THE WIPO "INTERNET TREATIES:" THE UNITED STATES AS THE DRIVER: THE UNITED STATES AS THE MAIN SOURCE OF OBSTRUCTION — AS SEEN BY AN ANTI-REVOLUTIONARY CENTRAL EUROPEAN

DR. MIHÁLY FICSOR

ABSTRACT

The copyright policy of the United States developed from initial isolationism, through the 1891 Chase Act, various bilateral and inter-American agreements and the establishment of the Universal Copyright Convention, to active participation in the international copyright cooperation. This development was completed by the United States’ accession to the Berne Convention in 1988. Since then, the United States has played a leading role in this field, which was manifested both during the negotiations of the 1994 TRIPS Agreement and the preparatory work of the two 1996 WIPO “Internet Treaties”, the WCT and the WPPT. These WIPO Treaties, the preparation and adoption of which the United States has had a decisive role, represent the most up-to-date international norms on copyright and related rights. The Treaties offer adequate responses to the challenges of digital technology and the Internet, and they do so in a well-balanced and flexible way. The Digital Millennium Copyright Act adopted in 1998 has implemented the Treaties in the same way. In view of the fact that the United States is the main producer of cultural and information goods protected by copyright and related rights, and may also be found in the frontline of the development of digital technology and the Internet, it is its important national interest that the WIPO Internet Treaties be adequately and effectively implemented all over the world. It is in surprising contrast with this national interest that the United States is also the main source of obstruction to a more general adherence to, and an appropriate application of the Treaties in the form of various “copyleft” ideologies and movements.

Copyright © 2006 The John Marshall Law School

Cite as Dr. Mihály Ficsor, The WIPO "Internet Treaties" The United States as the Driver: The United States as the Main Source of Obstruction — As Seen by an Anti-Revolutionary Central European, 6 J. MARSHALL REV. INTELL. PROP. L. 17 (2006).
THE WIPO “INTERNET TREATIES”: THE UNITED STATES AS THE DRIVER; THE UNITED STATES AS THE MAIN SOURCE OF OBSTRUCTION — AS SEEN BY AN ANTI-REVOLUTIONARY CENTRAL EUROPEAN

DR. MIHÁLY FICSOR*

I. UNITED STATES COPYRIGHT POLICY – FROM ISOLATIONISM TO PARTICIPATION; FROM PARTICIPATION TO LEADERSHIP

Under the first copyright law of the United States, adopted in 1790, only the works of U.S. citizens and residents were protected. The 1891 Chase Act offered an alternative to isolationism by authorizing the President to extend protection to foreigners, while still maintaining protection for U.S. citizens, on the basis of international treaties or reciprocity. The United States entered into bilateral relations with a number of countries, as well as regional treaties with inter-American countries.

The United States was the main advocate of the Universal Copyright Convention (“UCC”). Its membership in the Intergovernmental Committee of the UCC also established an indirect link with the Executive Committee of the Berne Union, as the two Committees and their Subcommittees regularly held joint sessions. In addition, the United Nations Educational, Scientific, and Cultural Organization (“UNESCO”) and the World Intellectual Property Organization (“WIPO”) also convened joint committees of experts, working groups, and other meetings. This was the so-called “guided development period” of the international copyright system, in which the U.S. delegations and experts played a decisive role.

* Dr. Ficsor is the President of the Hungarian Copyright Council, and International Legal Consultant of Smith, Strong and Schlesinger LLP, Washington D.C. This article is based on his presentation given on May 25, 2006, at The John Marshall Center for Intellectual Property Law’s Special 65th Anniversary Conference on the Role of the United States in World Intellectual Property Law. Formerly, Dr. Ficsor was Director General of the Hungarian authors’ society, ARTISJUS, and later Assistant Director General of WIPO in charge of copyright. Dr. Ficsor is a graduate of the Law Faculty of Eötvös Loránd University, Budapest, where he also taught copyright for several years. He is the Chairman of the Central and Eastern European Copyright Alliance (“CEECA”) as well as of the Hungarian Copyright Association, the national group of the International Literary and Artistic Association (“ALAI”).

1 Copyright Act of 1790, 1 Cong. Ch. 15, 1 Stat. 124 (1790).
3 International Copyright Relations of the United States, COPYRIGHT CIRCULAR 38A (U.S. Copyright Office, Washington, D.C.), Aug. 2003, available at http://www.copyright.gov/circs/circ38a.pdf (last visited Sept. 16, 2006). For example, “bilateral copyright relations between the United States and Belgium, France, the United Kingdom, and Switzerland were established by Presidential Proclamation No. 3 effective July 1, 1891.” Id. at n.14.
4 International Copyright Conventions, COPYRIGHT CIRCULAR 38C, (U.S. Copyright Office, Washington, D.C.), available at http://usinfo.state.gov/usa/infousa/laws/treaties/ucc.htm (last visited Sept. 16, 2006). In his proclamation of July 18, 1974, President Nixon was “[c]onvinced that a system of copyright protection . . . expressed in a universal convention . . . will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts . . . .” Id.
6 See generally United Nations Educational, Scientific, and Cultural Organization [UNESCO], http://portal.unesco.org (last visited October 1, 2006). UNESCO was founded on November 16, 1945 with the goal to “build peace in the minds of men.” Id.
8 See generally MIHÁLY FICSOR, THE LAW OF COPYRIGHT AND THE INTERNET: THE 1996 WIPO TREATIES, THEIR INTERPRETATION AND IMPLEMENTATION, 5–14 (Oxford University Press 2002). For example, in February 1985, WIPO and UNESCO convened jointly with the Group of Experts on the Copyright Aspects of the Protection of Computer Software, producing a breakthrough towards the recognition of computer programs as works to be protected under the Berne Convention and the UCC. Id. at 7.
The level of protection of the UCC, however, was much lower than that of the Berne Convention for the Protection of Literary and Artistic Works ("Berne Convention"). This discrepancy conflicted with the fact that the United States had a leading role in the production of and international trade in copyright goods and services.\(^9\) It was a genuine U.S. interest to accede to the Berne Convention to receive a higher level of protection for U.S. creators and copyright industries than that given by the UCC.\(^10\) However, there were certain elements in the U.S. copyright system not in accordance with the Berne Convention.\(^11\) Serious doubts emerged regarding the U.S. copyright system's compatibility with the Berne Convention.\(^12\) Nevertheless, the advantages offered by accession to the Convention were more important than the possible burdens and risks that came with amending the U.S. Copyright Act. The Berne Convention Implementation Act of 1988 resolved the issue of necessary amendments. The United States acceded to the Convention, which entered into force for the United States on March 1, 1989.\(^13\) During the preparatory work of the Implementation Act, some arguments in support of U.S. accession explicitly referred to the role of the United States in world intellectual property law.

Ralph Oman, the then Register of Copyrights, presented, inter alia in his key statement before the committee of the House of Representatives the following arguments: (i) "the United States authors must accede to the Berne Convention to secure dynamic leadership in international copyright relations,"\(^14\) and (ii) "adherence to the Berne Convention will enhance the United States' political credibility and strengthen its position for negotiating multilateral and bilateral trade agreements involving intellectual property."\(^15\) Ralph Oman's statement revealed that U.S. accession to the Berne Convention would strengthen its position in negotiations to what became the Trade Related Aspects of Intellectual Property ("TRIPS Agreement").

---

\(^9\) See Steven Siwek, Copyright Industries in the U.S. Economy: The 2004 Report (2004), available at http://www.iipa.com/pressreleases/2004_oct7_Siwek.pdf. Beginning in 1990, the International Intellectual Property Alliance ("IIPA") has commissioned and published economic studies indicating the contribution of the copyright industries to the U.S. economy. Id. The latest version covers data through 2002. Id. First, the 2004 report indicates that the United States "core" copyright industries amounted to an estimated six percent of the U.S. gross domestic product ("GDP") for a total of $626.6 billion. Id. The primary purpose of "core" copyright industries is to produce and/or distribute copyright materials. Id. Second, the contribution of the United States "total" copyright industries was twelve percent of the GDP for a total of $1.25 trillion. Id. The "total" copyright industries is composed of four groups: "core," "partial," "non-dedicated support," and "interdependent" sectors. Id. Third, the "core" copyright industries employed four percent of U.S. workers in 2002, accounting for 5.48 million workers. Id. Fourth, the "total" copyright industries employed 8.41\% of U.S. workers, accounting for 11.47 million workers. Id. Finally, the U.S. copyright industries led other major industry sectors, such as chemicals and related products, food and live animals, motor vehicles, parts, and accessories, and aircraft and associated equipment sector by achieving estimated foreign sales and exports of $89.26 billion. Id.


