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INTELLECTUAL PROPERTY (IP) PROTECTION: INTRODUCTION TO COPYRIGHT AND RELATED RIGHTS

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I. BASIC NOTIONS OF COPYRIGHT

A. INTRODUCTION

1. The purpose of this presentation is to explain the fundamentals of copyright law and practice, in order to lay the groundwork for the other presentations that will follow.

2. Copyright legislation is part of the body of law known as "intellectual property," which protects the interests of creators by giving them property rights over their creations. These rights of property are recognized under the laws of most countries in order to stimulate human intellectual creativity, to make the fruits of such creativity available to the public, and to ensure that international trade in goods and services protected by intellectual property rights is allowed to flourish on the basis of a smoothly functioning system of harmonized national laws.

3. In countries with Latin-based languages, the expression "intellectual property" referred only to copyright. In the international sphere, however, the expression referred to both industrial property and copyright, reflecting the evolution of the two international unions created at the end of 19th century to protect both types of intellectual property: the Paris Union created by the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Union, established under the Berne Convention for the Protection of Literary and Artistic Works of 1886. Under each Convention, a secretariat called the "International Bureau" was created for purposes of administration, and the two secretariats were combined in 1893. The resulting combined secretariat was known under various names, the last of which was "United International Bureaux for the Protection of Intellectual Property," known under its French acronym BIRPI, which became what is now WIPO.

4. Today, the expression "intellectual property" is used even more broadly, to refer to all creations of the human mind. Article 2 (viii) of the Convention Establishing the World Intellectual Property Organization does not define intellectual property as such, but gives the following list of the subject matter protected by intellectual property rights: literary, artistic and scientific works; performances of performing artists, phonograms, and broadcasts; inventions in all fields of human endeavor; scientific discoveries; industrial designs; trademarks, service marks, and commercial names and designations; protection against unfair competition; and "all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields."

5. The most direct source of protection for intellectual property is national laws. Other sources include legal instruments of regional bodies composed of groups of countries (such as the directives of the European Union), bilateral and plurilateral agreements among countries which contain provisions on intellectual property (such as the North American Free Trade

Agreement), and multilateral agreements, such as the Berne Convention and the Agreement on the Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement), concluded under the Uruguay Round of negotiations under the former GATT (now the World Trade Organization).

1. "Property"

6. In order to gain a fuller understanding of the term "intellectual property," it may be useful to approach it in terms of the notion of "property" in general. The most important feature of property is that the owner of the property may use it as he wishes; nobody else can lawfully use his property without his authorization. The property owner may be a human being or a legal entity, such as a corporation.

7. Roughly speaking, there are three types of property. One is property consisting of movable things, such as a wristwatch, a car, or furniture in a home. In some legal systems, this is known as "movable property." No one except the owner of the wristwatch, the car or the furniture can use these items of property. This legal right is referred to as "exclusive," because the owner has the "exclusive" right to use his property. Naturally, the proprietor may authorize others to use the property, but without such authorization, use by others is illegal.

8. The second type of property is immovable property, or as it is sometimes known, real property. Land and things permanently fixed on it, such as houses, are immovable property, because they cannot be lifted or moved.

9. The third type of property is intellectual property, which protects the creations of the human mind, the human *intellect*. This is why this kind of property is called "intellectual" property.

2. "Intellectual" Property

10. As noted above, intellectual property has been divided into two branches, namely "industrial" property, which protects inventions, and "copyright," which protects literary and artistic works as well as creations in the field of so-called "related rights." While other types of intellectual property also exist, for present purposes it is helpful to explore the distinction between industrial property and copyright in terms of the basic difference between inventions and literary and artistic works.

11. Inventions may be defined (in a non-legal sense) as new solutions to technical problems. These new solutions are ideas, and are protected as such; protection of inventions under patent law does not require that the invention be represented in a physical embodiment. Protection accorded to inventors is, therefore, protection against any use of the invention without the authorization of the owner. Even a person who later makes the same invention independently, without copying or even being aware of the first inventor's work, must obtain authorization before he can exploit it.

