - German Copyright Law's International Reach', *Michigan State International Law Review*, Volume 26, Number 3, 2018,
- Nimmer, David. 1992. 'Nation, Duration, Violation, Harmonization: An International Copyright Proposal for the United States', *Law and Contemporary Problems*, 55(2):211- 239.
- Nimmer, David. 1995. 'The End of Copyright', *Vanderbilt Law Review*, 48:1385-1419.
- Nimmer, David. 1996. 'Brains and Other Paraphernalia of the Digital Age', *Harvard Journal of Law and Technology*, 10(1): 1-46.
- Nimmer, David. 1998. 'Time and Space', *IDEA: The Journal of Law and Technology*, 38: 501-27.
- Okamoto, Kaoru. 1996. 'Copyright and Neighboring Rights Protection: The National Experience of Japan', Paper presented at WIPO Asian Regional

Congress on Copyright and Neighboring Rights, Chiang Mai, Thailand, November 18-20,1996. WIPO/CNR/CNM/96/3 dated October 29, 1996.

Olian Jr., Irwin A. 1974. 'International Copyright and the Needs of Developing Countries: The Awakening at Stockholm and Paris', Cornell International Law Journal, 7(2): 81-112.

Otten, Adrian. 2015. 'The TRIPs Negotiation: An Overview', in Watal and Taubman (2015), pp.55-79.

Palmer Alan K. and Thomas C. Vinje. 1992. 'The EC Directive on the Legal Protection of Computer Software: New Law Governing Software Development', Duke Journal of Comparative and International Law, 2:65-88.

Percifull, Mary B. 1992. 'Digital Sampling: Creative or Just Plain "CHEEZ-OID?"', Case Western Reserve Law Review, 42: 1263- 95.

Piotraut, Jean-Luc. 2006. 'An Authors' Rights-Based Copyright Law: The Fairness and Morality of French and American Law Compared', Cardozo Arts and Law Entertainment Journal, 24: 549-616.

'Public Data or Private Data?' 1996. Washington Post, November 3, 1996.

Reichman, Jerome H.1995. 'The Know-How Gap in the TRIPS Agreement: Why Software Fared Badly, and What Are the Solutions', Hastings Communications and Entertainment Law Journal, 17: 763-794.

Reinbothe, Jörg. 2015. 'Negotiating for the European Communities and their Member States' in Watal and Taubman (2015), pp.187-200.

Roy, Alpana. 2008. 'Copyright: A Colonial Doctrine in a Post-colonial Age', Copyright Reporter, 26(4): 112-134.

Sagar, Jagadish.2015. 'Copyright: An Indian Perspective', in WTO, Watal and Taubman (2015), pp. 341-50.

Sambhar, Isan.2020. 'India: Concept of Fair Use and Fair Dealing in Copyright', Mondaq, May 2020.

Samuelson, Pamela. 1986. 'Creating a New Kind of Intellectual Property: Applying the Lessons of the Chip Law to Computer Programs', Minnesota Law Review, 76: 471-531.

Samuelson, Pamela. 1990. 'Digital Media and the Changing Face of Intellectual Property', Rutgers Computer and Technology Law Journal, 16(2):323-40.

