

State educational institution of higher professional education “Russian academy of justice”

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MAKING AVAILABLE RIGHT AS PROVIDED BY RUSSIAN CIVIL LAW

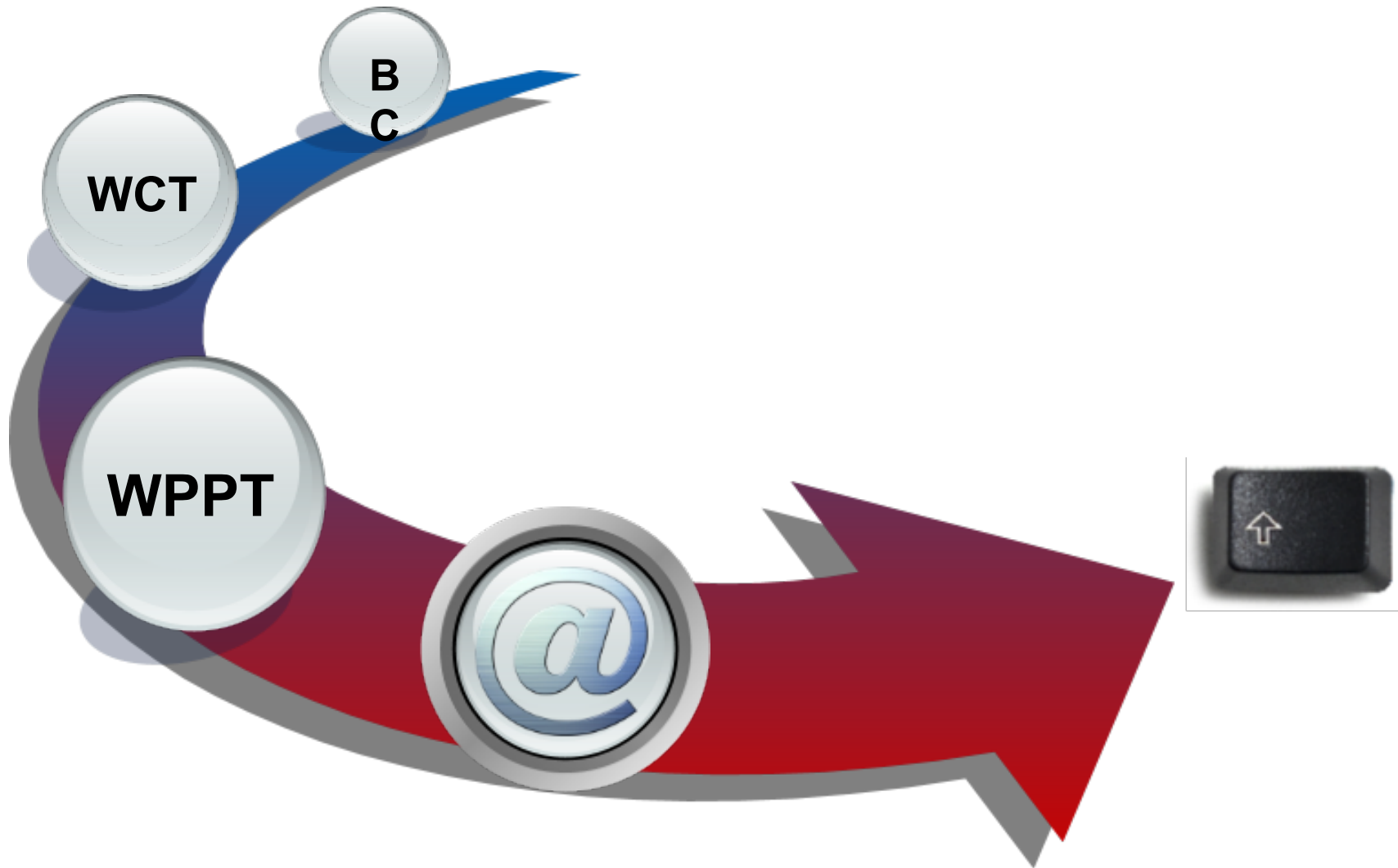
DISSERTATION

PART FIRST

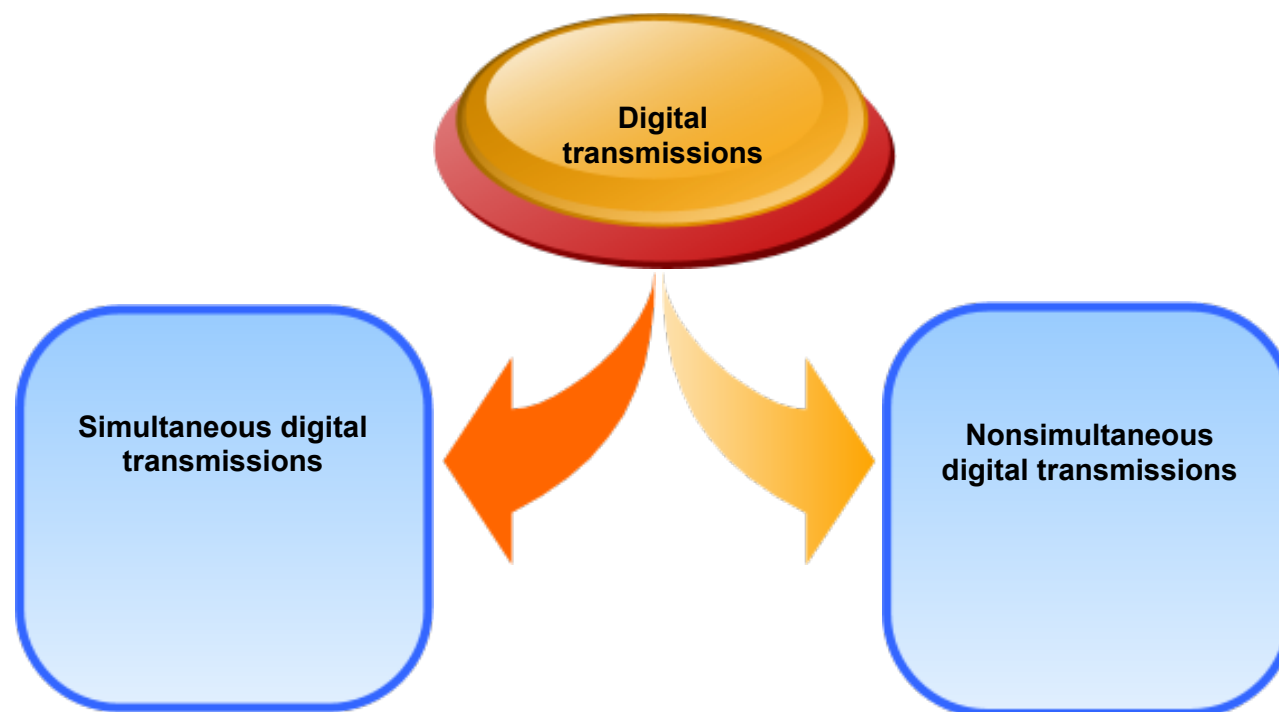
The history of origination and development of institution “making available right” in international and foreign private law

Specialization: 12.00.03 – civil law; business law; family law; international private law

The history of origination and development of institution “making available right” in international and foreign private law



- **New technical achievements in the field of digital technologies caused arising of certain important and complicated legal matters in a legal community**
- **First of all it was necessary to find solution to problem of legal qualification for digital delivery and transmission to consumers of works, performances and phonograms in Internet and similar networks. So called solution to problem of “digital delivery” and “digital transmission”.**



