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**THE WIPO COPYRIGHT AGENDA AFTER BEIJING AND MARRAKESH –
STILL A BROADCASTERS TREATY AND THEN A NEW
„GUIDED DEVELOPMENT PERIOD”?**

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Disclaimers

- 1. The views expressed by the speaker are not necessarily the same as those of any organization for which (i) he has ever worked; (ii) is working; or (iii) will ever work.**
- 2. If you find that the views of the speaker are not appropriate, those are not necessarily the views of the speaker.**

**1996 – 2004/5 – 2012/13:
CONTINUATION - DISRUPTION -
CONSOLIDATION**

1996 – 2004/05: continuation (1)

- **Entry into force (2000), interpretation and implementation of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT)**
- **Working on the „follow-up” agenda set at the 1996 Diplomatic Conference** first in separate committees and then in the Standing Committee on Copyright and Related Rights (SCCR)
 - the rights of **audiovisual performances**;
 - *sui generis* rights in **databases** (dropped);
 - (included after the WIPO World Symposium on Broadcasting held in Manila in April 1997) the rights of **broadcasters**.

1996 – 2004/05: continuation (2)

- **Review of the means of exercising rights in the digital environment**
 - **WIPO International Forum** on the Exercise and Management of Copyright and Neighboring Rights in the Face of Challenges of Digital Technology (Seville, May 1997);
 - New edition of the WIPO book on „**Collective management of copyright and related rights**” (2002)
- **Protection of expressions of folklore:** first, part of the „follow-up” copyright agenda; later discussed together with the issues of genetic resources and traditional knowledge
 - **WIPO-UNESCO World Forum** on the Protection of Folklore (Phuket, Thailand, April 1997);
 - **Intergovernmental Committee** on Intellectual Property and **Genetic Resources, Traditional Knowledge and Folklore** (it will have already its 28th session in July 2014).
- (Background) In 2000, **interpretation of the three-step test in two WTO panels** proving that it is a suitable means to establish adequate balance of interests.

DISRUPTION; REPROGRAMMING OF THE INTELLECTUAL PROPERTY GPS

Changing political environment

- (Background) The UN's **Millennium Development Goals**
- (Background) **Collapse of the WTO Doha Development Round** in Cancún 2013
- „**Declaration on the Future of WIPO**” in September 2004 (by „newcomers” with not duly informed allegations)
- Initiation of the **WIPO Development Agenda** at the September-October 2004 sessions of the WIPO Assemblies
- (Background) Preparation and adoption of the **UNESCO Convention** on the protection and promotion of the **diversity of cultural expressions** (2003-2005)

Reorientation (1)

- **Allegations** (not justified) **that WIPO had only concentrated on the interests of rightsholders and had not paid sufficient attention to exceptions and limitations** dictated by public interests and legitimate public interests.
- As regards copyright, badly founded **theories against the three-step test** and **doomsday forecasts about the impact of technological protection measures**.

Reorientation (2)

- **Developing countries** (duly justified) **demands for more active development projects**, with special attention to the conditions and needs of developing countries and, in particular, of LDCs.
- **Outcome:**
 - **more intensive programs** for the use of **IP for development**;
 - **freeze on norm-setting** that could have served **updating protection and enforcement of rights**;
 - priority for **exceptions and limitations**.

CONSOLIDATION; BALANCED COPYRIGHT PROGRAM

The basis for consolidation: adoption of a well-balanced Development Agenda

- The **WIPO Development Agenda**, which was initiated in 2004 was **adopted in 2007** by the WIPO General Assembly as announced on the WIPO website:
„The adoption of the Development Agenda was an important milestone for WIPO:
[The Agenda was formally established by WIPO's member states in 2007](#), in a decision which included the adoption of [45 Development Agenda recommendations](#), grouped into six clusters, and the establishment of a [Committee on Development and Intellectual Property \(CDIP\)](#).”
- The fine-tuned Development Agenda has had the beneficial result of **proving that adequate protection and enforcement of IP rights and the use of IP for development can „tango” together** (in nice romantic relationship).