- Samuelson, Pamela. 1996a. 'Copyright Grab', *The Wired*, 1 January 1996.
- Samuelson, Pamela. 1996b. 'The U.S. Digital Agenda at WIPO', *Virginia Journal of International Law*, 37: 369-439.
- Samuelson, Pamela and John Browning. 1997. 'Confab Clips Copyright Cartel: How a Grab for Copyright Powers was Foiled in Geneva', *The Wired*, January 3, 1997
- Samuelson, Pamela. 1999. 'Intellectual Property and the Digital Economy: Why the Anti-circumvention Measures Need to be Revisited', *Berkeley Technology Law Journal*, 14:519-64.
- Samuelson, Pamela. 2003. 'Mapping the Digital Public Domain: Threats and Opportunities', *Law and Contemporary Problems*, 66:147-71.
- Samuelson, Pamela. 2006. 'The Generativity of *Sony v. Universal*: The Intellectual Property Legacy of Justice Stevens', *Fordham Law Review*, 74(4): 1831-75.
- Samuelson, Pamela. 2010. 'The Past, Present and Future of Software Copyright Interoperability Rules in the European Union and the United States', *European Intellectual Property Review*, 34(3): 229-36.
- Samuelson, Pamela, Randall Davis, Mitchell D. Kapur and Jerome M. Reichman. 1994. 'A Manifesto Concerning the Legal Protection of Computer Programs', *Columbia Law Review*, 94: 2308-2431
- Samuelson, Pamela and Suzanne Scotchmer. 2002. 'The Law and Economics of Reverse Engineering', *The Yale Law Journal*, 111:1555-1663.
- Samuelson, Pamela and Hal R. Varian. 2002. 'The "New Economy" and the Information Technology Policy' in Jeffrey A. Frankel and Peter R. Orszag, *American Economic Policy in the 1990s*, Cambridge, Mass.: MIT Press, pp. 361-393.
- Samuelson, Pamela, Jerome H. Reichman and Graeme Dinwoodie. 2008. 'Legally Speaking: How to Achieve [Some] Balance in Anticircumvention Laws', *Communication of the ACM (Association of the Computing Machinery)*, 51(2): 21-6.
- Santos Tarragô, Piragibe dos. 2015. 'Negotiating for Brazil' in Watal and Taubman (2015), pp.239-56.

Scheinwald, Aaron. 2012. 'Who Could Possibly be Against a Treaty for the Blind?', *Fordham Intellectual Property, Media and Entertainment Law Journal*, 22(2):445 -511.

Sell, Susan K. 2009. *Cat and Mouse: Forum-Shifting in the Battle over Intellectual Property Enforcement*, Paper Prepared for American Political Science Association Meeting, September 3-6, Toronto.

Senftleben, Martin. 2010. 'The International Three-Step Test: A Model Provision for EC Fair Use Legislation', *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 1(2):67-82.

Senftleben, Martin. 2014. 'Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law' in Graeme Dinwoodie, ed., *Methods and Perspectives in Intellectual Property*, Cheltenham, UK: Edward Elgar, 2014, pp.30-70.

Sklar-Heyn, Sarah. 2011. 'Note, Battling Clearance Culture Shock: Comparing U.S. Fair Use and Canadian Fair Dealing in Advancing Freedom of Expression in Non-Fiction Film', *Cardozo Journal of International and Comparative Law*, 20: 233-76.

Sell, Susan K. 2011. 'Everything Old Is New Again: The Development Agenda Then and Now', *The WIPO Journal*, 3:(1):17-23.

Stokes, Bruce. 1991. 'Tinseltown Trade Wars', *National Journal*, February 1991.

Sun, Haochen. 2007. 'Overcoming the Achilles' Heel of Copyright Law: The Case for the Creative Destruction of the Three-Step Test', *Northwestern Journal of Technology and Intellectual Property*, 5:265-331.

Sundara Rajan, Mira T. 2016. 'Center Stage: Performers and Their Moral Rights in the WPPT', *Case Western Reserve Law Review*, 57(4):767-778.

Sunder, Madhavi. 2018, 'Intellectual Property in Experience', *Michigan Law Review*, 117:197-257.

Syngal, Brijendra K. and Sandipan Deb. 2020. 'How the Internet Arrived in India', *Livemint*, 10 February 2020.

't Hoen, Ellen. 2002. 'TRIPS, Pharmaceutical Patents, and Access to Essential Medicines: A Long Way from Seattle to Doha', *Chicago Journal of International Law*, 3(1): 27-46.

Taubman, Antony. 2015. 'Negotiating "Trade-related Aspects" of Intellectual Property Rights', in Watal and Taubman (2015), pp.15-52.

Thomas, John W. and Merilee S. Grindle. 1990. 'After the Decision: Implementing Policy Reforms in Developing Countries', *World Development*, 18(8):1163-81.

Three Step Declaration. 2008. Max Planck Institute, Munich and the Queen Mary University of London. Declaration on a Balanced Interpretation of the "Three-Step Test" in Copyright Law, 2008, reprinted in *Journal of Intellectual Property, Information Technology and Electronic Commerce Law*, 2010, 1(2): 119-122.