- **First definition of “digital delivery” of phonograms**

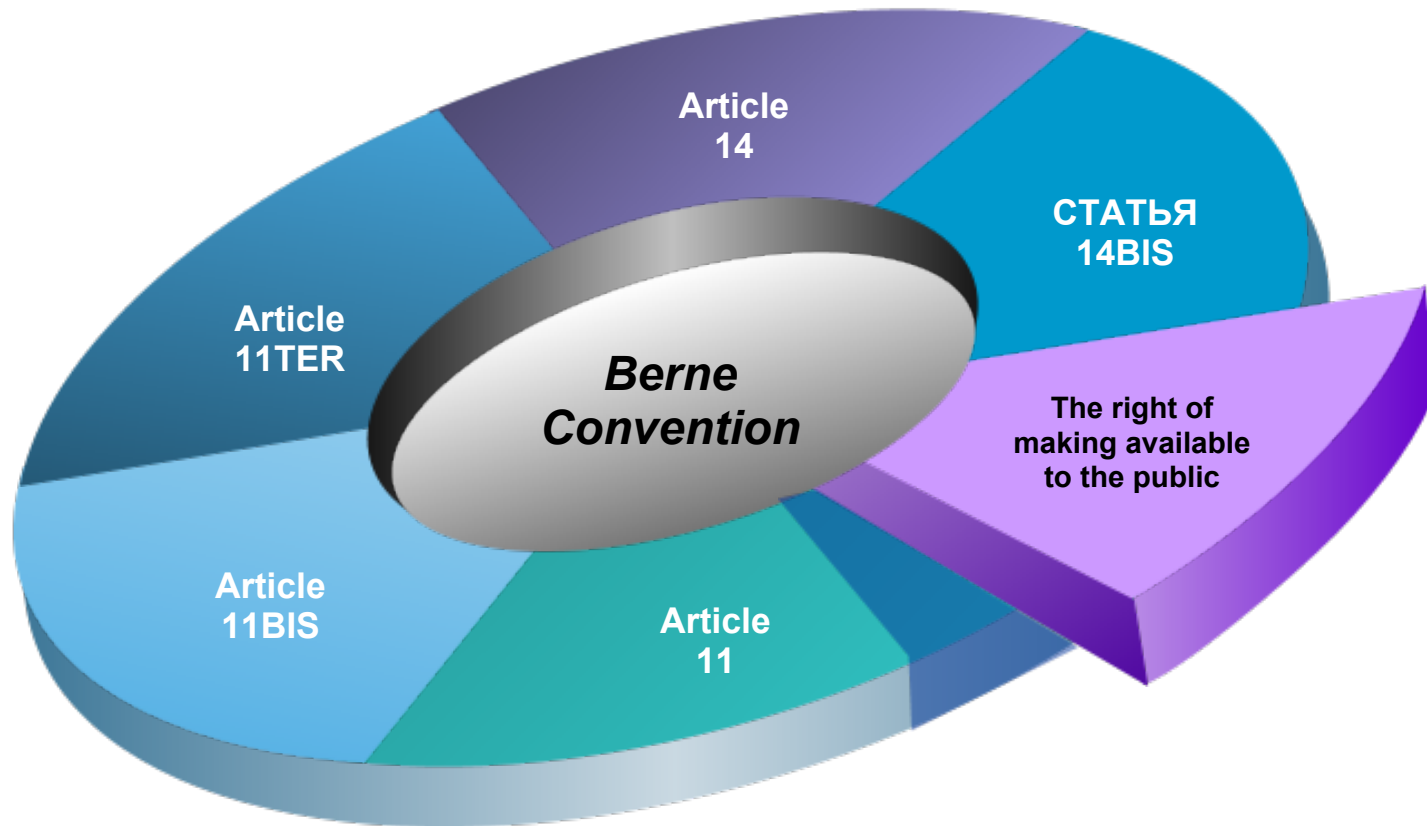
- *“making the sounds fixed in a phonogram or the digital representations thereof available to the public through an electronic retrieval system”*

- **First definition of “digital transmission” looked voluminous and complicated for perception**

- *“Digital transmission is the transmission of the images or sounds of a performance, or the sounds fixed in a phonogram or the digital representation thereof, in such a way that the transmission is made available to persons outside the normal circle of a family and its closest social acquaintances at a place or places whose distance from the place where the transmission is started is such that, without the transmission, the images or sounds would not be perceivable at the said place or places, irrespective of whether the said persons may perceive the images or sounds at the same place and at the same time or at different places and/or at different times...”*

- Search of suitable ways and means for solution to this problem was defined by legal community as **WIPO Digital Agenda**
- It was decided, that **“digital transmission”** will be considered as new form of communication to the public provided by Berne Convention. Program realization began with drafting suitable formulations that can fully reflect interactive nature of these new digital phenomena.