12. Literary and artistic works include books, music, works of the fine arts such as paintings and sculptures, and technology-based works such as computer programs and electronic data bases. Unlike protection of inventions, copyright law protects only the form of expression of

ideas, not the ideas themselves. The creativity protected by copyright law is creativity in the choice and arrangement of words, musical notes, colors and shapes. Copyright law protects the owner of property rights in literary and artistic works against those who "copy" or otherwise take and use the form in which the original work was expressed by the author.

13. From this basic difference between inventions and literary and artistic works, it follows that the legal protection provided to each also differs. Since protection for inventions gives a monopoly right in the exploitation of an idea, such protection is short in duration--usually about 20 years. The fact that the invention is protected must also be made known to the public--there must be an official notification that a specific, fully described invention is the property, for a fixed number of years, of a specific owner; in other words, the protected invention must be disclosed in an official register, open to the public, and the owner must ensure that his invention appears in the register.

14. Legal protection of literary and artistic works under copyright, by contrast, prevents only unauthorized use of the expressions of ideas. Without protection under a patent, a person who has disclosed to the public an idea cannot prevent third parties from using this idea. Therefore, the duration of protection can be much longer than in the case of the protection of ideas, without damage to the public interest. Also, the law can be (and, in most countries, is) simply declaratory, i.e., the law may state that the author of an original work has the right to prevent other persons from copying or otherwise using his work. Under copyright, a public register of works protected by copyright is not necessary.

B. COPYRIGHT

15. What has been said so far has been an introduction. The next part of this presentation will explain the general structure of copyright law, and will be divided into the following sections: (1) the *works* protected by copyright; (2) the *rights* granted to the owner of copyright; (3) *limitations* on such rights; (4) *duration of copyright;* (5) *ownership and transfer* of copyright; and (6) *enforcement* of rights.

1. Protected Works

16. Article 2 of the Berne Convention reads in part as follows:

> "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works, to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science. Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works

without prejudice to the copyright in the original work. Collections of literary or artistic works such as encyclopaedias and anthologies which, by reason of the selection and arrangement of their contents, constitute intellectual creations shall be protected as such, without prejudice to the copyright in each of the works forming part of such collections."

17. From this provision, it may be seen that copyright applies to "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression." The expression "literary and artistic works" is a general concept to be understood, for the purposes of copyright protection, as including every original work of authorship, irrespective of its literary or artistic merit.

18. All countries which are members of the Berne Union, and many other countries, provide protection under their copyright laws to the categories of works contained in the preceding list, which illustrates and gives examples of what is meant by the expression "every production in the literary, scientific and artistic domain." The list is not intended to limit the modes or forms of expression which are protected by copyright law. It is not an exhaustive list. Other modes or forms of expression of works in the literary, scientific and artistic domain, not included in the list, are protected also by many copyright laws.

19. Computer programs are a good example of a type of work which is not included in the list contained in the Berne Convention, but which is undoubtedly included in the notion of a "production in the literary, scientific and artistic domain" within the meaning of Article 2 of the Convention; indeed, computer programs are protected under the copyright laws of a number of countries, and under the TRIPS Agreement. A computer program is a set of instructions which controls the operations of a computer in order to enable it to perform a specific task, such as the storage and retrieval of information. A computer program is produced by one or more human authors but, in its final "mode or form of expression," it can be understood directly only by a machine (the computer), not by humans. Another example of a type of work not listed in Article 2 of the Berne Convention, but which is clearly included in the notion of a creation "in the literary, scientific and artistic domain," is multimedia productions. While no acceptable legal definition has been developed, there is a consensus that the combination of sound, text and images in a digital format which is made accessible by a computer program, embodies an original expression of authorship sufficient to justify the protection of multimedia productions under the umbrella of copyright.