\(^11\) Id. at 81–89. Mr. Oman cited "formality" differences between Berne and the U.S. copyright system, such as "notice," "registration and recordation," "deposits," and "renewal registrations." Additionally, Mr. Oman cited "non-formality" difference including, but not limited, the "retroactive application of Berne," "moral rights," "public performance rights," "architectural works," "works made for hire," and "fair use." Id. at 90–105.

\(^12\) Id. at 113–18 (presenting arguments against United States adherence to the Berne Convention).


\(^15\) Id. at 67.
United States adherence to Berne would complement our efforts in negotiating trade agreements under the General Agreement on Tariffs and Trade ("GATT"). Through the GATT negotiations we could develop a dispute settlement mechanism to redress the trade distorting consequences of inadequate intellectual property protection. The GATT requires a mature standard for copyright protection as a yardstick for evaluating the existence of trade barriers. If the United States joins the Berne Union, the Berne standard could be that minimum standard, and our trade negotiators around the world could insist on that standard as the one that constitutes adequate protection for GATT as well as for bilateral agreements.16

It unfolded exactly in that way. During the TRIPS Agreement negotiations, the U.S. delegation played a decisive role, and in regards to copyright, the substantive provisions of the Berne Convention became the basic standards. The substantive provisions of the TRIPS Agreement did not advance many new elements. In addition to certain clarifications, the new obligations consisted of granting a rental right for computer programs, audiovisual works, and phonograms,17 and the extension of the term of protection of the rights of performers and producers of phonograms from the Rome minimum of twenty years, to fifty years.18

For the United States, it was important that Part I, Section 1 of the TRIPS Agreement on "Copyright and Related Rights" offered a bridge between civil-law and common-law countries in respect to the protection of related rights. This was important because the United States had not acceded to the Rome Convention, and until the adoption of the TRIPS Agreement, it had only been party to two antipiracy conventions.19 It must be stated, that the TRIPS Agreement significantly improved the level of the protection for all intellectual property rights through provisions providing detailed standards for the enforcement of rights, and extending the World Trade Organization ("WTO") dispute settlement mechanism to intellectual property rights.

By the time the TRIPS Agreement was signed, the international copyright community faced a new challenge. Between the de facto finalization of the TRIPS Agreement, which took place at the end of 1992, and its signing in 1994, the Internet began a truly spectacular development. The international copyright community was unable to celebrate the TRIPS Agreement and sit idle for a long period of time. The phenomena of digital technology and the Internet raised important new questions that required urgent responses.

It was impossible to reopen the TRIPS negotiations to address these new questions raised by digital technology and the Internet. WIPO, however, had been dealing with the issues raised by the new technologies for copyright and related rights in two committees of experts. These committees had the objective of updating the international norms from the 1990s. One committee was responsible for copyright issues, and the other one was responsible for the issues on the rights of performers and producers of phonograms.20 The committees' preparatory work was slowed down for several years in order to avoid what was seen by many delegations as a danger of undesirable interference with the TRIPS

16 Id. at 68.
18 Id. art. 14 ¶ 5.
20 See generally Ficsor, supra note 8, at 18–25.
After the adoption of the WTO package of agreements in April 1994, the preparatory work in the two WIPO committees accelerated in order to address the issues of the copyright "digital agenda."22

II. THE WIPO "INTERNET TREATIES" — THE UNITED STATES AS THE DRIVER


Needless to say, the United States, because of its influence on the development of the Internet23 and as the place where the first online copyright issues emerged, took a leading role relating to those issues. The United States played a decisive role in the preparation of the new international norms with objectives to respond to the challenges raised by digital technology and, in particular, by the Internet.24

The two treaties that offered responses to these new challenges, baptized as the "Internet treaties" by the international press, were the WIPO Copyright Treaty ("WCT")25 and the WIPO Performances and Phonograms Treaty ("WPPT").26 It appeared that these two "Internet treaties" were prepared in a record time because only twenty months lapsed from the signing of the TRIPS Agreement in April 1994 and the signing of these two treaties in December 1996.27

The truth is, however, that intensive preparatory work took place not only in the period between April 1994 and December 1996, but also before 1994. This occurred not only in the two WIPO committees, but also at the national level, and at certain brainstorming meetings organized by WIPO in various countries. The first of these meetings was the WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Related Rights organized in cooperation with the U.S. Government, and was held at Harvard University at the end of March and at the beginning of April 1993.28

The national and regional studies, in particular those prepared in the United States, the European Community, and Japan, offered important contributions to the preparatory work of the new international norms.29 The U.S. study was the most advanced, and its impact was particularly significant.

The United States published the "Green Paper" in July 1994 under the title "Intellectual

21 Id. ¶ 21.
22 Id. ¶ 25–41.
27 See WCT, supra note 25 (stating WCT was adopted December 20, 1996 in Geneva, Switzerland); see also WPPT, supra note 26 (stating WPPT was adopted December 20, 1996 in Geneva, Switzerland); see also WPPT Notification No. 8: Ratification by the United States of America, available at http://www.wipo.int/docs/notdocs/en/wppt/treaty_wppt_8.html (last visited Sept. 16, 2006) (stating the United States of America did not ratify the WPPT Treaty until Sept. 14, 1999).
28 Ficsor, supra note 8, at 29–30 (discussing the topics discussed at the WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighbouring Rights convened at Harvard University in March–April 1994).
Property and the National Information Infrastructure – Preliminary Draft of the Working Group on Intellectual Property Rights.” In principle, the purpose of the Green Paper was to cover industrial property rights. However, of its 141 pages, only twelve were devoted to the issues that might emerge in the fields of patents, trademarks, and trade secrets. Instead, the Green Paper dealt mainly with copyright issues. It described the technology involved, its impact on copyright, and the possibility of using technological measures and rights management information for the protection and exercise of rights in the networked environment. At the end of the Green Paper, “preliminary findings and recommendations” were presented.

Following the release of the Green Paper, the Working Group heard testimonies from interested organizations and groups in special hearings in addition to receiving a great number of written proposals. The comments made at the hearings and presented in written form were taken into account for the “White Paper,” which was published by the Working Group in September 1995. The White Paper was released under the same title as the Green Paper, except that the references to the preliminary nature of the report had been removed. The White Paper followed the same structure as the Green Paper. However, at the end, it did not present “preliminary findings and recommendations,” as in the Green Paper. Instead, it presented concrete, final recommendations and appendices with the text of the proposed legislation, and with a statutory mark-up of the suggested modifications. In the draft provisions, several elements appeared, which would later become part of the two WIPO Treaties and then the Digital Millennium Copyright Act of 1998 ("DMCA").

At the joint sessions of the two WIPO Committees held in September 1995, the U.S. delegation announced the publication of the White Paper, described its contents, and made copies available to the delegations. This had great influence in the discussions and negotiations leading to the Diplomatic Conference and the adoption of the two WIPO Treaties.

B. The WIPO “Internet Treaties” – the Role of the U.S. Delegation in the Negotiations at the Diplomatic Conference and a Description of the Treaties

The U.S. delegation played a decisive role during the WIPO Diplomatic Conference held in Geneva, which in December 1996, adopted the two “Internet Treaties”: the WCT and the WPPT. The delegation was very active in the negotiations and made a number of proposals, many of which were reflected in the texts of the Treaties adopted.

As mentioned above, before the finalization and publication of the U.S. White Paper, all of the interest groups had the opportunity to express their views and make proposals, which

---

31 Id. §§ I(B)-I(D).
32 Id. § IV.
34 See id. § IV (providing recommendations); see also id. app. 1 (providing proposed legislation); see also id. app. 2 (providing statutory markups).
were duly considered by the Working Group.\textsuperscript{37} The White Paper also served as a basis for the U.S. proposals submitted at the Diplomatic Conference. The composition of the delegation at the Diplomatic Conference excluded any possible bias in favor of one interest group over another. The delegation was composed of no less than thirty-three members, with whom the leadership of the delegation regularly consulted and discussed all of the proposals and negotiation issues. Within the delegation, in addition to the government officials and representatives of the various categories of owners of rights, the outlines of an interesting coalition emerged. Among the members of this unusual coalition were both educational and library associations, as well as representatives of certain industries, some of them economically much stronger than the copyright industries.\textsuperscript{38} The industrial members included telecommunication companies, Internet service providers, other information technology industries, entertainment equipment, and recording material manufacturers.\textsuperscript{39} Although these two groups, which were involved in the same cause, seemed an unlikely coalition because of their size and financial goal differences, its members had two things in common. First, although for different reasons, they all opposed multiple aspects of the proposed updating of the international copyright norms. Second, they were “newcomers” at WIPO: their level of copyright knowledge was still relatively low, which resulted in certain misgivings that were not truly justified.