Tellez, Viviana Muñoz and Sisule F. Musungu. 2010. 'A2K at WIPO: The Development Agenda and the Debate on the Proposed Broadcasting Treaty' in Krikorian and Kapczynski (2010), pp.175-96.

'US-France "Toast-Flap": Whodunit?' 1996. *Christian Science Monitor*, December 20, 1996.

von Eechoud, Mireille. 2021. 'Please Share Nicely- From Database Directive to Data (Governance) Acts', *Kluwer Copyright Blog*, August 18, 2021.

Vaver, David. 2007. 'Copyright and the Internet: From Owner Rights and User Duties to User Rights and Owner Duties', *Case Western Reserve Law Review*, Volume 57, 2007, pp.731-750.

von Lewinski, Silke. 2001. 'International Protection for Audiovisual Performers: A Never-Ending Story? A Resumé of the WIPO Diplomatic Conference 2000', *Revue Internationale du Droit d'auteur*, 189:3-65.

von Lewinski, Silke. 2012. *The Beijing Treaty on Audiovisual Performances*, Max Planck Institute for Intellectual Property and Competition Law Research Paper No. 13-08, pp.1-15.

Wager, Hannu. 'Copyright: A Nordic Perspective', in Watal and Taubman(2015), pp.321-340.

Watt, Richard. 2014. 'Fair Remuneration for Copyright and the Shapley Value', in Richard Watt, ed., *Handbook on the Economics of Copyright: A Guide for Students and Teachers*, Northampton: Edward Elgar Publishing Inc., pp.118-28.

Yap, Neil. 2017. 'Fitting Marrakesh into a Consequentialist Copyright Framework', *Journal of Intellectual Property and Entertainment Law*, 6(2):351-82.

Yu, Peter K. 2006. 'TRIPS and its Discontents', *Marquette Intellectual Property Law Review*, 10(2): 369-410.

Yu, Peter K. 2009. 'A Tale of Two Development Agendas', *Ohio Northwestern University Law Review*, 35:465-573.

Yu, Peter K. 2011a. 'TRIPs and its Achilles Heel', *Journal of Intellectual Property Law*, 18: 479 -531.

Yu, Peter K. 2011b. 'TRIPs Enforcement and Developing Countries', *American University International Law Review*, 26(3):727-782.

Yu, Peter K. 2011c. 'The TRIPs Enforcement Dispute', *Nebraska Law Review*, 89:1046-1131.

Yu, Peter K. 2020. 'Caught in the Middle: WIPO and Emerging Economies' in Ricketson (2020), pp.358-75.

### **C. Books and Monographs**

Altbach, Philip G. ed., 1995b. *Copyright and Development: Inequality in the Information Age*. Chestnut Hill, MA: Bellagio Publishing Network Research and Information Center.

Ayyar, Vaidyanatha R.V. 2009. *Public Policymaking in India*. New Delhi: Pearson Longman.

Baldwin, Peter. 2014. *The Copyright Wars: Three Centuries of Trans-Atlantic Battle*. Princeton, NJ: Princeton University Press.

Becker, Eberhard, Willms Buhse, Dirk Günnewig and Niels Rump. 2003. *Digital Rights Management Technological, Economic, Legal and Political Aspects*. Heidelberg: Springer Verlag.

Bell, David and Kate Oakley. 2015. *Cultural Policy*. London: Routledge.

Bollier, David. 2009. *Viral Spiral: How the Commoners Built a Digital Republic on their Own*. New York: New Press.

Boyle, James. 2008. *Public Domain: Enclosing the Commons of the Mind*. New Haven, CT: Yale University Press.

Briggs, W. 1906. *The Law of International Copyright*. London: Stevens and Haynes.

Caves, Richard E. 2000. *Creative Industries: Contracts Between Art and Commerce*. Cambridge, MA: Harvard University Press.

Clapes, Anthony Lawrence. 1993. *Softwars: The Legal Battles for the Control of the Global Software Industry*. Westport, CT: Quorum Books.

