

Standing Committee on Copyright and Related Rights

Thirty-Fifth Session

Geneva, November 13 to 17, 2017

**SCOPING STUDY ON THE IMPACT OF THE DIGITAL ENVIRONMENT ON
COPYRIGHT LEGISLATION ADOPTED BETWEEN 2006 AND 2016**

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EXECUTIVE SUMMARY

Following the request of WIPO Member States, the present study has been conducted to identify the general trends and strategies that they have followed adapting their copyright legislation to the digital environment between 2006 and 2016.

The study covers the copyright value chain, the limitations and exceptions in the digital environment, the impact of digital technology on protected subject-matter and on the management of copyright, and the question of new digital players.

For each of these themes, a common “pattern” in the strategies adopted by Member States is described, and “particularities” in the copyright legislation of Member States are identified. These particularities may include additional clarifications, or a specific approach adopted by Member States when regulating the identified theme.

The purpose of this study is to focus on the provisions which explicitly and directly refer to the digital environment and to focus on national copyright statutes only. Case-law or bilateral and plurilateral agreements, as well copyright-related laws (such as electronic commerce legislation) have not been included.

Overall, we have identified 94 Member States that had created and/or amended their copyright laws during the period 2006 and 2016, the list of which may be found in Appendix 1 of this study.¹

It may be observed that a majority of Member States have adopted provisions to face the challenges of the digital environment, whether to cover its technical components such as computer programs, databases and digital rights management, or to cover the rights of reproduction and making available to the public, as well as limitations and exceptions, including temporary reproduction, in the digital environment.

For instance, regarding the copyright value chain, we have identified specific provisions on (i) the right of reproduction in the digital environment (such as electronic and/or digital archiving and storage), (ii) the right of communication and/or making available to the public (including its interactive and technical aspects), (iii) the right of distribution and right of rental (particularly as applied to computer programs), and (iv) additional remuneration rights for digital communication (which may be granted, as the case may be, to one or various categories of rightholders). We have observed the following:

- 60% (56 Member States) have explicitly clarified the right of reproduction in relation to digital technology;
- 54% (51 Member States) have enacted provisions to adapt the right of communication and/or making available to the public to the digital environment;
- 35 % (33 Member States) have adapted the right of distribution and/or rental to the digital environment; and
- 10 % (9 Member States) have adapted the right to an equitable remuneration to the digital environment.

On the topic of limitations and exceptions, we focused our attention on provisions dealing with the use of works and other protected subject-matter by educational institutions in the digital environment, and we also looked at the provisions adopted by Member States to deal with e-lending activities in libraries as well as the preservation role of those institutions. We have also analyzed the general limitations and exceptions adopted by Member States in the digital environment as well as the question relating to so-called user-generated content and data

¹ For the purpose of this Study, the European Union (EU) is included in the statistics for Member States, although it is clear that the EU is part of WIPO's Governing Bodies and not a Member State.

mining. Finally, we focused on the provisions adopted to cover temporary reproduction. We have observed the following:

- 43% (40 Member States) have adapted to a certain extent their limitations and exceptions to the digital environment²; and
- 52% (49 Member States) have provisions on temporary reproduction.

As far as the impact of digital technology on the protected subject-matter and the management of copyright and related rights is concerned, we have observed that some Member States have chosen to adopt technical definitions that are specific to the digital environment. We have also looked at (i) the scope of protection of computer programs (focusing on how Member States define them) and of computer-generated works, (ii) limitations and exceptions applied to computer programs (interoperability, decompilation, back-up copies, the right to correct or study a program and the author's moral rights), (iii) the protection of databases, and (iv) digital rights management (technical protection measures and their relation to limitations and exceptions, and rights management information). We have observed that:

- 96% (90 Member States) have provisions on computer programs;
- 81% (76 Member States) have provisions on exceptions and limitations specifically for computer programs;
- 72% (68 Member States) have provisions on copyright protection of databases; and
- 71% (67 Member States) have provisions on digital rights management.

Finally, we analyzed the provisions on new digital players, including Internet intermediaries. Although most Member States have provisions on this topic outside their main copyright law (in particular in their e-commerce legislation), there are some Member States that have integrated such provisions in their copyright legislation. We have looked at the definition of internet intermediaries as well as their scope of liability, and notifications and counter-notifications systems. We observed that 22% (21 Member States) have provisions on Internet intermediaries.

The preliminary findings of this scoping study are meant to provide a basis for consideration by the Committee.

² This category does not include limitations and exceptions for temporary reproduction and those specific for computer programs.

INTRODUCTION

During the 33rd session of the Standing Committee on Copyright and Related Rights (SCCR) in November 2016, World Intellectual Property Organization (WIPO) Member States requested that a scoping study be conducted on the impact of digital technology on the development of national legislation governing copyright and related rights over the past ten years.

This request was based on a proposal submitted by the Group of Latin American and Caribbean States (GRULAC) in the 31st session of the SCCR, in which it was highlighted that “*a more embracing analysis regarding the issue is necessary*”³.

SCOPE OF THE STUDY

The main objective of this document is to describe the general trends and strategies adopted by Member States to adapt their copyright legislation to the digital environment, the aspects of which have been identified together with the WIPO Secretariat.

The relevant identified themes are as follows:

1. The digital environment and the copyright value chain: in this section, the study will describe how the identified Member States have adapted the economic rights to the digital environment, with a particular focus on the right of reproduction, the right of communication and/or making available to the public, the right of distribution and/or rental right, and the right to a specific remuneration for digital communication of protected works, whether for performers and producers on the one hand or for authors on the other.
2. The limitations and exceptions in the digital environment: this section analyzes how limitations and exceptions are tackled in the digital environment, whether for museums, archives, educational institutions and libraries, but also concerning temporary reproduction.
3. The impact of digital technology on the protected subject-matter and on the management of copyright: this section identifies the technical definitions of elements of the digital environment that have been specifically adopted by Member States, and also tackles the question of the protection of computer programs and database, as well as digital rights management.
4. New digital players and copyright: the final section of the study focuses on the provisions governing the liability of Internet intermediaries.

This scoping study is not meant to be exhaustive and to cover all aspects of the digital environment. Furthermore, WIPO has already undertaken work on related topics such as Internet intermediaries' liability⁴ and limitations and exceptions⁵. Therefore, this study does not enter into the detail of the provisions of each topic, but identifies general strategies adopted by Member States to tackle various question.

This study focuses on national copyright statutes. Case-law or bilateral and plurilateral agreements have not been included. In other words, copyright-related laws (such as electronic commerce legislation or regulations tackling a specific topic that had not been included in the main copyright statute) have been set aside.

Finally, although the study seeks to analyze the impact of digital developments over the past ten years, it has proved difficult, and in most cases impossible, to determine to which extent the

³ GRULAC, *Proposal for analysis of copyright related to the digital environment*, World Intellectual Property Organization, Standing Committee on Copyright and Related Rights, Thirty-First Session (Geneva, Switzerland: 2015), available at http://www.wipo.int/edocs/mdocs/copyright/en/sccr_31/sccr_31_4.docx

⁴ http://www.wipo.int/copyright/en/internet_intermediaries/

⁵ <http://www.wipo.int/copyright/en/limitations/>

changes made to copyright statutes during the period 2006-2016 specifically relate to the digital environment. Therefore, we have analyzed all the legislation that has been created and/or amended since 2006, regardless of the provisions that had been modified⁶.

THE METHODOLOGY

The execution of the scoping study was divided in six different stages: (i) listing of WIPO Member States that had created a new copyright law or amended their legislation since 2006, (ii) identification together with the WIPO Secretariat of the specific themes related to the digital environment to be investigated, (iii) analysis of the copyright legislation of the relevant Member States, (iv) meeting of academic experts to exchange views on the preliminary results of the study, (v) presentation of the preliminary results of the study during the 34th session of the SCCR on May 5, 2017, and (vi) submission of the final drafting.

The great majority of the relevant legislation has been identified through the WIPOLEX database⁷, in the section “Main IP-laws: enacted by the Legislature”. However, additional research was conducted to identify more recent instruments that had not yet been included in that database tool. Where such instruments existed, we opted for the most recent version, provided that it was published by the Government of the Member State.

When the language of the legislation was not English, French or Spanish, the WIPO Secretariat as well as external copyright experts assisted in the translation of the relevant provisions of most of the laws. However, not all the identified Member States’ legislations could be translated.

Finally, it was decided to focus only on the provisions that explicitly and directly refer to the digital environment. If, for instance, a given provision stated that the right of reproduction covers all the reproductions of a work “*in any manner or in any form*”, it would not be identified as a relevant provision. If a piece of legislation adopted a provision clearly referring to the digital environment, such as, for example, an exception covering “*digital or electronic reproduction*”, it was deemed relevant to our analysis.

Overall, the legislation of **94 Member States** has been analyzed, the list of which may be found in Appendix 1 of this study⁸

ORGANIZATION OF THE STUDY

This Study is divided in four parts, each relating to one of the above-mentioned identified themes.

Each of the parts is structured as follows:

Subsection 1: The relevant provisions of the main WIPO-administered Treaties are listed, namely

⁶ However, on account of their relevance, some instruments adopted before 2006, such as the European Union Directive No. 2001/29/CE of May 22, 2001 on the harmonization of certain aspects of copyright and related rights in the information society, Directive No. 2004/48/EC of April 29, 2004 on the enforcement of intellectual property rights as well as USC Title 17 of the United States of America, including notably the 1998 Digital Millennium Copyright Act (DMCA), have been included within the scope of the study.

⁷ See <http://www.wipo.int/wipolex/en/index.jsp>

⁸ It should be noted that the calculation of the number and percentages of Member States that have adopted a provision is the result of a computation of different variables (including for example the removal of Member States that follow two general trends in order not to count them twice).

- the Berne Convention for the Protection of Literary and Artistic Works (“Berne Convention”), 1971 Paris Act;
- the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (“Rome Convention”), Rome 1961;
- the WIPO Copyright Treaty (“WCT”), Geneva 1996;
- the WIPO Performances and Phonograms Treaty (“WPPT”), Geneva 1996; and
- the Beijing Treaty on Audiovisual Performances (“Beijing Treaty”), Beijing 2012.

Exceptionally, concerning computer programs and databases, provisions of the 1994 Agreement on Trade-Related Aspects of Intellectual Property rights (“TRIPS Agreement”), administered by the World Trade Organization, have also been listed. The content of each provision is reproduced in Appendix 2: WIPO frameworks applicable to the identified themes.

The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (“Marrakesh Treaty”), Marrakesh, 2013, has not been included in the study as it deals with specific limitations and exceptions for well-defined categories of beneficiaries, works and rights.

Subsection 2: The general trends adopted by Member States are then presented. In this subsection, a common “pattern” in the wording adopted by Member States is described. Although the formulation may vary slightly from one provision to another, a provision is included in the general trends if it is substantively similar to a majority of the provisions identified in other Member States.

Subsection 3: In this subsection, we present examples of identified “particularities” in the copyright legislation of Member States. These particularities may include additional clarifications, or a specific approach adopted by Member States to tackle the identified theme. It should be noted that for ease of reading and for the sake of clarity, we have not included all the conditions applicable to a specific provision. For instance, if a Member State has implemented an exception for digital libraries, we have not presented all the conditions applicable to this exception. Furthermore, this subsection intends to merely present *examples* of identified particularities, and does not intend in any way to present exhaustively all of the individual provisions adopted by Member States on a specific topic.

THE FACTUAL NATURE OF THE ANALYSIS

The study is intended to provide objective observations and analysis of the provisions adopted by Member States to adapt their legislation to the digital environment.

Although the author has adopted an objective approach, the analysis of Member States’ legislation may be subject to the author’s interpretation and understanding of different legal traditions. In addition, this study merges an important number of sources, texts and various references, which have been translated by several persons and subsequently analyzed by the author of this study. A few translations are still missing, and the work is still in progress. Member States are therefore strongly invited to share with the WIPO Secretariat any issue or concern they may have regarding a particular provision that has been attributed to their legislation.

Finally, the author would like to underline that the identification and presentation of a provision in the general trends or in the identified particularities does not in any way imply an endorsement or a judgment of value on the provision.

ACKNOWLEDGEMENTS

I would like to express my gratitude to the following academic experts for their exchange of views on the preliminary results of the study on April 6 and 7, 2017:

- Mr. Mihaly Ficsor (Hungary);
- Mr. Joseph Fometeu (Cameroun);
- Mr. Andres Guadamuz (Costa Rica);
- Ms. Jane Ginsburg (United States);
- Ms. Marisella Ouma (Kenya);
- Mr. Daniel Seng (Singapour);
- Mr. Pierre Sirinelli (France);
- Mr. Tatsuhiro Ueno (Japan);
- Ms. Raquel Xalabarder (Spain); and
- Mr. Fernando Zapata (Colombia).

I would also like to thank the following persons for their precious help in the translation of the various copyright legislation:

- Mr. Mihaly Ficsor;
- Mr. Joseph Fometeu;
- Ms. Anita Huss-Ekerhult;
- Mr. Rafael Ferraz Vazquez;
- Mr. Paolo Lanteri;
- Mr. Astri M. Lund;
- Ms. Geidy Lung;
- Mr. Andre Myburgh;
- Mr. Stef Van Gompel;
- Mr. Kinga Szelenbaum;
- Ms. Ola Zahran; and
- Mr. Fernando Zapata.

I particularly acknowledge the inestimable help of Professor Jorgen Blomqvist for his precious comments and relevant insights on the study.

Finally, this study would have been impossible without the continuous guidance, expertise and availability of the WIPO Secretariat, namely Ms. Sylvie Forbin, Ms. Michele Woods, Ms. Geidy Lung, and Mr. Paolo Lanteri.

Ms. Guilda Rostama, Ph.D.
October, 2017

I. THE DIGITAL ENVIRONMENT AND THE COPYRIGHT VALUE CHAIN

A. THE RIGHT OF REPRODUCTION

1. The WIPO framework regarding the right of reproduction

The WIPO framework regarding the right of reproduction is:

- Article 9 (1) of the Berne Convention;
- Articles 7(1)(c) and 10 of the Rome Convention;
- The Agreed statements of WCT relating to Article 1(4);
- Article 7 of the WPPT; and
- Article 7 of the Beijing Treaty

2. General trends regarding the right of reproduction in the digital environment

As regards the application of the right of reproduction in the digital environment, two general trends are identified⁹.

The first general trend consists in including electronic and/or digital archiving and storage (whether temporary or permanent) under the coverage of the right of reproduction.

The provision is usually formulated as follows: the right of reproduction includes the fixation of a work in any medium or by any process known or as yet unknown, including the temporary or permanent digital storage thereof.

Overall **39 Member States** have adopted provisions to this effect.