The „Beijing spirit” and the „Marrakesh miracle”

- The author of this presentation has submitted a **paper** to this conference **on the Marrakesh Treaty** in which he briefly analyzes, *inter alia*, the **joint positive impact of the Beijing Treaty and the Marrakesh Treaty**.
- Here it seems sufficient to mention the historical outcomes that the delegations at the two Diplomatic Conference as a result of sincere efforts **in a commendable spirit of compromise**
 - **solved the thorny issue of transfer of rights** which caused the failure at the 2000 Diplomatic Conference and thus **eliminated the last stubborn obstacle to providing adequate protection also for audiovisual performers**;
 - established a **unique format-oriented legal framework and organizational structure to facilitate trans-border availability of copies of published works accessible to the visually impaired**;
 - **put an end to unproductive debates on the three-step test** (confirming its application) **and TPM protection** (clarifying its interface with exceptions and limitations); and also
 - **duly addressed the specific conditions and needs of LDCs**.

THE MISSING LINK: BROADCASTERS TREATY

Out-of-date provisions of the Rome Convention

Broadcasting organisations shall enjoy the right to authorise or prohibit:

- (a) the **rebroadcasting** of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

No word about cablecasting, cable retransmission and simulcasting.

The Brussels Satellites Convention losing relevance

The basic provision in **Article 2(1)**:

Each Contracting State undertakes to take adequate measures to **prevent the distribution on or from its territory of any programme-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended**. This obligation shall apply where the originating organization is a national of another Contracting State and where the signal distributed is a derived signal.

- **Advantage: signal-based** protection.
- **Losing relevance** because it only covers telecommunication satellites and **does not cover direct-broadcasting satellites**.

The TRIPS Agreement using the „know-how” of the smart girl of a folk tale (1)



The smart girl solving the task to give something and still not to give something.

The TRIPS Agreement using the „know-how” of the smart girl of a folk tale (2)

The schizophrenic provisions of Article 14.3 of the TRIPS Agreement:

- *The pigeon under the sieve:* „**Broadcasting organizations shall have the right** to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.
- *The sieve is removed and the pigeon flies away through the open window:* **Where Members do not grant such rights** to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

Draft Broadcasters Treaty before the next meeting of the SCCR

Favoring or opposing a Broadcasters Treaty, or remaining neutral about it, is **not – or at least not necessarily – an issue of South-North division.**

The frequently quoted **mandate determined by the 2007 session of the WIPO General Assembly:**

„The objective[...] is to negotiate and conclude a WIPO Treaty on the protection of broadcasting organizations, including cablecasting organizations. The scope of the Treaty will be **confined to the protection of broadcasting and cablecasting organizations in the traditional sense**[...]

It is understood that the sessions of the SCCR should aim to agree and finalize, on a **signal-based approach**, the objectives, specific scope and object of protection.”

Agreement on the majority of key issues and a still pending key issue (1)

In accordance with the mandate of the General Assembly, **there seems to be emerging agreement** that:

- the Treaty should be limited to **signal-based protection**;
- it should **protect the rights of broadcasters and cablecasters in the „traditional sense“**;
- consequently, **webcasters are not supposed to be covered (yet)**;
- **signals should be protected also in their pre-broadcast stage.**

Agreement on the majority of key issues and a still pending key issue (2)

There is still a key pending issue. If it is solved, the chance for a Treaty is decisively increased:

- The Treaty **would be meaningless if it did not offer protection against unauthorized simulcasting** (simultaneous online transmission of their programme-carrying signals).
- **There is, at least, one delegation which tends to interpret the mandate of the General Assembly in a way that it does not extend to simulcasting.**
- **This interpretation does not seem to be correct** since it may hardly be argued in a well-founded manner that, **when the signals reach the Internet**, they are not **signals of broadcasters and cablecasters** in the traditional sense, and since they are, **there is no reason to deny protection against such a use** which is becoming increasingly important for the exploitation of broadcast programs.
- As a last resource, it would, of course, be also possible to clarify the mandate by the General Assembly in such a reasonable way.

