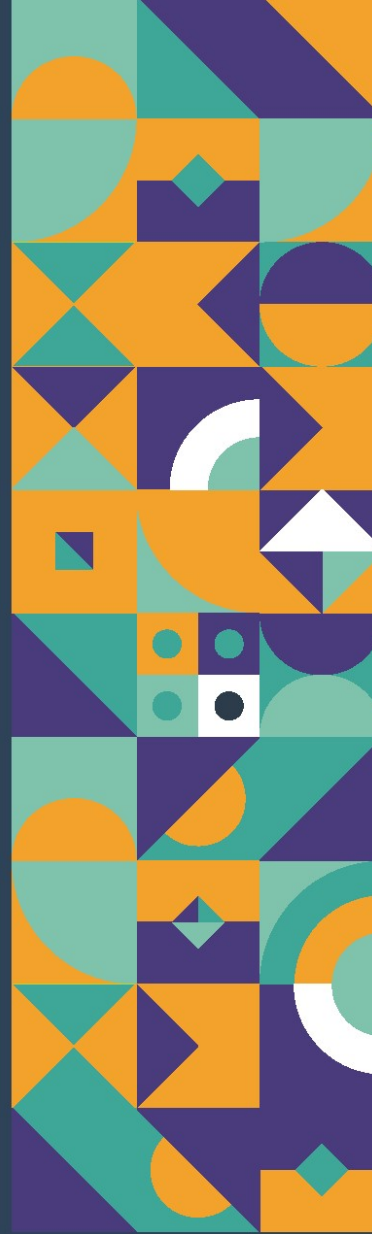




Guidelines for Ratification/Accession and Domestication of International Instruments on Copyright and Related Rights



**ARIPO Guidelines for
Ratification/Accession
and Domestication of
International Instruments
on Copyright and
Related Rights**

**ARIPO Office
Harare, Zimbabwe
2019**

ARIPO Guidelines for Ratification/Accession and Domestication of International Instruments on Copyright and Related Rights

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PREFACE

The Lusaka Agreement establishing the African Regional Intellectual Property Organization (ARIPO) sets out one of the objectives of the Organization as “to promote the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole;” ARIPO has taken the initiative to assist the Member States by developing ‘Guidelines for Ratification/Accession and Domestication of International Instruments on Copyright and Related Rights’. The Guide was adopted by the 42nd Session of the Administrative Council held at Windhoek, Namibia from 19 to 23 November 2018. The Guide addresses the need and benefits of international treaties to ARIPO Member States and can help to persuade their Governments to expedite the process of either ratifying/acceding to International Copyright and Related Rights Instruments and domesticate the Treaties in their National laws for the benefit of the right holders and creative industries in the respective countries.

ARIPO had earlier in 2016, developed Guidelines for the domestication of the Marrakesh Treaty. This has proven to be successful as most ARIPO Member States are joining the Marrakesh Treaty.

We hope the Guidelines for Ratification/Accession and Domestication of International Instruments on Copyright and Related Rights will be a very useful tool that will persuade Governments to ratify/accede and domesticate the International Copyright Instruments for a level playing field, increase foreign direct investment and stimulate socio-economic growth in the countries.

Fernando dos Santos

Director General

1.0 INTRODUCTION

The African Regional Intellectual Property Organization (ARIPO) is committed to promote copyright and related rights and this is well captured in the objectives of the Organization under Article III of the Lusaka Agreement which include:

- a) to promote the harmonization and development of the intellectual property laws, and matters related thereto, appropriate to the needs of its members and of the region as a whole; and*
- b) to promote, in its members, the development of copyright and related rights and ensure that copyright and related rights contribute to the economic, social and cultural development of members and of the region as a whole.¹*

Over time, there have been significant developments in the copyright sector, thus the need for ARIPO Member States to ratify or accede to more recent copyright treaties such as the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT), WIPO Performances and Phonograms Treaty (WPPT), The Beijing Treaty for the Protection of Audiovisual Performances (BTAP) and the Marrakesh Treaty for the Protection of the Visually Impaired Persons (MT). In 2016, ARIPO published the Guidelines for the Domestication of the Marrakesh Treaty, which is a useful tool for the Member States.² Currently not many of the Member States have taken full advantage of the international copyright treaties and as such,³ fail to create a conducive environment to protect and advance copyright at the national level.