The second general trend consists in the exclusion of some kinds of digital reproduction from the general scope of the exception regarding private copying. This trend is usually laid out in three steps: it is stated that (i) users are allowed to make a private copy; (ii) this exception is not made applicable to software or a database, and (iii) exceptions regarding reproduction for private use of databases and computer software are made specific and presented in a different section of the statute.

Such provision is usually formulated along the following lines: *“Anyone is entitled to make or have made, for private purposes, single copies of works which have been made public if this is not done for commercial purposes. The provision of subsection [...] does not provide the right to make copies of computer programs in digitized form or to make copies in digital form of databases if the copy is made on the basis of a reproduction of the database in digital form”*. Other Member States have chosen a more simple formulation, by only stating that the right of reproduction for private purposes does not apply to reproduction of all or significant parts of databases and to reproduction of computer programs. Overall, **16 Member States** have adopted provisions following this pattern.

In total, **55 Member States** have adopted provisions on the right of reproduction in the digital environment that are similar to both general trends identified.

⁹ The question of temporary reproduction will be analyzed in the section on limitations and exceptions of this study.

3. Examples of identified particularities

The first category of particularities consists in clarifying the above-mentioned general trend. For instance, Serbia states that “*Work is copied, in particular, by [...] storage of the work in electronic form into the memory of the computer*” (Article 20). The Russian Federation has a similar provision (Article 1270(2)). The Law of Kazakhstan states that the forms of reproduction may include any permanent or temporary storage of works and objects of related rights in any material form, including an open information-communication network (Article 2(11)).

The second category of identified particularities relates to the definition of the reproduction of computer programs. For example, Thailand has a particular definition on the reproduction of computer programs, which includes the “*duplication or making copies of the program from any medium for a substantial part by any method, not creating a new work whether in whole or in part*” (Article 4)¹⁰.

Overall, **10 Member States** have particular provisions adapted to the digital environment.

Summary:

- **48 Member States** have a definition of the right of reproduction which follows the two general trends identified.
- **10 Member States** have particular provisions adapted to the digital environment
- **38 Member States** have either no definition of the right of reproduction or no digital component in their definition.

Overall 60% (56 Member States) have explicitly provided for the application of the right of reproduction in the digital environment.

B. THE RIGHT OF COMMUNICATION TO THE PUBLIC, INCLUDING THE RIGHT OF MAKING AVAILABLE

1. The WIPO framework regarding the right of communication to the public, including the right of making available

The WIPO framework regarding the right of communication to the public, including the right of making available, is:

- Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention;
- Article 7(1)(a) of the Rome Convention;
- Article 8 of the WCT;
- Articles 2(g), 6 and 10 of the WPPT; and
- Articles 2(d) and 10 of the Beijing Treaty

¹⁰ Further details on the specific definitions of reproductions in computer programs are provided in Part III of this study.

2. General trends regarding the right of communication to the public, including the right of making available

Many Member States have modeled their definition of the right of communication to the public, including making available, on the definitions of the WIPO-administered Treaties.

They usually provide to the effect that the right of making available to the public shall mean the exclusive right to communicate a copyright work to the public by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them.

Overall, **35 Member States** have provisions which follow this general trend.

3. Examples of identified particularities

The identified particularities regarding the right of communication to the public, including the right of making available, in the digital environment consists in focusing on three different aspects. Some Member States focus on the digital technology that is used to achieve the communication to the public and the making available (i). Some others have chosen to focus on the communication and making available to the public of databases (ii).

i) The digital technology used for communication and making available to the public

Some Member States have chosen to highlight either the fact that a communication and making available to the public is done interactively (a), or through the Internet (b), or focused on electronic or technological aspects (c).

a) Interactive transmissions

The European Union highlights the importance of interactive transmissions in the digital environment. It states in recital 25 of Directive 2001/29/EC that *“It should be made clear that all right holders recognized by this Directive should have an exclusive right to make available to the public copyright works or any other subject matter by way of interactive on-demand transmissions. Such interactive on-demand transmissions are characterized by the fact that members of the public may access them from a place and at a time individually chosen by them”*. Following this recital, some European Member States have chosen to explicitly include interactive transmissions in their definition of the right of communication to the public. For instance, Serbia has included in the right of public communication the *“interactive communication of the work to the public”* (Article 30(4)(2)(10)). Kazakhstan has a similar provision (Article 2(13)), as well as Tajikistan (Article 16(10)) and Turkmenistan (Article 16(2)). Bosnia and Herzegovina specifically have defined the technical means that can be used for the act of making available to the public as *“video-on-demand, music-on-demand and the like”* (Article 32).

The Republic of Korea has defined “interactive transmissions” as making a work available to the public *“in such a way that members of the public may access them from a place and at a time individually chosen by them”* (Article 2(10)). The Law of the United States of America also has a specific definition of an interactive service, namely as a service *“that enables a member of the public to receive a transmission of a program specially created for the recipient, or on request, a transmission of a particular sound recording, whether or not as part of a program, which is selected by or on behalf of the recipient”* (Section 114(7)). Finally, the Law of Singapore defines

“interactive services”, as services enabling an individual to receive “*transmission of program specially created for that individual*”, or to receive on request a transmission of a sound recording selected by the individual (Article 81(1)).

Overall **9 Member States** have adopted such provisions.

b) The online communication and making available to the public

Some other Member States clarify that the communication and making available to the public can be made online or via the Internet.

For example, the Republic of Moldova provides in its Law that public communication is the act of making available a copyright work via the Internet or other computer networks, so that any member of the public can access them from any place and at any time individually chosen by them (Article 3).

Ireland specifies that the definition of communication to the public also includes “*making available to the public of copies of the work, by wire or wireless means, in such a way that members of the public may access the work from a place and at a time chosen by them (including the making available of copies of works through the Internet)*” (Article 40-1-a). Uganda has a similar provision (Article 9(e)).

Overall **4 Member States** have adopted such provisions.

c) The electronic and information technology aspect

Some Member States have highlighted the information technology aspect of communication and/or making available to the public. For example, the Law of Mauritania states that the author has the exclusive right to do or to authorize the “*communication de l’oeuvre au public par tout système de traitement informatique*” (Article 25). Peru states that the communication to the public can be done via “*La transmisión analógica o digital de cualesquiera obras por radiodifusión u otro medio de difusión inalámbrico, o por hilo, cable, fibra óptica u otro procedimiento análogo o digital que sirva para la difusión a distancia de los signos, las palabras, los sonidos o las imágenes, sea o no simultánea o mediante suscripción o pago*” (Article 33c). Turkey includes in its definition of the right of communication to the public “*devices, enabling the transmission of signs, sounds and/or images including digital transmission*” (Article 25). Finally, Costa Rica considers, as far as the rights of the producers of phonograms and videograms are concerned, the communication by “*cable, optical fiber, electromagnetic waves, satellite or any other similar means providing members of the public with access to or remote communication of works*” (Article 82g). Spain has a similar provision (Article 20(2)(e), as well as Kyrgyzstan (Article 4).

Some other Member States tackle the right of communication and/or making available to the public under its electronic dimension. For example, the Act of the United Kingdom states that communication to the public includes “*the making available to the public of the work by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them*” (Article 20(2)). In its definition of communication to the public, Guatemala highlights the diffusion of signs, words, sounds and/or images through loudspeakers, phone, similar electronic devices, cable distribution or any other means (Article 21(6)). Ukraine states that the communication to the public is the transmission by air, with the consent of copyright and (or) related rights holders, via radio waves (as well as laser beams, gamma rays...) by wire or any type of surface or underground (underwater, via conductor, fiber optic) cable in the form of signals (Article 1).

Overall **11 Member States** have adopted such provisions.

ii) *The communication to the public/making available of databases*

Finally, some Member States have enacted provisions regarding the communication and making available to the public of databases.

For example, Ecuador specifies in its definition of the right of communication to the public that it includes “*public access to computer databases by means of telecommunication, where they incorporate or constitute protected works*” (Article 22(h)).

Spain includes in its definition of communication to the public “*El acceso público en cualquier forma a las obras incorporadas a una base de datos, aunque dicha base de datos no esté protegida por las disposiciones del Libro I de la presente Ley*” (Article 20(2)(j)).

The Law of Guatemala adds that communication to the public also comprises “*public access to databases and computers via telecommunications*” (Article 21(7)), and so do the Laws of Nicaragua (Article 23(5)(e), Panama (Article 55(8)) and Peru (Article 33g).

Overall **7 Member States** have adopted such provisions.

In total, in the Laws of **31 Member States** the study has identified particularities as regards the right of communication and making available to the public.

Summary:

- **35 Member States** have adopted definitions that are similar to the definition of WIPO-administrated Treaties
- **27 Member States** have particular provisions in their Laws
- **43 Member States** either have no definition of the right of communication and/or making available to the public, or have not adapted this right to the digital environment.

Overall 54% (51 Member States) have provisions adapting the right of communication and making available to the public to the digital environment.

C. THE RIGHT OF DISTRIBUTION AND THE RIGHT OF RENTAL

1. The WIPO framework regarding the right of distribution and the right of rental

The WIPO framework regarding the right of distribution and the right of rental is:

- Articles 6 and 7 of the WCT and the agreed statements to these Articles;
- Article 8, 9, 12 and 13 of the WPPT and their agreed statements; and
- Articles 8 and 9 of the Beijing Treaty.

Although the TRIPS Agreement is not a WIPO-administered Treaty, its Article 11 is also relevant for this topic.

2. General trends regarding the right of distribution and the right of rental

Besides a few notable exceptions, in relation to digital technology, the rights of distribution and rental focus almost exclusively on computer programs. Indeed, many Member States grant a

general right of rental to the author of a computer program, specifying that this right does not apply if the program itself is not the essential object of the rental, pursuant to Article 7 of the WCT.

In general, the provision is formulated as follows: *“The owner of copyright shall have the exclusive right to do, authorize, or prohibit, the rental of a computer program. The right of rental does not apply to rental of computer programs, where the program itself is not the essential object of the rental”*.

Overall, **20 Member States** have provisions that follow this general trend.

3. Examples of identified particularities

The identified particularities are either related to the rental right applied to computer programs (i) or to the right of distribution in general (ii).

i) The right of rental applied to a computer program

Some Member States include the right of software rental under the right of distribution. For example, the Law of Armenia states that the author of software has the right to *“distribute the original or copies thereof in any form including its rental and lending”* (Article 35(2)). The Law of Croatia states that *“The author of a computer program shall have [...] the exclusive right to do or to authorize [...] any form of distribution of the original or copies of a computer program, including the rental thereof”* (Article 109(3)). In Germany, the right holder has the exclusive right to make or authorize, among others, any form of dissemination of the original of a computer program or of reproductions, including its rental (Article 69(c)).

Other Member States include the right of rental of a computer program in the determination of copyright or the exclusive rights under copyright. In Canada for example, copyright includes the right *“in the case of a computer program that can be reproduced in the ordinary course of its use [...] to rent out the computer program”* (Section 3(h)). New Zealand has a right to *“issue to the public”, which, in relation to computer programs, “includes the rental of copies of computer programs to the public and rental subsequent to those works having been put into circulation”* (Article 9(2)).

Some other Member States limit the right of rental of computer software to commercial activities. In India, copyright includes the right *“(ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer program”* (Article 14(ii)). In Australia *“copyright, in relation to a work, is the exclusive right: [...] in the case of a computer program, to enter into a commercial rental arrangement in respect of the program”* (Part III - Division 1 – 31d).

Some Member states choose to state that the exhaustion of rights due to the selling of a physical copy of a computer program shall not exhaust the right of rental on it. For instance, the Law of Spain states that *“La primera venta en la Unión Europea de una copia de un programa por el titular de los derechos o con su consentimiento, agotará el derecho de distribución de dicha copia, salvo el derecho de controlar el subsiguiente alquiler del programa o de una copia del mismo”* (Article 99c). Italy has the same provision stating that the first sale of a copy of the program to the European Economic Community by the holder of the rights, or with his consent, exhausts the right to distribute that copy within the Community, with the exception of the right to control the further rental of the program or a copy of the same (Article 64bis(c)).

Finally, Article 7 of the WCT establishes a right of rental for computer programs provided that the program is not “the essential object of the rental.” Ecuador chooses to define the meaning of this notion, stating that *“The program shall be considered the essential subject matter where the functionality of the subject matter of the contract is directly dependent on the computer program”*

supplied with it, for example where a computer is rented with computer programs already installed on it“(Article 31).

ii) *Identified particularities regarding the right of distribution*

The Law of Nicaragua states that the right of distribution includes “*la efectuada mediante un sistema de transmisión digital individualizada y a solicitud de cualquier miembro del público, siempre que la copia así obtenida no tenga carácter transitorio o incidental*” (Article 2(6)). Peru grants to the author a specific right of digital importation: “*La importación comprende el derecho exclusivo de autorizar o no el ingreso al territorio nacional por cualquier medio, incluyendo la transmisión, analógica o digital, de copias de la obra que hayan sido reproducidas sin autorización del titular del derecho. Este derecho suspende la libre circulación de dichos ejemplares en las fronteras, pero no surte efecto respecto de los ejemplares que formen parte del equipaje personal*” (Article 35). Kazakhstan includes in its right of distribution the distribution of original copies of works through public telecommunication network (Article 16(2)).

Finally, Bulgaria addresses the question of digital exhaustion of rights. The Law states that “*The first sale or other transaction on the territory of the Member States of the European Union made by the owner of the copyright or with his consent which transfers the ownership of the original or copy of the work shall lead to exhaustion of the right of their distribution on this territory without prejudice to the right to permit their further renting [...]. The provision of para 1 shall not refer to the cases of conceding originals or copies of the work in digital way, in respect to the materialized copies of the work made by the recipient with the consent of the owner of the copyright*” (Article 18a).

Overall, **14 Member States** have particular provisions on the right of distribution and the right of rental.

Summary

- **20 Member States** address the right of rental of computer programs with provisions that are similar to the WIPO-administered treaties.
- **14 Member States** have particular provisions on the right of rental and the right of distribution.
- **61 Member States** either have no provision on the right of distribution or rental, or have not addressed it from a digital perspective.

Overall 35 % (33 Member States) have adapted the right of distribution and/or rental to the digital environment.

D. REMUNERATION RIGHTS FOR DIGITAL COMMUNICATION

1. The WIPO framework applied to remuneration rights

The WIPO framework applied to remuneration rights is:

- Article 12 of the Rome Convention;
- Article 15 of the WPPT and the Agreed statement concerning this Article; and
- Articles 11 and 12.3 of the Beijing Treaty

2. General trends regarding the remuneration rights

The study has not identified any general trend regarding the right to a single equitable remuneration in relation to digital uses of works or objects of related rights. Indeed, the very low number of Member States that have enacted such explicit provisions has led us to present them as “identified particularities”.

