

# **THE 1996 WIPO COPYRIGHT TREATY: EXTENDING COPYRIGHT LAW INTO THE DIGITAL DOMAIN WORLD OF THE 21st CENTURY?**

*Kingsley Kofi Kuntunkrunku Ampofo\**  
*Ghana*

*SUMMARY:1. Introduction; 2. General framework of the WCT; 3. Highlights of the WCT; 4. The question of ratification; Conclusion*

## **1. INTRODUCTION**

1.1 One of three draft treaties <sup>1</sup> prepared under the auspices of the World Intellectual Property Organization (WIPO) and considered at the December 1996 WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions convened in Geneva, Switzerland was the WIPO Copyright Treaty. The Diplomatic Conference also produced a second treaty, the WIPO Performances and Phonograms Treaty. <sup>2</sup>

1.2 The objective of this brief paper is to broadly sketch the basic framework rules of the WCT and indicate some of its highlights.

---

\* LL.B (Hons)Ghana; BL.(Ghana);LL.M.(Camb); WIPO Fellow at George Washington University (1997-98)(LL.M.Degree Expected, September 1998). Lecturer, University of Ghana, Legon, Ghana, West Africa. (Co-ordinator of Intellectual Property Law Programme, International Trade and Investment Law and Business Law).

<sup>1</sup> For background information tracking the preparatory work activities undertaken within the WIPO and elsewhere leading to the adoption of the WIPO Copyright Treaty (WCT) see generally Mihaly Ficsor, *Copyright for the Digital Era: The WIPO «Internet» Treaties*, 21 (3-4) Col -VLA J. of Law & Arts 197-223 (1997).

<sup>2</sup> As to the third draft treaty dealing with sui generis protection for databases, sufficient momentum was not generated to see it through to completion and it remains unfinished conference business. See Nimmer, *infra* note 8, at 7. See also P. Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l. L. 369-427 (1997).

Since the new treaty instrument came into being, the major initiatives leading to its completion, its rules, as well as its general significance to the international efforts to secure improved protection for international copyright issues have been the subject of meticulous legal comment.<sup>3</sup>

What follows therefore will generally take the form of a fleeting, aerial survey of the WCT's rules, without attempting a thorough analysis of each provision. The paper will further attempt to briefly track progress made thus far in the process of implementation. Brief discussion will also be made of some of the issues arising from the work of the WIPO Diplomatic Conference.

1.3 It is worthwhile to note that the culmination of the whole process of negotiation has been described by Thomas Vinje as a "happy result in Geneva".<sup>4</sup> For representatives from nearly 150 nations and representatives of some nongovernmental organisations it can be said that the WCT represented a fruitful outcome in international cooperation in the area of intellectual property protection, a phenomenon which has increased dramatically in recent years.

The successful conclusion of the WCT, it may also be said, has signalled a renewed and heightened level of interest by participant governments and the several other international actors present at the Diplomatic Conference in the important work of the World Intellectual Property Organization (WIPO) as an appropriate forum for IPRs-related negotiations. It will be recalled that WIPO's role suffered somewhat on account of the TRIPs Agreement negotiation process. Furthermore, WIPO's role as a major player in the field of intellectual property rights, can be said to have been re-asserted.

---

<sup>3</sup> See e.g., Ficsor, *supra* note 1.

<sup>4</sup> See Thomas C. Vinje, *The New WIPO Copyright Treaty: A Happy Result in Geneva*, 19 (5) EIPR 230-236 (1997) (stressing that the WCT in providing balanced, new and valuable rights to copyright holders, careful omission of problematic provisions that risked stifling innovation and investment in 'new delivery technology and the due regard paid to the needs of the larger public interest in areas such as education, research and access to information all contrived to produce 'a happy [negotiated] result').

1.4 In the interests of clarity and completeness it is proposed to quickly work through the WCT from the Preamble to Article 25, its closing article. Along the way I will attempt to indicate general points calling for comment under the relevant treaty provisions.

## **2. GENERAL FRAMEWORK OF THE WCT**

2.1 It may be useful at the outset to say just a little about the WCT's general framework. Embedded in the subject treaty instrument are twenty five articles. Hand in hand with the treaty rules, there is provided for Agreed Statements Concerning the WIPO Copyright Treaty, whose commendable purpose is to assist in the exercise of clarification of the actual treaty text, and to promote uniformity in its application so as to avoid differing interpretations by diverse national fora <sup>5</sup>.

2.2 The WCT reinforces the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) <sup>6</sup>. Regarding the juridical status of the WCT in relation to the Berne Convention, its Article 1(1) answers this crucial question in the following terms:

*This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.*

---

<sup>5</sup> In relation to Article 7 of the WCT, an unagreed statement, which was not a consensus statement, was recorded to the effect that «the storage of a protected work in digital form in an electronic medium constitute[d] a reproduction within the meaning of Article 9 of the Berne Convention.» As to the efficacy of this statement for the purposes of the interpretation of treaties under the Vienna Convention, Mason has expressed some doubt. See Anthony Mason, *Developments In The Law Of Copyright And Public Access To Information*, 19 (11) EIPR 636, 639 (1997).

<sup>6</sup> See Julie S. Sheinblatt, *The WIPO Copyright Treaty*, 13 (1) Berkeley Techn. L. J. 535-550 (1998).

In the light of the above, Nimmer <sup>7</sup> has aptly described the WCT as «a brand new [treaty] instrument», a «Berne add-on», with the consequence that legislative changes may be made necessary in many developing as well as developed countries around the world.