¹ Emphasis our own

² https://www.aripo.org/wp-content/uploads/2018/12/ARIPO_Guidelines_for_the_Domestication_of_the_Marrakesh_Treaty.pdf

³ This is the case even though some Member States have signed onto certain international copyright treaties

It is important to provide clear guidelines for the ratification of the treaties that will facilitate the process of enacting or reviewing national legislation to take cognisance of these benefits.

These guidelines will serve as a formal structure for which Member States can use to ratify or accede to the international treaties, they are parties to. It will serve to assist Member States in making international instruments applicable at the national level. Domestication makes international conventions applicable at the domestic level thus making it possible to implement them for the benefit of citizens.

1.1 Brief Background

Protection of copyright and related rights in most ARIPO Member States can be traced to the advent of the colonial era where the Ordinances were promulgated and after independence, the provisions were carried over into the laws. It is important to note that over the years, several ARIPO Member States have revised their copyright laws or passed new laws while others are yet to make the necessary revisions to update the laws.

Many of the laws were recently updated to incorporate the recent developments at both national and international level with many of them establishing or enhancing administrative structures such as copyright offices and collective management organisations. However, there are various challenges faced by different countries especially in relation to ratification/accession and domestication of the international instruments.

The Berne Convention is the oldest international treaty in the field of copyright. The original text has undergone various revisions with the latest being the Paris Act of 1971. The aim

of the Berne Convention is to provide uniform protection of copyright and related rights.⁴

Works of authors in a Member State are automatically protected in all countries party to the Convention, with the result that these authors may derive financial benefits from the expansion of markets for their works. As a consequence, there is no discrimination amongst Member States of the Convention, thus, a country becomes part of the international system for protection of authors' rights, and by extension, the international trading system for goods and services protected by copyright. This is important for exchange of culture, entertainment, information, and technology.

Ratification of/Accession to the Convention demonstrates a willingness to exert the political will necessary to protect the rights of authors from other countries. This may also be a pre-condition to successful international cooperation, including attracting foreign investment in sectors of the economy other than intellectual property.

It is important to note that most of the ARIPO Member States that have ratified or acceded to the Berne Convention⁵ have taken on the responsibility of ensuring that their citizens enjoy minimum standards of protection as laid out in the Berne Convention and carried over to the TRIPS Agreement.⁶

Only three⁷ ARIPO Member States have not acceded to the Berne Convention. It is notable that the general principles espoused in the Berne Convention have been included in the WIPO Internet Treaties as well as the Beijing Treaty.

⁴ The Berne convention in its preamble seeks, "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.

⁵ Berne Convention for the Protection of Literary and Artistic Works, 1886

⁶ The Berne convention in its preamble seeks, "to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works.

⁷ Uganda, Sierra Leone and Somalia

1.2 Objectives of the Treaties

The WCT, WPPT and Beijing Treaties seek to update and supplement other copyright and related rights treaties primarily to respond to developments in technology and in the marketplace. Since both the Berne Convention and the Rome Convention were last revised in the middle of the 20th Century, new types of works, new markets, and new methods of use and dissemination have come up.

The WCT, WPPT and the Beijing Treaty address the challenges posed by digital technologies, and in particular access and dissemination of protected material over digital networks such as the Internet.

The WCT deals with the protection for authors of literary and artistic works, such as writings and computer programs; original databases; musical works; audiovisual works; works of fine art and photography. The WPPT deals with protection of rights of performers and producers of phonograms. The Beijing Treaty on the other hand deals with the protection of the rights in audiovisual performances.

Contracting States are required to provide for the minimum rights, allowing creators to control and/or be compensated for the use of their creations by third parties. These Treaties ensure that the owners of those rights are adequately protected when their works are disseminated through new technologies such as especially through the Internet.