3. Examples of identified particularities

The right to equitable remuneration for digital broadcasting and other communication to the public may be granted, on an optional basis, to performers and producers (i), and sometimes to authors as well (ii). Some Member States also provide details on how the amount of remuneration should be calculated (iii)

i) The right of equitable remuneration for performers and phonogram producers

The Act of Canada, for example, grants a right to remuneration to makers and performers whose audio recording is communicated to the public by telecommunication, specifying that the royalties are shared in half between the maker and the performer (Article 19(1)(1.2)). In China the performer and the producer of audio and audiovisual recordings are granted a right to receive compensation for any “*publication through information network*” (Article 38A(6) and Article 42). In Germany the Law states that an appropriate remuneration shall be paid to the performing artist if the performance is made available to the public by means of a data storage device (Article 78(2)). In Spain, performers (both: of audiovisual recordings and phonograms) are granted an exclusive right of making available on interactive means, together with an unwaivable right to receive equitable remuneration when this exclusive right is transferred to the producer (audiovisual or phonogram producer) (Article 108.3 of the Copyright Law of 23/2006 of July 7, 2006). This right of remuneration is managed through mandatory collective management. The Law of the Republic of Korea states that if a digital sound transmission organization makes a transmission by using commercial phonograms, it shall pay a reasonable remuneration to the producer of the phonogram (Article 83). Finally, the United Kingdom Act states that “*Where a commercially published sound recording of the whole or any substantial part of a qualifying performance is played in public, or is communicated to the public [...] the performer is entitled to equitable remuneration from the owner of the copyright in the sound recording*”, adding that “*the reference to publication of a sound recording includes making it available to the public by electronic transmission in such a way that members of the public may access it from a place and at a time individually chosen by them*” (Article 182D(1)(A).

ii) Rights of remuneration for authors in relation to digital transmissions

Some Member States grant a specific remuneration to authors either for digital reproduction or for digital distribution or making available of their works.

In Spain, authors of audiovisual works are granted an unwaivable right to receive equitable remuneration for the making available on interactive means; this remuneration is linked to the transfer of the exclusive rights to the producer (Article 90.4 of the Copyright Law 23/2006 of July 7, 2006). This right of remuneration is managed through mandatory collective management. The Lithuanian legislation also states that for communication to the public of the work, “*including the making available to the public of the work via computer networks (on the Internet)*”, the author shall be entitled to receive a remuneration (Article 15(3)). France provides that “*La publication d'une œuvre d'art plastique, graphique ou photographique à partir d'un service de communication au public en ligne emporte la mise en gestion, au profit d'un ou plusieurs organismes de gestion collective et agréés à cet effet par le ministre chargé de la culture, du droit de reproduire et de représenter cette œuvre dans le cadre de services automatisés de référencement d'images*” (Article L 136(2)(l)). Furthermore, the French legislation gives the

author a right to a share of the advertising revenue derived from the use of a book published in digital form, if such revenue is “indirectly related to the book” (Article L132(17)(6)). It is also required that the publishing contract guarantee that the author receive a fair and equitable compensation on all proceeds from the marketing and the distribution of a book published in digital form (Article L132(17)(6)).

Finally, some other Member States envisage a specific right of remuneration for authors in the form of a limitation or exception. For instance, the Law of the Republic of Korea states that when libraries reproduce books in digital format or interactively transmit them, they shall pay the owners of author’s rights remuneration *“in accordance with the standards determined and published by the Minister of Culture, Sports and Tourism”* (Article 31(5)). As regards the communication and making available to the public of a work on websites or by search engines, Spain has a provision according to which right holders may receive equitable remuneration for the making available of extracts of works on websites or by content aggregators for information purposes: *“La puesta a disposición del público por parte de prestadores de servicios electrónicos de agregación de contenidos de fragmentos no significativos de contenidos, divulgados en publicaciones periódicas o en sitios Web de actualización periódica y que tengan una finalidad informativa, de creación de opinión pública o de entretenimiento, no requerirá autorización, sin perjuicio del derecho del editor o, en su caso, de otros titulares de derechos a percibir una compensación equitativa”* (Article 32(2)). As regards digital reproduction, The Law of France provides for instance that authors are entitled to compensation for reproduction made from a licit source onto a digital recording medium (Article L311-1).

iii) *The determination of the amount of remuneration*

Finally, some Member States provide details on how to calculate the amount of remuneration to which the right holder is entitled. For instance, the Law of Spain states that when determining the amount of the equitable compensation, reproduction made by digital equipment shall not be included in the right to private copy: *“ A los efectos de la determinación de la cuantía de la compensación equitativa, no tendrán la consideración de reproducciones para uso privado: a) las realizadas mediante equipos, aparatos y soportes de reproducción digital adquiridos por personas jurídicas, que no se hayan puesto, de hecho ni de derecho, a disposición de usuarios privados y que estén manifiestamente reservados a usos distintos a la realización de copias privadas”* (Article 25(4)). Sweden has a similar provision stating that: *“When a businessman, in the course of his professional activities, manufactures or imports into this country material supports on which sounds or moving images may be recorded and which are especially suitable for the making of copies of works for private purposes, the authors of such protected works, that have thereafter been broadcast by sound radio or television or have been published on material supports by means of which they can be reproduced, have a right to remuneration from the businessman”* (Article 26k), and stating further that the remuneration *“in respect of material supports where digital recording can be made repeatedly, 0,4 “Öres” for each megabyte storage capacity”*.

Summary

- **9 Member States** have provisions for authors, performers or producers to receive equitable remuneration for the digital communication of works;
- **85 Member States** have no provision for equitable remuneration specifically addressing the digital communication of a work.

Overall 10 % (9 Member States) have adapted a right to equitable remuneration to the digital environment.

II. LIMITATIONS AND EXCEPTIONS IN THE DIGITAL ENVIRONMENT

A. THE WIPO FRAMEWORK APPLICABLE TO LIMITATIONS AND EXCEPTIONS

The WIPO framework applied to remuneration rights is:

- Article 9(2), 10 and 10*bis* of the Berne Convention, as well as the ‘minor reservations’;
- Article 15 of the Rome Convention;
- Article 10 of the WCT;
- Article 16 of the WPPT; and
- Article 13 of the Beijing Treaty.

B. GENERAL TRENDS: DIGITAL LIMITATIONS AND EXCEPTIONS FOR LIBRARIES, ARCHIVES AND MUSEUMS AND EDUCATIONAL INSTITUTIONS

Only 31 Member States have specific provisions for exceptions and limitations in the digital environment. However, among these Member States, we have identified general trends regarding limitations and exceptions applicable to educational institutions (1), and to libraries and archives (2).

1. Exceptions and limitations for educational institutions in the digital environment

Some limitations and exceptions applicable to educational institutions relate to the right of reproduction. They usually contain the following elements: educational institutions may make multiple reproductions of works in an electronic or digital version, provided that (i) such reproduction is necessary and is merely done to serve educational purposes (whether teaching or research), (ii) it is mainly intended for an audience of students or in a digital working space, (iii) there are no commercial benefits pursued in the reproduction, and that (iv) the author is properly named.

Other Member States also provide for an exception for digital communication and/or making available to the public by educational institutions. They usually allow for educational institutions to digitally make a work available on the Internet for educational or scientific research purposes or to make available works in computer networks, provided that access to the works is available only to enrolled pupils or students and their teachers.

Other limitations and exceptions focus on the caching or storage of works by educational institutions. They usually state that these institutions can engage in “proxy web caching” to enable staff and students of the institution to use the system to gain online access to works for educational purposes. The educational establishment is obliged to delete the stored material within a reasonable time after it is no longer relevant to the course of instruction, and the user needs to be authenticated through a specific verification process.

Finally, some Member States have limitations and exceptions for the use of computer programs by educational establishments. They provide that programs already made public may be reproduced and distributed to the extent deemed necessary by a person who is responsible for education at a school or an educational institution in the context of a course of lessons, provided that it does not unreasonably prejudice the interests of the owner of rights in those programs.

Overall, **12 Member States** have provisions for educational institutions in the digital environment.

2. Exceptions and limitations for libraries, archives and museums in the digital environment

Among the Member States that have established limitations and exceptions for libraries, it is interesting to note that their “point of focus” vary significantly. They focus on libraries either in the context of their e-lending activities (i) or their preservation role (ii).

i) Provisions regarding e-lending activities

Some Member States focus on the fact that libraries may digitally reproduce, under certain conditions, protected works at the request of a user. Those provisions usually contain the following elements: libraries may provide a digital copy to a person who has made such a request, provided that (i) they ensure that the person cannot reproduce the material or communicate it to someone else, (ii) the reproduction is of a short extract and is an “isolated copy”, (iii) the requested work is not a computer program, and that (iv) the reproduction is done to satisfy the desires of library borrowers.

Other Member States focus on technical and practical aspects of the limitations and exceptions applicable to libraries. Indeed, some of them have developed an important amount of provisions on the technical conditions on which libraries may reproduce and communicate the works. For instance, some Member States provide that users may only access the works on specific terminals within the premises of the library. They usually state that libraries may, without authorization and without payment of remuneration, communicate a work to the public via computer networks at terminals designated for that purpose in those establishments. The libraries must make sure that the content of the works cannot be transferred or transmitted outside the terminals of the establishments to external networks and that users cannot, when using any equipment supplied by the library, make an electronic copy of the work or communicate it to others.

Some others provide that the library users must be provided clear information on what they are allowed to do. In other words, the librarian or archivist must ensure that each user is informed in writing about the limits of copying, and it is sometimes emphasized that the digital copy is communicated to the user in a form that cannot be altered or modified. Certain Member States emphasize that libraries may not be held liable where a person makes an infringement of an audiovisual item on a machine (including a computer) if there is affixed to, or in close proximity to, the machine a notice of information.

Finally, some other Member States focus on the number of users who may simultaneously access the works. For example, some Member States consider that the number of users who may use them at the same time shall not exceed the number of copies of such books kept at the libraries, or the number authorized to be used by the holders of copyrights. Other Member States simply state that no person should be supplied on the same occasion with more than one copy of the same material.

Overall, **18 Member States** have provisions on libraries regarding their e-lending activities.

ii) Provisions regarding preservation in the digital environment

Some Member States provide for exceptions to the right of reproduction applicable to libraries, archives and museums in the context of their preservation role in the digital environment.

In some situations, national legislation envisages such reproduction in the case of reproduction of orphan works. Such provisions usually contain the following elements: libraries and archives may reproduce orphan works which are contained in their collections for the purposes of digitization, making them available to the public, indexing, cataloguing, preservation or restoration, but only in order to achieve aims related to their public-interest missions, in particular the preservation and educational access to orphan works contained in their collections.

Other Member States adopt a broader approach and do not restrict the possibility of digital reproductions by libraries to orphan works. They state that a public archive or library has the right to reproduce a work included in its collection without the authorization of its author and without payment of remuneration in order to digitize the collection for purposes of preservation. They also state that libraries may store a work in any medium by electronic means for preservation purposes if the library already possesses a non-digital copy of the work.

Finally, it bears mentioning that some Member States have provisions similar to the ones presented in this section that are applicable to both libraries and archives as well as educational institutions and museums. In other words, they do not make a difference between these different stakeholders and establish limitations and exceptions applicable to them without distinguishing their roles.

11 Member States have provisions on libraries, archives and museums regarding their preservation role.

Overall, **37 Member States** have exceptions and limitations applied to libraries, archives and museums which follow the above-mentioned general trends.

C. EXAMPLES OF IDENTIFIED PARTICULARITIES

Some Member States have clarified the above-mentioned general trends focusing on libraries, archives, educational institutions and museums (i). But other Member States have chosen to adopt broader limitations and exceptions in the digital environment that are not restricted to a specific category of stakeholders. They focus for example on limitations and exceptions in the online environment (ii) or on user-generated content and data mining (iii).

i) *Limitations and exceptions for libraries, archives, museums and educational institutions*

A small number of identified particularities are directly related to the above-mentioned trends. For example, the Law of the Netherlands states that *“It is not regarded as an infringement of the copyright in a literary, scientific or artistic work for libraries, educational establishments, museums or archives accessible to the public which are not seeking a direct or indirect economic or commercial advantage, to make a reproduction provided that the sole purpose of making the reproduction is to preserve access to the work if the technology available to make it accessible becomes obsolete”* (Section 16n). In addition, the Law of Denmark allows libraries, archives and museums to make copies of, *inter alia*, computer games for non-commercial use, but under a number of conditions, such as that the use should be for safety and protection purposes, for completing incomplete works which are not commercially available, or for acquiring such unavailable, but essential, published works (Article 16(1)).

In the Russian Federation an exception allows educational institutions to digitize and make available to the public abstracts of dissertations papers and theses (Article 1274(7)). It also states that libraries receiving copies of such dissertations papers shall be allowed, without the consent of the rightholder to make copies of them, in particular in electronic form, for the purpose of restoration, replacement of lost or damaged copies, or for the purpose of ensuring preservation and availability for users (Article 1245(4)).

ii) *Limitations and exceptions in the online environment*

Some Member States have general limitations and exceptions which apply to telecommunications through the Internet. For example, Canada states that *"It is not an infringement of copyright for an individual to reproduce a work [...] if the individual legally obtained the copy of the work [...] and is authorized to use the medium or device on which it is reproduced [...]. A medium or device includes digital memory in which a work or subject matter may be stored for the purpose of allowing the telecommunication of the work or other subject matter through the Internet or other digital network"* (Article 29.22(1) and (2)). Armenia has created a "Freedom of panorama" exception, stating that it is possible to reproduce *"works located on streets, parks, squares and other places open for attendance"* and distribute them, including on the Internet (Article 25). Italy states that it is permissible to release free of charge through the Internet, images or music with low resolution or degraded, for educational or scientific use, and only if such use is not for profit (Article 70-1 bis). Lithuanian legislation states in the context of the exception for quotation that it shall be permitted to communicate to the public (including by making it available to the computer via computer networks) *"a relatively short passage of a literary and scientific work which has been lawfully published or made available to the public"* (Article 21). The Law of Belarus states in its Article 33 that articles on current economic, political, social and religious issues duly published in newspapers and magazines, or duly placed for public use in the Internet may be used in printed mass media, broadcast or cablecast by electronic mass media and communicated to the public in any other way if such actions are not specifically prohibited by the author or other holder of rights to respective works.