The Diplomatic Conference adopted two well-balanced and sufficiently flexible Treaties: the WCT and the WPPT. As these Treaties approach their 10th anniversary, it is quite clear that they have become indispensable parts of the international copyright and related rights standards. The number of ratification instruments necessary for accession and for the entry of the two Treaties into force was set unusually high.\textsuperscript{40} Nevertheless, the Treaties entered into force relatively early: the WCT on March 6, 2002,\textsuperscript{41} and the WPPT on May 20, 2002.\textsuperscript{42} As of the middle of April 2006, the WCT and the WPPT, had fifty-eight and fifty-seven Contracting Parties, respectively.\textsuperscript{43} The seventeen Member States of the European Communities are likely to ratify the Treaties before the end of 2006. As a result, the number of Contracting Parties that signed the Treaties will increase to seventy-six for the WCT and seventy-five for the WPPT. These numbers will probably reach eighty more members before the end of the year 2006.\textsuperscript{44}

In addition to the growing adherence to the two WIPO Treaties, the Treaties’ success is reflected in the adequate manner in which they are being implemented and applied in the overwhelming majority of the countries that have ratified or acceded to the Treaties, and even in countries that have not yet done so.

The WCT contains the most up-to-date international copyright norms. The WCT obligates its contracting parties to comply with the substantive norms of the Berne


\textsuperscript{38} \textit{Id.} at 2.

\textsuperscript{39} \textit{Id.}

\textsuperscript{40} Compare WCT, \textit{supra} note 25 art. 20 (requiring thirty instruments of ratification before the WCT entered into force), and WPPT, \textit{supra} note 26 art. 29 (requiring thirty instruments of ratification before the WPPT entered into force), with Rome Convention art. 29, \url{http://www.rome-convention.org/instruments/i_conv_orig_en.htm} (requiring seven instruments of ratification), and Berne Convention, \textit{supra} note 5 art. 23 (requiring five instruments of ratification).

\textsuperscript{41} WCT, \textit{supra} note 25.

\textsuperscript{42} WPPT, \textit{supra} note 26.

\textsuperscript{43} For the actual list of Contracting Parties of the two Treaties, see WIPO’s web-site at \url{www.wipo.int}.

\textsuperscript{44} If we only calculate seventy-six Contracting Parties in the case of the WCT and we compare this with the growth of the membership of the Berne Union, we can see that it was only in 1984 that the seventy-sixth country acceded to the Berne Convention, that is, nearly ten times later (not within ten years, but ninety-four years). The number of Contracting States of the Rome Convention, at the moment of the completion of this paper is eighty-three, and it hardly increases substantially anymore. It seems to be quite a realistic forecast that the WPPT will reach and overtake the Rome Convention concerning the level of adherence, at latest in 2007, when it will be eleven years old in contrast with the forty-six year old Rome Convention.
Convention. Furthermore, the WCT includes the substantive copyright norms of the TRIPS Agreement by reproducing the relevant norms with some drafting changes. The WCT also provides for certain new elements of copyright protection not necessarily related to the so-called “digital agenda.” Finally and most importantly, the WCT offers an appropriate response to the challenges of digital technology, particularly the Internet. The WCT clarifies the application of the existing norms of the Berne Convention, and adapts the international system of copyright protection, when necessary, to the conditions and requirements of the digital environment.

The relationship between the WPPT and the Rome Convention has been regulated in a way similar to the relationship between the TRIPS Agreement and the Rome Convention. This means that: (i) in general, the Contracting Parties are not obligated to apply the substantive provisions of the Rome Convention, (ii) only a small number of the Rome Convention’s provisions are included by reference in the WPPT, and (iii) Article 1(1) of the WPPT contains, mutatis mutandis, practically the same provisions as Article 2(2) of the TRIPS Agreement: it provides that nothing in the Treaty derogates from obligations that Contracting Parties have to each other under the Rome Convention.

The level of protection provided by the WPPT, in general, corresponds to the level of protection under the Rome Convention and the TRIPS Agreement. However, it does not extend to the rights of broadcasting organizations. Also, as far as the rights of performers are concerned, the WPPT only extends to the aural aspects of performances, and their fixations on sound recordings. Finally, the WPPT also contains new provisions, which have been worked out on the basis of the so-called “digital agenda.”

However, it should be emphasized that the two Internet Treaties have led to neither a larger scope of copyright protection and related rights, nor a higher, more demanding level of protection. The Treaties take into account all of the various legitimate interests, but they have done nothing more. They have adapted the international norms of these rights to the new environment, allowing the international norms to continue to offer the indispensable conditions for the promotion of creativity and for economic, social, and cultural development.

When the Diplomatic Conference convened, the debates about the impact of digital technology were already in the third stage. In the first stage, there was both a kind of euphoria and a great fear of this new phenomenon. It was in this period that some Internet “gurus,” the majority of which were from the United States, predicted the death of copyright as an unworkable legal institution in the global digital network. In the second stage, there was a strong anti-thesis to such an extreme view. Many copyright experts expressed the view that the international, regional, and national norms did not need to be changed. Some experts argued that the norms might function without any problems in the digital environment. By the time of the Diplomatic Conference, the international copyright community reached the third stage — synthesis. The community reached an agreement that certain modifications were necessary in the norms on copyright and related rights, but that those modifications should consist of adaptation rather than a fundamental alteration of the system of protection.

In accordance with this agreement, the new Treaties clarified the application of the

---

65 WCT, supra note 25 art. 1(4) (providing “Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.”).

66 In particular, the explicit recognition of a right of distribution of copies in respect of all categories of works, which under the Berne Convention is only provided explicitly for cinematographic works, leaving the issue of exhaustion of this right to national legislation, and assimilating the term of protection of photographic works to the term of other works.

67 See generally WPPT, supra note 26 art. 5(1); see also BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE, WORLD INTELLECTUAL PROP. ORG. DIPLOMATIC CONFERENCE ON THE PROT. OF AUDIOVISUAL PERFORMANCES, at 2, U.N. Doc. IAVP/DC/3 (Aug. 1, 2000), available at http://www.wipo.int/documents/en/document/iavp/doc/iavp_dc3.doc (stating the WPPT “that was adopted by the Diplomatic Conference did not extend the protection of performers to their performances fixed in audiovisual fixations”).
existing norms in the digital environment, and, in particular, on the Internet, adapted the existing norms for this purpose, and introduced new norms where they were indispensable to maintain an appropriate level of protection for copyright and related rights and to effectuate public policy considerations.

The so-called “digital agenda” included the following main issues: (a) the application of the right of reproduction in the digital environment, (b) the right or rights applicable for interactive transmissions, (c) exceptions and limitations in the digital environment, and (d) the protection of technological measures and rights management information. Clarifying and adapting the existing international norms has settled the issues mentioned in (a) through (c). In contrast, new norms have been adopted to settle the issue in (d).48

Attendees of the Diplomatic Conference attempted to formulate and adopt detailed norms for the right of reproduction concerning the numerous acts of reproduction that take place during Internet transmission through a series of temporary storage, but do not have any relevance for the exploitation of the works and objects involved, and lack importance from the viewpoint of the legitimate interests of owners of rights.49 While the text of the Treaties does not provide any specific provisions on this subject, an agreed statement has been adopted clarifying that the right of reproduction is fully applicable in the digital environment, and that storage of works and objects of related rights is also an act of reproduction. The absence of these specific provisions implies that the general right of reproduction provisions are applicable. The result is that the concept of reproduction, and, thus, the exclusive right of reproduction, extends to any storage. This includes any temporary, transient storage.50

With regards to interactive transmissions through the Internet, or any other similar future network, an agreement was reached, during the preparatory work of the two Treaties and at the Diplomatic Conference, that such acts should be covered by an exclusive right of owners of copyrights and related rights. This agreement was based on the premise that, without such an exclusive right, owners of rights would not be able to control the use of their works and objects of related rights. However, there was no agreement on what kind of exclusive right the Treaties should recognize.51 For a while, the absence of agreement regarding the legal characterization of interactive digital transmissions seemed to be a major obstacle. However, the famous “umbrella solution” solved this obstacle.52 The essence of the “umbrella solution” is a neutral description.53 This description has been included in the text of the two Treaties as “making available to the public of (works) (performances fixed in phonograms) (phonograms), by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.”54 In the

---

48 Which, however, do not provide for new rights, and only grant certain means that are indispensable for copyright and related rights to have a chance at all to survive in the new environment.
49 See generally Ficsor, supra note 8, at 139–43. WCT supra note 25, agreed statement concerning art. 1(4), which reads as follows: “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.” See also WPPT, supra note 26, agreed statements concerning arts. 7 and 11 with similar contents concerning the right of reproduction of performers and producers of phonograms, respectively.
50 See Ficsor, supra note 8, at 448–50.
51 This was due to the fact that transmissions through the Internet may be deemed to be similar both to acts of communication to the public by wire or by wireless means (broadcasting) since it takes place through transmissions of program-carrying signals and to acts of distribution since, as a result of the transmissions, copies of works and objects of related rights are obtained in the receiving computers.
52 See Ficsor, supra note 8, at 204–09.
53 Id. at 206. Neutral does not involve specific legal characterization. Id.
54 See WCT, supra note 25 art. 8; see also WPPT, supra note 26 art. 10 (“[p]erformers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them”).
The WIPO "Internet Treaties:" The United States as the Driver

The right of communication to the public has been extended to this act. However, on the insistence of the U.S. delegation, the Diplomatic Conference has clarified that the obligation to grant an exclusive right for such an act may also be fulfilled on the basis of another right or the combination of different rights. In contrast, the WPPT applies the "umbrella solution" directly. That is, the WPPT provides for an exclusive right of performers and phonogram producers for interactive transmission through the internet.

