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**Copyright Session 9A. 25 Years of Copyright.
Where Has It Been? Where Is It Going?**

**FROM THE „OLD” INTERNATIONAL SYSTEM – THROUGH A TRADE
AGENDA, A DIGITAL AGENDA, A DEVELOPMENT AGENDA, AND
AN INTERMEDIARIES’ AGENDA – TO A CREATORS’ AGENDA**

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2017 – 25 = 1992; the „old system”

- **UNESCO’S Universal Copyright Convention is practically dead** (since, between those who have joined Berne, it is not applicable anymore)
- **The „guided development” period** (based on interpretation of the Berne Convention and the Rome Convention) **is over. The Phonograms Convention still the most important anti-piracy treaty. The importance of the Satellites Convention is fading away.**
- **The Uruguay Round negotiations at full speed** with the broadest possible interpretation of the concept of „trade-related aspects of intellectual property”.
- **Preparatory work had begun at WIPO of what became later of the WCT and the WPPT**, but slowed down to give preference to the TRIPS negotiations.
- **Berne in 1992 (January): 91; in 2017 (March): 173**
- **Rome in 1992 (January): 42; in 2017 (March): 92**

2017 – 23 = 1994; TRIPS Agreement

- **April 1994, Marrakesh: TRIPS Agreement** (- 19 of the Marrakesh Treaty (☺))
- **Berne plus, but not too much:** (interpretative provisions on the basis of Berne: computer programs and databases, clarification of the idea/expression dichotomy; limited rental right, extension of the three-step test to all economic rights).
- **Rome plus-minus** (**plus:** rental right for producers of phonograms; extension of term of protection for performers and producers of phonograms from 20 to 50 years; **minus:** no mention about Rome-12-kind of single equitable remuneration; application of the know-how of the „smart – girl” of the Hungarian folk tale for the rights of broadcasting organizations).
- **The real plus:**
 - **detailed obligations for enforcement of rights;**
 - Inclusion of IP rights under the efficient WTO **dispute settlement system.**
- Number of **WTO Members** – an thus **coverage of the TRIPS Agreement** –
March **2017: 164**

2017 – 21 = 1996; WIPO „Internet Treaties”

- **December 1996:** WIPO Copyright Treaty (**WCT**) and WIPO Performances and Phonograms Treaty (**WPPT**).
- **Berne and Rome plus; TRIPS plus – minus** (minus due to the absence of detailed norms on enforcements of rights and an effective dispute settlement mechanism).
- **Plus: the results of „digital agenda”:**
 - clarification on the application of the right of **reproduction for storage in electronic memory**;
 - exclusive **right of (interactive) making available to the public**;
 - clarification of the **application of exceptions and limitations in the digital online environment**;
 - Obligations for the **protection of technological measures and electronic rights management information**.
- **Contracting Parties** in March **2017** of both Treaties: **95**.

2017 – 17 = 2000; WTO dispute settlement reports on the „three-step test”

- **WT/DS114/R of March 17, 2000:** Canada – Patent Protection of Pharmaceutical Products:
 - **Faithful interpretation** of the TRIPS Article 30 version of the test, inter alia, **on the basis of the „preparatory work”** (negotiation history) of **Article 9(2) of the Berne Convention**;
 - Clarification that **„externality” aspects** (such as those under TRIPS Articles 7 and 8) **should be taken not in addition but within the application of the test.**
- **WT/DS160/R of June 15 2000:** United States – Section 110(5) of the US Copyright Act
 - Following the interpretation in the patent case, but **more quantitative than normative approach** (in particular the first step: „special case”).
- **Also in 2000: Failure of the WIPO Diplomatic Conference on the rights audiovisual performers** due to absence of consensus on the transfer of rights.