2. Rights Protected

20. Earlier in this lecture, it was noted that there are three kinds of property--movable property, immovable property and intellectual property--and that the most important feature of property is that the owner may use it exclusively, i.e., as he wishes, and that nobody else can lawfully use it without his authorization. When we say that the owner of property can use it "as he wishes" we do not, of course, mean that he can use it regardless of the legally recognized rights and interests of other members of society. For example, the owner of a car may use it "as he wishes," but this does not mean that he may drive his car recklessly and create danger to others, nor that he may disregard traffic regulations.

21. Copyright is a branch of intellectual property. The owner of copyright in a protected work may use the work as he wishes, and may prevent others from using it without his authorization. Thus, the rights granted under national laws to the owner of copyright in a protected work are normally "exclusive rights" to authorize others to use the work, subject to the legally recognized rights and interests of others.

22. There are two types of rights under copyright, economic rights, which allow the owner of rights to derive financial reward from the use of his works by others, and "moral rights," which allow the author to take certain actions to preserve the personal link between himself and the work. Moral rights will be discussed later in this presentation.

23. The next question which we must examine is what is meant by "using" a work protected by copyright. Most copyright laws state that the author or owner or rights has the right to "authorize or prevent" certain acts in relation to a work. Such acts include the following: reproduction of the work (making copies); public performance of the work; broadcasting or other communication to the public of the work; translation of the work; and adaptation of the work.

(a) *Right of reproduction and related rights*

24. The right of the owner of copyright to prevent others from making copies of his works is the most basic right under copyright. For example, the making of copies of a protected work is the act performed by a publisher who wishes to distribute copies of a text-based work to the public, whether in the form of printed copies or digital media such as CD-ROMs. Likewise, the right of a phonogram producer to manufacture and distribute compact discs (CDs) containing recorded performances of musical works is based, in part, on the authorization given by the composers of such works to reproduce their compositions in the recording. Therefore, the right to control the act of reproduction is the legal basis for many forms of exploitation of protected works.

25. Other rights are recognized in national laws in order to ensure that the basic right of reproduction is respected. For example, some laws include a right to authorize *distribution* of copies of works; obviously, the right of reproduction would be of little economic value if the owner of copyright could not authorize the distribution of the copies made with his consent. The right of distribution is usually subject to exhaustion upon first sale or other transfer of ownership of a particular copy, which means that, after the copyright owner has sold or otherwise transferred ownership of a particular copy of a work, the owner of that copy may dispose of it without the copyright owner's further permission, for example, by giving it away or even by reselling it. Another right which is achieving wider and wider recognition, including in the TRIPS Agreement, is the right to authorize *rental* of copies of certain categories of works, such as musical works included in phonograms, audiovisual works, and computer programs. The right of rental is justified because technological advances have made it very easy to copy these types of works; experience in some countries has showed that copies were made by customers of rental shops, and therefore, that the right to control rental practices was necessary in order to prevent abuse of the copyright owner's right of reproduction. Finally, some copyright laws include a right to control *importation* of copies as a means of preventing erosion of the principle of territoriality of copyright; that is, the legitimate economic interests of the copyright owner would be endangered if he could not exercise the rights of reproduction and distribution on a territorial basis.

26. There are some acts of reproducing a work which are exceptions to the general rule, because they do not require the authorization of the author or other owner of rights; these are known as "limitations" on rights. The subject of limitations on rights will be discussed later in this presentation, but it bears mention here that an area of major concern at present relates to the scope of a limitation, traditionally present in copyright laws, which allows individuals to make single copies of works for private, personal and non-commercial purposes. The emergence of digital technology, which creates the possibility of making high-quality, unauthorized copies of works which are virtually indistinguishable from the source (and thus a perfect substitute for the purchase of, or other legitimate access to, authorized copies), has called into question the continued justification for such a limitation on the right of reproduction.