Spain has an exception for online service providers that offer search engine services: *"la puesta a disposición del público por parte de prestadores de servicios que faciliten instrumentos de búsqueda de palabras aisladas [...] no estará sujeta a autorización ni compensación equitativa siempre que tal puesta a disposición del público se produzca sin finalidad comercial propia y se realice estrictamente circunscrita a lo imprescindible para ofrecer resultados de búsqueda en respuesta a consultas previamente formuladas por un usuario al buscador y siempre que la puesta a disposición del público incluya un enlace a la página de origen de los contenidos"* (Article 32(2)). The law of Japan also has an exception for services provided by search engines. It is stated that business operators who, under specific conditions, engage in the business of searching in response to a request from the public may, to the extent deemed necessary for the performance of the said search and the provision of the said search results, record and/or adapt the works on a recording medium or make automatic public transmissions of the works (Article 47sexies).

Finally, it can be noted that Japan has a provision for the reproduction required for an offer of a transfer of ownership of an artistic work: *"In the case where the owner of an original or a copy of an artistic work or a photographic work, or other person having an authority for a transfer of ownership [...] such person may for the use for such offer, make the reproduction or the public transmission (including the making transmittable in the case of an interactive transmission) of such work"* (Article 47bis). In other words, Japan has an exception allowing for the digital reproduction of an artistic work in case of online auctions.

iii) *User-generated content and data mining*

Canada is the only identified Member State which has implemented an exception for user-generated content. Article 29.21(1) states that it is not an infringement of copyright for an individual to use an existing work which has been published or otherwise made available to the public, in the creation of a new work if (i) it is done solely for non-commercial purposes, (ii) the source of the existing work is mentioned, (iii) the individual had reasonable grounds to believe that the existing work is not infringing copyright, and that (iv) the dissemination or use of the new work does not have a substantial adverse effect, whether financial or not, on the communication of the original work.

Furthermore, a few Member states have an exception for data mining. For example, the Law of France establishes an exception for digital reproduction used for the exploration of texts and data in scientific writings for public research purposes and not for commercial ends (Article L 122-5-10).

The United Kingdom has a section dedicated to copies for text and data analysis for non-commercial research. It states that a person who has lawful access to the work may “*carry out a computational analysis of anything recorded in the work for the sole purpose of research for a non-commercial purpose*” if “*the copy is accompanied by a sufficient acknowledgement (unless this would be impossible for reasons of practicality or otherwise*” (Article 29A).

Japan has an exception for the “*reproduction for information analysis*” which states that “*For the purpose of information analysis (information analysis means to extract information, concerned with languages, sounds, images or other elements constituting such information, from many works or other such information, and to make a comparison, a classification or other statistical analysis of such information) [...] it shall be permissible to make recording on a memory, or to make adaptation (including a recording of a derivative work created by such adaptation), of a work, to the extent deemed necessary*” (Article 47septies).

11 Member States have identified particularities.

Summary

- **37** Member States have exceptions and limitations applicable to libraries, educational institutions, archives and museums in the digital environment
- **11** Member States have identified particularities
- **54** Member States have no exception and limitation adapted to the digital environment.

Overall 43% (40 Member States) have adapted their limitations and exceptions to the digital environment.

D. TEMPORARY REPRODUCTION

1. The WIPO framework regarding temporary reproduction

The WIPO framework regarding temporary reproductions is:

- Article 9(2) of the Berne Convention;
- Articles 1(4) and 10 of the WCT and the agreed statements to those provisions; and
- Articles 7, 11 and 16 of the WPPT and the agreed statements to those provisions.

2. General trends regarding temporary reproduction

Most Member States that have integrated a temporary reproduction exception have highlighted the following aspects: the temporary reproduction of a work shall be permitted if (i) it is a transient or incidental act constituting an integral and essential part of a technological process, (ii) it has no independent economic significance, and (iii) the sole purpose is to allow for the transmission of the work in the network among third parties through an intermediary, or for the authorized use thereof.

38 Member States have integrated a provision containing the above-mentioned elements.

3. Examples of identified particularities

Some Member States do not apply the exception of temporary reproduction to computer programs. For instance, Estonia (Chapter IV, paragraph 18(4)) and Iceland (Article 10) have a definition which is similar to the above-mentioned general trend but expressly specifies that the exception does not apply to computer programs. The Law of the Republic of Korea states that if a work is used on a computer, it may be temporarily reproduced on that computer to the extent necessary for smooth and efficient information processing (Article 35*bis*).

The Law of Australia clarifies that this exception does not apply if the reproduction is made from an illicit source (Article 43B(2)(a)(i)).

Botswana (Article 19) and Granada (Article 13) underline that “*The temporary reproduction of a work shall be permitted if all of the following conditions are met- (a) the reproduction is made in the process of a transmission of the work or an act of making a stored work perceptible; b) it is caused by a person or entity that, by virtue of authorization by the owner of the copyright or of operation of law, is entitled to make that transmission or make the work perceptible*”. Maldives has a similar provision (Article 13), as well as Mali (Article 29), which emphasizes that the temporary reproduction must be “*automatiquement effacée sans permettre la récupération électronique de l’œuvre*”, and Niger (Article 26). The Law of Australia states that the temporary reproduction must be “*destroyed at the first practicable time*” (Article 43C(7)).

In addition to the above-mentioned conditions, the Law of Mauritius states that temporary reproduction may be permitted where “*the reproduction is made in the process of a digital transmission of the work or an act of making a digitally stored work perceptible*” (Article 17). Mauritania has a similar provision (Article 51), as well as the Seychelles (Article 10), and Rwanda (Article 204).

12 Member States have a particular provision related to temporary reproduction.

Summary

- **38 Member States** have a provision allowing temporary reproduction in the digital environment
- **12 Member States** have an identified particularity on temporary reproductions.
- **45 Member States** have no provision on temporary reproductions.

Overall 52% (49 Member States) have a provision on temporary reproduction.

III. THE IMPACT OF DIGITAL TECHNOLOGY ON THE PROTECTED SUBJECT-MATTER AND ON THE MANAGEMENT OF COPYRIGHT

When most of the WIPO-administered treaties were adopted, many elements of the digital world did not yet exist. Although these new technologies are covered by the broad definitions of the treaties, some Member States have endeavored to create definitions specifically applicable to the new elements (A). In addition, Member States have adopted precise provisions applicable to computer programs (B), databases (C) and to digital rights management (D).

A. ADOPTION OF TECHNICAL DEFINITIONS SPECIFIC TO THE DIGITAL ENVIRONMENT

Some Member States have established technical definitions of components of the digital environment that are not mentioned in WIPO-administered treaties. For instance, Australia provides a definition of “caching”, highlighting the fact that it facilitates efficient access to works for users (Article 116AB). The Law of New Zealand defines “file sharing” as a situation where *“material is uploaded via, or downloaded from, the Internet using an application or network that enables the simultaneous sharing of material between multiple users”* (Article 122(A)(a)). The Republic of Korea has in its Law a specific definition for digital sound transmissions, emphasizing that the latter is *“commenced upon request of the members of the public and intended for simultaneous reception by the public”* (Article 2(11)). The Law of Brazil has a definition of “transmission” or “emission”, namely *“the dissemination of sounds or of sounds and images by means of radio waves or satellite signals, by wire, cable or other conductor, by optical means or by any other electromagnetic process”* (Article 5(II)). Singapore defines in its Law “simulcasting” as a means of simultaneously *“broadcasting the work, adaptation, recording or film in both analogue form and digital form”* (Article 7). The Law of Ukraine has a specific definition of websites, which it defines as a collection of data, electronic (digital) media, objects of copyright and (or) related rights which are linked to each other and structured in connection with a website address and/or account of the website owner, and is accessed through an Internet address, which may consist of domain name, records about directories or numerical address according to the Internet protocol (Article 1). It also has a definition for webpage, website owner, webpage owner, and hyperlink.

Some Member States have original definitions related to computer programs. For instance, the Law of Japan states that (i) a programming language refers to the letters and other symbols as well as their systems for use as means of expressing a program, (ii) a “rule” means a special rule on how to use in a particular program a programming language mentioned in the preceding item, and (iii) that “algorithm” means methods of combining, in a program, instructions given to a computer (Articles 2 and 10). Samoa defines a computer as *“an electronic or similar device having information-processing capabilities”* (Article 2), and Turkey has a specific definition for “interfaces”, which are defined as *“The parts of a program that form the interaction and connection between the hardware and software elements of a computer”* (Article 1(h)).

Some other Member States provide clarifications on copyright law concepts to adapt them to the digital world. For example, the Statute of the United States of America defines literary works as *“works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects”* (Section 101). The Côte d’Ivoire includes in its definition of works in the artistic and literary field *“les livres en format audio tels que les livres sonores”* (Article 6). Lithuania includes in the works that are protected by copyright derivative works created on the basis of other literary, scientific or artistic works, such as static and interactive Internet homepages (Article 4 – 3(1)). Australia defines in its Law an electronic literary or musical work as *“a book, a periodical publication or sheet music in electronic form”* (Part II-Section 10). Tunisia includes in the scope of copyright protection the *“oeuvres numériques”*, but without giving a specific definition (Article 1). Finally, the Law of

Ukraine has a specific definition for digital information, which includes audiovisual works, musical works (with or without text), computer programs, phonograms, videograms, which can exist and/or be stored in the form of one or more files (parts of files), records in a database on storage devices of computers, on servers, or on the Internet (Article 1).

The Law of Malta has a specific definition of fixation of a work, which is defined as “*the embodiment of sounds, images, or both, or digital representations thereof, in any material form, from which they can be perceived, reproduced or communicated through a device*” (Article 2(1)). Peru defines in its law fixation as “*Incorporación de signos, sonidos, imágenes o la representación digital de los mismos sobre una base material que permita su lectura, percepción, reproducción, comunicación o utilización*” (Article 2(13)).

Summary

- **16 Member States** have enacted definitions specific to the digital environment

Overall 17% (16 Member States) have specific definitions on components of the digital world.

B. COMPUTER PROGRAMS

1. The scope of protection of computer programs

i) The WIPO framework regarding the scope of protection of computer programs

The WIPO framework regarding the scope of protection of computer programs is Article 4 of the WCT and the agreed statement concerning that Article.

Although the TRIPS Agreement is not a WIPO-administered Treaty, its Article 10.1 is also relevant for this topic.

ii) General trends on the protection of computer programs

National legislation in a small number of Member States simply states that software is protected by copyright without giving any special definition or without classifying it under any specific category of works.

Other Member States have chosen to place computer programs in the category of literary works.

A large number of Member States, however, have chosen to give in their legislation a technical definition of a computer program (including those States that categorize computer programs as literary works). The following elements may be found in those provisions: (i) Computer programs are a set of instructions expressed in words, codes, schemes or in any other form, capable, when incorporated in a machine-readable medium, of causing a computer to perform a particular task or achieve a particular result, (ii) they cause a device having an information processing capability to perform a particular function of conversion to another language, code or notation and reproduction in a different material form, and (iii) computer program protection includes the preparatory design materials and manuals, but ideas and principles, which underlie any element of a computer program, including those which underlie its interfaces, are not protected.

83 Member States have provisions on the scope of protection of computer programs which follow one or more those general trends.

iii) *Examples of identified particularities*

The WIPO-administrated treaties and the TRIPS Agreement do not provide any definition of computer programs, and a number of Member States have established definitions which differ from the above-mentioned general trend.

The statutes of some Member States require that a computer program be an original individual and intellectual creation. The Belgian Law emphasizes that *“Aucun autre critère ne s'applique pour déterminer s'il peut bénéficier d'une protection par le droit d'auteur”* (Article 2 of the law transposing the Directive of the 14th of May 1991). Spain adds that *“El programa de ordenador será protegido únicamente si fuese original, en el sentido de ser una creación intelectual propia de su autor”* (Article 96(2)), and the Law of Lithuania states in its Article 10 that *“When establishing originality of a computer program, criteria for quality or artistic value shall not be applied”*. Albania states in its Law that *“a computer program shall be protected as an act of speech if it is an individual original intellectual creation of the author himself”* (Article 88).

Other Member States focus on the tasks that a computer program achieves. For instance, the Law of Uruguay states that *“The expression of ideas, pieces of information and algorithms, in so far as it is formulated in original sequences ordered in a suitable manner in order to be used by a data processing device or an automatically controlled device, shall be protected in the same way”* (Article 5). Chile defines in its Law a “copy of a computer program”, as *“soporte material que contiene instrucciones tomadas directa o indirectamente de un programa computacional y que incorpora la totalidad o parte sustancial de las instrucciones fijadas en él”* (Article 5(t)). The Law of Tajikistan extends the protection of computer programs not only to preparatory materials but also to audiovisual images generated as a result of the operation of the program (Article 3).

The focus of other Member States lies in providing details on the components of computer programs that are protected. For example, Malta includes in its definition of “computer program” the fact that computer programs are constituted by *“interfaces which provide for physical interconnection and interaction or the interoperability between elements of software and hardware and preparatory design material”* (Article 2(1)). Uganda states that computer programs are literary works and associates them with *“electronic data banks and other accompanying materials”* (Article 5(1)(e)). Panama states that *“La protección se extiende a cualquiera de las versiones sucesivas del programa y a los programas derivados”* (Article 22). According to the Law of Uzbekistan, copyright protection extends to *“computer software of all types, including application programs and operating systems, that can be expressed in any programming language and in any form, including initial text and object code”* (Article 6).

Other Member States have emphasized that a computer program may be expressed in a particular language or as an electronic expression. For instance, the Law of the Former Yugoslav Republic of Macedonia states that: *“A computer program, within the meaning of this Law, shall be a program in any electronic form of expression, including the preparatory design material, provided that it is an individual and intellectual creation”* (Article 95). The Law of Singapore limits the application of its rules concerning decompilation to *“a literary work, being a computer program expressed in a low level language”* (Article 39A(1)). The United Kingdom Act states that *“It is not an infringement of copyright for a lawful user of a copy of a computer program expressed in a low level language to convert it into a version expressed in a higher level language”* (Article 50B). The Law of Malta states that copyright in a literary work (which includes computer programs) shall include the exclusive right to authorize or prohibit *“the translation in other languages including different computer languages”* (Article 7(1)(d)).

Other Member States have focused on the rights granted to authors of computer programs. For instance, The Law of Poland clarifies that the economic rights for computer programs include the right to make a *“permanent or temporary reproduction of a computer programs in full or in part, by any means and in any form”* (Article 74(4)). The United Kingdom Act has a description of the right of adaptation specifically adapted to computer programs, which refers to an arrangement or altered version of the program or a translation of it, where a translation includes *“a version of the program in which it is converted into or out of a computer language or code or into a different computer language or code”* (Article 21(3) and (4)). Thailand also has a definition of “adaptation” which is specific to computer programs: the *“conversion, modification or emulation of an original work for a substantial part, not creating a new work whether in whole or in part, which with regard to computer programs, includes a reproduction by means of transformation, modification of the program for a substantial part, not creating a new work”* (Article 4). Finally, the Law of Montenegro emphasizes that *“The loading, displaying, running, transmission or storage in digital form of the computer program, which require its reproduction, shall be considered as the author’s exclusive right of reproduction within the meaning of this Act”* (Article 112).

