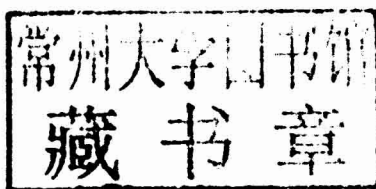


THE WIPO TREATIES ON COPYRIGHT

A Commentary on the WCT, the WPPT,
and the BTAP

SECOND EDITION

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PREFACE

When, in 2002, we presented the first edition of this book, entitled ‘The WIPO Treaties 1996’, it was the first comprehensive commentary on the new WIPO Treaties, the WCT and the WPPT, which were adopted on 20 December 1996. A lot has happened since, and the Treaties have come to life: they were rapidly implemented by many countries; the first instruments of ratification/accession had already been deposited by the late 1990s; and both Treaties came into force in 2002, ie less than six years after their adoption in Geneva. This is, comparatively speaking, a short time frame, given the unusually high number of thirty instruments of ratification/accession required under Articles 20 WCT and 29 WPPT to bring them into force. The success story of the Treaties was to continue. In 2010, the European Union as the first intergovernmental organization became a Contracting Party, together with all of its (today twenty-eight) Member States. And at present, the WCT and the WPPT have more than ninety members each.

In the Preface to the first edition of this book, we anticipated that the adoption of these Treaties would be seen as a historic achievement. Now we know for sure that they have changed the infrastructure of international copyright protection for good and have become an indispensable and integral part of it. Literature interprets the WCT and the WPPT side by side with the Berne Convention and the Rome Convention; national and regional legislators and courts, including the Court of Justice of the European Union, have applied them; and the fact that they have been a reference point for WTO/TRIPs panel decisions has demonstrated their value in practice and their cross-fertilizing impact on the entire environment of international copyright.

Meanwhile, efforts continued over the years to close the gap that the WPPT had left with respect to the protection of audiovisual performances, until finally this gap was closed with the adoption of the BTAP in 2012.

It was also this achievement that gave us the incentive to present the second edition of our book, and we feel the time is ripe for it for a number of reasons. We are now in a position to update our commentary and analysis in the light of recent literature, legislation, and court decisions; the relevant references have been added in the respective chapters. We can assess the development of the WCT and the WPPT over the last (almost twenty) years; Chapter 17 of Part IV contains a detailed evaluation. Finally, in Chapter 9 of Part II, we have added a comprehensive commentary on and analysis of the BTAP.

And so, we believe that it is only appropriate—reflecting its contents—that the second edition of the book should have a new title.

Even more recently than the BTAP, another WIPO copyright treaty was adopted: the Marrakesh VIP Treaty of 2013. To be sure, this Treaty addresses a rather specific issue, namely exceptions to, and limitations of, the rights for the benefit of visually impaired persons, and is, strictly speaking, not part of the trilogy of WIPO copyright treaties that this book is about. Nevertheless, the Marrakesh Treaty is also an important element of the

international copyright infrastructure. Therefore, in Chapter 18 of Part V, this book also presents an overview of its provisions.

The respective roles of both authors regarding the preparation, negotiation, and implementation of WCT and WPPT have already been referred to in the Preface of the previous edition of this book. As far as the BTAP and the Marrakesh Treaty are concerned, it is to be noted that Jörg Reinbothe was Head of the EC Delegation at the Diplomatic Conference of 2000, and that Silke von Lewinski was a member of the German delegation at the Diplomatic Conference of 2000, Deputy Head of the German Delegation at the Diplomatic Conferences of 2012 and 2013 leading to the adoption of the two new Treaties, and a member of that Delegation in several meetings during the preceding informal phases of the negotiations.

The manuscript was finalized in July 2014.

Jörg Reinbothe and Silke von Lewinski
Brussels/Munich
July 2014

Note:

The paragraph numbers in this book are structured in a way which allows for easy navigation of the text. Each paragraph has three numbers which refer to the chapter, the article of the treaty under discussion, and paragraph respectively. For example paragraph 8.10.3 is paragraph 3 of Chapter 8 and refers to article 10 of the treaty under discussion. For text which does not refer to any particular article, the second number is '0'.

PREFACE TO THE FIRST EDITION

The twentieth century has seen many decisive developments regarding the international legislation on copyright and related rights. The Berne Convention of 1886 has been revised several times to adapt to new technology, new forms of exploitation and new markets. The Rome Convention of 1961 has brought about widespread international recognition of important neighbouring rights. The WTO/TRIPs Agreement of 1994 further updated the protection of authors and holders of neighbouring rights. In addition, it structured for the first time at international level the landscape of enforcement of rights.