On the issue of exceptions and limitations, the Diplomatic Conference adopted an agreed statement concerning Article 10 of the WCT, which reads as follows:

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.

This agreed statement also applies mutatis mutandis concerning Article 16 of the WPPT on limitations and exceptions. However, it is important to emphasize that any exception or limitation must correspond to the "three-step test" included in Article 10 of the WCT and Article 16 of the WPPT. Thus, while the existing exceptions and limitations may only be extended to the digital environment, new exceptions and limitations may be devised only if, under the new conditions of the digital environment, they (i) may be considered to be special cases, (ii) do not conflict with a normal exploitation of the works and objects of related rights concerned, and (iii) do not unreasonably prejudice the legitimate interests of owners of rights.

The truly new provisions of the two Treaties are those that relate to technological measures and rights management information. During the preparatory stages of the Treaties and at the Diplomatic Conference, it was recognized that granting appropriate rights in the digital network environment is insufficient, and that copyright and related rights could not be adequately protected and exercised without the support of technological measures and electronic rights management information. The two Treaties do not include any provision on the issue of what kinds of such measures and information should or may be applied. What they only do is that they obligate contracting parties to provide adequate legal protection and effective legal remedies against the circumvention of technological measures (and it is understood that a contracting party cannot fulfill this obligation without also providing such protection and remedies against the manufacture, importation and

---

55 See WCT, supra note 25 art. 8.
56 See Records of the 1996 Diplomatic Conference, supra note 36, at 675. The delegate of the United States made a statement, which is reflected in the report in the following way:

He expressed support for Article 10 of the draft WCT; in the final text, Article 8] and Articles 11 and 18 of [the draft WPPT; in the final text, Articles 10 and 14] concerning the rights of communication to the public and making available to the public, which were key to the ability of owners of rights to protect themselves in the digital environment. He 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 those rights might he 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.

Id. No other delegation has made any comment on this statement.

57 See WPPT, supra note 26 arts. 10 and 14.
58 See Records of the 1996 Diplomatic Conference, supra note 36.
59 See WCT, supra note 25 art. 10, and WPPT, supra note 26 art 16.
60 See WCT, supra note 25 art. 11; see also WPPT, supra note 26 art. 18 (outlining "Obligations concerning Technological measures" in which a "Contracting Party shall provide adequate legal protection and effective legal remedies").
distribution of devices, as well as against commercial services, for circumvention), and against those who, knowing the relevant circumstances and consequences, remove or alter electronic rights management information without authority or use, works or objects of related rights or copies thereof without authority, knowing that such information has been removed or altered without authority.\footnote{See WCT, supra note 25 art. 12; see also WPPT, supra note 26 art. 19 (outlining “Obligations concerning Rights Management Information”).}

The WCT and the WPPT do not include detailed provisions on the enforcement of rights. However, they do provide that: “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.”\footnote{See WCT, supra note 25 art. 14; see also WPPT, supra note 26 art. 23 (outlining “Provisions on Enforcement of Rights”).} This provision mirrors the first sentence of Article 41(1) of the TRIPS Agreement.\footnote{See TRIPS, supra note 17 art. 41(1) (“Members shall ensure that enforcement procedures... are available under their law so as to permit effective action against any act of infringement of intellectual property rights... including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”).}

A mutatis mutandis version of a general provision of the TRIPS Agreement concerning enforcement obligations is an important factor in the interpretation of the WCT and the WPPT. The mirrored reflection between TRIPS, the WCT, and the WPPT indicates that the enforcement provisions specified in Part III of the TRIPS Agreement are needed for achieving the provisions’ specified results: “effective action against any act of infringement of rights” and “expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringement.”\footnote{See id.} In this context, given the origin of the text and the circumstances of its adoption, it seems to follow that only those contracting parties may fulfill their obligations under the Treaties, which apply more or less the same measures as those prescribed in Part III of the TRIPS Agreement, not only against infringements of copyright and related rights, but also against the violations of the provisions concerning technological measures and rights management information.\footnote{See id. art. 41-49.}

Additionally, in the digital networked environment, there is a specific indispensable condition involving the successful fight against piracy. This condition is based on an adequate regulation of the liability of service providers. Given that it is normally a matter for national legislatures, the WCT and the WPPT do not regulate the issues of liability. However, Article 14 of the WCT and Article 23 of the WPPT are relevant also from this standpoint. They state: “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.”\footnote{WCT, supra note 25 art. 14; WPPT, supra note 26 art. 23.}

In order to carry out such enforcement provisions of the WCT and the WPPT regarding the service and software provider liability, a number of principles should be applied. First, immunities should be established at a level indispensable for guaranteeing reasonable security for service providers: no blanket immunities would be in harmony with Article 14(2) of the Treaty. Second, rules should be in accordance with the objectives of copyright law, i.e., they must not undermine the incentives for creation, production, and dissemination of works or disregard the value of human creation. Third, rules should promote cooperation between copyright owners and service providers when possible, to encourage marketplace solutions, in order to facilitate the detection and pursuit of copyright piracy. This can be carried out through the application of technological means and the expeditious removal of infringing material. Finally, the applicability of injunctive relief and other similar legal remedies by
The WIPO “Internet Treaties:” The United States as the Driver

courts should be maintained.

C. The Digital Millennium Copyright Act and its International Impact

The preparation of the U.S. legislation implementing the two WIPO Treaties took place in the same thorough way as the preparation of the White Paper, making it possible for all stakeholders to express their opinions and make suggestions. As a result of the thorough preparation, the same well-balanced results were produced and embodied in the DMCA of 1998. The DMCA provides detailed norms, particularly in two important fields: first, the protection of technological measures and rights management information, and, second, the liability of service providers.

The provisions of the DMCA have served as a model, in many aspects, for other countries. It is far from being the case that the U.S. model adoption is only due to the Free Trade Agreements the United States conducted with various countries. For example, Article 6.2 of the Information Society Directive of the E.U. adopted in 2001 reproduces nearly word for word the provisions embodied in Section 1201(a)(2) and Section (b)(1) of U.S. Copyright Act included by the DMCA. Also, the 2000 Electronic Commerce Directive of the E.U. has adopted a great number of elements of the provisions of the DMCA concerning the liability of service providers.

III. THE WIPO “INTERNET TREATIES:” THE UNITED STATES AS THE MAIN SOURCE OF OBSTRUCTION

A. Introductory Remarks

Both the WIPO “Internet Treaties” and the DMCA are well-balanced, and as time has gone by, their success has become more evident. Certain doomsday forecasts predicting the failure of the system have joined the quickly growing database of failed prophesies, as the Treaties have enabled a successful response to the challenges of digital technology and the Internet.

This does not mean, however, that everybody shares the celebration of the success of the new legislation. Certain groups have never ceased to criticize the new provisions, in particular, the provisions regarding the protection of technological protection. These groups, both at the 1996 Diplomatic Conference, and during the preparatory work of the DMCA, strongly opposed these provisions, and when their arguments were not accepted, they continued their fight in other forums and in the media. These groups mainly work in the

70 Id.
United States, and when they appear at the international level, their U.S. dominance is also conspicuous. The composition of these groups\textsuperscript{71} is quite colorful, and their motives and financial sources also differ. However, all these groups are in favor of (i) a more liberal, sometimes "ultraliberal," copyright policy, (ii) the preservation of as much total freedom in the "cyberspace" as possible, (iii) the restriction of the scope of protection, and (iv) the broadening of exceptions and limitations in the digital networked environment. One of their main objectives is to try to obstruct further adherence to the WIPO Treaties and, as regards the countries that have recently ratified or acceded to the Treaties, to discourage them from full and effective implementation, as in the DMCA, to the European Union Information Society Directive, and a growing number of other countries.

