

The WIPO Treaties: Reproduction Right

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WHAT IS THE REPRODUCTION RIGHT?

The right of authors, performers and 'phonogram producers' to authorise or prohibit copying of their works and other protected material has been a longstanding feature of international instruments in the copyright field before the 1996 WIPO Treaties.

The Berne Convention (1971), Rome Convention (1961), Geneva Phonograms Convention (1971), and the WTO TRIPs Agreement (1994) by incorporation of Berne Convention requirements, all require protection of this important right.

A major achievement of the

1996 WIPO Treaties was to clarify and confirm the **broad scope of this reproduction right**, particularly in its application to works and phonograms in the digital environment.

Both the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) re-state the Berne Convention requirement that the reproduction right must cover reproductions in '**any manner or form**'. Furthermore, the WPPT explicitly protects '**direct and indirect reproductions**,' as provided by the Rome Convention.

The full scope of this right is further clarified in an agreed statement that was adopted unanimously in the treaty negotiations. The agreed statement confirms that the right of reproduction '**fully applies in the digital environment**, in particular to the use of phonograms in **digital form**. It is understood that **storage** of a protected phonogram in digital form **in an electronic medium** constitutes a reproduction.'

(WPPT, Articles 7, 11 and 16 and Agreed Statements; WCT, Agreed Statement Concerning Article 1(4).)

EXECUTIVE SUMMARY

The right to control copying of protected material is a critical feature of 21st century copyright protection. Rights owners depend upon this right in order to fight growing piracy problems on one hand, and to develop business models for on-line commerce on the other.

Accordingly, the WIPO Treaties confirm that authors, performers and phonogram producers retain a broad right of reproduction. The treaties build upon the Berne Convention, and clarify that the rights owners' reproduction right applies fully in the digital environment, irrespective of the technology or medium used, or of the nature or duration of the copying.

WHY IS THIS RIGHT IMPORTANT?

For phonogram producers, the right to authorise the making of copies of their phonograms constitutes the basic tool not only to **license legitimate uses** of their phonograms, but also to **fight piracy**—the unauthorised reproduction and dissemination of phonograms.

With the advance of high-volume CD and other optical disc production, as well as digital technologies and interactive networks, controlling permanent and temporary copying has become even more important to rights owners.

Phonograms can be reproduced without any loss of

quality and with an ease and rapidity that was unforeseeable even a relatively short while ago. The global manufacturing capacity of all CDs, CD-ROMs and Video-CDs rose an estimated 22% since 1996 to over 23 billion units annually in 2001—nearly four discs per year for every man, woman and child on the face of the planet! Sales of pirate music CDs stood at 500 million units in that year alone.

Music will more and more often be enjoyed not only on the basis of permanent copies such as CDs, but also on the basis of temporary copies that disappear when use of the phonogram ends. Indeed, in many

of the most economically valuable on-line uses of works, the most important copyright-cognisable act will be the making of temporary reproductions.

A strong right of reproduction, including temporary reproductions, is therefore essential to ensure that authors' and phonogram producers' and performers' legitimate interests enjoy adequate protection in this changing environment.

It is also fundamental for the development of new licensing and business models which will allow consumers to have greater and easier access to music.



More and more, music will be enjoyed not only on the basis of permanent copies such as CDs, but also through on-line uses involving temporary copies that disappear when the use ends.

HOW SHOULD THIS BE IMPLEMENTED?

WIPO TREATY TEXT

WCT Art. 1(4). *Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.*

WPPT Art. 7. *Performers shall enjoy the exclusive right of authorising the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.*

WPPT Art. 11. *Producers of phonograms shall enjoy the exclusive right of authorising the direct or indirect reproduction of their phonograms, in any manner or form.*

WPPT Agreed Statement Concerning Articles 7, 11 and 16: *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.*

(A corresponding provision for authors and works is contained in Agreed Statement to WCT Article 1(4).)

Most countries' copyright laws already contain a reproduction right. In implementing the WIPO Treaties, it is necessary to check whether all of the necessary elements of the reproduction right are protected by national statutory or case law. These are as follows:

■ **Any manner or form of reproduction, including use and storage in digital form.** This means that the exclusive right should apply irrespective of the technology used in the act of copying or the medium onto which protected material is copied. National law should also ensure that all types of temporary and permanent reproductions that take place in the use and

electronic storage of a work in digital form are protected by copyright.

■ **Direct and indirect reproduction.** The WPPT grants phonogram producers and performers the exclusive right to authorise indirect as well as direct reproduction. Among other things, this means that the right owner's consent is needed for copying from a tangible phonogram as well as for copying from a broadcast or other type of communication.

■ **In whole or in part.** It is clear that protection should cover the use of the whole or parts of a work or phonogram. This is traditionally recognised under

most copyright and related-rights laws, and becomes even more important now that technology has made extracting, copying and commercial use of parts of phonograms in advertising, multimedia and sampling so easy.

■ **Protection of authors, phonogram producers and performers.** The treaties require that authors (WCT Art. 1(4)), phonogram producers (WPPT Art. 11) and performers of literary or artistic works or expressions of folklore (but not necessarily audiovisual performers) (WPPT Arts. 7, 2(a)) benefit from the exclusive reproduction right.

FREQUENTLY ASKED QUESTIONS (FAQS)

Are exceptions to the reproduction right allowed?

Yes. The new treaties allow limitations and exceptions to the reproduction right that comply with the 'three-step test' of Berne Article 9(2). (WCT Art. 10; WPPT Art. 16.) Such exceptions thus must be: (i) confined to certain special cases, which (ii) do not conflict with a normal exploitation of the phonogram and

(iii) do not prejudice the legitimate interests of the copyright holder. Note that this approach is more rigorous than the Rome Convention test which vaguely allowed exceptions for 'private use'. The three-step test highlights the appropriate economic and other issues to be considered in determining, for example, whether certain exceptions traditionally permitted in the analogue environment are ap-

propriate for works and phonograms in digital form.

Have countries had to adapt their reproduction right to conform with the treaties?

Generally no, although the EU implementation contains an express statement of the reproduction right. Laws that limit the reproduction right to 'tangible,' 'physical' or 'permanent' reproductions may require amendment.

SAMPLE IMPLEMENTING LEGISLATION

IFPI Model Legislation: *Authors, producers of phonograms and performers shall have the exclusive right to authorise or prohibit the direct or indirect, temporary or permanent reproduction of their respective works, phonograms, or fixations of performances, in any manner or form, in whole or in part.*

Lithuania Copyright Act 1999: *Art. 2(24): Reproduction means the making of a copy of a work or an object of related rights, in whole or in part and in any material form, including their permanent or temporary storage in an electronic form.*

EU Copyright Directive: *Art. 2: 'Member States shall provide for the exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part: (a) for authors, of their works, (b) for performers, of fixations of their performances; (c) for phonogram producers, of their phonograms; (d) for the producers of the first fixations of films, in respect of the original and copies of their films; (e) for broadcasting organisations, of fixations of their broadcasts, whether those broadcasts are transmitted by wire or over the air, including by cable or satellite'. Art. 5(5): 'The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.'*

IFPI has represented the international recording industry since 1933. Its membership comprises more than 1,400 record producers and distributors in over 70 countries. For more information, please contact

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