These developments, crucial in themselves, were topped in December 1996 by the adoption of the two WIPO Treaties—WCT (WIPO Copyright Treaty) and WPPT (WIPO Performances and Phonograms Treaty). Those who, like the authors of this book, witnessed the procedure of signature in the early morning hours of 21 December 1996, in Geneva, felt that this was a truly historical moment for the international protection of copyright.

The adoption of WCT and WPPT marks a milestone for several reasons. Firstly, because these Treaties have introduced the first international copyright rules tailor-made for the new environment created by digital technology. This fact has earned them the name, 'Internet Treaties'. Secondly, and linked to this fact, because the international copyright community of more than 120 national and regional delegations achieved consensus on these pieces of international legislation even before the new digital environment had settled down, and thereby paved the way for its development. Thirdly, because WIPO, world-wide the only international organisation and member of the United Nations family of multilateral organisations specialising in the protection of intellectual property with a long tradition, has proven with these Treaties that it is still going strong—it continues to be the world's think tank for copyright and neighbouring rights protection. And finally, because the WCT and WPPT, for the groups of rightholders they cover, incorporate and update all achievements of the Berne Convention, the Rome Convention and the WTO/TRIPs Agreement.

All this may not be obvious at first sight. Therefore, we offer to share our insights in and personal experience of the negotiation, adoption and implementation of the new WIPO Treaties. As representative of the European Community, Jörg Reinbothe has participated in the negotiations of the Treaties in the run-up to the Diplomatic Conference of 1996 and was head of the EC delegation at this Conference. He also participated in the TRIPs negotiations as member of the EC delegation. Subsequent to the adoption of WCT and WPPT, he has been in charge of preparing the accession of the European Community to the Treaties. Silke von Lewinski followed the negotiations of the Internet Treaties closely as a scholar. She advised the EC delegation as expert and member of the EC delegation before and during the Diplomatic Conference. We, the two authors of this book, have thus not only been eyewitnesses of, but also active in the deliberations that led to, the adoption of WCT and WPPT. This position and our work regarding influencing and implementing policy, as well as in terms of research, have been, consequently, at the origin of the idea to write this commentary and analysis of the WIPO Treaties.

In the context of international treaty making, much is being determined by the need to provide for 'constructive ambiguity', and much can more easily be explained by those who have participated in the negotiations. The commentary contained in this book is our attempt to analyse the WCT and WPPT against this background to the best of our knowledge and recollection. It seeks to provide for sound and neutral interpretative guidance of their provisions. To the extent possible and appropriate, we have also taken account of pieces or projects of implementing legislation at national and regional level, as well as of evaluations in recent literature of the issues contained in WCT and WPPT.

The book is addressed to those who have the task of implementing the Treaties into national or regional law, or who have to interpret such law in the light of and in conformity with the Treaties. It may be of practical relevance also to others, who come across the WCT and WPPT in the course of their professional activity or research. Not being native English speakers ourselves, we deliberately wrote this book in English with a view to assisting the widest possible audience in better understanding the WCT and the WPPT.

In its introductory Chapter 1 ('The evolution of the Treaties'), this commentary explains the historical background of the negotiations on the WCT and the WPPT and puts it into perspective with previously existing conventions on the protection of copyright and neighbouring rights. Moreover, it describes in detail the mechanisms and procedures followed during the Diplomatic Conference of 1996, which led to the adoption of the Treaties.

Chapter 2 ('Commentary on the Articles of the WCT and WPPT') constitutes the main part of this book. Subsequent to general explanations on the principles of interpretation, it contains an Article by Article commentary of all WCT and WPPT provisions including any, 'agreed statements' or declarations made. Each such commentary illustrates the historical background for the provision in question, notably the discussions in the Committees of Experts, the Basic Proposal and the deliberations at the Diplomatic Conference. Subsequently, the respective provision is analysed, both with respect to its main thrust and its wording.

Chapter 3 ('Proposals which were not adopted') addresses issues which, while having been discussed before or at the Diplomatic Conference, did not find their way into the Treaties (the abolition of provisions on non-voluntary licenses; the definition of rental; the modification right; the protection of audiovisual performances), or were not taken up at all by the Diplomatic Conference (the protection of intellectual property in respect of databases).

Finally, Chapter 4 ('Assessment of the outcome of the Treaties') assesses what added value WCT and WPPT constitute as compared with the Berne Convention, the Rome Convention and the WTO/TRIPs Agreement.

Commenting for the first time in a detailed and comprehensive manner on the 1996 WIPO Treaties WCT and WPPT, the importance of which cannot be overestimated, has not been an easy task. We have tried to fulfil it in a constructive spirit and with prudence, following only our academic and legal conscience. We apologise for any omissions which may have occurred and for the likely lack of perfection. The manuscript was finalised in October 2001.

Jörg Reinbothe and Silke von Lewinski
Brussels/Munich, October 2001

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