

STATUS OF THE WORLD INTELLECTUAL PROPERTY ORGANIZATION (WIPO) IN THE UNITED NATIONS SYSTEM AND ITS COMPETENCES

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Abstract: As a specialized agency of the United Nations (UN), the World Intellectual Property Organization (WIPO) plays a key role in promoting the protection of intellectual property (IP) throughout the world and also represents a global forum for IP services and cooperation. Moreover, the WIPO strives to contribute to balanced international development but also endeavors to deal with an extraordinarily long list of related and/or transversal policy topics. Taking into consideration the tectonic changes brought about by digital transformation, the COVID-19 outbreak, the aggression of the Russian Federation on Ukraine, and rising global inequalities, the paper re-examines WIPO's role in the global context by focusing on three major issues. First, it analyses some of the WIPO's main functional and organizational features (Chapter 2), striving to distill some of its unique characteristics. Second, it turns to the question of WIPO's role in the protection of copyright (Chapter 3) and examines the scope of improvements to the international regulatory framework established by the Berne Convention. Finally, it focuses on the functioning of the WIPO-administered systems related to some major industrial property rights (Chapter 4), arguing that they are functional, user-friendly, and mainly accessible online, but also characterized by certain shortcomings, such as the "home mark" requirement and the risks of "central attack" (for trademarks), as well as cost, duration, and better implementation of the recommendations formulated by the WIPO Development Agenda (for patents).

Keywords: WIPO, UN system, international organization, intellectual property rights, copyright, trademarks, patents.

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INTRODUCTION

The entire new system of multilateral international relations established after the Second World War and, to some extent, even during its last months, largely relies on the so-called *United Nations System* (United Nations, 2022; Federal Reserve, 2022).¹ In this system, the specialized agencies of the United Nations (UN) play an important and ever-expanding role. Comprised *lato sensu* – in order to include the related organizations maintaining liaison offices² at the UN Headquarters – there are 17 such entities, including, among others, the International Criminal Court, the Food and Agriculture Organization, the International Atomic Energy Agency, the International Telecommunication Union, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the World Health Organization. This list also includes the World Intellectual Property Organization (WIPO), a specialized agency of the UN whose mission is to “lead the development of a balanced and effective international IP system that enables innovation and creativity for the benefit of all” and to represent “the global forum for intellectual property (IP) services, policy, information, and cooperation” (WIPO, 2022a). The WIPO is a self-funding organization and has 193 member states and 1,588 employees (WIPO, 2021), while around 250 inter-governmental and non-governmental organizations have official observer status at various meetings organized and coordinated by the WIPO. In a rapidly changing world, when the entire system dedicated to the protection of intellectual property rights (IPRs) is challenged not only theoretically and ideologically (Kinsella 2013) but also blatantly side-lined for political reasons, the role of the WIPO can be even more important and, therefore,

¹ The so-called “Bretton Woods System”, established in order to set the basis of international monetary relations, was the consequence of an Agreement reached in July 1944, during a conference held in New Hampshire, United States, and attended by 730 delegates, representing 44 allied nations. Delegates to the conference have set the basis of the International Monetary Fund (IMF) and of the system nowadays known as the World Bank Group (WBG).

² According to the Report entitled *Liaison Offices in the United Nations System* prepared in 2007 by Gérard Biraud, a liaison office is defined “as an office established by one entity (organization, fund, or program) of the United Nations system at the headquarters location of another, to ensure the former’s representation and coordination on issues and activities of common interest”.

it is worth being thoroughly re-examined (Gotev, 2022).³ Given that, despite its ever-growing complexity and the influence of digital transformation (Ćemalović, 2021), the entire system of IPR protection can still be divided into two big sections: copyright and industrial property. The role of the WIPO should be analyzed separately in those distinct fields. For methodological reasons, the subject analysis should be preceded by an overview of the main characteristics of the WIPO as a sui generis specialized agency of the UN. The author's intention is to observe all the above-mentioned elements in light of rapidly changing international relations while also dedicating attention to WIPO's role in global development. Therefore, this article will first focus on some of the WIPO's main functional and organizational features (Chapter 2), before turning to the question of its role in the protection of copyright (Chapter 3), and industrial property (Chapter 4).

