



## **Literary and Artistic Property Facing Digital Technology**

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Concerns grow badly in the field of creative arts due to the dramatic evolution in technology provided by the Wireless Application Protocol, known as (WAP), especially after the availability of transmission and reception of digital content via mobile phones, and the prevalence of new technology to make copies (classic reproduction, downloading, burning of audio files or audio-visual files, ...etc.).<sup>(1)</sup>

These concerns have increased greatly with music files being compressed to half of its traditional size, and with audio files being renovated with high rates in about a century starting from the era of radio transmission and video files, moving to audio tapes "cassettes" and Compact Discs: CD-ROMs,<sup>(2)</sup> until the beginning of this recent era of Cyberspace<sup>(3)</sup> or what is known as the Digital Age,<sup>(4)</sup> and in particular the beginning of the era of Virtual Recording Studios.<sup>(5)</sup>

To address and face all these technological developments, it was unnatural thus to conclude international agreements regulating the use of these technologies, as to avoid affecting the exclusive rights of intellectual property rights owners. The reason behind that the said means are simply means of violation which do not necessarily require legislative confrontation unless the material element was at the same level of novelty. For example, the act of reproduction using updated versions of technology does not require adopting new legislations.

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<sup>(1)</sup> Wipo, Consumer: [http://www.wipo.int/about-wipo/en/info.center/digital\\_age\\_distribution.htm](http://www.wipo.int/about-wipo/en/info.center/digital_age_distribution.htm).

<sup>(2)</sup> Wipo, Distibution: [http://www.wipo.int/about-wipo/en/info.center/digital\\_age\\_distribution.htm](http://www.wipo.int/about-wipo/en/info.center/digital_age_distribution.htm).

<sup>(3)</sup> Wipo, Dissemination: [http://www.wipo.int/about-wipo/en/info.center/digital\\_age\\_Part\\_ii.htm](http://www.wipo.int/about-wipo/en/info.center/digital_age_Part_ii.htm).

<sup>(4)</sup> Wipo, International Music in the Digital Age: [http://www.wipo.int/about-wipo/en/info.center/digital\\_age\\_music\\_intro.htm](http://www.wipo.int/about-wipo/en/info.center/digital_age_music_intro.htm).

<sup>(5)</sup> Wipo, Music in the Digital Age:

[http://www.wipe.int/about-wipo/en/info.center/digital\\_age\\_index.htm](http://www.wipe.int/about-wipo/en/info.center/digital_age_index.htm)

Consequently, the World Intellectual Property Organization (WIPO) concluded two treaties on internet in 1996, the first deals with Copyright<sup>(6)</sup> and the second deals with Performances and Sound Recordings.

In Budapest, specifically on the 23rd of November 2001, the members of the Council of Europe concluded A Convention called the "Convention on Cyber Crime". This Convention focused on computer-related crimes, with the intention of adopting a common criminal policy for protecting the society, and stimulating cooperation in adopting international legislations to face the on-going globalization of computer networks and the potential risks of using such networks in committing crimes. The ultimate goal of the said Convention is the protection of the legitimate interests of copyright and neighboring rights holders vis-à-vis the development of information technologies<sup>(7)</sup> This Convention adopts one single article concerning infringements of Copyright and Related rights,<sup>(8)</sup> or the so-called neighboring rights.<sup>(9)</sup>

Accordingly each Member State is invited to adopt legislative provisions and other appropriate measures, as and when necessary, to address copyright infringement a crime in accordance with its national legislations and laws, and in accordance with the 1971 Act of Paris of the Berne Convention for the Protection of Literary and Artistic Works, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) and the "WIPO" Convention of Copyright 'WCT'.

In Strasbourg, specifically on the 28<sup>th</sup> of January 2003, an additional Protocol to the European Convention was concluded and signed with respect to the criminalization of acts of racism and crimes of xenophobic nature committed through computer systems. It was intended to impose an action plan based on the standards and values of the Council of Europe and on human rights agreements regulating the use of computers and targeting common solutions to be set out in the face of the technological developments.

All this has been associated with an urgent need to develop an integrated system for the management of intellectual property rights in the information society and in the online environment, to address the circulation of audio files, audio-visual works and computer programs, with different techniques over the Internet.

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<sup>(6)</sup> Known as the (WCT).

<sup>(7)</sup> WCT.

<sup>(8)</sup> Offences Related to infringements of copyright and related rights.

<sup>(9)</sup> Droits Voisins.

It is worth noting that the International Federation of the Phonographic Industry (IFPI) has adopted a new term “Manifestation” to express the digital content circulated over the Internet. It is obvious that not every content is classified in the concept of law as a work, but it may be an "expression" of that work, which is also known as a "Digital Object"<sup>(10)</sup>. In other words, there is a distinction between the work which is "immaterial" and the expression of it which is "material".