(b) *Rights of public performance, broadcasting and communication to the public*

27. Under numerous national laws, a "public performance" is considered any performance of a work at a place where the public is or can be present, or at a place not open to the public, but where a substantial number of persons outside the normal circle of a family and its closest social acquaintances is present. On the basis of the right of public performance, the author or other owner of copyright may authorize live performances of a work, such as the presentation of a play in a theater or an orchestra performance of a symphony in a concert hall. Public performance also includes performance by means of recordings; thus, musical works embodied in phonograms are considered "publicly performed" when the phonograms are played over amplification equipment in such places as discotheques, airplanes, and shopping malls.

28. The right of "broadcasting" covers the transmission by wireless means for public reception of sounds or of images and sounds, whether by radio, television, or satellite. When a work is "communicated to the public," a signal is distributed, by wire or wireless means, which can be received only by persons who possess the equipment necessary to decode the signal. An example of "communication to the public" is cable transmission.

29. Under the Berne Convention, authors have the exclusive right of authorizing public performance, broadcasting and communication to the public of their works. Under some national laws, the exclusive right of the author or other owner of rights to authorize broadcasting is replaced, in certain circumstances, by a right to equitable remuneration, although such a limitation on the broadcasting right is less and less common.

30. In recent years, the rights of broadcasting, communication to the public and public performance have been the subject of much discussion. New questions have arisen as a result of technological developments, in particular digital technology, which has produced what is referred to as the "convergence" of telecommunications and computer technology. These developments have blurred the legal distinctions between the traditional forms of making works available to the public by incorporeal means, such as broadcasting, communication to the public and public performance. Discussions will continue in an effort to adapt the legal definitions of such uses to new technological and commercial realities.

(c) *Translation and adaptation rights*

31. The acts of translating or adapting a work protected by copyright also require the authorization of the owner of rights. "Translation" means the expression of a work in a language other than that of the original version. "Adaptation" is generally understood as the modification of a work to create another work, for example adapting a novel to make a motion picture, or the modification of a work to make it suitable for different conditions of exploitation, e.g., by adapting an instructional textbook originally prepared for higher education into an instructional textbook intended for students at a lower level.

32. Translations and adaptations are works protected by copyright. Therefore, in order to reproduce and publish a translation or adaptation, authorization must be obtained from both the owner of the copyright in the original work and of the owner of copyright in the translation or adaptation.

33. In recent years, the scope of the right of adaptation has been the subject of discussion, because of the increased possibilities for adapting and transforming works which are embodied in digital format. With digital technology, manipulation of text, sound and images by the user is quick and easy; discussions have focused on the appropriate balance between the rights of the author to control the integrity of the work by authorizing modifications, on the one hand, and the rights of users to make changes which seem to be part of a normal use of works in digital format, on the other hand.

(d) *Moral rights*

34. The Berne Convention requires Member countries to grant to authors: (i) the right to claim authorship of the work (sometimes called the right of "paternity"); and (ii) the right to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the work which would be prejudicial to the author's honor or reputation (sometimes called the right of "integrity"). These rights, which are generally known as the moral rights of authors, are required to be independent of the economic rights and to remain with the author even after he has transferred his economic rights. It is worth noting that moral rights are only accorded to human authors; even if someone else is the owner of economic rights in a work (for example, a film producer or a publisher), only the individual creator has moral interests at stake.

3. Limitations on Rights

35. The first limitation is the exclusion from copyright protection of certain categories of works. In some countries, works are excluded from protection if they are not fixed in tangible form; for example, a work of choreography would only be protected once the movements were written down in dance notation or recorded on videotape. In some (but not all) countries, moreover, the texts of laws, court and administrative decisions are excluded from copyright protection.

36. The second category of limitations on the rights of authors and other owners of copyright concerns particular acts of exploitation, normally requiring the authorization of the owner of rights, which may, under circumstances specified in the law, be done without

authorization. There are two basic types of limitations in this category: (1) "free uses," which are acts of exploitation of works which may be carried out without authorization and without an obligation to compensate the owner of rights for the use, and (2) "non-voluntary licenses," under which the acts of exploitation may be carried out without authorization, but *with* the obligation to compensate the owner of rights.