These U.S. groups, or international "NGOs" following the U.S. groups' ideology and programs, wage the war against the WIPO Treaties and the DMCA through different channels, in different ways, and by different means. Three of these movements will be analyzed more closely: first, the so-called "WIPO Development Agenda"; second, the continued campaign for as much freedom in the "cyberspace" as possible; and finally, "copyleft" movements for "free access" and "free culture." The criticism and attempts to obstruct the adoption of the WIPO Treaties, the DMCA, and other national laws take different forms in the three above-mentioned movements.

\textbf{B. The WIPO "Development Agenda"}

In September 2004, at the initiative of the above-mentioned U.S. groups, a meeting was convened in Geneva with no mandate from any organ of WIPO. These groups had only one thing in common: they did not have sufficient information about WIPO's programs and activities. Nevertheless, without the participation of the member countries of WIPO, which would have had the mandate to discuss and decide about the activities of WIPO, these groups adopted a manifesto on the "Future of WIPO."\textsuperscript{72} This manifesto echoed criticism of WIPO's policies and activities, as well as the existing international IP system. Additionally, the WIPO Treaties, as well as the national laws implementing them, were strongly criticized. In particular, the provisions on the protection of technological measures were condemned for their alleged controversial nature.

A few days later, at the annual meetings of the Assemblies of WIPO, some of these views and ideas were echoed in the proposals of certain countries under the title of WIPO Development Agenda. One of the proposals was that all ongoing activities carried out under the aegis of WIPO, with the objective of international harmonization of intellectual property norms, including the preparation of a Broadcasters Treaty (which was the main item on the agenda of the WIPO Standing Committee on Copyright and Related Rights), should be suspended no matter what kind of justifications may otherwise support their continuation and conclusion.

In the WIPO Development Agenda, besides some misrepresentations and exaggerations, a number of reasonable principles and requirements are reflected. However, these principles and requirements have always been duly taken into account in the programs and activities of WIPO, and not only in the form of generous development cooperation activities, institution building,\textsuperscript{73} technical and financial assistance programs,\textsuperscript{74} guidance to legislators and

\begin{footnotesize}
\begin{itemize}
\item[71] Examples of their members are "Netizens," consumer organizations, anti-globalization movements, academics, and cultural "revolutionaries."
\item[73] Such as the establishment of industrial property organizations, copyright administrations collective management bodies, and the improvement of their technical basis and practical operation.
\item[74] For example, in the framework of the WIPONET program.
\end{itemize}
\end{footnotesize}
governments and consulting with them on draft laws and regulations, but also in the field of the making of international norms on copyright and related rights.

From the moment of its establishment, WIPO has always had an intensive de facto development agenda in the field of copyright law. More precisely, WIPO and its development agenda were born together at the 1967 Stockholm diplomatic conference where the WIPO Convention was adopted and the Berne Convention was revised. The Stockholm revision conference of the Berne Union had already addressed two issues related to the specific interests of developing countries, which are now also high on the WIPOs newly-presented "Development Agenda." These two issues are (i) preferential treatment for developing countries for educational and research purposes, and (ii) intellectual property protection for folklore. In response to the demands of developing countries which were better prepared than before and represented at the Stockholm conference in greater number, the revision conference adopted a protocol to the Berne Convention. This protocol provided a system of compulsory licenses in order to fulfill the specific needs of developing countries in the field of education and research. Additionally, Article 15(4) of the Convention was to take care of the protection of folklore. The 1971 Paris revision conference of the Berne Union was devoted to the transformation of the Protocol into an Appendix to the Berne Convention on the basis of a new deal between industrialized countries and developing countries concerning the compulsory licensing system. It is another matter, however, that the solutions offered to developing countries in the two above-mentioned aspects have rarely been applied in practice.

Regarding the Appendix, the absence of its practical application was not due to the International Bureau of WIPO, but simply because of the attitudes of the member countries of the organization. These attitudes included those of developing countries, which did not make truly serious efforts in order to benefit from the preferential system. Generally, three reasons are mentioned for the non-application of the Appendix. First, the compulsory licensing system provided for is overly complex with a number of conditions to fulfill and different deadlines to respect. Second, publishers from industrialized countries have been more amenable to fulfilling the demands of developing countries in the form of cooperation agreements and preferential licensing schemes. Finally, the application of reprographic technology has become widespread, offering a "simpler" alternative to compulsory reprint licenses.

As far as folklore protection was concerned, it was recognized that even though Article 15(4) was supposed to take care of the protection of folklore, it was not truly suitable to fulfill this task at the international level. This was due to certain basic concepts of copyright, such as "work," "originality," or "author," and certain provisions, such as those on the post mortem auctoris or post publicationem calculation of the term of protection, not being in harmony with the recommendations, guiding principles, and model provisions prepared under the aegis of WIPO have consistently taken into account the specific interests of developing countries.

Where the recommendations, guiding principles, and model provisions prepared under the aegis of WIPO have consistently taken into account the specific interests of developing countries.

Due to the acceleration of the decolonization process from the beginning of the 1960s.

See Berne Convention, supra note 5, art. 15(4)(a), which reads as follows:

In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

Id. The Report of Main Committee I of the Stockholm Diplomatic Conference includes the following clarification regarding this provision:

The proposal of the Working Group did not mention the word 'folklore' which was considered to be extremely difficult to define. Hence, the provision apply to all works fulfilling the conditions ... It is clear, however, that the main field of application of this regulation will coincide with those productions which are generally described as folklore.

with the fundamental features of folklore.\textsuperscript{78}

This does not mean, however, that WIPO has left developing countries alone with these unresolved problems. Efforts have been made to facilitate the practical application of the Berne Convention. A WIPO-UNESCO Working Group was created for this purpose,\textsuperscript{79} which at its December 1982, session adopted detailed "Advisory Notes on the Implementation of the System of Translation and Reproduction Licenses for developing countries under the Copyright Conventions."\textsuperscript{80} Additionally, when it became clear that Article 15(4) of the Berne Convention was not suitable for the protection of folklore, a WIPO-UNESCO Committee of Governmental Experts was convened in June 1982.\textsuperscript{81} This committee developed and adopted, "Model Provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions."\textsuperscript{82} The Model Provisions outlined a \textit{sui generis} system for the protection of "traditional artistic heritage."\textsuperscript{83}

In December 1984, a WIPO-UNESCO Working Group considered a draft convention based on the concepts worked out in the Model Provisions, but it received strong opposition from the industrialized countries. In addition, it was recognized also by developing countries that the time was not yet ripe for such a convention to have a chance to be adopted due \textit{inter alia} to certain difficulties concerning the identification of expressions to be protected, and the unresolved issue of "regional" or "transborder" folklore.\textsuperscript{84} However, the issue of the protection of folklore has not disappeared from the WIPO agenda. Protection of folklore became the focus of a debate in April 1997, at the WIPO-UNESCO "World Forum on the Protection of Folklore" organized in Phuket, Thailand.\textsuperscript{85} More recently, protection of folklore has been one of the important items on the agenda of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.\textsuperscript{86} In June 2005, this WIPO Committee held its eighth session, and has made promising progress concerning the international protection of folklore.

The framework of this paper does not make it possible to review all the activities of WIPO from the viewpoint on how the interests of developing countries are taken into account in WIPO's norm-setting activities. However, the best example seems to be the preparation and adoption of the two WIPO "Internet Treaties"—the WCT and the WPPT. WIPO did everything possible within the limits of its financial resources in order to actively involve developing countries into the preparatory work. This made it possible for them to assess the various proposals, according to their interests and to submit their own proposals in duly informed manner. WIPO regularly financed the participation of the representatives of a great number of developing countries in the sessions of the preparatory committees and at the Diplomatic Conference. WIPO has also organized, and financed the cost of a number of participants. There have been two rounds of regional consultations in each of the three main regions of the developing world: for Africa, in Abuja, Nigeria in January 1996, and in Casablanca, Morocco in November 1996; for Asia, in Denpasar, Indonesia, in December 1995, and in Chang Mai, Thailand, in November 1996; and for Latin America in Geneva.
Switzerland at the headquarters of WIPO in January 1996, and in Santiago de Chile in October 1996.\footnote{See Ficsor, supra note 8, at 40–41.} As a result of these consultations, developing countries made a number of proposals, either jointly or separately, and played a decisive role in the negotiations at the Diplomatic Conference. The President of the Diplomatic Conference, Esther Mshai Tolle, who was also the then Ambassador and Permanent Representative in Geneva of Kenya, was from a developing country.\footnote{See Records of the 1996 Diplomatic Conference, supra note 36, at 845, 883.}

This preparatory work was contrary to the allegations of certain “copyleft” organizations and some representatives of the “Friends of Development” misled by those organizations, which complained that WIPO’s norm-setting activities are not sufficiently member-driven.\footnote{GROUP OF FRIENDS OF DEVELOPMENT, \textit{Statement of the Group of Friends of Development} Mar. 6, 2005, http://www.ipjustice.org/WIPO/groupoffriends.shtml} The preparatory work took place exclusively on the basis of proposals made by member countries of WIPO and the European Communities as a regional entity. The WCT and the WPPT were adopted as a result of intensive negotiations between the various groups of countries, including the three major groups of developing countries mentioned above.