1.3 Importance of Ratification/Accession and Domestication of the Treaties

It is important to note that the copyright mandate in ARIPO is relatively new in comparison to industrial property. ARIPO has done a comparative study on the adherence to international copyright treaties by Member States and it is surprising that there are countries, which have signed treaties but have not ratified them. This may be attributable to various factors, one of which is lack of specific guidelines on ratification or accession and domestication of the same depending on whether the country is a monist or dualist.

Previous studies by ARIPO⁸ indicate that although many of the ARIPO Member States had signed various International Treaties on the protection of copyright and related rights, few had ratified the treaties. It is notable that there are a few Member States that did not sign and are yet to accede to them. It is important for Member States to adhere to International Norms for the benefit of the rights holders and the creative industry as a whole.

The following paragraphs provide the benefits of ratification in relation to the various treaties/agreements, namely the WIPO Performances and Phonograms Treaty, The WIPO Copyright Treaty and the Beijing Treaty for the Protection of Audiovisual Performances.

These treaties were adopted to update the existing international laws in light of the technological advances especially in relation to the Internet. The WIPO Copyright Treaty and the

⁸ Comparative Study on Copyright Laws of ARIPO Member States (Botswana, Ghana, Kenya, Rwanda, Sierra Leone & Uganda) and their adherence to international instruments on Copyright and Related Rights, Vol. 1, 2016 and Comparative Study on Copyright Laws of ARIPO Member States (Botswana, Ghana, Kenya, Rwanda, Sierra Leone & Uganda) and their adherence to international instruments on Copyright and Related Rights, Vol. 2, 2017 .

WIPO Performances and Phonograms Treaty are normally referred to as the WIPO Internet Treaties. Although the Beijing Treaty was adopted later, it more or less addresses the same issues but in relation to audiovisual performances. The treaties provide economic incentives to rights holders in the digital environment and more so in relation to electronic commerce. This helps in the development of sustainable national copyright industries through protection of the industry and also attracts foreign direct investment.

1.3.1 Uniformity in legal provisions

The primary importance of adhering to international treaties, such as the Berne Convention, is to ensure a uniform system of copyright protection. Thus, being a signatory of the International Copyright Treaties or Conventions illustrates a commitment on the part of the signatories and they are accordingly expected to set systems within their jurisdictions to observe their international commitments. The Berne Convention provides the minimum standards of protection.

1.3.2 Protection across borders (International protection)

Secondly, copyright, like all other intellectual property rights is territorial and there is need to have regional and national laws to ensure protection beyond the borders. This has become even more important in the digital environment where works can be accessed and disseminated from any country. For instance, WCT parties who are also members of the WTO, bound by the TRIPs Agreement are already under the obligation to provide most of the rights under the WCT to other Member States.

This is based on the principle of national treatment that is espoused in the treaties. Parties to the Treaty are required to

offer the same protection to nationals of other states within their countries as they would to their own nationals. This is quite important especially in the digital environment.

1.3.3 Domestication will encourage investment in the sector

Domestication of the treaties, more so in the ARIPO Member States encourages outside investment and provides the necessary legal framework for the creation, dissemination and access to works. Creators are also able to exploit their works over the Internet within a structured legal environment without the use of physical copies of the works as most copyright works are digitised.

1.3.4 Allows for competition among authors

It is important to note that protection of foreign copyright works allows the domestic authors to compete on a fair level with the foreign rights holders. If the foreign works are not protected, they are likely to disadvantage the local rights holders as they can be used without licences and create an unfair playing field. A good example is when foreign sound recordings were not protected in Kenya prior to the enactment of the Copyright Act No. 12 of 2001 (now Chapter 130 of the laws of Kenya), there was an influx of foreign sound recordings that were cheaper than the local works.

1.3.5 Promotion of electronic commerce

As earlier stated, the copyright works are digitised and can be created, disseminated and accessed over the digital networks. This has been enhanced by increased Internet bandwidth, which allows for real time access of audio-visual works, books and other texts, performances, sound recordings and multimedia works. It is imperative that the legal

framework provides for the protection of the same, which is through the ratification/accession and domestication of these international treaties. The treaties have attempted to address some of the issues raised although the basic principles of copyright and related rights still apply.

The deployment of technological protection measures and rights management systems is one way through which this can be done but one cannot rely on national legislation alone due to the trans-national nature of e-commerce in relation to copyright and related rights. These measures help in enforcement of the rights in the digital environment.