37. Examples of free uses include the making of quotations from a protected work, provided that the source of the quotation, including the name of the author, is mentioned and that the extent of the quotation is compatible with fair practice; use of works by way of illustration for teaching purposes; and use of works for the purpose of news reporting. In respect of a free use for reproduction, the Berne Convention contains a general rule, rather than an explicit limitation: Article 9(2) provides that member States may provide for free reproduction in "special cases" where the acts do not conflict with normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. As noted above, numerous laws contain provisions allowing reproduction of a work exclusively for the personal, private and non-commercial use of human individuals; the ease and quality of individual copying made possible by recent technology has led some countries to narrow the scope of such provisions, including through systems which allow certain copying but incorporate a mechanism for payment to owners of rights for the prejudice to their economic interests resulting from the copying.

38. In addition to specific free uses enumerated in national laws, the laws of some countries recognize the concept known as "fair use" or "fair dealing", which allows use of works without the authorization of the owner of rights, taking into account factors such as the following: the nature and purpose of the use, including whether it is for commercial purposes; the nature of the work used; the amount of the work used in relation to the work as a whole; and the likely effect of the use on the potential commercial value of the work.

39. As noted above, "non-voluntary licenses" allow use of works in certain circumstances without the authorization of the owner of rights, but require that compensation be paid in respect of the use. Such licenses are called "non-voluntary" because they are allowed in the law, and do not result from the exercise of the exclusive right of the copyright owner to authorize particular acts. Non-voluntary licenses were usually created in circumstances where a new technology for the dissemination of works to the public had emerged, and where the national legislator feared that owners of rights would prevent the development of the new technology by refusing to authorize use of works. This was true of two non-voluntary licenses recognized in the Berne Convention, which allow the mechanical reproduction of musical works and broadcasting. It should be noted, however, that the justification for non-voluntary licenses is called increasingly into question, since effective alternatives now exist for making works available to the public based on authorizations given by the owners of rights, including in the form of collective administration of rights.

4. Duration of Copyright

40. Copyright does not continue indefinitely. The law provides for a period of time, a duration, during which the rights of the copyright owner exist. The period or duration of copyright begins from the moment when the work has been created, or, under some national laws, when it has been expressed in a tangible form. The period of duration continues, in

general, until some time after the death of the author. The purpose of this provision in the law is to enable the author's successors to benefit economically from exploitation of the work after the author's death.

41. In countries which are party to the Berne Convention, and in many other countries, the duration of copyright provided for by national law is, as a general rule, the life of the author and not less than 50 years after his death. The Berne Convention also establishes periods of protection for works in respect of which the duration cannot be based on the life of a single human author, for example, anonymous, posthumous and cinematographic works. It should be noted that a trend exists in certain national laws toward lengthening of the duration of copyright. For example, a directive of the European Union requires that, as from July 1, 1995, the duration of copyright under the national laws of the member States be fixed at 70 years following the death of the author.

5. Ownership and Exercise of Copyright

42. The owner of copyright in a work is generally, at least in the first instance, the person who created the work-that is to say, the author of the work. There are exceptions to this general principle, including in the Berne Convention, which contains a set of rules for determining initial ownership of rights in cinematographic works (Article 14*bis*). Also, certain national laws provide that, when a work is created by an author who is employed for the purpose of creating that work, then the employer, not the author, is the owner of the copyright in the work. As noted above, however, moral rights always belong to the individual human author of the work, whoever may be the owner of economic rights.

43. The laws of many countries provide that, whoever is the initial owner of rights in a work, all economic rights may be transferred (moral rights, being personal to the author, can never be transferred). Transfers of copyright may take one of two forms: assignments and licenses.