2017 – 13-10 = 2004-7; Development Agenda

- **September 2004:** landing in Geneva at WIPO the representatives of a number of „public interest” and IT industry NGOs: „Declaration on the future of WIPO”.
- **September – October 2004:** first proposal by Argentina and Brazil at the WIPO Assemblies sessions for the establishment of a development agenda.
- **Freezing norm-setting activities (the draft Broadcasters Treaty close to be ready for a diplomatic conference becoming the immediate victim).**
- **September – October 2007:** Adoption of the Development Agenda by the WIPO General Assemblies:
 - **45 recommendations;**
 - establishment of the **Committee on Development and Intellectual Property.**

2017 – 6-5 = 2011-12; online intermediaries wrecking SOPA, PIPA and – in Europe – ACTA

- **2011: two bills in the US Congress:** Stop Online Piracy Act (**SOPA**) and Protect IP Act (**PIPA**).
- **IT companies and online intermediaries** with an intensive campaign among their customers, by blackouts, and by menaces of suspending services **achieved the withdrawal of the draft laws in 2012** (New York Times: „a political coming of age for the industry”; Boston Herald: „powerful... cyber-bullies”; MPAA: „abuse of power.. of... these companies”).
- **Extension of a hysterical campaign against the Anti-Counterfeiting Trade Agreement (ACTA) in Europe** which, by that time, was in accordance with the existing norms of the European Union.
- **The campaign based on weird slogans and misleading allegations succeeded;** the Commission became divided and various fractions of the European Parliament frightened.
- Representatives of creators and producers spoke about a „**Munich moment**”.

2017 – 5 = 2012; BTAP

- **June 2012:** adoption of the **Beijing Treaty on Audiovisual Performances (BTAP)**.
- **Extension of the model of WPPT on the rights of performers** concerning the fixation of their performances on phonograms **to fixations in audiovisual fixations**.
 - **Confirmation of the principles and basic solutions applied in the WCT and the WPPT 16 years later.**
 - **Clarification of the conditions applicability of exceptions and limitations in case of use of technological measures** in an agreed statement.
- **Article 12 on transfer of rights: recognition of the applicability of different systems in national laws.**
- **The BTAP may enter into force after the deposit of 30 instruments of ratification or accession. In March 2017, there are 15.**

2017 – 4 = 2013; Marrakesh Treaty

- **June 2013: adoption of the Marrakesh Treaty** to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled.
- **The international treaties had made it possible exceptions and limitations for the visually impaired persons also before (see the WIPO-UNESCO Model Provisions adopted in 1982).**
- The **plus elements** of the Marrakesh Treaty
 - **further clarification** of the application of exceptions and limitations;
 - the Contracting Parties **that are ready to apply** exceptions and limitations **what they are allowed to apply already under the existing treaties obligate themselves to do so;**
 - **the real essence:** organization and cooperation framework for cross-border exchange of accessible format copies with due guarantees.
- **Unique nature** of the Marrakesh Treaty: it is a **special-format treaty**.

2017 – 2 = 2015; an emerging creators' agenda?

- **December 2015:** at the session of the WIPO Standing Committee on Copyright and Related Rights (**SCCR**), the Group of Latin American and Caribbean Countries (**GRULAC**) submitted a proposal (document SCCR/31/4), inter alia, **suggesting the following agenda items:**
 - Analysis and discussion of the **role of companies and corporations that make use of protected works** in the digital environment and their way of action, including **the verification of the level of transparency on business and the proportions of copyright and related rights payment to the multiple rights holders.**
 - **Building consensus on the management of copyright in the digital environment**, in order to deal with the problems associated to this matter, from **the low payment of authors and performers.**
- **Message: copyright should function as advertised** (for the protection of creators, promotion of creation and access to works and other creative productions).

2017 – 1 = 2016; attempt at establishing due balance of interests; the EU reform package

- **September 2016: EU reform package**; within it a **Proposal for a Directive on copyright in the Digital Single Market** and within it, in particular Articles 13 (along with recital (38)) to 16.
- **Article 13.** Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users [**obligations of active – “false” – intermediaries to contract with rightholders and cooperate with them to fight infringements**]; in particular if read together, and applied in accordance with, **recital (38)**.
- **Article 14.** Transparency obligation; **Article 15.** Contract adjustment mechanism, and **Article 16.** Dispute resolution mechanism (**in order to guarantee “Fair remuneration in contracts of authors and performers”** – the same objective as in the GRULAC proposal).