The WCT and WPPT Treaties reflect the interests of developing countries appropriately. For example, it was due to the opposition of developing countries that the provisions in the draft treaties on the elimination of non-voluntary licenses concerning the right of broadcasting and mechanical rights were not adopted.\footnote{See Ficsor, supra note 8, at 80–81.} Additionally, the third draft treaty on \textit{sui generis} protection of databases proposed by certain industrialized countries was not even considered in substance by the Diplomatic Conference.\footnote{See Ficsor, supra note 8, at 69–70 for general discussions on draft treaty.}

The well-balanced nature of the two Treaties was also recognized and expressed, for example, in the title of an article, “Africa 1 – Hollywood 0,” published on the outcome of the 1996 Diplomatic Conference in the March 1997, issue of WIRED, the “Netizen” magazine.\footnote{John Browning, \textit{Africa 1 Hollywood 0}, WIRED, Issue 5.03 Mar. 1997.} If “1” means victory and “0” means defeat, the real result of the Diplomatic Conference was rather this: Africa 1, Asia 1, Latin America 1, Europe 1, North America 1, Australia 1, Hollywood 1, Redmond 1, science 1, education 1, . . . shortsightedness 0, stupidity 0. However, the WIRED article was correct in that the two Treaties had duly taken into account the legitimate interests of developing countries.

In their preambles, the two Treaties state the principle of balancing between the protection of copyright and related rights and other public interests in accordance with the existing international norms.\footnote{See WCT, supra note 25, at Preamble (“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”); see also WPPT, supra note 26, at Preamble (“Recognizing the need to maintain a balance between the rights of performers and producers and the larger public interest, particularly education, research, and access to information”).} However, they do offer sufficient “flexibilities.”\footnote{Exceptions to and limitations of copyright and related rights within the limits of the “three-step test” the application of which has been extended by Article 10 of the WCT and Article 16 of the WPPT to all economic rights.} The “WIPO Development Agenda” proposed by the group of countries which call themselves the “Friends of Development,” points out the need for advising developing countries about the use in their legislation of such “flexibilities.” This is, however, another thing that has always been duly taken into account in WIPO’s activities. The WIPO guiding principles, recommendations, and model provisions prepared for developing countries have always contained the exceptions and limitations possible under the international copyright and related rights norms. Not only those that are provided for \textit{expressis verbis}, but also the possible exceptions and limitations that, on the basis of the three-step test, may be introduced in order to fulfill certain public interests.

Exceptions for educational purposes, library purposes, and handicapped people are...
examples of categories put on the agenda of the WIPO Standing Committee on Copyright and Related Rights, as part of the "WIPO Development Agenda" in the field of copyright and related rights.\textsuperscript{85} All possible broad educational and library exceptions have always been included in WIPO guiding principles, recommendations, and model laws. WIPO, along with UNESCO, played a pioneer role in working out principles and standards concerning exceptions for handicapped people. In October 1982, a WIPO-UNESCO Working Group adopted "Model Provisions Concerning the Access by Handicapped Persons to Works Protected by Copyright," which was then incorporated in the subsequent WIPO model provisions.\textsuperscript{86} Thus, the "Friends of Development" ask WIPO to follow certain principles that WIPO has always respected, as a real friend of development.

However, this does not mean that developing countries do not have problems applying intellectual property rights, including copyright and related rights, and that it would not be justifiable for the competent WIPO bodies to deal with the specific conditions and needs of these countries.

As early as the 1967 Stockholm and 1971 Paris revision conferences of the Berne Union, the international community has recognized the legitimate demands of developing countries to enjoy preferential treatment for educational and research purposes.\textsuperscript{87} Many developing countries have made great progress in the meantime, and have become so-called newly-industrialized countries. Presently, few of them are, in fact, wealthier than certain "industrialized countries," and some of them have also become net exporters of certain copyright products. However, at the other end of the spectrum, there are the least developed countries ("LDCs"), which still struggle with terrible poverty and do need all kinds of assistance and preferential treatment.

When addressing the present problems facing developing countries, and in particular LDCs, now we are faced with a situation that is completely different from what was taken into account at the 1967 and 1971 revision conferences. The options offered in the Appendix to the Berne Convention are out-of-date in the era of more perfect and efficient forms of reprographic reproduction and the widespread use of digital technology and the Internet. Who would take it seriously any more in this new environment that it would be truly helpful for these countries to apply compulsory licenses one, three, five, and, in certain cases, even seven years\textsuperscript{88} after the publication of works they need for education and scientific research? Questions regarding developing countries and LDCs remain today. For example, may we, can we, and should we, provide some preferential treatment for developing countries, in particular, for LDCs, duly adapted to the new technological environment and existing economic and social conditions of those countries? Would it not be justified to allow LDCs to enjoy free reproduction and communication of those works that are indispensable for non-profit educational and research activities? Also, would it not be justified to allow LDCs to introduce broader exceptions for the prohibition of the circumvention of technological protection measures when this is needed for such purposes? The author of this paper, for the most part, gives affirmative answers to these questions. However, before considering possible concrete solutions, it is necessary to take into account the present status of the protection of copyright and related rights at the international level.

This seems necessary because, from the viewpoint of the international community — both industrialized countries and developing countries, including LDCs — any preferential treatment would be based on an important condition. Namely, in order for the international copyright system to contribute in this way to the development of these countries, it must also

\textsuperscript{85} See WIPO document SCCR/12/3 submitted by Chile to the 12th session of the Standing Committee on Copyright and Related Rights (November 17–19, 2004) in which it was proposed that the issues of these exceptions be discussed by the Committee.

\textsuperscript{86} Of which, as the delegate of Hungary, the author of this paper happened to be Chairman. For the report of the Working Group and the model provisions, see Copyright WIPO, December 1982 issue, at 354–56.

\textsuperscript{87} In the form of compulsory licenses provided for in the Appendix to the Berne Convention.

\textsuperscript{88} See Berne Convention, supra note 5, Appendix, arts. II(2)(a), (3)(a), III(3) (providing these periods must elapse before any compulsory licenses may be granted).
offer appropriate incentives for the creation and production of new valuable works and protected materials through the protection and enforcement of the rights of creators and producers.

To achieve this, the integrity of at least the *primary markets* for works and objects of related rights should be maintained, and the protection and enforcement of rights should be made more effective. When one considers introducing preferential treatments in light of these recognitions, a number of important issues must be addressed from new angles, including parallel importation, control of optical disc production lines, and effective measures against piracy with global impact. Additional issues arise during the implementation and application of the two WIPO Internet Treaties, including adequate protection against the circumvention of technological protection measures and the regulation of the liability of service and software providers in order to guarantee their reasonable cooperation in fighting online infringements. In general, one must examine all issues in respect to which it is important to make sure that a possible preferential treatment does not go beyond what is justified and does not create conflicts with a normal exploitation of works and objects of related rights in other markets to which such a treatment is not extended.

On the basis of these principles, a reasonable new deal might be struck. But, just as it takes two to tango, the deal discussed here also requires two sides acting as partners. Such a deal is badly needed; however, unfortunately, in the unnecessarily antagonistic and over-politicized atmosphere recently created, the chance to strike a deal is weaker than it is desirable.

Even so, any government delegation that truly considers itself a friend of development would have to make at least a *bona fide* attempt at any imaginable side of the negotiation table. One may hope that the unnecessary antagonism that certain "copyleft" NGOs have used to pollute discussions on the "development agenda" will eventually fade away. One may also hope that the extreme exaggerations will be eliminated, or will simply be forgotten. Then, the real work, with truly realistic objectives, may begin in the existing, competent bodies of WIPO.