Making available right as a form of communication to the public



provided by Berne Convention

- **During discussion about problem of digital delivery and digital transmission in WIPO Committees of Experts arose difference of opinion relating to kinds of rights used in digital transmission. As a result was reached a compromise. Two kinds of rights can be adopted by national legislation:**
 - *the right of communication to the public;*
 - *the right of distribution by transmission;*
 - *or simultaneous use of these two kinds of rights*
- **It was noted that “distinctions among rights of communication to the public, public performance and distribution are becoming increasingly irrelevant in the face of technological change”.**
- **Such effect is a result of cycle of ordered and interrelated technical stages existing within digital transmission.**
- **Digital transmission begins with information downloading and completes at device allowing to end user to perceive visually or by ear transmitted information and create permanent or ephemeral copies of received information. Therefore digital transmission is a complex operation which combines permanent or temporary reproduction of works on hard drive of user’s device with public performance of works through mechanism of information display on screen.**
- **Interactivity of receiving of copyrighted materials by members of public began to be considered as main criterion of difference between digital and analogue technologies.**

- **Interactivity was defined as ability of recipients or users to choose individually place and time to receive works, performances or phonograms.**
- **First attempt to apply interactivity of receiving works by users as one of legal criteria of protection was made by world legal community during the preparatory work for the Brussels Conference of 1948.**
- **The subject of discussion was technology of sound transmission over telephone lines in stereo for listening of theatrical performances at a sizeable distance from theatre.**
- **A dial-up services that allowed subscribers to hear transmissions of theatrical performances over a telephone line were known in France as “Théâtrephone” and in England as “Electrophone”.**
- **Coin-operated telephone receivers which allowed to use this service were set up in hotels, cafés, clubs or at the place of abode of certain consumers. For purposes of payment were issued subscription tickets – some “prototype” of modern plastic payment cards for mobile telecommunication services.**
- **“Théâtrephone” and “Electrophone” inherently have certain similarity with widespread currently in digital networks use on-demand.**

- **Certain similarity between use on-demand and “Théâtrephone” and “Electrophone” is based on the fact that the separate members of public, rather than the public in whole, can decide when and where they want to access to work.**
- **Consideration of services “Théâtrephone” and “Electrophone” took place within the discussion about expansion of scope of right to communicate to the public in such a way that the authors of literary and artistic works be granted a second exclusive right. The exclusive right of authorizing “any new communication to the public, whether by wire or not”.**
- **“It thus resolves satisfactorily the problem of subsequent uses of the original broadcast.”**
- **According to the explanatory memorandum prepared by the Belgian authorities and the Bureau of the Union, any broadcast aimed at a new circle of listeners or viewers, whether by means of a new emission over the air or by means of a transmission by wire, must be regarded as a new act of broadcasting, and as such subject to the author’s specific authorization.**
- **In its turn right to communicate to the public for the first time was included in Berne Convention at the Rome Conference of 1928. In 1928 this right can be exercised only through one form of communication – broadcasting.**