2017 →; forecasts about WIPO norms-setting

- It's difficult to make predictions, especially about the future (by Niels Bohr? Samuel Goldwyn? Mark Twain? Anonymous? In any way, it is true.)
- But it seems, at WIPO:
 - **hopefully a Broadcasters Treaty** – as the missing link of WIPO „Internet Treaties” – **will be finally adapted** (bottom line: to be meaningful at all, simulcasting should be covered);
 - **probably a new „guided development” period** (with „soft law” solutions) **may come**;
 - **this may apply for pending issues of exceptions and limitations too**;
 - **but other issues** (such as the role, obligations and liability of intermediaries; contractual guarantees; collective management, and possibly even private international law questions) **may be added and follow this way**;
 - **the issues of digital online use of works and other objects of related rights will ever more dominate.**

2017 → hope

Hope for the future:

**Peaceful coexistence and balanced application of
the trade agenda, the digital agenda, the development agenda,
the intermediaries' agenda and
the creators' agenda.**

2017 → GPS for the digital online future (1)

Francis Gurry, Director General of WIPO, guidance about the future of copyright on the Internet at the „Blue Sky Conference” in Sidney in February 2011 will continue applying.

About the tasks of balancing:

„It is a question that **implies a series of balances**: between **availability**, on the one hand, and **control of the distribution of works** as a means of extracting value, on the other hand; between **consumers and producers**; between **the interests of society and those of the individual creator**; and between the **short-term gratification of immediate consumption and the long-term process of providing economic incentives that reward creativity and foster a dynamic culture.**”

2017 → GPS for the digital online future (2)

Francis Gurry in his „Blue Sky” speech on the future of copyright on the adaptation of copyright to the conditions of the online environment:

„Adaptation in this instance requires, in my view, activism. I am firmly of the view that a passive and reactive approach to copyright and the digital revolution entails the major risk that policy outcomes will be determined by a Darwinian process of the survival of the fittest business model. The fittest business model may turn out to be the one that achieves or respects the right social balances in cultural policy. It may also, however, turn out not to respect those balances. The balances should not, in other words, be left to the chances of technological possibility and business evolution. They should, rather, be established through a conscious policy response.”

2017 → GPS for the digital online future (3)

Francis Gurry in his „Blue Sky” speech on the future of copyright about the need for new approaches:

„In order to effect a change in attitude, I believe that we need to reformulate the question that most people see or hear about copyright and the Internet. People do not respond to being called pirates. Indeed, some, as we have seen, even make a pride of it. They would respond, I believe, to a challenge to sharing responsibility for cultural policy...

„The final element of a comprehensive and coherent design is better business models. This is undoubtedly happening now. But the story is not over.”

2017 → GPS for the digital online future (4)

Francis Gurry in his „Blue Sky” speech on the future of copyright warning against the idea of trying to waiting for a single solution:

„I do not think that there is any single magical answer. Rather, an adequate response is more likely to come from a combination of law, infrastructure, cultural change, institutional collaboration and better business models...

„Recognizing the limitation of law, and its inability to provide a comprehensive answer, should not mean that we abandon it...”

2017 → GPS for the digital online future (5)

Francis Gurry in his „Blue Sky” speech on the future of copyright about the decisive role of online intermediaries:

„I believe that the question of... the responsibility of intermediaries is paramount. The position of intermediaries is key. They are at once, service providers to, as well as partners, competitors and even clones of creators, performers and their business associates; hence the difficulty that we have in coming to a clear position on the role of intermediaries.”

**2017 → still a lot of opportunity to Learn,
Debate and Have Fun**

**Thank you Hugh and the wonderful team of Hansen IP
Institute for these**

25 years

**and we wish you a lot of luck and success for the
coming years (which is also our deeply selfish interest)**

THANK YOU

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