Other substantive issues (1)

It goes without saying that, even if the streaming issue is solved, there are still several aspects of a Broadcasters Treaty on which further negotiations are needed.

Scope of rights

It is an understandable wish of broadcasters that the level of protection does not **decrease** below what is provided in the Rome Convention and the TRIPS Agreement . However, it seems that **the chance for a Treaty fulfilling the key objective (protection against signal piracy) is the better the simpler the solution which is chosen**; such as, for example, **the kind of „umbrella solution” proposed by the US Delegation** at the December 2013 session of the SCCR:

Right:

Broadcasting organizations shall have the **right to authorize the simultaneous or near-simultaneous retransmission of their broadcast or pre-broadcast signal over any medium.**

Definitions:

A "**near-simultaneous**" retransmission is one that is delayed only to the extent necessary to accommodate time differences or to facilitate the technical transmission of the signal.

A "**pre-broadcast signal**" is a signal transmitted to the broadcasting organization for the purpose of subsequent transmission to the public. (Emphasis added.)

Other substantive issues (2)

Exceptions and limitations

There are **various alternative draft provisions** on exceptions and limitations. **One of them consists in the application of the out-of-date provisions of Article 15 of the Rome Convention.**

The Rome Convention is on the protection of **three categories of beneficiaries** of related rights: performers, producers of phonograms and broadcasting organizations. **When the international norms on the protection of performers and producers of phonograms producers were updated** in the WPPT and the BTAP, *mutatis mutandis*, **the same provisions were adopted on exceptions and limitations based on the application of the three-step test** (Article 16 of the WPPT and Article 13 of the BTAP). There is **no valid reason not to include the same kinds of provisions in a Broadcasters Treaty.**

Protection of technological measures (TPMs) and rights management information (RMI)

For the same reasons, **of the various alternatives, the choice of that one is justified which corresponds to the relevant provisions of the WPPT and the BTAP.**

**OTHER ISSUES ON THE WIPO
COPYRIGHT AGENDA – TOPICS
FOR A POSSIBLE NEW „GUIDED
DEVELOPMENT” PERIOD**

„Guided development” in the 1970s and 1980s

The expression „guided development” was **originally coined by Sam Ricketson** in his 1986 book on the Berne Convention **to characterize WIPO’s copyright activities in the 1970s and 1980s** but it has also been used in WIPO publications.

It refers to that period when **no revision of the international norms took place and WIPO** (for a while along with UNESCO) **offered advice to governments and legislators through recommendations, guiding principles, model provisions, etc.**

Committees of governmental experts and other WIPO bodies worked out **solutions to respond to the challenges of new technologies which then were applied in many countries** (such as those concerning **reprographic reproduction, cable retransmission, private coping** and even **protection of folklore**) and several of them later **were also built in new treaties** (such as those on **computer programs, databases, storage of works in computer memories, satellite broadcasting and rental**).

Current and possible future issues

- It is submitted that, **as regards exceptions and limitations other than those covered by the Marrakesh Treaty** currently on the WIPO agenda – at present and in the foreseeable future – **those kinds of forms would be suitable which were applied in the above-mentioned „guided development” period.** In the case of those exceptions and limitations, **the unique specific reasons leading to the adoption of a treaty are not present.** It is another matter that **guidance is truly needed** regarding exceptions for educational activities, for research and for library and archive purposes. This is particularly true regarding **specific issues** having emerged with the application of digital online technologies, such as **distance education** or **digitizing** library and archive collections (with the related issues of **orphan works**).
- **The same is true concerning those possible new issues which were mentioned at the December 2013 session** of the SCCR such as „licensing solutions for online uses”, „voluntary cross-industry initiatives”, „codes of conduct”, and „collective management of copyright and related rights”.

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