2.3 The question may be asked: Why did this treaty instrument emerge? In trying to answer the question, and also to get a fairly complete picture of what the WCT was all about, a good place to begin is its Preamble which opens thus:

***The Contracting Parties,***

***Desiring*** to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

***Recognizing*** the profound impact of the developments and convergence of information and communication technologies on the creation and use of literary and artistic works,

***Emphasizing*** the outstanding significance of copyright protection as an incentive for literary and artistic creation,

***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,

***Have agreed as follows . . . .***

As shown by its very Preamble, a primary aspiration of the WCT was to update aspects of international copyright protection to meet the challenging legal issues posed by phenomenal developments in

---

<sup>7</sup> Nimmer, *infra* note 8 at 8.

and the use of digital technological devices. According to David Nimmer, an influential commentator on international copyright law issues, the WCT was intended to «update copyright protection to the new frontier of the Internet.»<sup>8</sup>

2.4 Specifically in relation to the recital in the Preamble to the WCT recognizing the need to maintain a balance between the rights of authors and the «larger public interest» concerns in education, research and access to information Mason has commented thus:<sup>9</sup>

The new Treaty, by identifying the primacy of the larger public interest as a goal, gives special meaning to a framework within which it should be possible to balance the proprietary and commercial interests of authors, publishers and copyright owners with the larger public interest which insists on the dissemination of knowledge and free access to information and ideas by means of the application of fair dealing and fair use provisions to the new digital environment. That larger public interest is constitutionally protected in many jurisdictions by a guarantee of freedom of communication. Such a guarantee may include not only the right to disseminate ideas and information but also the right to have access to them.

### **3. HIGHLIGHTS OF THE WCT**

3.1 Of the main innovations contained in the WCT the following are to be noted:

---

<sup>8</sup> David Nimmer, *Commentary /Analysis of WIPO Treaties*, 3-39 (Matthew Bender & Co., 1998).

<sup>9</sup> Mason, *infra* note 5, at 637-638. Mason further argues that in working towards an effective and fair balance of the relevant opposed interests identified by him as existing between the larger public interest and the protection of creative work, it should be borne in mind that «proposals to extend and expand copyright, particularly in relation to electronic transmissions, may collide with constitutional and convention-based guarantees of freedom of communication which are designed to encourage the free flow of ideas and information . . . . Indeed, it may be said that those who are intent on copyright reform have failed to look at the broad picture, thereby leaving out of account not only constitutional and conventional guarantees, but also the law of privacy and the law of defamation.» *Id.*

i. The WCT expressly confirms and grants copyright protection to computer programs and to databases. It is specified that computer programs are to be accorded copyright protection as literary works within the Berne Convention regime (WCT, art. 4). As to databases, copyright protection is to be enabled when by reason of their selection and arrangement, that is to say, when a minimal amount of creative authorship or a sufficient quantum of originality is demonstrated, they can be said to constitute intellectual creations (WCT, art. 5.)

ii. Also afforded authors by the WCT are three exclusive rights, namely:

- a. the right of distribution (WCT, art. 6);
- b. the right of rental (WCT, art. 7); and
- c. the right of communication to the public (WCT, art. 8).

Right of distribution :

It is to be noted that the right of distribution is the right to authorise the making available to the public the original and copies of a work through sale or other transfer of ownership.

### **Right of rental :**

This is the right to authorise commercial rental to the public of the original and copies of computer programs (except where the computer program itself is not the essential object of the rental), cinematographic works and works embodied in phonograms. It bears emphasis that the rental right is limited by the fact that a country must grant rental rights only if commercial rental of the works has led to widespread copying of such works, thereby materially impairing the reproduction right.

### **Right of communication to the public :**

Article 8 is concerned with on-line communication to the public, and is an expansively worded provision. Under this article, very broad scope is given to authors of artistic and literary works to authorise any communication to the public of their works by wire or wireless means, as the case may be, in such a way as to facilitate public access to the relevant subject works when and where they choose to do so.

iii. Specific obligations are by Article 12 of the WCT placed on all WCT Contracting States to protect anti-copying technology and rights management information for all qualifying works within the meaning of the Treaty. In this regard the WCT requires all contracting states to provide «adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention: (1) to remove or alter any electronic rights management information without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.» (Art. 12).

#### **4. THE QUESTION OF RATIFICATION**

4.1 The WCT was adopted by the Diplomatic Conference on December 20, 1996. By the WCT's Article 20 provision, it will enter into full force and effect three months after thirty (30) instruments of ratification or accession by WIPO Member States have been deposited.

4.2 As of this writing, it has been ascertained that only one WIPO Member State, Indonesia, has adopted national legislation implementing the WCT.<sup>10</sup>

4.3 Implementation efforts, more or less at the introductory stage in the United States, commenced at the end of July 1997 in the form of four bills introduced in that country's Congress. These are the following:

---

<sup>10</sup> Tamber Christian, Implementation Of the WIPO Copyright Treaty - How Hard Can It Be?, 15 (3) Computer Lawyer 8-16 (March 1998).

- i. The Copyright Treaties Implementation Act (House Bill 2281);
- ii. The WIPO Copyright and Performances and Phonograms Treaty Implementation Act of 1997 (Senate Bill 1121);
- iii. The Digital Copyright Clarification Act and Technology Education Act of 1997 (Senate Bill 1146);
- iv. The Digital Era Copyright Enhancement Act (H.R. 3048).

## **CONCLUSION**

The intention of this paper has not been to provide a comprehensive commentary on the provisions of the WCT. Its modest purpose was to outline aspects of the WCT's rules which, when made effective, will offer important protections for copyrighted works in a digital networked world. To the extent that technical amendments and elaborate mechanisms regarding anti-circumvention and rights management information - may be involved in the process of implementation of the WCT, the time may not be near when the WCT may be enabled to fully enter into force.