It was confirmed in 2003<sup>(11)</sup> during the Diplomatic Conference of the World Intellectual Property Organization (WIPO), that 605 million people got connected to the Internet, representing 10% of the population of our planet Earth. Such development is very huge since the number that got connected to the internet in 1999 was only 205 Million people! In addition to that, it was to reach one billion people in 2005! Moreover, the global distribution rates of population using the internet are 37% in North America, 31% in Asia, and 29% in Europe. The modest infrastructure in Africa in the area of telecommunications is considered to be an impediment in this regard. On the other hand, there is a dramatic escalation of the total e-commerce around the globe. In the year 2000 it was worth (433 million U.S. dollars), in the 2002 it was worth (1.9 trillion U.S. dollars) and in the year 2004 it was worth (6 trillion U.S. dollars)?!!

Access is the most important thing the digital environment ,probably offers for digital content in general, is 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. This advantage is also a source of anxiety and concern because the amount of piracy in the field of music has reached 950 million CDs sold in equivalence to 4.3 billion U.S. dollars, and in the field of Cinematic movies the illegal downloading has reached 400.000:600.000 movie every day?!<sup>(12)</sup> And the percentage of the number of listeners to radio broadcasting over the Internet since January 2001 until January 2003, that is in two years only has increased by 749%<sup>(13)</sup>.

Certain items were added to the following two web conventions as follows:

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<sup>(10)</sup> Mrs. Taja Koskinen-Olson.

<sup>(11)</sup> Dr. Mihaly Fiscor, Protection of Copyright and Related Rights in the Digital Context: The WIPO "Internet Treaties", WIPO-ESCWA/IP/BEY/03/6, April 2003: The WIPO-ESCWA Arab Regional Conference on Recent Developments in the Field of Intellectual Property (Beirut. May 5 and 6, 2003) No.16, p.3.

<sup>(12)</sup> Ibid, p.5.

<sup>(13)</sup> Ibid, p.5.

### **A- *The WIPO Copyright Treaty (WCT):***

According to Article (20) of the Berne Convention Member States are authorized to enter into agreements to grant wider rights to authors than those they were granted by the WIPO Treaty or contain other provisions which are not inconsistent with the said Treaty. Article (1) of the WCT adopted an explicit provision as to prohibit interpretation of the Treaty in a way that reduces or minimizes the level of protection granted by the Berne Convention.

The WIPO Treaty also added the following:

- (1) Member States shall comply with Articles 1 to 21 of the Berne Convention and its Appendix (Articles 1 to 4 of the WCT).
- (2) Member States of the Berne Convention as well as those of the WIPO may become party to this Treaty (Article 17 of the WCT).
- (3) A Safeguard Clause (Article 1(2) of the WCT), where nothing in this Convention shall affect or minimize the protection granted to the rights of authors of literary and artistic works.
- (4) Highlighting relevant provisions of the TRIPS Agreement for the protection of computer programs, databases and the right of commercial rental.
- (5) The explicit recognition of the Right of Distribution of Copies of cinematographic works, and the enforcement of a system of equitable duration of protection of photographic works and other works, leaving the question of exhaustion of rights to national legislations.

### **B- *The WIPO Performances and Phonograms Treaty (WPPT):***

- (1) This Treaty referred to some Articles of the Rome Convention, specifically Articles 3(2) and 3(3) regarding the standards of protection.
- (2) Member States shall respect their obligations regarding the Rome Convention (Article 1(2)).
- (3) Paying attention to role performers (Artists) and producers of Phonograms, not broadcasting organizations.

Problems of the Digital Era will be shown as follows regarding the classification adopted by the two WIPO Conventions (WCT) and (WPPT):

**A- *The Right of Reproduction:*** it does not mean reproduction on certain devices but the *transient, temporary* or *incidental* reproduction upon

the request of the user of the work even by the way of *browsing*<sup>(14)</sup>, where the debate arises as to whether the process of temporary or transient reproduction in this regard serve the interests of the rights holders or not?

**First Theory:** The sufficiency of the Berne Convention (Article 9(2)): special cases which are not inconsistent with the normal exploitation of works, performances and Phonograms and do not unreasonably affect the legitimate interests of rights holders (3 conditions known as the “Three-step Test”).

**Second Theory:** The prohibition of excessive reproduction (Too Much Reproduction), taking into consideration the extent of excessiveness: the duration of the process of reproduction in seconds or minutes or hours?

**Third Theory:** Keeping the concept of reproduction unchanged and allowing certain limitations to transient or temporary reproduction in some justified cases.