THE WIPO'S MAIN FUNCTIONAL AND ORGANIZATIONAL FEATURES

Even though the Convention Establishing the WIPO was signed in 1967 and entered into force in 1970, this UN specialized agency administers some important long-standing international treaties, such as, among others, the Paris Convention for the Protection of Industrial Property (signed in 1883) and the Berne Convention for the Protection of Literary and Artistic Works (signed in 1886). The two above-mentioned conventions provided for the establishment of an "International Bureau", an entity that could be seen as a predecessor of what is nowadays the WIPO. This organization is also "the world's most comprehensive source of data on the intellectual property system, [but also] of empirical studies, reports, and factual information on intellectual property" (WIPO, 2022b). However, the WIPO's most significant *differentia specifica* from many other UN agencies is the fact that it is a financially independent, almost entirely self-funding organization. This chapter shall, therefore, first focus on the sources of the WIPO's financing before turning to the questions of the

³ According to the latest report of the International Trademark Association (INTA), numerous disturbances in the functioning of the entire system of IPR protection have been observed in Russia, while on March 7, 2022, the Government of the Russian Federation decided that IPRs should not be paid to patent holders from "unfriendly countries".

organization's governance and functioning. The WIPO's main source of financing is the fees paid by legal or natural persons intending to acquire various IPRs through the systems of international registration or deposition administered by the organization, such as, for example, the Madrid System (for trademarks) and the Patent Cooperation Treaty (for patents). Many of those fees can also be paid online, through the system WIPO pay.⁴ The WIPO's financial autonomy due to fee incomes undoubtedly defines its overall functioning, while some authors have questioned whether the organization can "continue to use income surpluses in the manner to which it has become accustomed given the shaky legal justifications on which such expenditures rest [mainly because] much of the WIPO's current financial and governance arrangements rest on *de facto* rather than *de jure* foundations" (Heath, 2020, pp. 340-341). However, it remains to be seen to what extent the WIPO's income and expenditures have been impacted by the COVID-19 breakout, but also if and how the aggression of the Russian Federation on Ukraine will reshape the world's economy, as well as the existing systems and practices of international IPR protection. In the current state of affairs, the WIPO undoubtedly remains "the UN's most successful self-financing organization (also facing) a range of governance challenges that arise from these unique financial arrangements" (Birkbeck, 2016, p. 3). While the observation related to "shaky legal justifications" for expenditures seems to be somewhat excessive and summary, it is certainly true that, in some aspects of its functioning, the WIPO remains the victim of its own financial success. The overall governance of the organization is defined by the Convention Establishing the WIPO (WIPO Convention), but it also includes a complex scheme of governing and consultative bodies and organs related to the Unions administered by the WIPO. The main decision-making and policy bodies of the organization are the 22 assemblies (one of which is the WIPO General Assembly - GA) and the Coordination Committee (CC). Moreover, any WIPO's governing body is entitled to constitute permanent committees, while the GA can establish *ad hoc* standing committees in order to treat a specific issue within the organization's scope of competence. Any state having membership status

⁴ Apart from the Madrid System and the Patent Cooperation Treaty, WIPO Pay enables online payments for the Lisbon System (geographical indications), the Alternative Dispute Resolution mechanism, the Domain Name Dispute Resolution mechanism, and WIPO Academy.