In addition, the recognition of rights such as the rights of making available provides an avenue for further exploitation of the works across the borders and this may be through the collective management of copyright and related rights. The legal system at national level has to take into account the changing technological landscape and at the moment the adherence to these three international treaties provides the necessary legal framework.⁹

1.3.6 Contribution to the National Economy

The economic importance of copyright and related rights in ARIPO Member States cannot be underestimated. The economic contribution of copyright-based industries is up to 5.3% of the Gross Domestic Products in some of the Member and Observer States.¹⁰ This can be directly linked to the protection of copyright and related rights at both national and international level. Effective copyright protection attracts investment; both foreign and domestic.

⁹ It is important to note that technology keeps changing especially in the last twenty years. There are new challenges in relation to dissemination and access through disruptive technologies, which may not have been envisaged or covered by the WIPO Copyright Treaties and the Beijing Treaty.

¹⁰ Kenya (5.3%), Malawi (3.46%), Tanzania (3-4.6%) and South Africa (4.11%)

1.3.7 Additional Benefits of each Treaty

In addition to the above, the specific treaties have benefits that are enumerated as below:-

1.3.7.1 Beijing Treaty

WIPO Beijing Treaty on the Protection of Audiovisual Performances updates the protection of audiovisual performers in the digital environment. The benefits specific to ratification/ accession to this treaty include:-

- (i) Local producers and performers will enjoy economic rewards when their films, TV series and other audiovisual products are screened or otherwise made available abroad;
- (ii) Protection of the works online is enhanced especially in relation to the provision for technological protection measures as well rights management systems.
- (iii) It will provide protection as well as encourage the use of works beyond the national borders.

1.3.7.2 WIPO Copyright Treaty (WCT)

The WIPO Copyright Treaty, as earlier stated seeks to ensure that; -

- (i) Contracting States provide legal remedies against the circumvention of technological protection measures used by authors to protect their work/s, and will extend to third countries that are also contracting states. This is very important in the digital environment.
- (ii) Contracting States provide legal remedies against the removal or alteration of information, such as data that identify works or their authors, necessary for the management

(e.g., licensing, collecting and distribution of royalties) of their rights ("rights management information");

- (iii) Enforcement procedures are available under Contracting Parties' domestic laws so as to permit effective action against any act of infringement of rights covered by the Treaty. Thus, if an infringement occurs in one of the Member States online, it will be possible to follow and possibly take the requisite legal action.

1.3.7.3 WPPT

The WIPO Performances and Phonograms Treaty:-

- (i) Provides for the single equitable remuneration to the performers and producers of sound recordings for the direct or indirect use of phonograms, published for commercial purposes, broadcasting or communication to the public.
- (ii) This provision is optional but where it is applied it is of benefit to the rights holders and can be claimed in third countries if it is also protected there. Ratification ensures that the principle of national treatment is applied.

It is critical for Member States to ratify/accede and domesticate the treaties. The ratification and subsequent domestication of the Treaties shows that the multilateral norm-setting system as embodied by WIPO can function well to provide important and sustainable protection for authors and rights holders in the dynamic world of technology.

2.0 GUIDELINES FOR RATIFICATION / ACCESSION AND DOMESTICATION OF TREATIES

2.1 Guidelines for Ratification / Accession to Treaties

Ratification or accession to treaties is within the purview of national legislation, which provides for the procedures required at national level. In some countries, this may be entrenched in the Constitution or they may have a specific law on the ratification/accession and implementing regulations.

The Ministry in charge of matters of copyright and related rights or the relevant government agency shall take the lead role and make the document available to the public for scrutiny and comments. Some of the issues to be addressed include; the objectives of the Treaty, the benefits, as well as challenges.

This may be followed by consultations between the stakeholders. Once this has been done, each country should follow the prescribed format for the ratification of or accession to the Treaty. One of the most important steps is to have either Cabinet¹¹ approval or Parliamentary approval or both; this will depend on the laws of the country. For instance, in some ARIPO Member States such as Kenya and Uganda, ratification and accession is done within the provisions of the Treaty Making and Ratification Laws.