Choosing the adequate theory for application requires the definition of the concept of reproduction. Copying or reproduction means the “fixation” of the work through a device. Fixation in this case contradicts with “stability”, which requires proof of any transient, temporary or accidental storage as long as it does not affect the normal exploitation of the work.

**B- The Right of Interactive Transmission:** which means the transfer of protected material via the Internet, so the question which arises is whether the right of the making available to the public or the right of distribution constitutes a part of the right of interactive transmission?

This right was described as making the work 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, leaving the classification of the work to each Member State to decide whether it be the right of distribution or the right of reproduction or any other right, and this solution was called the (*Umbrella Solution*)<sup>(15)</sup>.

**C- Limitations and Exceptions:** The two WIPO Conventions (WCT, Article 10) and (WPPT, Article 16) agree that every Member State has the right to impose limitations and exceptions subject to three conditions i.e. applying on special cases, not inconsistent with the normal exploitation of works, performances and phonograms and do not unreasonably affect the legitimate interests of rights holders.

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<sup>(14)</sup> Ibid, p. 7 and what follows.

<sup>(15)</sup> Ibid, p. 14 and what follows.

It is worth to be noted that Article (10) of the WCT and Article (16) of the WPPT impose this limitation of the three-step test on all of the economic rights of authors, performers and producers of phonograms.

**D- *Electronic Right Management Information:*** Article (1) of the WCT as well as Article (18) of the WPPT enforced Member States to:

- (1) Face the reproduction or distribution of tools or devices that help remove or alter any electronic rights management information without authority.
- (2) Provide adequate legal protection and effective legal remedies by means of Access Control or Copy Control against the circumvention of effective technological measures.
- (3) Disengage any devices or tools that help in the circumvention of effective technological measures whether these devices are intended to perform these actions from the start or are used marketing.
- (4) Face individual tools or downloaded ones that perform the action of the circumvention of effective technological measures<sup>(16)</sup>.

It is also worth noting that the study of Dr. Uma Suthersanen<sup>(17)</sup> emphasized that there are three challenges of digital technology that face intellectual property rights protection: identical reproduction of original works, lost profit and lack of control over technologies used in the digital exploitation of works.

Some solutions were proposed as will be seen later due to the ongoing revision of most of the Treaties and Conventions. The Berne Convention in Berlin (1908) was revised to include cinematography and phonograms, then the Rome Convention (1928) was revised to include broadcasting, afterwards in Brussels (1948) it was revised to include television. The European directive issued in 2001 as to copyright in the information society<sup>(18)</sup> explicitly referred to the right of communicating the work to the public and the right of personal use for natural persons only and for non-commercial purposes provided for equitable remuneration of rights holders and taking into consideration the extent to which technological protection measures were applied. Furthermore, the Act that was issued in the United States of America known as the Digital Millennium Copyright Act (DMCA) enforced Internet Service Providers

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<sup>(16)</sup> Ibid, p. 14 and what follows.

<sup>(17)</sup> Dr. Uma Suthersanen, Copyright the Internet: Risks and Opportunities for Authors and Composers, WIPO National Seminar on Copyright and Collective Management, WIPO/CCAA/MCT/03/1, November 28, 2003.

<sup>(18)</sup> EC Copyright in the Information Society Directive 2001: Directive 2001/ 29/ EC Adopted on April 9.2001.

(ISP) to respond positively to any notice from the rights holders that deals with any infringement of their rights whether it be by deletion or by denial of access so that no legal action could be taken against them, which is known as “Notice and Takedown”. In addition to the above, the European Directive for the protection of databases<sup>(19)</sup> aims at protecting these databases against collecting information, illegal use of abstracts and digests or the reuse of these databases.

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Certain solutions were proposed as follows<sup>(20)</sup>:

- (1) ***The Traditional Solution:*** the Collective Management of Rights to create a unified front in the face of infringements of the monopoly of rights holders.
- (2) ***The Modern Solution:*** the Digital Right Management (DRM).
- (3) ***The Inclusion of Cautionary Information:*** the Right Management Information (RMI) by means of watermarking to identify the author of the work, the terms of use, the code number and the bar code to be used. These data if printed for example on a movie presented in a cinema, will allow producers to know the source.
- (4) ***Anti-Circumvention Devices:*** for example, passwords, encryption, scrambling programs or Secure Digital Music Initiative (SDMI) which is a technology used to prevent the listening to illegal copies of music on devices used for that purpose.
- (5) ***Collecting royalty on the devices used for the storage of protected materials or for operating these devices.***

At the end of her study, Dr. Uma Suthersanen emphasized her optimism that the Copyright Act will protect rights holders against modern technology and the greatest danger comes from the users and consumers themselves who deal with certain technologies that facilitate copying and free use, and that the free internet service provides for all, without the control of any natural or legal person, free copying and downloading. Needless to say that “*Gnutella*” allows the search for any data and sends back its response to the consumer without reference to the file source<sup>(21)</sup>.