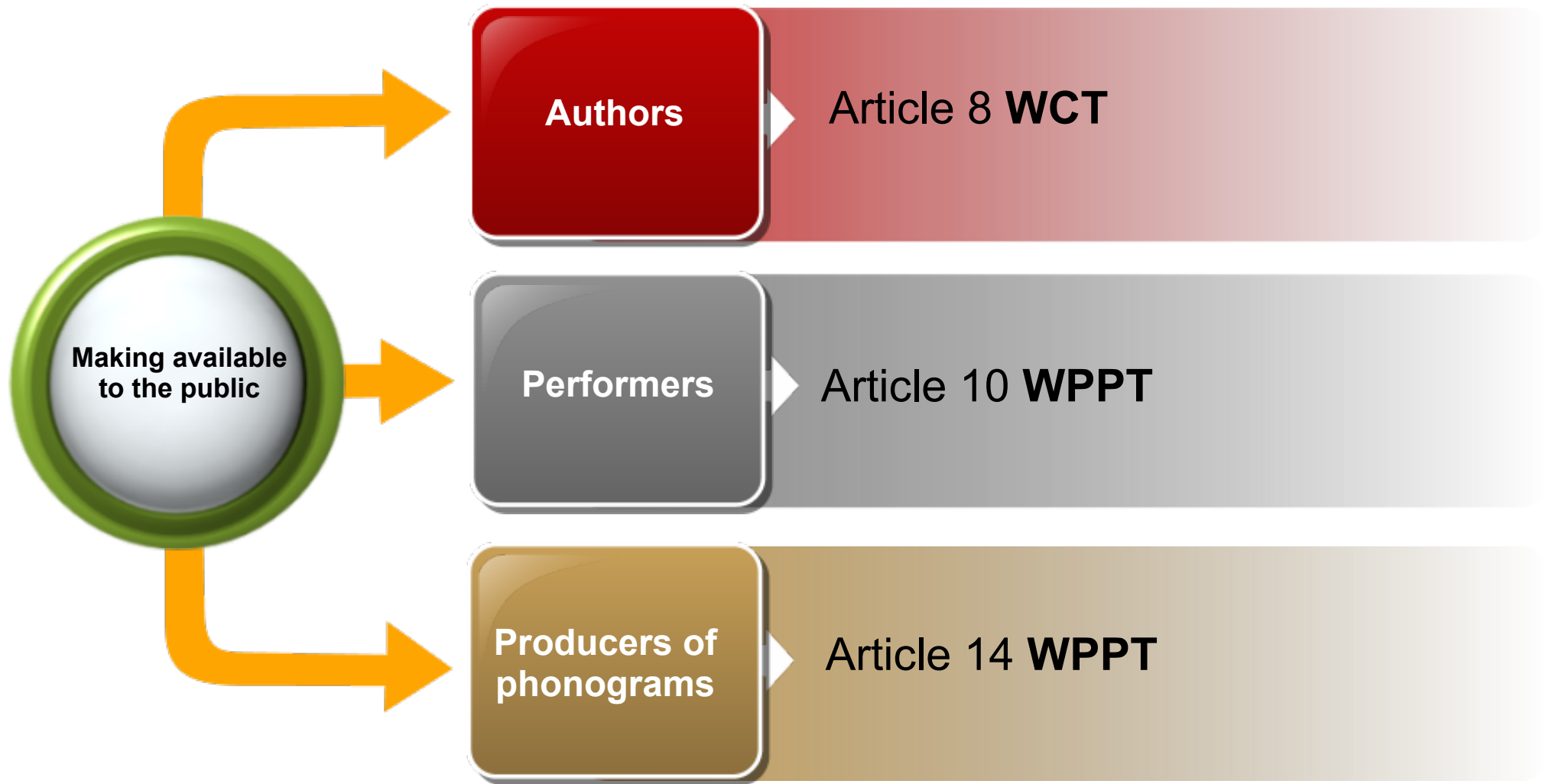
- **The Report of Brussels Revision Conference 1948 acknowledged that the number of listeners of “Théâtrephone” and “Electrophone” at any given time was likely to be small, and offered this as one reason for the technology’s non coverage by the article 11*bis*(1)(ii) broadcasting right.**
- **Thus the solution for problem of interactivity of receiving of copyrighted materials by members of public was adjourned for 48 years – till 1996.**

- **In international copyright legislation the legal institution “making available to the public” was introduced as a result of enactment by legal community the two WIPO Treaties:**
 - WIPO Copyright Treaty
 - WIPO Performances and Phonograms Treaty

- **Replacement the strategy of “recommended improvements” by strategy of creation the new international rules of law for protection literary and artistic property**