Once the treaty has gone through the consultation phase, the law will determine whether the approval will be first done by the Executive then the Parliament or vice-versa. However, where there is no procedure set out in the law for the process

¹¹ In Kenya, it is the Treaty Making and Ratification Act No 45 of 2012 and in Uganda, Ratification of Treaties Act of 1998

of ratification/accession, the countries may be guided by the Vienna Convention on the Law of Treaties (1969) if they are parties to the Treaty.

2.2 Guidelines for Domestication of Treaties

The domestication of international conventions makes international instruments applicable at the national level. Domestication makes international conventions applicable at the domestic level thus making it possible to implement them for the benefit of citizens.

International Conventions are concluded after a process of negotiation by State Parties. Treaties are legally binding only for those States that have ratified/acceded to them and have agreed to be bound by their provisions. They establish the minimum standards at International level.¹²

A country may ratify a Treaty but register its reservations to that treaty indicating that, while it is bound by most of the provisions, it does not agree to be bound by certain specific provisions, as provided for under Article 2 of the Vienna Convention on the Law of Treaties which defines reservations as a *“unilateral statement, however phrased or named, made by a state, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or modify the legal effect of certain provisions of the treaty in their application to that State”*.

Reservations are accepted only if they do not defeat the object and purpose of the Treaty. The Vienna Convention¹³ allows countries to make reservations unless they are *“incompatible with the object and purpose of the treaty”*.

¹² R. Shabbat. 'Practice and Methods of International Law' (New York: 1984) p 27

¹³ Article 19

The status of international conventions within a domestic legal system is generally determined by domestic law. Every state has its own standard way of domesticating international conventions depending on its national legal and political systems, which may be applied on every international convention. Domestication ensures that the provisions of the conventions are applicable to the country.

Most treaties are not self-executing and vary in the way they are domesticated. In some Countries Treaties are superior to domestic law, in others, Treaties are given Constitutional status and in yet others only certain provisions of a Treaty are incorporated into domestic law. Rules governing the application of treaties in states vary depending on two doctrinal considerations; dualism and monism.

According to the monist approach, national law is linked and subject to international law with regard to all State organs. Both international law and domestic law are applied at the State level to govern State affairs. Treaties, once ratified, are regarded as directly applicable and have force of law. In the event of a conflict in the application of law, international law prevails. Dualists on the other hand, regard international and national law as completely separate. In addition to ratification, there has to be an act of domestic legislation before the treaty provisions can be applied domestically, thus, once a Treaty enters into force for a State, it does not automatically become part of its law. Internal ratification may be needed such as a decision by the legislature, before Treaty binds a State.

In such a system, ultimate responsibility for the application of a treaty rests with the government and the legislature. It is argued that the dualist approach provides the opportunity for States to establish a legal regime that suits the state's unique circumstances, and unlike monism, has greater certainty and

precision because a state makes it clear which international rules are accepted in its domestic law and which are not.¹⁴

The different Constitutional background of ARIPO Member States means that the implementation and domestication of these treaties will vary enormously. For the monist states, the treaties will take immediate effect, once they are ratified and will run concurrently with the national laws and will even take precedence over the national laws should there be a conflict. It is recommended that ARIPO continues with its capacity-building activities in its Member States regarding ratification of the treaties.

With respect to the dualist's states, there is more of an opportunity to slowly include them in the national legislative process. It is still recommended that ARIPO also carries out capacity building activities to provide further understanding of the benefits that the ratification and domestication of these treaties will be.

¹⁴ KB Angara 'Domestication of International Conventions: A Comparative Study of Kenya and Sweden in their Domestication of the United Nations Convention on the Rights of the Child (UNCRC)', available from http://erepository.uonbi.ac.ke/bitstream/handle/11295/59446/Kariungi_Domestication%20of%20International%20Conventions....pdf?sequence=3

3.0 GUIDELINES FOR LEGISLATION OR LEGISLATIVE AMENDMENTS

The activities that take place in cyberspace have for a long time been somewhat difficult to regulate or control. In 1996, WIPO Member States adopted what are known as the WIPO Internet Treaties which set international norms aimed at preventing unauthorised access to and use of creative works on the Internet or other digital networks.