in any of the Unions administered by the WIPO has the right to have a representative in the General Assembly. According to the WIPO Convention, "the Government of each State shall be represented by one delegate, who may be assisted by alternate delegates, advisors, and experts" (Art. 6-1b), while the expenses of national delegations are borne by their governments. Each state has one vote in the GA, while the working quorum is one-half of all member states. Of the ten competences of the GA enumerated in Article 6-2 of the WIPO Convention, some are related to the functioning of other bodies and entities of the organization (the right to appoint the Director General and to approve her/his report; the competence to review and approve the reports and activities of the Coordination Committee); while the others concern various administrative and financial issues (measures related to the administration of the international agreements; adoption of the "budget of expenses common to the Unions"; adoption of the internal financial regulations; and the right to determine the working languages of the Secretariat). Even if, to a certain extent, the WIPO's CC may look like the organization's executive branch of power, its competences (defined by Art. 8-3 of the WIPO Convention) are more advisory and preparatory than *stricto sensu* decision-making. For example, the CC advises other organs (of the Unions and the WIPO) "on all administrative, financial, and other matters of common interest either to two or more of the Unions, or to one or more of the Unions and the Organization" (Article 8-3i). In a similar vein, the CC prepares the draft agenda of the GA, as well as the draft agenda and the draft program and budget of the Conference. Most of the operational competence of the CC is related to the nomination of the candidate for the Director General and the appointment of the Acting Director General. With its main constitutive, legal, and functional features, the WIPO has all the major characteristics of a typical international organization. As some authors have rightfully summarized, it "was founded by an international treaty, its membership comprises states, it has a secretariat (...), the plenary organ (...), and can be said to possess international personality" (Duxbury, 2020, p. 46). However, apart from its quasi-total self-financing status already mentioned above, what distinguishes it from practically all other classical international organizations - including the other UN specialized agencies - are the following two features. First, the organization is, on the one hand, in its healthy mid-fifties, given that it was formally established by a treaty signed in 1967, but, on the other hand, through a complex organizational structure, it administers Unions established by the conventions signed

almost a century and a half ago. Second, apart from its main mission to assure the protection of IPRs, the WIPO endeavors to deal with an extraordinarily long list of related and/or transversal policy topics, such as, among others, global health, climate change, economics, and frontier technologies. All the above-mentioned policy topics, as well as some others, are also enumerated on the WIPO's website, in the list of "other policy topics" related to the policy in the field of intellectual property taken *stricto sensu*. It is very likely that, with digital transformation and other phenomena related to the 4th industrial revolution, this list will progressively become longer. Finally, when it comes to the disturbances in the international IP system caused by the aggression of the Russian Federation on Ukraine, the WIPO's reaction was relatively swift but, according to the *Statement of Provisions Potentially Applicable to WIPO Global IP Services Regarding Ukraine and the Russian Federation*, has been limited to the invocation of some potentially applicable provisions already adopted in the framework of the Madrid System (Rule 5 and 5bis(1) of Regulations) and the Patent Cooperation Treaty (PCT Art. 48 and Rules 26bis.2, 49ter.1, 49ter.2, 49.6 and 82bis) (WIPO, 2022c).

THE WIPO'S ROLE IN COPYRIGHT PROTECTION

On the international level, the legal basis of copyright protection is established by the Berne Convention for the Protection of Literary and Artistic Works, signed in 1886 and amended in 1979. Apart from the Paris Convention, the Berne Convention is the oldest international treaty administered by the WIPO. This treaty introduces the common minimum standards of protection in three important aspects: 1) nature of the works to be protected; 2) rights stemming from that protection ("copyright", also known under the term "author's rights"); and 3) duration of the protection.⁵ In addition, this Convention sets some basic principles of copyright protection, of which the most important is the so-called

⁵ According to a general rule, each party to the Convention should, in the context of its own national legislation, grant the protection that lasts during "the life of the author and fifty years after his death" (Art. 7-1). There are, however, certain exceptions, like, for example, in the case of works of applied art and photographic works, for which "it shall be a matter for legislation in the countries of the Union to determine the term of protection [but] this term shall last at least until the end of a period of twenty-five years from the making of such a work" (Art. 7-4).

principle of non-formal, automatic protection of whatever work defined as “literary or artistic” by its Article 2-1. So-called “automatic protection” effectively means that, unlike in the case of various types of industrial property rights, “the enjoyment and the exercise of (author’s) rights shall not be subject to any formality” (Art. 5-2). This is particularly important in light of the fact that the overwhelming majority of “scientific, academic, literary or artistic works is (...), by nature non-material, intangible, even if they can often be followed by important material outcomes, such as a sculpture, a painting, a sheet of music or a book” (Ćemalović, 2020, p. 150). For this particular reason, the Berne Convention allows its signatories an important exception to the principle of “automatic” protection of an author’s rights: national legislation is entitled not to grant the protection for some “specified categories of works (...), unless they have been fixed in some material form” (Art. 2-2). As for the administrative tasks regarding the Union established by the Berne Convention, they are performed by a unified⁶ International Bureau.