- Croome, John. 1998. *Reshaping the World Trading System*. Geneva: WTO.
- Dam, Kenneth W. 2001. *The Rules of the Global Game: A New Look at U.S. International Economic Policymaking*. Chicago: University of Chicago Press.
- Devereaux, Charan, Robert Z. Lawrence and Michael D. Watkins 2006. *Case Studies in US Trade Negotiation: Making the Rules*. Washington D.C.: Peterson Institute of International Economic Relations.
- Dnes, Antony W. 2011. *Law and Economics Analysis of Fair Use Differences Comparing the US and UK*, Report for the Review of IP and Growth, Paper prepared for the UK Intellectual Property Office.
- Durant, Will and Ariel Durant. 1967. *Rousseau and Revolution*, 'The Story of Civilization', Part X. New York: Simon and Schuster.
- FIA Guide, 2012. International Federation of Actors (FIA), *A FIA Guide to the WIPO Beijing Audiovisual Performances*, 2012.
- Ficsor, Mihály. 2002. *The Law of Copyright and the Internet: The 1996 WIPO Treaties, Their Interpretation and Implementation*, Oxford: Oxford University Press.
- Foucault, Michel. 1970. *The Order of Things: An Archaeology of the Human Sciences*. London: Routledge.
- Gay, Joshua. ed., 2002. *Free Software, Free Society: Selected Essays of Richard M. Stallman*. Boston: Free Software Foundation.
- Geist, Michael (ed.), 2005. *In the Public Interest: The Future of Canadian Copyright Law*. Toronto: Irwin Law.
- Geist, Michael. (ed.), 2010. *From 'Radical Extremism' to 'Balanced Copyright': Canadian Copyright and the Digital Agenda*. Toronto: Irwin Law.
- Geist, Michael. (ed.), 2013. *The Copyright Pentalogy: How the Supreme Court of Canada Shook the Foundations of Canadian Copyright Law*. Ottawa: University of Ottawa Press.
- Gervais, Daniel J. 1999. *The TRIPS Agreement: Drafting History and Analysis*. London: Sweet and Maxwell.
- Ginsburg, Jane C. and June Besek, eds. *Adjuncts and Alternatives to Copyright, Proceedings of the 2001 ALAI Congress*. New York: Association Littéraire et Artistique Internationale, USA, 2002.

Ginsburg, Jane C. and Edouard Treppoz. 2015. *Copyright Law, U.S. and E.U. Perspectives: Texts and Cases*. Cheltenham, UK: Edward Elgar Publishing,

Goldstein, Paul. 1996. *Copyright's Highway: From Gutenberg to Celestial Jukebox*. New York: Hill and Wang, Paperback Edition.

Goldstein, Paul. 2007. *Intellectual Property: The Tough New Realities that Could Make or Break Your Business*. New York: Portfolio

Goldstein, Paul and P. Bernt Hugenholtz. 2013. *International Copyright: Principles, Law and Practice*, Oxford: Oxford University Press.

Graham, Lawrence D. 1999. *Legal Battles that Shaped the Computer Industry*. Westport, CT: Quorum Books.

Greenstein, Seth. 1996. *WIPO Diplomatic Conference: News from Geneva*. Available at <http://web.archive.org/web/19970301064839/http://hrrc.org:80/wiponews.html>; last accessed on 25 July 2021.

Guibault, Lucie, Guido Westkamp, Thomas Rieber-Mohn, Bernt Hugenholtz, Mireille van Eechoud, Natali Helberger, Lennert Steijger, Mara Rossini, Nicole Dufft and Philipp Bohn. 2007. *Study on the Implementation and Effect in Member States' Laws of Directive 2001/29/EC on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society*. Institute for Information Law, University of Amsterdam.

Hennessy, Peter. 2000. *The Prime Minister: The Office and Holders Since 1945*. London: Allen Lane, Penguin.

Hugenholtz, Bernt P. and Ruth L. Okediji. 2008. *Conceiving an International Instrument on Limitations and Exceptions to Copyright*. Amsterdam: Institute for Information Law.

IFPI Position Paper, 1996. International Federation of the Phonographic Industry (IFPI). 1996. *Draft Treaty for the Protection of Performances and Producers of Phonograms: IFPI Position Paper*. 30 September 1996 .