Contracting States are required to strike a balance between protecting right owners online and also enabling the public interest notion.

3.1 WIPO Copyright Treaty (WCT)

The WIPO Copyright Treaty is deemed to be a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works in relation to Contracting Parties that are members of the Union. To this end, no provisions in the WCT can lower the minimum provisions as set out in the Berne Convention. It thus follows that the WCT Contracting parties have to have the minimum provisions as per the Berne Convention. It is notable that this special relation is limited to the Berne Convention.

The issues addressed by the WCT that had not been considered under the Berne Convention or were not included in the TRIPs Agreement are known as the “Digital Agenda”. The rights to be considered related to the transmission, distribution, storage, and access of works, exceptions and limitations as well as technological protection measures and rights management systems.

3.1.1 “Digital Agenda”

The right of reproduction as provided for in the Berne Convention is understood to apply in the digital environment.¹⁵ This means that the Member States of the Berne Convention need to have specific provisions on the right of reproduction in the digital environment.

In relation to the right of transmission, owing to the different provisions at national level, the WCT adopted what is known as the “*Umbrella Solution*” which extends the right of communication to the public to all categories of works, including transmissions in interactive systems. This is a technologically neutral provision and can be extended to all transmissions over the digital networks including the Internet. This gave rise to what is known as the ‘right of making available to the public’ which may be included in the national law either as part of making available or as a separate ‘new’ right.

The exceptions and limitations under the Berne Convention and therefore in most national laws are applicable in the digital environment.

It should be noted that in the digital environment, protection and enforcement may require measures beyond copyright to prevent the unauthorised access to protected works in the digital environment which includes technological protection measures and rights management systems.

ARIPO Member States should consider provisions for technological protection measures and rights management systems as well as make it illegal to circumvent technological protection measures or alter or delete rights management information systems. These are provided for in Article 11 and 12 of the Treaty.

¹⁵ This was made clear in the Agreed Statement Concerning Article 1(4): The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted there under, fully apply in the digital environment, in particular, 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

3.1.2 Eligibility for Protection, Scope and Subject Matter

Article 3 of the WCT provides for the application of Article 3 to 6 of the Berne Convention and also provides clarification of the protection of computer programmes and original databases. It further prescribes the application of Article 2 and *2bis* of the Berne Convention. Mathematical concepts, ideas and methods of operation are not protected. It lays emphasis on the idea /expression dichotomy.¹⁶

3.1.3 Rights Protected

In addition to the rights granted under the Berne Convention, the Treaty provides for the exclusive right to authorise the making available of to the public of originals or copies of works. Article 6(2) provides a useful clarification in relation to the exhaustion of the right of distribution. It is for the contracting party to decide whether or not it shall be at national, regional or international level. Article 7 of the Treaty provides an exclusive right of rental to the public in respect of the same categories of works including computer programs and cinematographic works embodied in phonograms. These are also subject to the exceptions and limitations in the Treaty.

3.1.4 Duration for Protection of Photographic works

Article 9 of the WCT provides for the minimum term of protection for photographic works as 50 years. This brings it in line with other copyright works as opposed to the provisions in the Berne Convention, which has a shorter term of 25 years.

¹⁶ This underscores the relationship between the WCT and the Berne Convention.

3.1.5 Limitations and Exceptions

Like the TRIPS Agreement, the exceptions and limitations under Article 10(1) and 10(2) may be based on the three-step test and cover all rights granted under the WCT.

3.2 WIPO Phonograms and Performances Treaty (WPPT)

The WIPO Performances and Phonograms Treaty (WPPT) is the second WIPO Internet Treaty that was adopted in 1996 by the WIPO Member States. It is important to note that unlike the case of the WCT and the Berne Convention, the WPPT has no special relation with the Rome Convention. This means that the WPPT Contracting Parties are under no obligation to apply the substantive provisions of the Rome Convention. The WPPT makes very few references to the Rome Convention. However, WPPT seeks to address the protection of the rights of performers and producers of sound recordings in the digital environment.