Taking into consideration that, in many aspects, the Berne Convention is not adapted to the realities of the 4th industrial revolution and digital transformation, the 1996 Diplomatic Conference has given birth to two important treaties. First, the WIPO Copyright Treaty (WCT) has introduced two important new subject matters to be protected by copyright: 1) computer programs; and 2) compilations of data or other material (so-called “databases”). Second, the WIPO Performances and Phonograms Treaty (WPPT), another international agreement signed the same year under the auspices of the organization, covers the rights of performers and producers of phonograms, intending to adapt them to the digital environment. However, given the rapid technological development, both the WCT and the WPPT nowadays require some important amendments and improvements in order to cover issues such as, for example, online content-sharing services and fair remuneration of authors and performers.⁷ The two copyright-related international

⁶ According to Art. 24-1a) of the Berne Convention, the International Bureau “is a continuation of the Bureau of the Union united with the Bureau of the Union established by the International Convention for the Protection of Industrial Property”. This International Bureau can be considered as a predecessor of today’s WIPO.

⁷ On the level of the European Union, these two issues are covered by a recently adopted Directive 2019/790 of April 17, 2019, on copyright and related rights in the Digital Single Market.

agreements have been adopted at a very early stage of the development of the Internet, and “the current international copyright agenda deals with the remnants of what was a very promising – and, for an international organization, a very early – start in tackling or in addressing this question in the holding of the 1996 Diplomatic Conference” (Ginsburg, 2011, p. 2). Judging by the organization’s activity over the past ten to fifteen years, the WIPO strives to raise awareness of the need to adapt the existing regulatory framework to new realities and challenges. For this reason, it permanently organizes conferences on various topics, including those relevant to copyright protection in the digital environment.⁸ Those events gather the representatives of states, civil society, rights holders and scholars, and often produce significant and applicable recommendations, but rarely engender legally binding documents.

THE WIPO’S ROLE IN THE PROTECTION OF INDUSTRIAL PROPERTY

The notion of industrial property encompasses various IPRs whose quintessence is that they grant the right holders a time-limited monopoly to use the object of right (for example, an invention or a sign used in trade) after fulfilling a number of formal criteria.⁹ Taking into consideration, on the one hand, the variety of industrial property rights (patents, trademarks, designs, geographical indications, etc.) and, on the other hand, the limited space, this chapter will focus on the WIPO’s role regarding the Madrid System (for registering and managing trademarks) and the Patent Cooperation Treaty (allowing to seek patent protection internationally). What is nowadays known under the common designation “Madrid System” is the consequence of a long and laborious international cooperation, initiated by the Madrid Agreement Concerning the International Registration of Marks (Madrid Agreement), concluded in 1891 and amended in 1979. The most significant practical feature of the

⁸ For example, back in 2011, the WIPO organized the conference “Enabling Creativity in the Digital Environment: Copyright Documentation and Infrastructure”. The objective of this event was to “present the information and findings the WIPO has gathered through a number of initiatives during the past biennium”.

⁹ As it has already been mentioned in the previous chapter, this is the main distinction between industrial property rights and copyright (author’s rights), given that, in principle, the enjoyment of author’s rights cannot be subject to any formality.