IFPI Study, 1993. International Federation of the Phonographic Industry (IFPI). 1996. *The Impact of Technology on Copyright: A Study Commissioned by IFPI*. October 1996.

Judt, Tony. 2005. *Postwar: A History of Europe since 1945*, New York: The Penguin Press.

Kamina, Pascal. 2002. *Film Copyright in the European Union*. Cambridge: Cambridge University Press.

- Khan, M.A. 1996. *Principles and Perspectives of Copyright*. New Delhi: Sarup and Sons.
- Khan, Shahid Ali. 2000. *Socio-economic Benefits of Intellectual Property Protection in Developing Countries*. Geneva: WIPO.
- Kingdon, John W. 1995. *Agendas, Alternatives and Public Policies*, Second Edition. New York: Longman.
- Krikorian, Gaëlle and Amy Kapczynski ed., 2010. *Access to Knowledge in the Age of Intellectual Property*. New York: Zone Books.
- Lipszyc, Delia. 1999. *Copyright and Neighbouring Rights*. Paris: UNESCO Publishing.
- Litman, Jessica D. 2006. *Digital Copyright*. Amherst, New York: Prometheus Books.
- Masnack, Michael and Leigh Beadon. 2019. *The Sky is Rising: A Detailed Look at the State of Entertainment Industry, 2019*. Washington, DC: Computers and Communication Industry Association.
- Matthews, Duncan. 2002. *Globalising Intellectual Property Rights: The TRIPs Agreement*. London: Routledge.
- Negroponte, Nicholas. 1995. *Being Digital*. New York: Alfred A. Knopf.
- Misra, B. B. 1970. *The Administrative History of India*. New Delhi: Oxford University Press.
- Neustadt, Richard E., and Ernest May. 1986. *Thinking in Time: The Uses of History for Decision-Makers*. New York: Free Press.
- Okediji, Ruth L. ed., 2017. *Copyright Law in an Age of Limitations and Exceptions*. Cambridge: Cambridge University Press.
- Pasternak, Boris. 1984. *Selected Poems*, Translated from Russian by Jon Stallworthy and Peter France. New York: Penguin.
- Pollaud- Dulian, Frédéric. 2005. *Le Droit d'auteur* . Paris: Economica.
- Preeg, Ernest H. 1995. *Traders in a Brave New World: The Uruguay Round and the Future of the International Trading System*. Chicago: University of Chicago Press.
- Putnam, David with Neil Watson. 2000. *Movies and Money*. New York: Vintage Books.

Reinbothe, Jörg and Silke von Lewinski. 2015. *The WIPO Treaties on Copyright: A Commentary on the WCT, the WPPT, and the BTAP*, 2<sup>nd</sup> Edition. Oxford: Oxford University Press.

Ricketson, Sam. 1986. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986*. London: Centre for Commercial Law Studies, Queen Mary College.

Ricketson, Sam ed., 2020. *Research Handbook on the World Intellectual Property Organization: The First 50 Years and Beyond*. Cheltenham, UK: Edward Elgar Publishing.

Ricketson, Sam and Jane C. Ginsburg. 2006. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, 2<sup>nd</sup> Edition. Oxford: Oxford University Press.

Sell, Susan K. 2003. *Private Power, Public Law: The Globalization of Intellectual Property Rights*. Cambridge: Cambridge University Press.

Senftleben, Martin. 2004. *Copyright, Limitations and the Three-Step Test: An Analysis of the Three-step Test in International and EC Law*. Alphen aan den Rijn, the Netherlands: Kluwer Law International.

Skidelsky, Robert. 2000. *John Maynard Keynes: Fighting for Freedom, 1937-1946*, Volume III. London: Viking.

Smith, Adam. 2005, *An Inquiry into the Nature and Causes of the Wealth of Nations*. Electronic Classics Series Publication, Penn State University.

Subramanian, T.S.R. 2004. *Journey through Babudom and Netaland*. Delhi: Rupa and Co.,

von Lewinski, Silke. 2008. *International Copyright Law and Policy*. Oxford: Oxford University Press.