3.2.1 The Digital Agenda

These include definitions, rights applicable to storage and transmission of performances and sound recordings in the digital environment. It also includes exceptions and limitations in the digital environment, application of technological protection measures and rights management information systems in relation to performers and producers of sound recordings.

The right of reproduction and other rights are subject to the three-step test. Just like the WCT, Article 10 and 14 of the WPPT make provisions for the right of making available to the public of their performances¹⁷ and their phonograms.

¹⁷ In their fixed performances.

The WPPT in Article 18 and 19 mirror the provisions on technological protection measures and rights management information in the WCT.

3.2.2 Criteria for Eligibility, National Treatment

The application criteria are the same as the provisions of Article 4, 5, 17 and 18 of the Rome Convention. Article 3(1) requires Contracting Parties to extend the protection to performers and producers of sound recordings who are nationals of other Contracting Parties. This can be looked at together with Article 4, which deals with the principle of national treatment.

3.2.3 Rights of Performers and Producers

The rights granted to performers only cover the live aural performances and performances fixed in phonograms. It excludes the right of broadcasting and communication to the public of the live performances. It introduces the protection of moral rights of the performers, which are independent of the economic rights.

The rights granted to the producers of sound recordings are quite similar to those granted to the performers. The Treaty also includes the right of reproduction, right of making available to the public, the right of rental and right of distribution.¹⁸

3.2.4 Right to Remuneration for Broadcasting and Communication to the Public

This is a right that is granted to both the performers and producers of sound recordings. It forms the basis of collective management in the digital environment. The performers and

¹⁸ Articles 6, 7, 9, 11, 12 and 13 of the WPPT

producers of sound recording shall be entitled to a single equitable remuneration where the performances fixed in sound recording and sound recordings are communicated to the public.¹⁹

3.2.5 Exceptions and Limitations

Article 16 of the WPPT requires that Contracting Parties may provide for the same kind of limitations and exceptions in relation to the exclusive rights granted to the performers and producers of sound recordings within their national law. Article 16(2) provides for the three-step test. It is important to note that the three-step test is applied to the formulation of exceptions and limitations and should not as such be expressly included in the national law. It is more of a criterion of determining the exceptions and limitations.

3.2.6 Transferability of Rights

The Treaty does not limit the transferability of economic rights. However, in terms of the transferability of moral rights, the Treaty leaves it to the national laws to determine if they shall cease at the expiry of the economic rights or shall be transferred by testamentary disposition.²⁰

3.2.7 Technological Protection Measures and Rights Management Information

Articles 18 and 19 of the WPPT make similar provisions in relation to the technological protection measures and rights management.

¹⁹ Article 15

²⁰ Article 5 of the WPPT

3.2.8 Formalities and Duration of Protection

Article 17(2) of the WPPT computes the term of protection is calculated from the end of the year in which the sound recording was made. Article 20 clearly states that there shall be no formalities required for the protection of the rights of the performers and producers of sound recordings.

3.3 WIPO Beijing Treaty for the Protection of Audiovisual Performances

This may be considered the third WIPO Internet Treaty although it was adopted in 2012. The provisions are very similar to those accorded to performers in the WPPT. The Treaty deals with the protection of audiovisual performances. The WPPT only focused on the protection of performers in sound recordings. The protection of audiovisual performances can be traced back to the Rome Convention.

3.3.1 The Digital Agenda

The Beijing Treaty, like the WIPO Internet Treaties makes provision for exploitation of rights in the digital environment. These include the right of reproduction, the transmission of works over the digital environment, and storage of audiovisual performances. An audiovisual performance is defined as *“an embodiment of moving images whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device.”* The definition of audiovisual performances is important and should be included in the national laws.²¹ Article 4 also provides for the principle of national treatment.

The Treaty thus, requires Contracting Parties to provide full protection within their territories to right holders who are na-

²¹

tionals of other Contracting Parties, thereby ensuring that local producers and performers enjoy economic rewards when their films, TV series and other audiovisual products are screened or otherwise made available abroad. This is likened to the same 'national treatment' requirement set under the Berne Convention.

The Treaty grants audiovisual performers the following economic rights for their performances fixed in audiovisual fixations, especially in the digital environment; the right of reproduction; the right of distribution; the right of rental; and the right of making available.