Finally, a few Member States have provisions on computer-generated works. For instance, Barbados defines them as *“a work generated by a computer in circumstances such that the work has no human author”* (Chapter 300(2)(1)). The United Kingdom states that computer-generated work *“means that the work is generated by computer in circumstances such that there is no human author of the work”* (Article 178), and in Ireland a work is considered to be computer-generated when the author of the work is not an individual (Article 2). Some Member States also specify who is considered the author of a computer-generated work: The Act of New Zealand states that the person who creates the work shall be taken to be, in the case of a computer-generated work *“the person by whom the arrangements necessary for the creation of the work are undertaken”* (Article 5(2)(a)). The Law of India simply states that an author is *“in relation to any literary, dramatic, musical or artistic work which is computer-generated, the person who causes the work to be created”* (Article 2(d)(vii)). As regards the duration of copyright in a computer-generated work, the Law of New Zealand provides that *“copyright expires at the end of the period of 50 years from the end of the calendar year in which the work is made”* (Article 22(2)). The Law of Ireland states that the copyright in a work which is computer-generated shall expire 70 years after the date on which the work is first lawfully made available to the public (Article 30).

29 Member States have identified particularities regarding the scope of protection of computer programs.

Summary:

- **83** Member States have provisions on computer programs which follow the general trend
- **29** Member States have identified particularities
- **4** Member States have no provisions on the scope of protection of computer works.

Overall 96% (90 Member States) have provisions on computer programs.

2. Limitations and exceptions applicable to computer programs

i) The WIPO framework applicable to limitations and exceptions regarding computer programs

The general provisions on limitations and exceptions, such as the three-step test of Article 9(2) of the Berne Convention and Article 10 of the WCT are applicable to computer programs.

ii) General trends on limitations and exceptions applied to computer programs

a) General trends regarding interoperability and decompilation

Most Member States that have included in their legislation an exception for decompilation and interoperability highlight the following aspects: (i) decompilation may be done without the consent of the author and without the right to receive additional compensation, (ii) the user has the right to reproduce and convert object code and/or source code, (iii) decompilation must be indispensable in order to achieve interoperability, (iv) the information necessary to achieve interoperability should not have previously been readily available from the other sources to the lawful user or the persons acting on his instructions, and (v) the information obtained as a result of the mentioned decompilation may be used only for the purpose of achieving interoperability of an independently created computer program and may not be transferred to other persons.

45 Member States have integrated provisions on interoperability.

b) General trends regarding the right to make back-up copies and to correct or study the program

A vast majority of Member States have integrated an exception so that the legitimate user of a computer program may make back-up copies.

Those provisions usually contain the following elements: (i) the reproduction must be made for the purpose only of being used, by or on behalf of the owner of the original copy, (ii) the copy must be made in the event that the original copy is lost, destroyed or rendered unusable, and (iii) the exception does not apply to an infringing copy of the computer program.

Among these Member States, some provide for a possibility for the lawful user of a computer program to reproduce and/or to adapt the software, without the author's consent, in order to correct errors, or to test and/or study how the program works in order to understand the ideas and principles that underlie its functioning.

30 Member States have enacted provisions which follow these general trends.

iii) Examples of identified particularities

The identified particularities consist in adapting the application of general limitations and exceptions to computer programs (a), regulating the issues of interoperability and decompilation (b), establishing rule in relation to the right to observe, study and correct errors of the computer program (c), or in the relation to the right to make backup copies (d), and finally legislating around the moral rights of the author of a computer program (e).

a) The adaptation of general limitations and exceptions to computer programs

First of all, some Member States have established provisions allowing users to make private copies of computer programs. For instance, the Law of Sweden states that *“Anyone who for his private use copies a computer program which is published or of which a copy has been transferred with the authorization of the author shall not be subject to criminal liability, if the master copy for the copying is not used in commercial or public activities and he or she does not use the copies produced of the computer program for any purposes other than his private use”* (Article 53). The Law of Panama contains the following exception regarding reproduction of computer programs: *“No constituye reproducción ilegal de un programa de ordenador a los efectos de esta Ley la introducción del mismo en la memoria interna de respectivo aparato, por parte del usuario lícito y para su exclusivo uso personal”* (Article 26).

Some other Member States have limited the exceptions applicable to computer programs to particular situations. For instance, the Law of Thailand contains a list of exceptions applicable to computer programs. As long as the three-step-test is complied with, *“An act against a computer program which is a copyright work (...) in the following cases shall not be deemed an infringement of copyright provided that the purpose is not for profit (i) comment, criticism or introduction of the work with an acknowledgment of the ownership of the copyright in the computer program, (ii) reporting of news through mass media with an acknowledgment of the ownership of copyright in the computer program, (iii) reproduction, adaptation, exhibition or display for the benefit of judicial proceedings or administrative proceedings by authorized officials or for reporting the result of such proceedings, (iv) use of the computer program as part of questions and answers in an examination, and (v) making copies of the computer program so as to keep them for reference or research in the public interest”* (Article 35).

Other national legislation limits the exceptions applicable to computer program to specific rights. For instance, the Law of Japan states that *“The owner of a copy of a program work may make copies or adaptations (including the making copies of a derivative work created by means of adaptation) of that work if and to the extent deemed necessary for the purpose of exploiting that work on a computer by himself”* (Article 47ter). The Law of Afghanistan states that *“The reproduction, in a single copy, or the adaptation of a computer program by the rightful owner of a copy of that computer program and publishing it shall be allowed for the purposes that follow (...) 2 For the purpose of archive and documenting [keeping documents] and papers or changing a rightful computer program, provided that the version of the computer program is destroyed, lost or unusable”* (Article 39(2)). The Law of Laos states that reproducing a computer program is permissible where *“such reproduction occurs in the ordinary operation of the computer program, providing the use of the computer program is consistent with terms of authorization of the copyright owner”* (Article 111(5)). Finally, the Act of the United Kingdom states that *“The making of a copy of a work, other than a computer program, by an individual does not infringe copyright in the work provided that the copy is a copy of the individual’s own copy of the work, is made for the individual’s private use, [and] is made for ends which are neither directly or indirectly commercial”* (Article 28B(1)(a)(i)). It then explains that a copy which is lawfully acquired on a permanent basis includes *“a copy which has been purchased, obtained by way of a gift, or acquired by means of a download resulting from a purchase or a gift”*, and that it *“does not include a copy which has been borrowed, rented, broadcast or streamed, or a copy which has been obtained by means of a download enabling no more than temporary access to the copy”* (Article 28B(4)).

b) Identified particularities regarding interoperability and decompilation

Although a large number of Member States have adopted provisions on interoperability, only a small number have defined what interoperability is. For instance, in the European Union it is stated that: the *“functional interconnection and interaction is generally known as ‘interoperability’; such interoperability can be defined as the ability to exchange information and*

mutually to use the information which has been exchanged" (Recital 10, Directive 2009/24/EC). The Law of Turkey states that interoperability is "*The ability of computer program parts to jointly function, to interact and to mutually use the exchanged information*" (Article 1(i)). The Law of Kazakhstan states that decompilation of a computer program is a technical measure consisting in changing the object code to a source code with the aim to study the structure and code of a computer program (Article 2 (41)). Turkmenistan has a similar provision (Article 1).

Regarding decompilation, the Law of Singapore defines it in relation to a computer program expressed in a low level language as "*converting the computer program into a version expressed in a higher level language*", or "*incidentally in the course of so converting the computer program, copying the computer program, and 'decompile' shall be construed accordingly*" (Article 39A(6)).

Finally, the Swiss statute does not refer to decompilation but to "decoding" (in French: "*décryptage*"): "*La personne autorisée à utiliser un logiciel peut se procurer, par le décryptage du code du programme, des informations sur des interfaces avec des programmes développés de manière indépendante*" (Article 21).

c) Identified particularities regarding the right to observe, study and correct errors on computer programs

Some Member States adopt a broader approach than the general trends identified. For instance, the Law of Senegal does not put any particular condition on back-up copies, it simply states: "*A legitimate user may make a backup copy of a computer program intended to replace the original*" (Article 41). In addition to the lawful copy allowed to correct errors, the Law of New Zealand states that the lawful user of a computer program does not infringe the copyright in it by copying or adapting it, if "*a properly functioning and error-free copy of the program is not available [...] within a reasonable time at an ordinary commercial price*" (Article 80B(1)(b)). The Law of Singapore emphasizes that in order to observe, study and test computer programs, the lawful user may perform any of "*acts of loading, displaying, running, transmitting or storing the computer program which he is entitled to do*" (Article 39B(1)).

Certain other Member States on the other hand add specific conditions for users who study and correct errors on computer programs. The Law of Niger, for instance, states that any reproduction or adaptation that is done to study and to correct errors shall be "*détruit dans le cas où la possession prolongée de l'exemplaire du programme d'ordinateur cesse d'être licite*" (Article 17). The Law of the United States of America states that "*it is not an infringement for the owner or lessee of a machine to make or authorize the making of a copy of a computer program if [...] such copy is destroyed immediately after the maintenance or repair is completed*" (Paragraph 117(c)).

Finally, some Member States envisage a right to modify the computer program. For instance, the Law of Ukraine states that a person lawfully possessing a copy of a computer program shall be entitled to modify that computer program with the aim of ensuring its operation when it is used with the user's technical equipment, and performing the acts related to the operation of the computer program in accordance with its intended purpose (Article 24(1)(1)). Kazakhstan has a similar provision (Article 24(1)).

d) Identified particularities relating to the right to make backup copies

Some Member States have taken a broader approach to the exception for backup copies than the general trends that were identified. For instance, the Law of Germany states that the creation of a back-up copy by a person authorized to use the program cannot be prohibited by contract if it is necessary to secure future use of the computer program (Article 69(d)(2)). The

Law of Switzerland does not envisage any particular conditions for backup copies. It merely states “*La personne qui a le droit d'utiliser un logiciel peut en faire une copie de sauvegarde; il ne peut être dérogé à cette prérogative par contrat*” (Article 24). The Former Yugoslav Republic of Macedonia also states: “*The lawful user of the computer program may, without authorization by the right holder, make a back-up copy, insofar as it is necessary for its use*” (Article 97(2)). The Law of Colombia states that the reproduction of a computer program, including for personal use, shall require the authorization by the owner of the rights, with the exception of a backup copy (Andean Decision 351 of 1993, Article 25).

Some other Member States on the other hand add conditions regarding the possibility to make back-up copies. For instance, the Law of Tunisia limits the possibility of making a backup copy to merely a single copy: “*Toutefois, est permis sans autorisation de l'auteur ou son représentant, la réalisation d'une seule copie de sauvegarde du programme d'ordinateur par le propriétaire de l'exemplaire licite de ce programme d'ordinateur*” (Article 46). The Law of Serbia states that “*If a work of authorship is a computer program, the person who has legitimately obtained a copy of that computer program for his/her own usual use, may do the following without its author's permission and without paying any remuneration [...] Make a single backup copy of the program on a lasting tangible carrier*” (Article 47).

e) Identified particularities relating to the moral rights of the author of a computer program

Some Member States provide a limitation of the moral rights of the author of computer programs.

For instance, the Law of France establishes the principle that the author of a computer program cannot, unless otherwise stated, “*s'opposer à la modification du logiciel par le cessionnaire des droits [...] lorsqu'elle n'est préjudiciable ni à son honneur ni à sa réputation [...] exercer son droit de repentir ou de retrait*.” (Article L 121-7). Article 20 of the Japanese law contains a similar provision stating that the author cannot invoke his right to integrity when modifications are necessary “*or enabling to use on a particular computer a program work which is otherwise unusable on that computer, or to make more effective the use of a program work on a computer*” (Article 20(2)(iii)).

The Law of the United Kingdom states that the right to be identified as the author of a work does not apply to any description of computer programs (Article 79(2)(a)).

Article 13(2)(3) and (4) of the law of the Republic of Korea provides that the author shall have the right to maintain the integrity of the content, form and title of his/her work, but that he/she cannot object to a modification if it intends to enable use of programs that can be used only on specific computers, or to use programs more effectively on specific computers.

43 Member States have enacted particular provisions regarding exceptions and limitations applicable to computer programs.

Summary:

- **66** Member States have provisions on the right to make backup copies, to correct errors, on interoperability and decompilation that follow general trends
- **30** Member States also have identified particularities whether on interoperability, the observation and study of computer programs, the backup copies or moral rights
- **18** Member States have no provisions on this topic

Overall 81% (76 Member States) have a provision on exceptions and limitations applied to computer programs

C. DATABASES

1. The WIPO framework regarding databases

The WIPO framework regarding databases is Article 5 of the WCT and the agreed statement concerning Article 5.

Article 10 (2) of the TRIPS Agreement is relevant as well.

2. The general trends on the protection of databases

Similarly to computer programs, the approach of Member States to databases varies.

Some Member States provide no specific definition of a database and simply include it in the category of literary works.

Other Member States provide for protection of databases, but do not specify such protection from a digital perspective. They mainly focus on databases as compilations of works, of excerpts of works or unprotected information, and which, by choice or arrangement of the content, constitutes an intellectual creation.

Some Member States, however, additionally require that databases be compiled in systematic and methodical order and accessible through electronic means.

59 Member States have provisions on databases that are similar to the above-mentioned general trends.

3. Examples of identified particularities

The first category of identified particularities relates to the limitations and exceptions applicable to databases. For instance, Montenegro has created a general exception for the use of databases by lawful users: *“A lawful user of a disclosed database or of a copy thereof may, without acquirement of the corresponding economic right and without payment of a remuneration, use that database, if this is necessary for the purposes of access to and the normal use of its contents”* (Article 61). Norway has a similar provision (Section 39h).

The second category of identified particularities relates to the exclusion from the scope of protection of computer programs which have been used for the creation of the database. The Law of Malta states for instance that the scope of protection *“does not extend to computer programs used in the making or operation of a database accessible by electronic means comprised within the term “computer program”* (Article 2(1)). The Law of Singapore applies a similar exclusion of computer programs from compilations, stating that the latter is a table of data *“other than relevant materials or parts of relevant materials”* defined as *“works, including computer programs”* (Article 7A(3)), which, by reason of the selection or arrangement of its contents, constitutes an intellectual creation.

The third identified particularity relates to the scope of protection of databases. For example, the Law of Germany states that a database which is significantly modified in its content qualitatively or quantitatively is to be considered a new database, provided that the change has required a substantial investment qualitatively or quantitatively (Article 87(a)). Austria has a similar provision (paragraph 40f. The Law of Hungary states that *“the regulations relating to databases*

shall appropriately be applied also to the documentation necessary for their operation and accessing their contents” (Article 60/A(2)).