**C. "Copyleft" Theories on Why Copyright Protection Should be Limited in the Digital, Networked Environment**

The organizations participating in the September 2004 meeting whose ideas indirectly — through the "Future of WIPO" manifesto and certain elements of the "WIPO Development Agenda" — have created recently an unnecessarily tense atmosphere in WIPO and have slowed down the carrying out of some important programs that would serve the interests of the entire international community. Among those organizations, we can see many well known representatives of certain "Netizen" foundations and groups. The ideas of some of those foundations and groups about the future of copyright, if any, in the digital environment and, in particular in the context of the Internet, are very simple. Information wants to be and must be free, they say, and they mean not only just information as such (the knowledge about certain facts, ideas, procedures, methods of operation, etc.) which, of course, have always been free under copyright, but also all kinds of works and objects of related rights, everything that can be digitized and transmitted through the Internet. They state that they will eliminate the "outdated" copyright system and organize a "revolution" in order to guarantee "free access."

There are many forms of and ideological "justifications" for these "free access" movements. Some involved in the movement, for example, insist on the idea that the so-

---

99 Including protection against the unauthorized importation, manufacture, and distribution of circumvention devices, and the offering of commercial services for circumvention.

100 Because the reasons to grant such a treatment do not exist in the way they do in certain developing countries, in particular in LDCs.
called “cyberspace” is a separate world, which should remain the realm of complete freedom, and where things that have not been free in the “traditional” world should enjoy freedom. All this sounds very “revolutionary.” However, it is nothing but the result of a non sequitur inference: it is an example of a typical failure of human logic.

The representatives of these ideas have become more active at recent WIPO copyright meetings. Due to their extremist nature, these representatives and their ideas do not deserve too much discussion. Yet, due to the fact that these ideas are expressed in “sexy” slogans, they may, and do, have some impact among those who fail to foresee the possible consequences of their practical application. As such, they warrant some discussion.

First, it should be pointed out that cyberspace does not exist.\textsuperscript{101} Cyberspace is a metaphor. While it is not necessary to regulate metaphors, it is often necessary to regulate the reality to which they refer. The reality is that all the computers in which protected materials are stored, all the computers from which they are uploaded, all the telecommunication devices necessary for transmissions through the Internet, all the computers into which such materials are downloaded, all the people who operate and use the system, and all the people who gain and who lose as a result of unauthorized use of works and objects of related rights may be found in any country of the “traditional” world. Thus, slogans suggesting that national laws and intergovernmental organizations do not have anything to do with this mysterious world of freedom are totally wrong. There is no reason whatsoever to give up the protection and enforcement of certain rights that are recognized in the “traditional” world.\textsuperscript{102}

Second, it is an invalid argument that the intervention of national laws and international treaties is unnecessary. Some argue that, even if certain regulation were justified with regard to the Internet, everything may nonetheless be settled through the application of a “netiquette.” This “netiquette” would provide a set of non-binding, but voluntarily respected rules as to what may or should not be done on the Internet. At the beginning of the Internet’s spectacular career, and when it left its pervious, embryonic “incarnation” as ARPANET, it was used almost exclusively by academics and researchers for exchange of information and for publication. At this point in time, a “netiquette” may have been sufficient. However, the Internet is now a true marketplace. Pirates and certain parasitic “services” now also use the Internet as a channel for massive unauthorized exploitation of works and objects of related rights. Therefore, it is obvious that a “netiquette” can no longer be sufficient. The intervention of national laws and international treaties is now indispensable.

Third, a more reasonable argument proposed by those making enthusiastic preparations for burying copyright in the digital networked environment must be addressed. That is, even if copyright owners attempt to exercise their Internet rights, they would not have any chance to succeed because a work or object of related rights uploaded on the global network becomes immediately available for the entire, exponentially-growing Internet population. When such a work is uploaded, nobody is able to determine where, in which way, and for what purposes it is used or further transmitted. However, legendary Charles Clark eloquently responded to this argument by stating: “the answer to the machine is in the machine.”\textsuperscript{103} The two WIPO Internet Treaties, the WCT and the WPPT, established the necessary international norms to efficiently apply this “answer” in the form of technological protection measures and electronic rights management information. Currently, there are national laws and regional regulations to adequately implement these norms. These laws and regulations take due care through appropriate legal mechanisms to eliminate and prevent any conflicts that may emerge between the protection of technological measures and the applicability of certain exceptions.

\textsuperscript{101} It certainly does not exist in the sense that there would be something outside our “traditional” world.

\textsuperscript{102} Because their protection is dictated by due respect for human rights, and because they are indispensable means to promote creativity as a fundamental public interest.

Certain unhappy grave-diggers who have ordered a coffin for copyright and invested in burial preparations, do not want to recognize that anti-circumvention norms function well. These critics keep repeating that the application and protection of technological measures are “controversial,” that they do not work, and that they unjustifiably obstruct access to works and objects of related rights. In reality, these arguments lie opposite the truth.

The framework of this paper does not allow for the rehearsal of all the debates surrounding these allegations. It is, however, necessary to mention two things. The first being a frequent and quite telling contradiction. The advocates of free access on the Internet, particularly, technological-protection-free access, regularly repeat two arguments against the application and protection of such measures. The first one is that such measures are useless; any protection measures are circumvented “within a couple of minutes.” Thus, the works and objects of related rights, which owners seek to protect become freely accessible through the Internet. The second one is that such protection measures are insurmountable obstacles to access through the Internet. No words can describe the seriousness of this self-contradictory argument.

The second thing worth mentioning concerns the series of doomsday prophesies. Some have predicted that adequate technological protection measures will eliminate the chance of benefiting from the exceptions justified by certain public interests. It is quite clear now that these have to be added to the ever-growing database of failed prophesies. The results of the administrative regulation procedures in the United States are well known. However, there are also other examples, such as what has happened so far in my own country, Hungary. In Hungary, Act CII of 2003 completed the implementation of the Information Society Directive and applied Article 6.4 of the Directive. This Article requires the establishment of an appropriate intervention mechanism for cases where owners of rights using technological measures do not guarantee the enjoyment of certain exceptions. In Hungary, this intervention mechanism involves a mediation procedure that either individual beneficiaries of exceptions or their representative organizations may initiate. The Hungarian Copyright Council is the competent body for such mediation. The provisions on the mediation procedure entered into force on May 1, 2004. We know from our “copyleft” friends that technological measures create terrible problems for the beneficiaries of certain exceptions. However, the truth is that, in spite of the alleged “terrible” problems, no applicants have submitted mediation procedure requests yet; all of the not too numerous disputes have been settled peacefully on the basis of voluntary agreements between the interested parties.

D. “Creative Commons” – What They Are and What They Are Not

There are other justifications that the advocates of “free access,” “free music,” “free culture,” and “free everything” attempt to use in their campaign to deconstruct the existing, well-balanced, well-functioning international copyright system. One such justification relates to the “creative commons” licensing system. The creative commons licensing system is a reasonable and useful initiative in itself, if applied in the context in which it fits. However, some zealots misinterpret and misrepresent it. The “creative commons” licenses are for authors ready to make their works available to the public without exercising all their economic rights. These authors have always existed, but the Internet has made it easier for them to make their works available at a low cost without involving a publisher or a producer. In addition, there have always been certain methods available to authors to indicate their intent not to exercise their economic rights. The “creative commons” licenses, however, has


105 See http://creativecommons.org.
the advantage that they offer a standardized system with easily recognizable notices. There appear to be at least three groups of authors who, for different reasons, are ready to offer free access to their works, or to simply not exercise certain rights.

The first, and by far the most decisive group, comprises the academics, university professors, and researchers who launched the “creative commons” movement. In academia, copyright-produced income is quite frequently of marginal importance. Instead, the reward for scholarly, scientific work, and for the publications reflecting the results thereof, is mainly the academic status itself. Indications of such status include the promotion in the academic rank, the reputation among peers, public popularity, media appearances, and the fame that accompanies these activities. This kind of status is not just a matter of glory, which is otherwise an important value in itself for any human being. Numerous advantages accompany status, beginning with salary or other payments from universities or research institutions. Other advantages include academic rank, fame, and popularity. The advantages also extend, for example, to the involvement in public and private projects, consultancies, invitations to various events, and guest professorships, among other things. It is not a surprise, therefore, that academics and researchers acting as authors behave in quite a specific way. Many are not only ready to allow publication of their studies free of charge, but in attempt to reach a higher status, are even ready to pay the publishers of reputable scholarly and scientific journals to publish their articles. It is quite clear when these academics and researchers offer their works for free on the basis of “creative commons” licenses, it is because they can afford to do so. In turn, their creative work is subsidized by public or private funds, or “self-subsidized” from other resources. Therefore, this group of scientists and researchers, which form quite an atypical group of authors, for the reasons discussed, tend to regard copyright as a negligible economic source.