Waldfoegel, Joel. 2018. *Digital Renaissance: What Data and Economics Tell Us about the Future of Popular Culture*. Princeton, NJ: Princeton University Press.

Watal, Jayashree and Antony Taubman, ed., 2015. *The Making of the TRIPS Agreement: Personal Insights from the Uruguay Round*. Geneva: WTO.

## **D. Cases**

### **1. Judgments**

*Apple Computer, Inc., v. Microsoft Inc.*, 799 F.Supp.1006 ( N.D.Cal.1992)

*Computer Associates International, Inc. v. Altai, Inc.*, 982 F.2d 693 (2d Cir. 1992).

*Feist Publications, Inc. v. Rural Telephone Service Co*, 499 U.S. 340 (1991).

*Sega Enterprises Ltd. v. Accolade, Inc.*, 977 F.2d 1510 (9th Cir. 1992).

*Sony v. Universal City Studios, Inc.*, 464 U.S.417 (1984).

*Whelan Associates v. Jaslow Dental Laboratory , Inc.*, 797 F.2d 1222, 230 USPQ 481 (3d Cir. 1986).

## **E. Documents of Governments**

### **Australia**

1994 Copyright Convergence Group. *Highways to Change: Copyright in the New Communication Environment*.

### **Japan**

1995 Agency for Cultural Affairs, *Study of Institutional Issues Regarding Multimedia*, English Translation Arranged by Copyright Research and Information Centre, February 1995 [Agency for Cultural Affairs].

### **United Kingdom**

2002 U.K. IP Commission. *Integrating Intellectual Property and Development Policy*, Report of the Commission on Intellectual Property.

### **United States**

1993 The White House. 1993. *The National Information Infrastructure: Agenda for Action*.

1994 U.S. Green Paper. Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: A Preliminary Draft of the Report of the Working Group on Intellectual Property Rights*.

1995 Lehman Report. Information Infrastructure Task Force, Working Group on Intellectual Property Rights, *Intellectual Property and the National Information Infrastructure: Report of the Working Group on Intellectual Property Rights*.

1996 U.S. Department of Commerce, Patent and Trademark Office, *Briefing on Request for Comments on the Chairman's Text of the Diplomatic*

*Conference on Certain Copyright and Neighbouring Rights Related Questions to be Held in Geneva from December 2-20, 1996*, November 12, 1996.

2017 United States Copyright Office, *Section 1201 of Title 17*, A Report of the Register of Copyright, June 2017.

Senate Subcommittee Hearing, 2020

The United States Senate Committee on the Judiciary Subcommittee on Intellectual Property, 116th Congress.

Hearing on the *Digital Millennium Copyright Act at 22: What Is It, Why It Was Enacted, And Where Are We Now*, February 11, 2020

Mark Schwartz Statement

Hearing in *Copyright Law in Foreign Jurisdictions: How Are Other Countries Handling Digital Piracy*, March 10, 2020.

Justin Hughes Statement

Pamela Samuelson Statement

2020 United States Copyright Office. 2020. *Section 512 of Title 17*, A Report of the Register of Copyright, May 2020.

## **F. Documents of Regional Organisations**

### **European Communities (EC) / European Union (EU)**

1991 Computer Programme Directive. Council Directive 91/250/EEC of 14 May 1991 on the Legal Protection of Computer Programs.

1988 EC Green Paper. Commission of the European Communities, Green Paper on *Copyright and the Challenge of Technology-Copyright Issues Requiring Immediate Action*, COM (88)172 final

1995 EC Green Paper. 1995. Commission of the European Communities, Green Paper on *Copyright and Related Rights in the Information Society*, July 1995, COM (95)382 final.

1996 EC Follow-up Report. Commission of the European Communities, *Follow-Up to the Green Paper on Copyright and Related Rights in the Information Society*, COM (96)568 final, November 1996.

2001 EUCD: Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society

2005 DG Internal Market and Services Working Paper, 'First Evaluation of Directive 96/9/EC on the Legal Protection of Databases', *EUROPA* (Dec. 12, 2005).