The fourth category of identified particularities relate to the definition of database. Japan defines the database as an *“aggregate of information such as articles, numericals or diagrams, which is systematically constructed so that such information can be retrieved with the aid of a computer”* (Article 2(xter)). Ireland makes a distinction between a database which is a *“collection of independent works, data or other materials, arranged in a systematic or methodical way and individually accessible by any means”*, and an *“original database”* defined as *“a database in any form which by reason of the selection or arrangement of its contents constitutes the original intellectual creation of the author”* (Article 2). Ecuador defines the database as a *“compilation of works, facts or data in printed form, in the storage unit of a computer or in any other form”* (Article 7).

14 Member States have overall identified particularities.

Summary:

- **59 Member States** have provisions on the protection of databases which follow the general trends
- **14 Member States** have identified particularities
- **26 Member States** have no provisions on databases

Overall 72% (68 Member States) have a provision on the protection of databases.

D. DIGITAL RIGHTS MANAGEMENT

1. The WIPO framework applicable to digital rights management

The WIPO framework applicable to digital rights management is:

- Articles 11 and 12 of the WCT, as well as the agreed statement concerning Article 12;
- Articles 18 and 19 of the WPPT; and
- Article 15 and 16 of the Beijing Treaty, as well as the agreed statement concerning Article 15 as it relates to Article 13.

2. General trends regarding digital rights management

i) Technological protection measures (TPM)

The first general trend relates to the definition of TPMs. The provision is usually formulated as follows: efficient TPMs are devices or components which, in the normal course of their operation, are designed to prevent or restrict acts in respect of works or subject matter of related rights which are not authorized by the right holder.

The second general trend relates to the prohibited actions on TPMs, which consists in (i) descrambling a scrambled work or decrypting an encrypted work or to otherwise (ii) avoid, bypassing, removing, deactivating or impairing the technological protection measure, and (iii) the making or import, for sale or rental, of a device or facility specially designed or adapted to render inoperative any device or facility intended to prevent or restrict the reproduction of a work or impair the quality of the copies made.

ii) *Rights management information*

The first general trend relates to the definition of rights management information, which is defined as information provided by right holders to identify (i) the work or subject matter of related rights, (ii) the author or the related rights holder, and (iii) the terms and conditions of use of the work or subject matter of related rights

In general, the prohibited actions on rights management information consist in the removal or alteration of any electronic rights management information without authority as well as in the distribution or importation for distribution, broadcast, communication and/or making available to the public, without authority, of works, performances, phonograms or broadcast programs, knowing that electronic rights management information has been removed or altered without authority.

All the Member States that have provided for technical protection measures also have provisions applicable to rights management information¹¹.

60 Member States have provisions that follow the above-mentioned general trends.

3. Examples of identified particularities

The identified particularities are in three areas, namely: (i) the definition of TPMs, (ii) the prerogatives granted to the right holder on the use of TPMs, and (iii) the specific cases in which the circumvention of TPMs is allowed.

i) *Identified particularities on the definitions of DRM*

First of all, some Member States have definitions that do not follow the general trends. For instance, Uruguay has penalties for any person who alters or suppresses, without authorization from the right holder, “*the electronic data supplied by the holders of copyright and related rights to enable the administration of their patrimonial and moral rights*” (Article 46(C)). The Law of Poland states that “*technological protection measures shall be any and all technology, equipment or elements thereof intended to prevent or to restrict any actions permitting the use of works or artistic performances in breach of law*” (Article 6(10)). The New Zealand Act gives the example of what TPM protection does not encompass: “*it does not include a process, treatment, mechanism, device, or system to the extent that it controls geographic market segmentation by preventing the playback in New Zealand of a non-infringing copy of a work*” (Article 226(b)).

In addition, some Member States have introduced definitions that are similar to TPMs but not addressing exactly the same technology. For instance, the Law of Côte d’Ivoire has a provision on the “*dispositif anti-copie audionumérique*”, which is defined as a “*système incorporé dans un appareil enregistreur audionumérique qui, s’il est enlevé, contourné ou désactivé, rend inopérante la fonction d’enregistrement de l’appareil, qui détecte en permanence les codes introduits dans les enregistrements audionumériques et qui, à la détection d’un tel code, interrompt automatiquement la fonction d’enregistrement de l’appareil pendant une durée d’au*

¹¹ However, Mongolia is the only identified Member State which has a definition and a legal framework for rights management information but not for technical protection measures (Article 3(1)(14)). On the contrary, Turkmenistan has a definition and a legal framework for TPMs but not for rights management information.

moins vingt-cinq seconds” (Article 1). The Law of Singapore gives a particular definition of “standard technical measure” by defining it as a technical measure that (i) is used to identify or protect material, (ii) has been developed through an open, voluntary process by a broad consensus of copyright owners and network service providers, (iii) is available to any person on reasonable and nondiscriminatory terms, and (iv) that does not impose substantial costs on network service providers or substantial burdens on their primary networks (Article 193(A)).

Finally, some Member States have provisions regarding TPMs used on computer programs. For instance, the Law of the United Kingdom has a separate definition for technical devices applied to computer programs (Section 296), and another one for technological protection measures applied to works other than computer programs (Section 296ZF). Mexico also has a specific provision concerning TPMs applied to computers: “*Queda prohibida la importación, fabricación, distribución y utilización de aparatos o la prestación de servicios destinados a eliminar la protección técnica de los programas de cómputo*” (Article 112).

ii) Identified particularities regarding the prerogatives of right holders concerning DRM

Some Member States focus on the prerogatives of right holders concerning TPMs. The Law of France provides that representation, publishing and audiovisual production contracts must include an option for the producer to have recourse to technical measures and information in electronic form. The contract must also specify the objectives of each mode of communication, as well as the conditions under which the author can have access to the essential characteristics of such technical measures or information in electronic form (Article L. 131-9).

The Law of Côte d'Ivoire emphasizes the fact that the right holders must have a right to rectify rights management information (Article 111).

The Republic of Korea defines in its Law technological protection measures by making reference to the consent of a right holder, stating that they “*shall mean technological measures by a rights holder or a person who has obtained consent from such a right holder to effectively prevent or restrict access to works*” (Article 2(28)). The same emphasis is found in the Law of Singapore in Article 261(C)(1), which mentions a technological measure “*applied to a copy of a work or other subject-matter by or with the authorization of the owner of the copyright*”.

The Law of Senegal presents technological protection measures as a faculty for owners of copyright who “*may in the exercise of their rights, use technological measures with a view to preventing or limiting acts, in respect of their works, performances, phonograms, videograms or programs, which they have not authorized and which are not permitted by law*” (Article 125).

iii) Identified particularities regarding exemptions from the protection against circumvention of TPMs

The largest number of particularities relate to provisions restricting the protection against circumvention of technical protection measures. These exemptions refer to (i) interoperability of computer programs, (ii) encryption research and studying of flaws, (iii) protection of personal data, (iv) private use of works, and (v) the possibilities for libraries, archives and educational institutions to benefit from the limitations and exceptions they have been granted by law.

For what concerns the interoperability of computer programs, the Law of Malaysia, for example, states that circumvention of technological protection measures is possible for the sole purpose of achieving interoperability of an independently created computer program with the original program (Article 36(A)(2)(a)). The Law of Panama emphasizes the good faith of the person circumventing the technological protection measures, stating that it is legal to carry out: “*actividades no infractoras de ingeniería inversa respecto a la copia de un programa de computación obtenida legalmente, realizadas de buena fe con respecto a los elementos*

particulares de dicho programa de computación que no han estado la disposición inmediata de la persona involucrada en dichas actividades, con el único propósito de lograr la interoperabilidad de una programa de computación creado independientemente con otros programas” (Article 145(I)(3)). Nicaragua emphasizes that the person must “que haya hecho un esfuerzo de buena fe por obtener autorización para realizar dichas actividades, en la medida necesaria, y con el único propósito de identificar y analizar fallas y vulnerabilidades de las tecnologías para codificar y decodificar la información” (Article 111 2.3 b).

Member States have also adopted provisions to allow circumvention of TPMs in order to allow encryption research and the studying of flaws. For instance, the Canadian Law creates an exception to the right of reproduction when the purpose of reproduction is to conduct research on encryption (under certain conditions) and makes it mandatory for a person who detects a vulnerability or security flaw in a computer program to inform the holder of the copyright in the program, giving such right holder sufficient notice of his intention to make this information public (Article 30.62(1) and (3)). The Law of India had adopted a broader approach by stating that technical protection measures may not prevent a person from “*doing anything necessary to conduct encryption research using a lawfully obtained encrypted copy*” (Article 65(A)(2)(b)). The Law of the United States of America defines encryption research as “*activities necessary to identify and analyze flaws and vulnerabilities of encryption technologies applied to copyrighted works, if these activities are conducted to advance the state of knowledge in the field of encryption technology or to assist in the development of encryption products*” (Section 1201(g)). Finally, some Member States have limited the possibility to lawfully circumvent TPMs by requiring that the person doing the circumvention “*is employed or appropriately trained or experienced in that field or is doing so on behalf of a person so engaged, employed, trained or experienced*” (Singapore, Article 261D(e)(B) and (C)).

Some Member States have taken into consideration the protection of personal data and privacy. For instance, the Law of Singapore states in its Article 261D(1)(b) that circumvention of technological protection measures is possible if the technological measure has the capability to collect or disseminate personally identifying information to reflect the manner of use of a network by persons without providing conspicuous notice of such collection or dissemination to those persons, and the act is done for the sole purpose of identifying and disabling the technological measure. The Republic of Korea makes it possible to circumvent technological protection measures to “*identify and disable capability to carry out undisclosed collection or dissemination of personally identifiable information that tracks the online activities of an individual*” (Article 104bis(3)).

In addition, the legislation of some Member States address the use of TPMs to prevent private use of works. For instance, the Law of France states that producers and distributors of television services may not use technical measures that would end up depriving the public of the benefit of the exception for private copying, including using a digital medium or format (Article L. 331-9). In Sweden, the consent of the author is not necessary for the circumvention of a TPM that prevents or limits the acts of making available if someone “*who in a lawful way has access to a copy of a work protected by copyright, circumvents a technological measure in order to be able to watch or listen to the work*” (Article 52d(2)).

Finally, certain Member States have adopted provisions allowing libraries and educational institutions to make full use of the relevant limitations and exceptions, even if TPMs have been applied to the work. For instance, the Law of the Republic of Korea has a provision which allows educational institutions and non-profit libraries as well as archive management institutions to circumvent TPMs if they wish to decide whether to purchase a work, provided that “*any access thereto is impossible without circumventing technological protection measures*” (Article 104bis(5)). Singapore has a similar provision stating that such action is possible for non-profit libraries, non-profit archives, educational institutions in order that they may have “*access to a work or other subject-matter or recording of a performance which is not otherwise available to the library, archive or institution, [but] for the sole purpose of determining whether to acquire a copy of the work or other subject-matter or recording*” (Article 261D(1)). Spain adopts a broader

approach by stating that “*Los titulares de derechos sobre obras o prestaciones protegidas con medidas tecnológicas eficaces deberán facilitar a los beneficiarios de los límites que se citan a continuación los medios adecuados para disfrutar de ellos, conforme a su finalidad, siempre y cuando tales beneficiarios tengan legalmente acceso a la obra o prestación de que se trate. Tales límites son los siguientes: c) Límite relativo a la cita e ilustración con fines educativos o de investigación científica [...] d) Límite relativo a la ilustración de la enseñanza o de investigación científica*” (Article 161).

23 Member States have provisions with the above-mentioned particularities.

Summary:

- **60** Member States have provisions on TPMs (and 59 have provisions on digital rights management) that follow general trends
- **23** Member States have identified particularities regarding TPMs
- **27** Member States have no provisions on TPMs or DRM

Overall 71% (67 Member States) have a provision on DRMs

IV. NEW DIGITAL PLAYERS AND COPYRIGHT: PROVISIONS GOVERNING THE RESPONSIBILITIES OF INTERMEDIARIES

A. THE WIPO FRAMEWORK

WIPO-administered Treaties contain no special provisions governing the responsibilities of intermediaries, but the agreed statement to Article 8 of the WCT is relevant.

However, it may be argued that any regulation on the liability of Internet intermediaries should comply with Article 14(2) of the WCT¹², which states 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*”. Articles 23 of the WPPT and 20 of the Beijing Treaty on Audiovisual Performances follow similar wording in this respect.

B. GENERAL TRENDS REGARDING INTERNET INTERMEDIARIES

There are no general trends identified regarding Internet intermediaries. Indeed, the very few number of Member States that have enacted such provisions have led us to present them among the “identified particularities”.

However, it may be noted that in the Recital 59 of Directive 2001/29/EC, the European Union highlights the major role of new digital intermediaries stating that “*In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end*”.

C. EXAMPLES OF IDENTIFIED PARTICULARITIES

i) Identified particularities regarding the definition of Internet intermediaries

The approach of Member States on the definitions of Internet intermediaries is quite variable.

First of all, the legislation of some Member States define Internet intermediaries by categorizing them according to their activities. For instance, the Law of Australia in Part V – Division 2AA – Section 116AA, classifies Internet intermediaries in four categories, namely (i) intermediaries who “*provide facilities or services for transmitting, routing or providing connections for copyright material, or the intermediate and transient storage of copyright material in the course of transmission, routing or provision of connections*” (category A), (ii) intermediaries involved in “*caching copyright material through an automatic process*” (category B), (iii) intermediaries whose business involves “*storing, at the direction of a user, copyright material on a system or network controlled or operated by or for the carriage service provider*” (category C), and (iv) intermediaries whose business is to “*refer users to an online location using information location tools or technology*” (category D). Other Member States have a similar approach but categorize

¹² See in this sense, M. FICSOR, Guide to the copyright and related rights treaties administered by WIPO, WIPO. Available at http://www.wipo.int/edocs/pubdocs/en/copyright/891/wipo_pub_891.pdf Dr. Ficsor argues that for the requirements under Article 14(2) of the WCT to be fulfilled, any possible regulation of the liability of service providers – more precisely the limits of liability along with the conditions of such limits – should correspond to a series of principles listed at points CT-14.8 to CT-14.10.

Internet intermediaries differently. For example, Bahrain only has two categories. The first one is *“Anyone who provides transmission, routing or connections for online digital communications, between or among points specified by a user, of material of the user’s choosing, without modification to the contents of the material in its transmission or reception”*, and the second one is *“Any provider or operator of online utilities and services, or of services accessible online”* (Article 46 (b)).