Madrid Agreement is that it allows the nationals of all contracting parties to “secure protection for their marks applicable to goods or services” by filing a single trademark application and paying only one set of fees, allowing them to acquire protection in up to 128 countries.¹⁰ This application is filed at “the International Bureau of Intellectual Property referred to in the Convention establishing the World Intellectual Property Organization” (Art. 1(2)). However, the Madrid System is nowadays a much more complex set of tools, providing (potential and existing) trademark owners with various services, ranging from a trademark database search to application assistance, fee calculation, and portfolio management. However, the main precondition for using the Madrid System is to hold a trade mark application or a registration in a contracting party of the Protocol to the Madrid Agreement (so-called “home mark” requirement) but also to fulfill one of the following three criteria: be a national of the Protocol contracting party, be domiciled or have a real and effective industrial or commercial establishment in it. As it was rightfully underlined, “the requirement of a “home mark” creates difficulty for a person or corporation which does not have any of those links” (Przygoda, 2011, p. 75), while an international trademark registration can be attacked in all designated states via the invalidation of its application or registration in the home country, an operation often referred to as the “central attack” (Gilson, Gilson Lalonde, 2003, p. 20). As it was the case of the WIPO’s financing more thoroughly examined in Chapter 2, the Madrid System administered by the organization is, to an important extent, the victim of its most important (and successful) feature: unique application before a central international administrative entity. The most important common characteristic of the Madrid System and the Patent Cooperation Treaty (PCT) is that they both allow seeking protection internationally by filing

¹⁰ As it has been underlined in one of WIPO’s explanatory publications, the objectives of the Madrid System are two-fold, given that “it facilitates the obtaining of protection for marks (trademarks and service marks) [but also] since an international registration is equivalent to a bundle of national registrations, the subsequent management of that protection is made much easier, [because] there is only one registration to renew, and changes such as a change in the ownership or in the name or address of the holder, or a limitation of the list of goods and services, can be recorded in the International Register through a single simple procedural step”. For more details, see the Overview of “The Madrid System for the International Registration of Marks. Objectives, Main Features, Advantages”.

a single application. The PCT was signed in 1970 (amended in 1979, modified in 1984, and 2001), and, as of May 31, 2022, has 156 contracting states. This Treaty allows international application for the protection of an invention (Art. 3) and provides for an international search in order to “discover relevant prior art” (Art. 15-2). Moreover, it comprises rules on international preliminary examination of patent applications (Art. 31-42) and introduces a basic regulatory framework as regards to patent information services (Art. 50). Apart from its numerous advantages concerning the reduction of administrative burden for multinational patent applications, some of the most commonly underlined disadvantages of the system established by the PCT are its cost, duration (Singh, 2021), and the fact, that as in the case in some countries of Latin America, its main beneficiaries “have been non-residents rather than local companies and individual inventors [what] rebuts the frequently made argument that acceding to the PCT would generate incentives for local innovation and benefit local inventors by boosting their capacity to protect their developments in third countries” (Correa and Correa, 2020, 803). Given that the WIPO Development Agenda, formally established in 2007, insists on “taking into account the priorities and the special needs of developing countries”, there is some considerable room for improvement in the regulatory framework established by the PCT. Moreover, taking into consideration that, according to the latest World Inequality Report, the COVID-19 pandemic has exacerbated intra-state but also inter-state misbalances in development and income, the WIPO’s role in making the international IP system “balanced and effective (...), for the benefit of all” becomes even more important.¹¹

CONCLUSIONS

As a specialized agency of the UN, the WIPO has some standard characteristics typical for an international organization: its members are states; it has been established by a multilateral treaty; and the structure and competences of its main organs in many aspects look like those of many other organizations belonging to the UN family. However, a more thorough examination of the WIPO’s main functional and organizational features has shown that it has some important specificity, mainly because

¹¹ The WIPO’s Committee on Development and Intellectual Property (CDIP) was established by the WIPO GA in 2008.

of its particular mission, quasi-total self-financing status, and the fact that it deals with a long list of related and/or transversal policy topics. The complex, trans-disciplinary, and sometimes technical, but also subtle and often etheric substance of IP as a concept has undeniably left an imprint on the eponymous UN specialized agency dealing with IPRs, and it is, therefore, legitimate to consider it as a *sui generis* organization in many important aspects. When it comes to the WIPO's role in the protection of copyright, the international regulatory framework established by the Berne Convention has been considerably improved in the last decades via numerous initiatives undertaken by the organization, but it remains mostly obsolete and not fully adapted to the needs of the digital environment. Finally, while the functioning of the WIPO-administered systems related to some major industrial property rights can be described as functional, user-friendly, and mainly accessible online, their main shortcomings are the "home mark" requirement and the risks of "central attack" (for trademarks), as well as cost, duration, and better implementation of the recommendations formulated by the WIPO Development Agenda (for patents).

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