2014 Katsarova, Ivana. *An Overview of Europe's Film Industry*, Briefing by European Parliamentary Research Service.

2014 Séverine Dusollier, Caroline Ker, Maria Iglesias and Yolanda Smits, 'Contractual Arrangements Applicable to Creators: Law and Practice of Selected Member States', EU Directorate General for Internal Affairs, 2014.

2015 Renda, Andrea, Felice Simonelli, Giuseppe Mazziotti, Alberto Bolognini and Giacomo Luchetta. 2015. *The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society*, No. 120, Brussels, Centre for European Policy Studies.

2018 JIIP and Technopolis. Study in Support of the Evaluation of Directive 96/9/EC on the Legal Protection of Databases: *Final Report*, A Study Prepared for the European Commission DG Communications Networks, Content & Technology by Joint Institute for Innovation Policy (JIIP) and Technopolis.

### **Organisation for Economic Cooperation and Development (OECD)**

2010 OECD, *The Economic and Social Role of Internet Intermediaries*, April 2010.

## **G. Documents of International Organisations**

### **United Nations Conference on Trade and Development (UNCTAD)**

1985 *The History of UNCTAD, 1964-84*, UNCTAD/OSG/ 286, 1985. Available at [https://unctad.org/en/Docs/osg286\\_en.pdf](https://unctad.org/en/Docs/osg286_en.pdf); last accessed on 27 November 2019.

2003 ICTSD-UNCTAD Dialogue, 2nd Bellagio Series on Development and Intellectual Property, 18-21 September 2003, *Report: Towards Development-Oriented Intellectual Property Policy: Advancing the Reform Agenda*.

## **World Intellectual Property Organisation (WIPO)**

- 1971 *Records of the Intellectual Property Conference of Stockholm, June 11-July 14, 1967.*
1978. *Guide to the Berne Convention for the Protection of Artistic and Literary Works (Paris Act, 1971).*
- 1981 *Guide to the Rome Convention and to the Phonogram Convention.*
- 1986 *The First Hundred Years of the Berne Convention for Protection Literary and Artistic Works.*
- 1993 Worldwide Symposium, Harvard. *WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights*, Harvard University, March 31-April 2, 1993.
- 1993 International Bureau, *Questions Concerning a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms*, Memorandum prepared for the First Session of the Committee of Experts for a Possible Instrument on the Rights of Performers and Producers of Phonograms, Geneva, June 28-July 2, 1993, INR/CE/1/ 2, dated March 12, 1993.
- 1994 Worldwide Symposium, Paris. *WIPO Worldwide Symposium on the Future of Copyright and Neighbouring Rights*, Le Louvre, Paris, June 1-3, 1994.
- 1994 Berne Protocol Questions. *Questions Concerning a Possible Protocol of the Berne Convention*. 1994. Memorandum Prepared by the International Bureau, WIPO BCP/CE/IV/2, dated 5 October 1994.
- 1995 Worldwide Symposium, Mexico City. *Worldwide Symposium on Copyright in the Global Information Infrastructure*, Mexico City, May 22-24, 1995.
- 1995 *Agreement between the World Intellectual Property Organisation and the World Trade Organisation*, WIPO Publication No. 223 (E).
- 1996 Worldwide Forum, Naples. *WIPO Worldwide Forum on the Protection of Intellectual Creations in Information Society*, Naples, October 18 to 20, 1995.
- 1996 Committees of Experts, February 1996. *Report Adopted by the Sixth Session of the Committee of Experts on a Possible Protocol to the Berne Convention (February 1 to 9 1996) and Fifth Session of the Committee of Experts*

*on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonogram (February 1 to 9 1996)*, WIPO BEP/CE/VI/16-INR/CE/V/14 dated February 9, 1996.

1996 WIPO-India Seminar. *International Harmonization of Copyright in the Face of the Globalization of Trade and the New Technologies*, WIPO-INDIA National Seminar on Digital Technology and Intellectual Property, New Challenges and New Opportunities, New Delhi, 16-17 February 1996.

1996 *Draft Final Clauses of the Treaty to be Considered by the Diplomatic Conference*, Memorandum of the Director General, CRNRIPM/2 dated April 3, 1996.