44. Under an assignment, the owner of rights transfers the right to authorize or prohibit certain acts covered by one, several, or all rights under copyright. An assignment is a transfer of a property right; thus, if all rights are assigned, the person to whom the rights were assigned becomes the owner of copyright.

45. In some countries, an assignment of copyright is not legally possible, and only licensing is allowed. Licensing means that the owner of the copyright remains the owner but authorizes someone else to carry out certain acts covered by his economic rights, generally for a specific period of time and for a specific purpose. For example, the author of a novel may grant a license to a publisher to make and distribute copies of his work, and, at the same time, he may grant a license to a film producer to make a film based on the novel. Licenses may be exclusive, which means that the owner of copyright agrees not to authorize any other person to carry out the licensed acts, or non-exclusive, which means that the copyright owner may authorize others to carry out the same acts. A license, unlike an assignment, does not generally convey the right to authorize others to carry out acts covered by economic rights.

46. Licensing may also take the form of collective administration of rights. Under collective administration, authors and other owners of rights grant exclusive licenses to a single entity, which acts on their behalf to grant authorizations, to collect and distribute remuneration, to prevent and detect infringement of rights, and to seek remedies for infringement. An advantage to authors in authorizing collective administration lies in the fact that, with multiple possibilities for unauthorized use of works resulting from new technologies, a single body is capable of ensuring that mass uses take place on the basis of authorizations which are easily obtainable from a central source.

6. Enforcement of Rights

47. The Berne Convention contains very few provisions concerning enforcement of rights, but the evolution of new national and international enforcement standards has been dramatic in recent years, due to two principal factors. The first is the galloping advances in the technological means for creation and use (both authorized and unauthorized) of protected material, and in particular, digital technology, which makes it possible to transmit and make perfect copies of any "information" existing in digital form, including works protected by copyright, anywhere in the world. The second factor is the increasing economic importance of the movement of goods and services protected by intellectual property rights in the realm of international trade; simply put, trade in products embodying intellectual property rights is now a booming, worldwide business. The TRIPS Agreement contains detailed provisions on the enforcement of rights, is ample evidence of this new link between intellectual property and trade. The following paragraphs identify and summarize some of the enforcement provisions found in recent national legislation, which may be divided into the following categories: conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices.

48. *Conservatory or provisional measures* have two purposes: first, to prevent infringements from occurring, particularly to prevent the entry of infringing goods into the channels of commerce, including entry of imported goods after clearance by customs; and second, to preserve relevant evidence in regard to an alleged infringement. Thus, judicial authorities may have the authority to order that provisional measures be carried out without advance notice to the alleged infringer. In this way, the alleged infringer is prevented from relocating the suspected infringing materials to avoid detection. The most common provisional measure is a search of the premises of the alleged infringer and seizure of suspected infringing goods, the equipment used to manufacture them, and all relevant documents and other records of the alleged infringing business activities.

49. *Civil remedies* compensate the owner of rights for economic injury suffered because of the infringement, usually in the form of monetary damages, and create an effective deterrent to further infringement, often in the form of a judicial order to destroy the infringing goods and the materials and implements which have been predominantly used for producing them; where there is a danger that infringing acts may be continued, the court may also issue injunctions against such acts, failure to comply with which would subject the infringer to payment of a fine.

50. *Criminal sanctions* are intended to punish those who willfully commit acts of piracy of copyright and related rights on a commercial scale, and, as in the case of civil remedies, to deter further infringement. The purpose of punishment is served by the imposition of substantial fines, and by sentences of imprisonment consistent with the level of penalties applied for crimes of corresponding seriousness, particularly in cases of repeat offenses. The purpose of deterrence is served by orders for the seizure, forfeiture and destruction of infringing goods, as well as the materials and implements the predominant use of which has been to commit the offense.