Other Member States have a simple definition of Internet intermediaries without categorization. For example, the Law of Chile defines in its Article 5(y) a service provider as *“una empresa proveedora de transmisión, enrutamiento o conexiones para comunicaciones digitales en línea, sin modificación de su contenido, entre puntos especificados por el usuario del material que selecciona, o una empresa proveedora u operadora de instalaciones de servicios en línea o de acceso a redes.”*

Some other Member States emphasize in their definitions of Internet intermediaries the services they provide to users. For example, the Law of Lithuania, in its Article 78-2, defines Internet intermediaries as *“natural or legal person [...] which provides network services, consisting of a transmission of information, submitted by third parties, in a network or providing of a possibility to use a network and (or) storing of the submitted information”*. The Law of the Russian Federation has a similar provision (Article 1253(1)(1)). In the Republic of Korea, Internet intermediaries are also defined as persons who provide services, or operate facilities for such purpose, that allow users to reproduce and interactively transmit works by accessing or going through information and communications networks (Article 2(30)). The Law of the United Kingdom defines “Internet access service”, as an electronic communications service that (i) is provided to a subscriber, (ii) consists entirely or mainly of the provision of access to the Internet, and (iii) includes the allocation of an IP address or IP addresses to the subscriber to enable that access (Article 124N of the Digital Economy Act). France defines Internet intermediaries as individuals or corporate bodies who ensure via online communication services, even free of charge, the public availability of stored signs, writings, images and sounds or messages of any nature provided by recipients of these services (Article 6 of the Law on Confidence in the Digital Economy).

Finally, some Member States have a definition of “service provider”, but without any liability regime. For instance, in Oman it is stated that *“A provider or operator of online services, network access, or associated facilities services”* and *“With regard to transitory connections, a provider of transmission, routing, or connections for direct digital online communications, without modification of their content, between or among points specified by the user, of material of the user’s possession and a content of his choice”* (Article 1(28)).

Overall, **19 Member States** have such provisions.

ii) Identified particularities regarding the scope of liability of Internet intermediaries

Member States have adopted different approaches concerning Internet intermediaries’ scope of liability, regardless whether they have categorized them according to their activities or not. The Internet intermediary is usually not liable if (i) it does not modify or select the content of the transmission, (ii) the transmission of the work is initiated by a person other than the service provider, (iii) it does not select the recipients of the information (iv) it was unaware of the illicit nature of such content or of the facts and circumstances underlying such illicit nature, (v) it acted promptly to remove the information or made it inaccessible as soon as they became aware of it, (vi) it complies with any conditions imposed by the copyright owner of the material for access to that material or has no interference with the right holders in using standard technical measures, and (vii) it has not received any financial benefit directly from the act of infringement in the circumstances.

Some other Member States set out general principles of non-liability. For instance, the Law of Canada states that *“A person who, in providing services related to the operation of the Internet or another digital network, provides any means for the telecommunication or the reproduction of a work or other subject matter through the Internet or that other network does not, solely by reason of providing those means, infringe copyright in that work or other subject matter”* (Section 31(1)(1)). In Singapore, in a Section entitled *“Exemption of network service provider from liability for removal of copy from network”*, non-liability of the Internet intermediary is secured if it takes *“action in good faith”* in relation to the removal of the electronic copy or the disabling of access to the electronic copy (Article 193DA).

Other Member States do not provide any definition of ISPs but establish a general obligation regime. For instance, Mongolia establishes a general obligation for ISPs in Article 25(1): *“An Internet service provider shall be obligated to prevent any copyright violation in websites hosted on its own server and provide authors and right holders with the possibility to enforce their rights”*, but does not specify them in further detail.

Finally, some Member States have created a special authority for the removal of infringing content. For instance, in Italy, Article 14 and 16 of the Regulation allow the *Autorità per le Garanzie nelle Comunicazioni* (AGCOM) to request, following a short administrative procedure that Internet service providers selectively remove or block access to websites hosting allegedly copyright infringing materials, and that on-demand providers remove illegal content from their catalogues and refrain from retransmitting illegal works in their future schedules. In cases of non-compliance with the orders, AGCOM can impose fines. The targets of AGCOM's intervention – in cases of online copyright infringement – are service providers, uploaders of the infringing content and website operators hosting infringing material rather than users.

Overall, **13 Member States** have such provisions.

iii) Identified particularities regarding notifications and counter-notifications

Some Member states have provisions regarding the procedure for right holders to follow when notifying Internet intermediaries of an infringement. Mongolia simply states that *“An Internet service provider shall facilitate the receipt of reports on violation of copyrights and related rights and shall be obligated to close the website in question as soon as such violation is reported”* (Article 25(2)). Article 103 of the Law of the Republic of Korea states that any person who claims that his/her copyright or other rights protected under the Act have been infringed due to the reproduction and interactive transmission of works may call on the online service provider to suspend the reproduction and interactive transmission of such works (Article 103(3)), which the online service provider must then comply with immediately.

Other Member States have adopted provisions on the content of notifications sent to Internet intermediaries as well as counter-notifications. For instance, the Law of New Zealand requires in its Article 92D that a notice *“contain[s] the information prescribed by regulations made under this Act, and be signed by the copyright owner or the copyright owner's duly authorized agent”*. The United States of America has instituted a system of counter notification, which must necessarily be in writing, contain an electronic signature of the author of the notification, the precise identification of the *“material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled”* and finally a *“statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled”* (Section 512(3)). Ukraine has a particular regime: whereas in most legislations, notices are to be sent directly to the hosting providers, rightholders first should try to achieve the removal or blocking of infringing materials through notices sent to website owners and webpage owners. If the website owners or webpage owners remove infringing information from their site or page, respectively, they are not liable for the given

infringement, provided that, within three months, they do not include again infringing copies of the same protected object more than twice (Article 52).

Some Member States require that Internet intermediaries notify the person who has made available the work which is considered to be infringing by the rightholder. For instance, the Law of Singapore states that in case the network service provider has received a counter-notification by the person who made the electronic copy of the work available, it must notify the person who furnished the notice that it will *“take reasonable steps to restore the electronic copy of the material to the network or to restore access to that electronic copy, as the case may be, if it is technically and practically feasible to do so, unless, within 10 working days after the date of such notification court proceedings are commenced by the owner of the copyright in the material”* (Article 193DA(2)(B)). The network service provider must also, after such removal or disabling, expeditiously take reasonable steps to notify the person who made the electronic copy of the material or work available and provide that person with a notice of removal or disabling. In the Republic of Korea, if another person believes that they have a legitimate interest, the online service provider shall promptly notify the presumed right holder and the Internet intermediary shall resume the reproduction and interactive transmission on a scheduled date, unless the claimant of rights files for litigation against the infringement (Article 103(3)).

Finally, it is interesting to note that the Law of the United Kingdom puts in place an obligation for Internet service providers to provide a copyright infringement list to the copyright owner. Indeed, Section 124B of the Digital Economy Act states that *“An Internet service provider must provide a copyright owner with a copyright infringement list for a period if (a) the owner requests the list for that period; and (b) an initial obligations code requires the Internet service provider to provide it”*, clarifying that a copyright infringement list is a list that *“sets out, in relation to each relevant subscriber, which of the copyright infringement reports made by the owner to the provider relate to the subscriber, but does not enable any subscriber to be identified”*.

Overall, **6 Member States** have such provisions.

Summary:

- **21 Member States** have adopted provisions on Internet intermediaries
- **73 Member States** have no provisions on Internet intermediaries

Overall 22% (21 Member States) have provisions on Internet intermediaries

CONCLUSION

According to the mandate given by the SCCR, this scoping study has focused on the general directions that Member States have taken to adapt their copyright legislation to the digital environment in the past ten years. The main objective of this document was to describe the trends and strategies adopted by Member States to adapt their copyright legislation to the digital environment, the aspects of which have been identified together with the WIPO Secretariat.

The mapping of WIPO Member States revealed that almost hundred Member States have adopted and/or updated their copyright laws between 2006 and 2016.

A vast majority of Member States have adopted provisions to address the challenges of the digital environment, in particular regarding computer programs, limitations and exceptions, and digital rights management. For instance, out of a total of 94 Member States:

- 96% of Member States have provisions on computer programs;
- 71% of Member States have wordings that mirror the provisions or are inspired by WIPO-administered Treaties concerning digital rights management; and
- 43% of Member States have adopted provisions on limitations and exceptions specifically adapted to the digital environment, addressing for example e-lending activities of libraries, or online education. 23 Member States also focus on restricting the protection against circumvention of technical protection measures. These exemptions refer to the interoperability of computer programs, encryption research and studying of flaws, protection of personal data, private use of works, and the possibilities for libraries, archives and educational institutions to benefit from the limitations and exceptions they have been granted by law.

Some Member States have provisions that are specifically drafted to adapt the economic rights to the digital environment, such as the right of reproduction in digital formats and the making available to the public in interactive networks. They address for instance the question of digital archiving and temporary reproductions. Some Member States have chosen to highlight either the fact that a communication and making available to the public is done interactively, or through the Internet or focused on electronic or technological aspects.

Only few Member States have gone beyond the provisions of WIPO-administered Treaties, by ensuring that rightholders are remunerated appropriately in the digital environment, for instance by implementing a specific remuneration for digital communication which may be granted, as the case may be, to authors and/or performers and/or producers of phonograms.

Finally, one may observe that topics not covered by WIPO-administered treaties are rarely addressed in the copyright laws of the Member States. Such topics include the liability of internet intermediaries, the questions of user-generated content, data mining or computer-generated works.

The preliminary findings of this scoping study are meant to provide a basis for consideration by the Committee.

APPENDIX

APPENDIX 1. TABLE OF IDENTIFIED MEMBER STATES AND COPYRIGHT LAWS

No.	MEMBER STATE	IDENTIFIED COPYRIGHT LEGISLATION
1	Afghanistan	Law Supporting the Rights of Authors, Composers, Artists and Researchers (Copyright Law), July 21 2008
2	Albania	Law No. 35/2016 of March 31, 2016, on Copyright and Related Rights
3	Argentina	Law No. 11.723 of September 28, 1933, on Legal Intellectual Property Regime (Copyright Law, as last amended by Law No. 26.570 of November 25, 2009)
4	Armenia	Law on 4 July 2006 No. 3R-142 on Copyright and Related Rights (as amended up to 30.09.2013)
5	Australia	Copyright Act 1968 (consolidated as of June 27, 2015)
6	Austria	Federal Law on Copyrights on Literary and Artistic Works and Related Rights (Copyright Act) (as last amended in 2015)
7	Azerbaijan	Law of the Republic of Azerbaijan on Copyright and Related Rights (as amended up to Law No. 636-IVQD of April 30, 2013)
8	Bahrain	Law No. 22 of the Year 2006 relating to the Protection of Copyright and Neighboring Rights
9	Barbados	Copyright Act, 1998 (Cap. 300) (as revised up to 2006)
10	Belarus	Law of the Republic of Belarus No. 262-3 on Copyright and Related Rights May 17, 2011
11	Belgium	Law transposing into Belgian Law the European Directive 2001/29/EC of May 22, 2001 on the Harmonization of Certain Aspects of Copyright and Neighboring Rights in the Information Society, 19 May 2009

		Loi transposant en droit belge la directive européenne du 14 mai 1991 concernant la protection juridique des programmes d'ordinateur (mise à jour 18 juillet 2007)
12	Benin	Law No. 2005-30 of April 5, 2006, relating to Copyright and Related Rights of the Republic of Benin
13	Bosnia and Herzegovina	Copyright and Related Rights Law July 13, 2010
14	Botswana	Copyright & Neighboring Rights Act, 2000 (Act No. 6 of 2006)
15	Brazil	Law No. 9.610 of February 19, 1998 (Law on Copyright and Neighboring Rights) "Normative Instructions (1 and 2) from Ministry of Culture, May 2016
16	Bulgaria	Law on Copyright and Neighboring Rights (as amended in 2011)
17	Cabo Verde	Decree-Law No. 1/2009 of April 27, 2009, revising the Law on Copyright
18	Canada	Copyright Act (R.S.C., 1985, c. C-42) 22 June 2016
19	Chile	Ley N° 17.336 Propiedad Intelectual 29 October 2016
20	China	Copyright Law of the People's Republic of China of February 26, 2010 (amended up to the Decision of February 26, 2010, by the Standing Committee of the National People's Congress on Amending the Copyright Law of the People's Republic of China)
21	Colombia	Andean Decision 351 of 1993 <u>Law 23 of 1982</u> <u>Law 1032 of 2010</u> <u>Law 1403 of 2010</u>

		<u>Law 1835 of 2017</u>
22	Costa Rica	Law No. 6683 on Copyright and Related Rights (as last amended by Law No. 8834 of May 3, 2010)
23	Côte d'Ivoire	Loi n° 2016-555 du 26 juillet 2016 relative au droit d'auteur et aux droits voisins
24	Croatia	Copyright and Related Rights Act and Acts on Amendments to the Copyright and Related Rights Act (OG Nos. 167/2003, 79/2007, 80/2011, 141/2013 & 127/2014)
25	Democratic People's Republic of Korea	Copyright Law of the Democratic People's Republic of Korea (as amended by Decree No. 1532 of February 1, 2006, of the Presidium of the Supreme People's Assembly)
26	Denmark	Consolidated Act on Copyright 2014 (Consolidate Act No. 1144 of October 23, 2014, on Copyright)
27	Djibouti	Law No. 154/AN/06 of 23 July 2006 on the Protection of Copyright and Neighboring Rights
28	Ecuador	Intellectual Property Law (Consolidation No. 2006-13)
29	Estonia	Copyright Act (consolidated text of January 1, 2017)
30	European Union	Directive on the harmonisation of certain aspects of copyright and related rights in the information society 22 May 2001 Directive on the protection of computer programs – 23 April 2009 Information Society Directive 8 June 2000
31	Finland	Copyright Act (Act No. 404 of July 8, 1961, as amended up to April 30, 2010)
32	France	Intellectual Property Code (consolidated version of

		January, 22, 2017) Loi pour la confiance dans l'économie numérique (June 21st, 2004)
33	Georgia	Law of Georgia on Copyright and Neighboring Rights (last amended as of May 4, 2010)
34	Germany	Gesetz über Urheberrecht und verwandte Schutzrechte (Urheberrechtsgesetz), 20.12.2016
35	Granada	Copyright Act (Cap 67, Act No. 21 of 2011)
36	Greece	Law No. 2121/1993 on Copyright, Related Rights and Cultural Matters (as amended up to Law No. 4281/2014)
37	Guatemala	Law on Copyright and Related Rights (Decree No. 33-98, as amended up to Decree No. 11-2006 of the Congress of the Republic)
38	Guinea	Loi n° 00342 du 12 avril 2012 fixant le régime de la propriété littéraire et artistique en république de Guinée
39	Holy See	Law No. 132 of March 19, 2011 on Copyright and Related Rights
40	Hungary	Act No. LXXVI of 1999 on Copyright (consolidated text as of January 1, 2007)
41	Iceland	Copyright Act No. 73 of May 29, 1972, as last amended by Act No. 97 of 30 June 2006
42	India	Copyright Act, 1957 (as consolidated up to Act No. 49 of 1999) The Copyright Amendment Act (2012)
43	Ireland	Copyright and Related Rights (Amendment) Act 2007 (S.I. No. 39 of 2007) (replacing ss 58, 226)
44	Israel	