1996 Committees of Experts, May 1996. *Report Adopted by the Seventh Session of the Committee of Experts on a Possible Protocol to the Berne Convention May 22 to 24 1996) and Sixth Session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonogram (May 22 to 24 1996)*, WIPO BEP/CE/VII/4-INR/CE/VI/4 dated August 5, 1996.

1996 Korean Proposal, May 1996. *Proposal of the Republic of Korea*, 2006. Committees of Experts, May 1996, BCP/CE/VII/3-INR/CE/VI/3 dated May 22, 1996.

1996 WIPO PrepCom Report. Draft Report of the Preparatory Committee of the Proposed Diplomatic Conference (December 1996) on Certain Copyright and Neighboring Right Questions, WIPO CRNR/PM/8 Prov. Dated May 24, 1996.

1996 WIPO, Governing Bodies, May 1996. Governing Bodies of WIPO and the Unions Administered by WIPO, Twenty-eighth Session May 21-2, 1996, *General Report*, AB/XXVIII/3 dated May 24, 1996.

1996 *Communication by the European Commission*, CRNR/DC/7 dated December 2, 1996.

1998 The Governance Structure of WIPO. Governing Bodies of WIPO and the Unions Administered by WIPO, Thirty-Second Series of Meetings, March 25 to 27, 1998, A /32/INF/2 dated February 20, 1998.

1998 World Forum Folklore. *Report of the UNESCO-WIPO World Forum on the Protection of Folklore*, organised by UNESCO and WIPO in cooperation with Thailand Government, Phuket, April 8-10, 1997, UNESCO Publication No. CLT/CIC/98/1 and WIPO Publication No. 758(EIF/S).

2003            WIPO Guide (2003): *Guide to Copyright and Related Rights Treaties Administered by WIPO and Glossary of Copyright and Related Rights Terms*.

2003            *WIPO Study on Limitations and Exceptions of Copyright and Related Rights in the Digital Environment*, prepared by Sam Ricketson.

2007            WIPO Study. *WIPO Study on Copyright Limitations and Exceptions for the Visually Impaired*, prepared by Judith Sullivan. SCCR/15/7 dated February 20, 2007.

2013            Gurry Speech: Marrakesh Diplomatic Conference, Closing Speech by Francis Gurry, Director General, World Intellectual Property Organization, 28 June 2013.



## **About the Author**

R.V. Vaidyanatha Ayyar holds a Ph.D. degree from the Andhra University and a M.P.A., degree from the Harvard University. He was a member of the Indian Administrative Service (1966-2003) and Secretary to Government of India in the Ministries of Culture (1997-2001) and Human Resource Development (2001-3). He has rich and varied experience in policy and program development and implementation particularly in the areas of education and culture, has several policy and program innovations to his credit, has extensive experience of dealing with a variety of international organisations and had negotiated many agreements in a number of fields. Dr. Ayyar had extensively explored the interface of law, education, culture, technology and economics. Among others, he led the Indian delegation to the historic WIPO Diplomatic Conference (1996) which concluded the Internet Treaties; he was also the Chairman of the Drafting Committee of that Conference.

After superannuation from the government, he took to teaching policy praxis at the Indian Institute of Management, Bangalore as a Visiting Professor (2003-9). Apart from authoring several articles in international and national journals he is the author of three books: *Public Policymaking in India* published by Pearson Longman in 2009, *The Holy Grail: India's Quest for Universal Elementary Education* (2016) and *History of Education Policymaking in India, 1947-2016* (2017), both published by Oxford University Press.

December 2021 marks the Silver Jubilee of the WIPO Diplomatic Conference, and a retrospective of that Conference is timely. In this book Dr. Ayyar revisits the WIPO Diplomatic Conference, describe the course of events, the negotiation dynamics, the doctrinal differences and sharply conflicting economic interests underlying the stands taken by the main parties to negotiations, the national and transnational interest groups that sought to influence the negotiation process and outcomes and the process whereby the Internet Treaties were concluded. The Companion Volume, *The WIPO Internet Treaties at 25*, describes all the developments germane to the Internet Treaties over the last twenty-five years, and examines at length how well these treaties withstood the creative gales of destruction having a bearing on the production, distribution and consumption of digital content. The Companion volume has been completed and would be published shortly.