With respect to unfixed or live performances, the Treaty provides three kinds of economic rights, namely: the right of broadcasting (except in the case of rebroadcasting); the right of communication to the public (except where the performance is a broadcast performance); and the right of fixation.

Article 5 states that Contracting Parties may provide moral rights to the performers with respect to live performances or performances fixed in audiovisual fixations.

3.3.2. Transfer of Rights

Lack of consensus on Article 12 on the transfer of rights led to the collapse of the 2000 WIPO Diplomatic Conference. Article 12 provides that:-

- (1) *A Contracting Party may provide in its national law that once a performer has consented to fixation of his or her performance in an audiovisual fixation, the exclusive rights of authorization provided for in Articles 7 to 11 of this Treaty shall be owned or exercised by or transferred to the producer of such audiovisual fixation subject to any contract to the contrary between the performer and the producer of the audiovisual fixation as determined by the national law.*

(2) *A Contracting Party may require with respect to audiovisual fixations produced under its national law that such consent or contract be in writing and signed by both parties to the contract or by their duly authorized representatives.*

(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.*

With respect to the transfer of rights²², the Treaty provides that Contracting Parties may stipulate in their national laws that once a performer has agreed to have its performance fixed, then the exclusive rights mentioned above are transferred to the producer of the audiovisual fixation. However, this option is not relevant if a contract between the performer and producer states otherwise. In the same manner, 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 the Treaty.

It is imperative that the ARIPO Member States make the relevant provision in relation to the transfer of rights. This is crucial for the growth and development of the audiovisual industries in the region.

3.3.3 Exceptions and Limitations

Article 13 provides for limitations and exceptions²³ and allows for Contracting Parties make the relevant provisions in their national legislation to appropriately cater for the audiovisual performers and to also confine these limitations and

²² Article 12

²³ It is important to point out here that limitations are provisions that limit protection altogether, whereas, exceptions provide immunity from infringement

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”.²⁴

This Article differs slightly from Article 9(2)²⁵ of the Berne Convention, in that it extends the application of the three-step test to all other exclusive rights. The Agreed Statement provides, similarly, that the Agreed Statement of Article 10 of the WIPO Copyright Treaty (WCT) applies similarly to the Beijing Treaty, that is, limitations and exceptions as established in national law in compliance with the Berne Convention may be extended to the digital environment. Contracting States are allowed to devise new exceptions and limitations which are appropriate to the digital environment. The extension of existing or the creation of new limitations and exceptions however, is allowed if the conditions of the “three-step” test are met.

3.3.4 Technological Protection Measures and Rights Management Information

Contracting Parties are required to provide for effective legal remedies against the circumvention of technological protection measures used by performers in connection with the exercise of their rights, and against the removal or altering of information that is used by the performer to identify him/herself, the actual performance and the audiovisual fixation itself. These measures are considered necessary for the management of rights.

There is need to exercise caution in the domestication of this provisions as there is a risk of locking out the legitimate

²⁴ Article 13(2)

²⁵ This Article states: “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”

persons allowed under the exceptions and limitations. To this end, the ARIPO Member States should ensure that they have provisions in their laws that exclude those who would otherwise enjoy the exceptions and limitations if the technological protection measures had not been placed on the work.

The term of protection for the performances must be at least 50 years from the end of the year in which the performance was fixed.²⁶ The Beijing Treaty will come into force three months after being ratified or acceded to by 30 eligible parties. As at the time of writing, only nineteen countries have ratified or acceded to the Treaty.

4.0 CONCLUSION

These guidelines mainly focussed on the most recent treaties on copyright and related rights, namely the WIPO Copyright Treaty, The WIPO Performances and Phonograms Treaty, and the Beijing Treaty. Not much was covered on the Berne Convention as most ARIPO Member States have acceded to the Convention and included the provisions in their national laws.

The Rome Convention was also not covered as the WPPT and the Beijing Treaty have addressed and updated the rights of the performers, producers of sound recordings, and audiovisual performers especially in relation to the digital environment.

These guidelines are meant to help the ARIPO Member States in the domestication of the International Conventions.

²⁶ Article 14



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