		Copyright Act, 2007 (as amended on July 28, 2011)
45	Italy	<p>Law No. 633 of April 22, 1941, for the Protection of Copyright and Neighboring Rights (as amended up to Decree 15 gennaio 2016)</p> <p>Decree of April 9, 2003 n. 70 and its Regulation (DELIBERA N. 680/13/CONS)</p>
46	Japan	Copyright Act (Act No. 48 of May 6, 1970, as amended up to Act No. 35 of June 24, 2015)
47	Kazakhstan	Law of the Republic of Kazakhstan No. 300-V of April 07, 2015, on Amendments and Addenda to Certain Legislative Acts of Kazakhstan on Intellectual Property Issues
48	Kyrgyzstan	Law of the Kyrgyz Republic on Copyright and Related Rights (as amended up to Law No. 14 of January 21, 2014)
49	Lao People's Democratic Republic	Law No. 01/NA of December 20, 2011, on Intellectual Property (as amended)
50	Lithuania	Law on Copyright and Related Rights No. VIII-1185 of May 18, 1999 (as amended on October 7, 2014 – by Law No. XII-1183)
51	Malaysia	Copyright Act 1987 (As at 1 July 2012))
52	Maldives	<p>The Copyright & Related Rights Act</p> <p>October 21, 2010</p>
53	Mali	Law No. 08-024 of July 23, 2008 laying down the Regime of Literary and Artistic Property in the Republic of Mali
54	Malta	Copyright Act of 2000 (Chapter 415) as amended up to Act No. VIII of 2011
55	Mauritania	Loi n°2012-038 relative à la propriété littéraire et artistique

56	Mauritius	Copyright Act 2014 April 21, 2014
57	Mexico	Federal Law on Copyright (as amended up to January 14, 2016)
58	Monaco	Loi n° 491 du 24/11/1948 sur la protection des œuvres littéraires et artistiques
59	Mongolia	Law of Mongolia on Copyright and Related Rights (as last amended on January 19, 2006)
60	Montenegro	Law No. 07-1/11-1/15 of July 12, 2011, on Copyright and Related Rights (promulgated by Decree No. 01-933/2 of July 25, 2011)
61	Netherlands	Act of September 23, 1912, containing New Regulation for Copyright (Copyright Act 1912, as amended up to July 1, 2015)
62	New Zealand	New Zealand Copyright Act 1994 (No. 143) (reprint as at 1 March 2016)
63	Nicaragua	Law 312/99 (Amendment by Law 577/2006) • Decree 22/00
64	Norway	Copyright Act (Act No. 2 of May 12, 1961, relating to Copyright in Literary, Scientific and Artistic Works Etc.) – Lov 12. mai 1961 nr. 2 om opphavsrett til åndsverk m.v. (åndsverkloven), May 12, 1961. Last amended June 6, 2015, with effect from July 1, 2015.
65	Oman	Royal Decree No. 65/2008 promulgating the Law on Copyright and Related Rights
66	Panama	Law No. 64 of October 10, 2012, on Copyright and Neighboring Rights
67	Peru	Copyright Law (Legislative Decree No. 822 of April 23, 1996)

		Law No. 30276 of November 13, 2014, amending the Copyright Law (Legislative Decree No. 822 of April 23, 1996)
68	Philippines	Republic Act No. 10372, entitled 'An Act Amending Certain Provisions of Republic Act No. 8293, otherwise known as the 'Intellectual Property Code of the Philippines', and for other purposes' February 28, 2013
69	Poland	Act No. 83 of February 4, 1994, on Copyright and Neighboring Rights (as amended up to May 20, 2016)
70	République du Niger	Ordonnance n° 2010-95 du 23 décembre 2010 portant sur le droit d'auteur, les droits voisins et les expressions du patrimoine culturel traditionnel
71	Republic of Korea	Copyright Act (Act No. 432 of January 28, 1957, as amended up to Act No. 12137 of December 30, 2013)
72	Republic of Moldova	Law No. 212 of July 29, 2016, on Amendments and Supplements to Law No. 139 of July 29, 2010, on Copyright and Neighboring Rights
73	Rwanda	Law No. 31/2009 of 26/10/2009 on the Protection of Intellectual Property
74	Samoa	Copyright Act 1998 (as consolidated in 2011)
75	Senegal	Law No. 2008-09 of January 25, 2008 on Copyright and Related Rights
76	Serbia	Law on Copyright and Related Rights December 11, 2009
77	Seychelles	Copyright Act, 2014 (Act No. 5 of 2014)
78	Singapore	Copyright Act (Cap. 63, 2006 Rev. Ed.) (consolidated as of 31 March 2015)
79	Spain	Texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las Disposiciones Legales Vigentes sobre la Materia (aprobado por el Real Decreto legislativo N° 1/1996 de

		12 de abril, y modificado por la Ley 21/2014, de 4 de noviembre)
80	Sweden	Act on Copyright in Literary and Artistic Works (1960:729), as amended up to April 1, 2011
81	Switzerland	Federal Act of October 9, 1992 on Copyright and Related Rights (status as of January 1, 2017)
82	Tajikistan	Law of the Republic of Tajikistan on Copyright and Related Rights (as amended up to 2009)
83	Thailand	Thailand Copyright Act B.E. 2537 (1994) Copyright Act (No. 2) B.E. 2558 (2015) Copyright Act (No. 3) B.E. 2558 (2015)
84	The former Yugoslav Republic of Macedonia	Law on Copyright and Related Rights, September 8 2010
85	The Russian Federation	Part IV of Civil Code of the Russian Federation adopted by Law No. 230-FZ December 18, 2006 (amended several times up to 2016)
86	Tunisia	Law No. 94-36 of February 24, 1994, on Literary and Artistic Property Law No. 2009-33 of 23 June 2009 amending and supplementing Law No. 94 36 of 24 February 1994 on literary and artistic property
87	Turkey	Law No. 5846 of December 5, 1951 on Intellectual and Artistic Works (as last amended by Law No. 5728 of January 23, 2008)
88	Turkmenistan	Law of Turkmenistan No. 257-IV of January 10, 2012, on Copyright and Related Rights
89	Uganda	The Copyright and Neighboring Rights Act, 2006

90	Ukraine	Law of Ukraine on Copyright And Related Rights No. 3793-XII , December 23, 1993 (amended several times up to 2017)
91	United Kingdom	Copyright, Designs and Patents Act 1988 (c. 48), revised and updated as of (as of Mar. 31, 2016) The Digital Economy Act 2010
92	United States of America	Circular 92 Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code December 2016
93	Uruguay	Law No. 9.739 of 17 December 1937 on Copyright (as last amended by Law No. 18. 046 of October 24, 2006)
94	Uzbekistan	Law of the Republic of Uzbekistan No. 42 of July 20, 2006 on Copyright and Related Rights

APPENDIX 2: WIPO FRAMEWORKS APPLICABLE TO THE IDENTIFIED THEMES

1. The WIPO framework regarding the right of reproduction

Article 9 (1) of the Berne Convention states that *“Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form.”*

The Rome Convention has two relevant provisions. Article 7(1)(c) states that *“The protection provided for performers by this Convention shall include the possibility of preventing: (c) the reproduction, without their consent, of a fixation of their performance: (i) if the original fixation itself was made without their consent; (ii) if the reproduction is made for purposes different from those for which the performers gave their consent; (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.”* Article 10 states that *“Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.”*

The agreed statement of WCT relating to Article 1(4) states that *“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.”*

Article 7 of the WPPT states that *“Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.”* Article 11 states that *“Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.”* Finally, the agreed statements related to Articles 7, 11 and 16 states that *“The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles.”*

In the Beijing Treaty, Article 7 states that *“Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form”*. The agreed statement related to Article 7 states that *“The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.”*

2. The WIPO framework regarding the right to communication to the public, including the right of making available

Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention grant rights of communication to the public for dramatic and musical works, for broadcast works, for recitations of works, for cinematographic adaptations of works and for cinematographic (audiovisual) works.

The Rome Convention states in its Article 7(1)(a) that: *“The protection provided for performers by this Convention shall include the possibility of preventing: (a) the broadcasting and the*

communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation.”

Article 8 of the WCT states that: *“Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”*

Three Articles of the WPPT address this question. Article 2(g) states that *“For the purposes of this Treaty (...) (g) “authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.”* Article 6 states that *“Performers shall enjoy the exclusive right of authorizing, as regards their performances: (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance.”* Finally, Article 10 states that *“Performers 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.”*

In the Beijing Treaty, Article 10 states that *“Performers 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.”* Finally, Article 11 states that *“(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations. (2) Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorization provided for in paragraph (1), they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration. (3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all.”*

3. The WIPO framework regarding the right of distribution and the right of rental

The WCT states in its Article 6 that *“Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.”* Article 7 of the WCT states that *“Authors of computer programs (...) shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works. Paragraph (1) shall not apply, (i) in the case of computer programs, where the program itself is not the essential object of the rental.”* Finally, the agreed statements concerning Articles 6 and 7 state that *“As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.”*

Four Articles of the WPPT address the right of distribution and rental. Article 8 states that *“Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.”* Article 12 states that *“Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms*

through sale or other transfer of ownership. "Article 9 states that "Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer." Article 13 states that "Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them, by or pursuant to, authorization by the producer." Finally, the agreed statements concerning Articles 8, 9, 12, and 13 read: "As used in these Articles, the expressions "copies" and "original and copies," being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

Article 8 of the Beijing Treaty states that "(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership. (2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer". Article 9 states that "(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in audiovisual fixations as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer. (2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers."

Article 11 of the TRIPS Agreement states that: "In respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works. A Member shall be excepted from this obligation in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title. In respect of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental".

4. The WIPO framework applied to remuneration rights

Article 12 of the Rome Convention states that "If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration."

Article 15 of the WPPT states that "Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public [...] For the purposes of this Article, phonograms made available to the public 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 shall be considered as if they had been published for commercial purposes." The agreed statement concerning Article 15 states that "It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity

to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.”

Article 11 of the Beijing Treaty states that “(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations. (2) Contracting Parties may in a notification deposited with the Director General of WIPO declare that, instead of the right of authorization provided for in paragraph (1), they will establish a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may also declare that they will set conditions in their legislation for the exercise of the right to equitable remuneration.” Furthermore Article 12 contains the following provision: “(3) Independent of the transfer of exclusive rights described above, national laws or individual, collective or other agreements may provide the performer with the right to receive royalties or equitable remuneration for any use of the performance, as provided for under this Treaty including as regards Articles 10 and 11.”

5. The WIPO framework applicable to limitations and exceptions

The Berne Convention states in its Article 9(2) that “*It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.*” The Berne Convention also has provisions on, among others, certain free uses of works, illustrations for teaching (Article 10), as well as uses of articles and broadcast works and of works seen or heard in connection with current events, (Article 10bis).

The Rome Convention states in its Article 15 that “(1) Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards: (a) private use; (b) use of short excerpts in connection with the reporting of current events; (c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (d) use solely for the purposes of teaching or scientific research. 2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organizations, as it provides for, in its domestic laws and regulations, in connection with the protection of copyright in literary and artistic works. However, compulsory licenses may be provided for only to the extent to which they are compatible with this Convention.”

The Preamble of the WCT recognizes “*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.*” Article 10 states that “(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. (2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author. “Finally, the agreed statement concerning Article 10 reads: “*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.*”

The Preamble of the WPPT recognizes “the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information.” Article 16 states that “(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.” The agreed statement concerning Article 10 states that “The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.”

In its Article 13, the Beijing Treaty states that “(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works. (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.”

6. The WIPO framework regarding temporary reproductions

The Berne Convention states in its Article 9(2) that “It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

The agreed statement concerning Article 1(4) of the WCT states that “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”.

The agreed statements concerning Articles 7, 11 and 16 of the WPPT state that “The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles”. The agreed statement concerning Article 7 states that “The reproduction right, as set out in Articles 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles”.

7. The WIPO framework regarding the scope of protection of computer programs

Article 4 of the WCT states that “Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.” The agreed statement concerning Article 4 states that “The scope of protection for computer programs under Article 4 of this

Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.”

Article 10.1 of the TRIPS Agreement states that “*Computer programs, whether in source or object code, shall be protected as literary works under the Berne Convention (1971)*”.

8 The WIPO framework applicable to limitations and exceptions regarding computer programs

Article 13 of the TRIPS Agreement states that “*Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder*”.

9. The WIPO framework regarding databases

Article 5 of the WCT states that “*Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.*”. The agreed statement concerning Article 5 states that “*The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.*”

Article 10 (2) of the TRIPS Agreement states that “*Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations shall be protected as such. Such protection, which shall not extend to the data or material itself, shall be without prejudice to any copyright subsisting in the data or material itself*”.

10. The WIPO framework applicable to digital rights management

Article 11 of the WCT states that “*Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.*” Article 12 states that “*Contracting Parties shall 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: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority. (2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.*” The agreed statements concerning Article 12 state that “*It is understood*

that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration. It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.”

Articles 18 and 19 of the WPPT have similar provisions to the WCT.

Article 15 of the Beijing Treaty states that “Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law.” Article 16 states that “(1) Contracting Parties shall 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: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances or copies of performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority. (2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation.” The agreed statement concerning Article 15 as it relates to Article 13: “It is understood that nothing in this Article prevents a Contracting Party from adopting effective and necessary measures to ensure that a beneficiary may enjoy limitations and exceptions provided in that Contracting Party’s national law, in accordance with Article 13, where technological measures have been applied to an audiovisual performance and the beneficiary has legal access to that performance, in circumstances such as where appropriate and effective measures have not been taken by rights holders in relation to that performance to enable the beneficiary to enjoy the limitations and exceptions under that Contracting Party’s national law. Without prejudice to the legal protection of an audiovisual work in which a performance is fixed, it is further understood that the obligations under Article 15 are not applicable to performances unprotected or no longer protected under the national law giving effect to this Treaty.”

11. The WIPO framework applicable to the responsibility of intermediaries

The agreed statement to Article 8 of the WCT reads: “It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11bis(2).”

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