The next category comprises “vanity publishers” or “accidental authors” for whom copyright is also negligible, but for different reasons. They do not consider themselves professional authors, and, due to the resources derived from their “everyday” activities, they can also afford not to exercise their economic rights. Consequently, in that respect, their relationship to copyright is similar to that of academics and researchers. They may use “creative commons” licenses, but they may also simply make their works available without concern for using such licenses. However, it is an undeniable advantage for others if they do use these licenses, since their use announces that the works concerned may be used freely.

A third group seems to be truly new, unlike academics, vanity publishers, and accidental authors. This group comprises those who wish to become professional authors or performers, and who make their works or performances available through the Internet using “creative commons” licenses, particularly musicians. They do so hoping to become a success, subsequently profiting from the copyright in their future productions. Profits from these copyrights may enable them to recoup the “investment” they made in the initial free distribution. These authors may be regarded as more typical than those belonging to the previous two groups since they care for economic rights in the long run. Nevertheless, like the other authors, when these authors use “creative commons” licenses, their creative activity is subsidized, or, in this case, more typically self-subsidized from other resources.

Thus, the “creative commons” licenses are useful for certain atypical groups of authors, and for the users of their works. They are particularly useful in academia, where they were “invented” and launched. However, problems may surface when the “creative commons movement” tries to extend these licenses to mainstream copyright fields where authors care for their economic rights. These problems are partly of a legal-technical nature, and partly major and structural.

Legal-technical problems emerge when attempting to transpose “creative commons”
licenses to mainstream copyright fields of typical authors who generally wish to exercise their rights. There are, quite clearly, conflicts between the “creative commons” licenses and the collective management of rights in musical works. One of the sources of such conflicts involves the irrevocability of the waiver of rights under the “creative commons” licenses. In principle, there is a chance that these conflicts may be eliminated, but it seems that the principle of irrevocability follows from the very philosophy of “creative commons.”

Some zealot advocates of “creative commons” frequently use anti-producer, anti-publisher, and generally, “anti-capitalist” slogans to prove the moral and human superiority represented by their “movement.” However, one should recognize that, in this specific context, “creative commons” are not faced with producers, publishers, and others whom the zealous advocates usually unfairly characterize as “greedy capitalists.” In this context, “creative commons” are faced with authors’ societies.

Both “creative commons” and those traditional “communities of creators” act in the name of authors, but in different ways. “Creative commons” assist atypical authors who do not wish to exercise some or any of their economic rights. In contrast, authors’ societies as “communities of creators” administer copyright in favor of typical authors who do wish to exercise their rights. Authors’ societies, as well-organized and well-functioning “communities of creators,” are indispensable means to facilitate creativity, to maintain and promote cultural diversity, and to support those creators desiring to benefit from external sources, but not from the copyright granted in their creative work. It is an important warning for “creative commons” that the real “communities of creators” recognize problems and sources of conflicts in attempts to apply the license-waiving rights in mainstream copyright fields.

The greatest problem emerges, however, when some zealots try to misrepresent the “creative commons movement” as something “revolutionary,” or as something that offers the optimal method of making works and objects of related rights available on the Internet, our era’s most important market. These zealots wrongly advocate the “creative commons movement” as something more noble and ethical than exercising economic rights, and they lionize it as the best guarantee for free access to culture.

E. “Free Access” versus Well-Balanced Protection of Copyright and Related Rights in the Digital, Networked Environment

The organizations and movements mentioned above, as well as some government delegations, which unfortunately seem to believe in their wisdom, now demand numerous impact studies before any international norm-setting begins. They demand these studies despite the clarity of all interests involved, all possible advantages and disadvantages, and all risks of adopting or not-adopting certain norms.

In this spirit, impact studies on the application of the above-mentioned “free access” ideas are in order. The author of this paper is from Hungary, a country in Central and Eastern Europe, where a collectivist, incentive-free, private-property-free system was introduced as a kind of social experiment. The Soviet-type communist regimes of Central and Eastern Europe were boastfully presented and advertised as “free access” societies, superior to and more promising than the production capabilities of “selfish,” “greedy” capitalist societies.

The nations of this region have some extremely useful information to share with the rest of the world. In particular, they may share information with the “ideologues” who have no experience with “free access” societies, but who try to sell ideas very similar to those already applied in practice. These nations have useful information on whether free access to the results of human work, including creative work, may, in the long run, produce the wonderful results advertised by the advocates of such systems.

For some years, the answer to this question was not obvious. However, it has now
become clear to everybody. Thorough “impact studies” on the attractiveness of such “free access” societies became available one after the other. The first one was “published” in 1956, when the Hungarian nation expressed its opinion with guns in hand. Then, in 1968, the Czechs and Slovaks followed suit though more moderately than the Hungarians. Likewise, from 1956 to 1989, the Polish nation expressed its negative opinion several times. Finally, in 1989, the entire system collapsed along with the Berlin Wall.

Of course, the advocates of “free access” are not Stalinist communists in the sense that they would be ready to accept or support the inhuman, undemocratic aspects of Soviet-type regimes. Nevertheless, they promote ideas very similar to the most fundamental economic and social principles on which these regimes were based, and which caused them to fail. Foremost among these utopian, collectivist ideas is the principle that “everybody should work for the common good unselfishly according to his talents, knowledge and experience, and everybody should have free access to the common good according to his needs.”

Those “free access” regimes collapsed because they offered free access to ever less products and lesser quality. Nobody should believe this was due only to the imperfect application of the otherwise beautiful principle quoted above. It was due to the principle itself. This system did fail because human beings are not abstract, perfect, altruistic angels. Humans need incentives in the form of personal, private advantages such as remuneration, income, property, and, horribile dictu, even profit in order that they be ready to create and produce using their talents, knowledge and experience to the fullest extent. Fulfillment of these direct, “selfish” interests indirectly serves the common good most effectively. This is true in all sectors of human activity, and it is equally true in the field of creation, production, and dissemination of works and objects of related rights.

IV. CONCLUSION

The adequate protection and enforcement of intellectual property treaties and laws, including treaties and laws on copyright and related rights, is an indispensable condition of economic, social, and cultural development and well-being.

The 1996 WIPO “Internet Treaties” serve this purpose. Their appropriate implementation and application is an indispensable condition for copyright to fulfill the fundamental public interest of granting incentives for the creation and production of works and objects of related rights necessary for global development. The adequate protection of technological measures against unauthorized circumvention is a basic element of this contention. Such protection can only be adequate if it also extends to protection against the importation, manufacture, and distribution of illegal circumvention devices and services. The litany of “copyleft” activists concerning the alleged “controversial” nature of technological measures is losing its justification. This loss is illustrated by the developments in statutory and case law, as well as the encouraging success of some legal, technology-protection-supported, on-line distribution systems. Their doomsday prophecies about “locking up” content and making the application of certain exceptions impossible have proved untrue. This is further supported by the application of the various systems guaranteeing due balance and harmony between technological protection measures and exceptions.

WIPO has had a “development agenda” since its very establishment. The recently proposed “WIPO Development Agenda,” therefore, does not really contain anything new. It includes certain requirements that WIPO has always taken into account and fulfilled. Obviously, given the world’s rapidly changing conditions, it is periodically necessary to revisit, and reconsider the needs of developing countries in accordance with the traditions of the nearly forty year old WIPO development agenda. Granting new kinds of preferential treatments for LDCs is also justified. However, this may only be achieved if global protection and enforcement of copyright and related rights are simultaneously updated and reinforced.

The promotion of economic, social, and cultural development by an adequate international copyright system, including the promotion of such development in developing
countries, would be endangered if the “copyleft” ideologies and ideas were applied. These ideologies may succeed in providing “free access” to works and objects of related rights, but such access, in the long run, would be to old creations and, with respect to new creations, to fewer works of lesser quality. One possible exception to this rule is the subset of certain scholarly and scientific works whose authors are rewarded atypically by means other than exercising their economic rights. A combination of some kind of “new folklore” in the form of constant imitation (as regards works and other productions not requiring substantial investment) and subsidized creations (as far as more costly productions are concerned) may emerge. One might say that this kind of combination worked in the Middle Ages. However, this could hardly be suitable to fulfill the growing requirements and rapidly changing needs of a global society in the 21st century.

Against this background, hopefully the United States will continue to be one of the drivers of an adequate and effective system for the protection and enforcement of copyright, and the sources of intended or unintended obstruction of the efforts to achieve this now existing in the United States will lose their intensity and influence.