51. *Measures to be taken at the border* are different from the enforcement measures described so far, in that they involve action by the customs authorities rather than by the judicial authorities. Border measures allow the owner of rights to apply to customs authorities to suspend the release into circulation of goods which are suspected of infringing copyright. The purpose of the suspension into circulation is to provide the owner of rights a reasonable time to commence judicial proceedings against the suspected infringer, without the risk that the alleged infringing goods will disappear into circulation following customs clearance. The owner of rights must generally satisfy the customs authorities that there is *prima facie* evidence of infringement, must provide a detailed description of the goods so that they may be recognized, and must provide a security to indemnify the importer, the owner of the goods, and the customs authorities in case the goods turn out to be non-infringing.

52. The final category of enforcement provisions, which has achieved greater importance in the advent of digital technology, includes *measures, remedies and sanctions against abuses in respect of technical means*. In certain cases, the only practical means of preventing copying is through so-called "copy-protection" or "copy-management" systems, which contain technical devices that either prevent entirely the making of copies or make the quality of the copies so poor that they are unusable. Technical devices are also used to prevent the reception of encrypted commercial television programs except with use of decoders. However, it is technically possible to manufacture devices by means of which copy-protection and copy-management systems, as well as encryption systems, may be circumvented. The theory behind provisions against abuse of such devices is that their manufacture, importation and distribution should be considered infringements of copyright to be sanctioned in ways similar to other violations.

II. BASIC NOTIONS OF RELATED RIGHTS

53. This part of the lecture is dedicated to the subject of what are called "neighboring rights," or more correctly, "rights neighboring on copyright." In the TRIPS Agreement, the expression "related rights" is used to refer to the same rights. The purpose of related rights is to protect the legal interests of certain persons and legal entities who either contribute to making works available to the public or produce subject matter which, will not qualifying as "works" under the copyright systems of all countries, express creativity or technical and organizational skill sufficient to justify recognition of a copyright-like property right. The law of related rights deems that the productions which result from the activities of such persons and entities are deserving of legal protection in themselves, as they are "neighbors" to the protection of works of authorship under copyright. Some laws make clear, however, that

the exercise of related rights should leave intact and in no way affect the protection of copyright.

54. Traditionally, related rights have been granted to three categories of beneficiaries: performers, producers of phonograms and broadcasting organizations. The rights of performers are recognized because their creative intervention is necessary to give life, for example, to musical works, dramatic and choreographic works, and motion pictures, and because they have a justifiable interest in legal protection of their individual interpretations. The rights of producers of phonograms are recognized because their creative, financial and organizational resources are necessary to make recorded sound available to the public in the form of commercial phonograms, and because of their legitimate interest in having the legal resources necessary to take action against unauthorized uses, whether it be through the making and distribution of unauthorized copies (piracy) or in the form of unauthorized broadcasting or communication to the public of their phonograms. Likewise, the rights of broadcasting organizations are recognized because of their role in making works available to the public, and in light of their justified interest in controlling the transmission and retransmission of their broadcasts.

55. The first organized international response to the need for legal protection of the three categories of related rights beneficiaries was the conclusion, in 1961, of the Rome Convention, or more specifically, the "International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations." Unlike most international conventions, which follow in the wake of national legislation and are intended to synthesize existing laws, the Rome Convention was an attempt to establish international regulations in a new field where few national laws existed at the time. This meant that most States would have to draft and enact laws before adhering to the Convention. Since the adoption of the Convention in 1961, a large number of States have legislated in matters related to the Convention, and a number of others are considering such legislation; indeed, the laws of many such States exceed the minimum levels of protection established by the Convention. While there is a widespread view that it is out-of-date and in need of revision or replacement by a new set of international norms in the field of related rights, the Rome Convention remains the international benchmark for protection in this field: for example, the European Union has required that all its Member States adhere to the Convention, and it was the basis for inclusion of provisions on the rights of performers, producers of phonograms and broadcasting organizations in the TRIPS Agreement (even though the levels of protection are not the same).