The two Internet Conventions provide the rights of authors and holders of neighboring rights, which are traditional rights offered by the Berne Convention to authors and by the Rome Convention to the

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<sup>(19)</sup> Database Protection Directive No. 96/9/EC OF March 11, 1996.

<sup>(20)</sup> Dr. Uma Suthersanen, Op.Cit, p. 7 and the following pages.

<sup>(21)</sup> Ibid, p. 9.

neighboring rights holders. The purpose of these two conventions was to bridge the gaps among different legal systems, aiming at maintaining coherence and consistency with regard to all rights holders. The two Internet Conventions emphasize<sup>(22)</sup> the fact that copyright and the related rights under these Conventions will not be prejudiced.

It is not possible though to talk about the exploitation of music by sharing it online without prior written consent of authors and related rights holders. The following three cases from the United States of America illustrate this situation, as follows:

**A- *The Audio Home Recording Act (AHRA)*:** this Act was issued to maintain a balance between the rights and interests of manufacturers of audio home recording devices and the rights of composers, performers and producers of sound recordings. This Act was based on three elements:

- (1) Adding a chip to audio recording devices to prevent the making of copies of audio works.
- (2) The payment of the manufacturers of 8 US dollars per device as well as 3% of the price of the digital medium and distributing the collected sum among the rights holders.
- (3) Non pursuing those who perform any audio home recording.

**B- *The RIO Case***<sup>(23)</sup>: This case was filed at the Ninth Circuit, Court of Appeals. The case was called under the name of the device that the company markets and distributes. This device enables the storage of MP3 files copied from other personal computers either by changing the sound track to compact MP3 to be stored directly on computer hard drives or by downloading MP3 files directly from the Internet<sup>(24)</sup>.

The Ninth Court ruled in the 15<sup>th</sup> of June 1999<sup>(25)</sup> that transferring MP3 files from the computer hard drive to RIO devices is allowed and that this action is not subject to liability. This rule was considered a historic victory to the Recording Industry Association of America (RIAA).

**C- *Napster Case***<sup>(26)</sup>: This case was filed at the same Ninth Circuit, Court

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<sup>(22)</sup> Ibid, p. 9.

<sup>(23)</sup> The Recording Industry Association Of America C/Diamond Multimedia: RIAA C/Diamond Multimedia.

<sup>(24)</sup> Known as "Ripping a CD".

<sup>(25)</sup> Case No. 98-56727.

<sup>(26)</sup> The Recording Industry Association Of America C/Diamond Multimedia: RIAA C/Diamond Multimedia.

of Appeals in which the dispute was about the possibility of reproducing, downloading, uploading, transferring or distributing of Phonograms of copyrighted materials. The Court ordered on the 12<sup>th</sup> of February 2001 that the said acts are not permitted. This decision was considered a historic victory for the music industry and that court order partly compensated the company for the negative effects of the RIO case.

All of the above shows that modern technology imposes certain challenges and that the public has certain needs that should be met. These technological challenges are represented in the ongoing technological availability of knowledge, while the pressing need of the public is continuous free access. Hence, there was an obligation to enforce certain measures to ensure that rights holders enjoy their rights and that their creativity continues to flow within a framework of legitimacy.

In this regard, we emphasize that the Egyptian law No. 82 for the year 2002 along with the majority of similar Arab Laws, the Model Law of copyright and neighboring rights and the New Version of the Arab Treaty on Copyright and Neighboring rights adopted by The Arab League prohibit any use of protected works without the prior written consent of the right holder. Moreover, the legislators of Arab Laws particularly emphasized that access to telecommunication and information networks is not lawful.

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As a matter of fact, art -especially the music- is the most universal language performed and received. In fact, music addresses the feelings directly and it does not need the vision of eyes but the hearing of ears. It is through music our emotional state become consistent with our psychological state, either by transmitting joy to us, happiness, sadness or awe. For all of the above music was always inherent to human activity whether it be a concert, a wedding, a funeral, or memorial meetings.

However, it is not possible to oblige creative authors of to leave their works to be pirated and used by the public without access control or equitable remuneration that allows the creative composer in the end to pursue his profession and be ensured that it will be the sole profession that he could earn his living from.

We should not ignore that only few authors or performers earn millions of dollars, but nonetheless their number is still limited not exceeding 8% of the total number of creators, the majority is still struggling to gain the minimum wages applicable by law in their countries!