56. The rights granted to the three beneficiaries of related rights in national laws are as follows, although not all rights may be granted in the same law. *Performers* are provided the rights to prevent fixation (recording), broadcasting and communication to the public of their live performances without their consent, and the right to prevent reproduction of fixations of their performances under certain circumstances; the rights in respect of broadcasting and communication to the public may be in the form of equitable remuneration rather than a right to prevent. Due to the personal nature of their creations, some national laws also grant performers moral rights, which may be exercised to prevent unauthorized uses of their name and image, or modifications to their performances which present them in an unfavorable light. *Producers of phonograms* are granted the rights to authorize or prohibit reproduction, importation and distribution of their phonograms and copies thereof, and the right to equitable

remuneration for broadcasting and communication to the public of phonograms. *Broadcasting organizations* are provided the rights to authorize or prohibit rebroadcasting, fixation and reproduction of their broadcasts. Under some laws, additional rights are granted: for example, in the countries of the European Union, producers of phonograms and performers are granted a right of rental in respect of phonograms (and, in respect of performers, audiovisual works), and some countries grant specific rights over cable transmissions. Under the TRIPS Agreement, likewise, producers of phonograms (as well as any other right holders in phonograms under national law) are granted a right of rental.

57. As in the case of copyright, the Rome Convention and national laws contain limitations on rights allowing, for example, private use, use of short excerpts in connection with the reporting of current events, and use for teaching or scientific research, of protected performances, phonograms, and broadcasts. Some countries allow the same kinds of limitations on related rights as their laws provide in connection with protection of copyright, including the possibility of non-voluntary licenses.

58. The duration of protection of related rights under the Rome Convention is 20 years from the end of the year (1) the fixation (recording) is made, in the case of phonograms and performances included in phonograms; (2) the performance took place, as regards performances not incorporated in phonograms; or (3) the broadcast took place, for broadcasts. In the TRIPS Agreement, the rights of performers and producers of phonograms are to be protected for 50 years from the date of the fixation or the performance, and the rights of broadcasting organizations for 20 years from the date of the broadcast. It is to be noted that many national laws which protect related rights grant a longer term than the minimal contained in the Rome Convention.

59. In terms of enforcement of rights, remedies for infringement or violation of related rights are, in general, similar to those available to owners of copyright described above, namely, conservatory or provisional measures; civil remedies; criminal sanctions; measures to be taken at the border; and measures, remedies and sanctions against abuses in respect of technical devices.

60. Finally, a word should be said concerning the relationship between the protection of related rights and the interests of developing countries. The largely unwritten and unrecorded cultural expression of many developing countries, generally known as folklore, may be protected under related rights as performances, since it is often through the intervention of performers that they are communicated to the public. By providing related rights protection, developing countries may also provide a means for protection of the vast, ancient and invaluable cultural expression which is a metaphor for their own existence and identity, indeed, the essence of what separates each culture from its neighbors across the frontier or across the world. Likewise, protection of producers of phonograms and broadcasting organizations helps to establish the foundation for national industries capable of disseminating national cultural expression within the country and, perhaps more important, in markets outside it; the enormous current popularity of what is called "world music" demonstrates that such markets exist, but it is not always the case that the economic benefits from the exploitation of such markets return to the country where the cultural expressions originated. In sum, protection of related rights may serve the twin objectives of preserving national culture and providing a means for commercially meaningful exploitation of international markets.

61. The interest of developing countries in the protection of related rights goes beyond the protection of folklore, and into the realm of international trade and development. Today, the extent to which a country protects intellectual property rights is increasingly and inextricably bound together with the range of possibilities available to that country to benefit from rapidly expanding levels of international trade in goods and services protected by such rights. As an example, the "convergence" of telecommunications and computer infrastructures, referred to above, will result in international investment in many sectors of developing-country economies, including but by no means limited to intellectual property, and those countries with poor records concerning, or a lack of political commitment to, the protection of intellectual property rights will simply be left out of the picture. Protection of related rights, thus, has become part of a much larger picture, and is a necessary precondition to participation in the emerging system of international trade and investment that will characterize the 21st century.

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