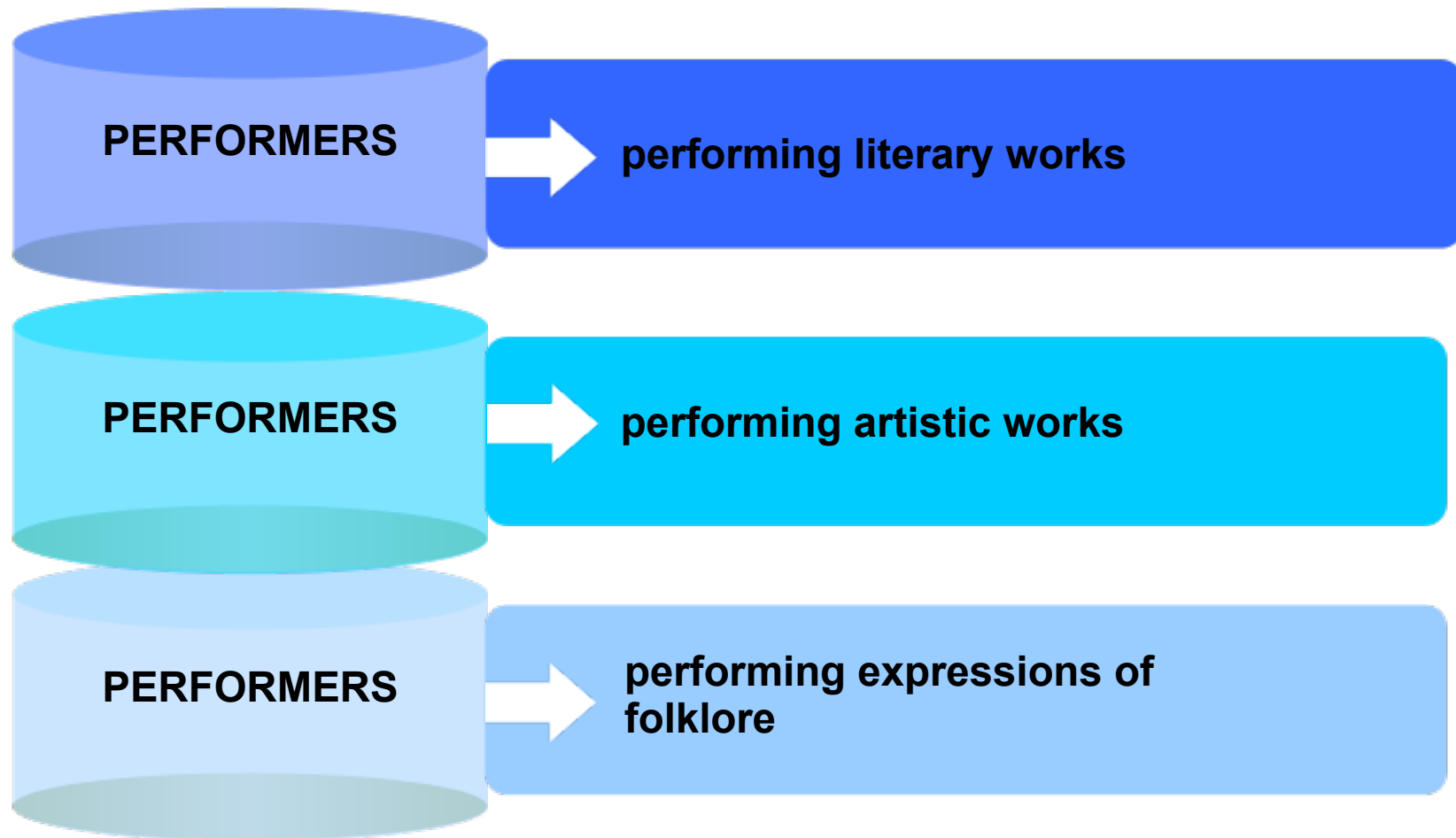
- **WIPO Treaties were adopted at Diplomatic Conference convened in Geneva within the period from 2nd till 20th of December 1996 and had entered into force in 2002:**
 - *On 6th of March had entered into force the WCT*
 - *On 20th of May had entered into force the WPPT*
- **WCT and WPPT – “treaties of global informational infrastructure” in field of copyright and neighbouring rights**



Authors

The provisions of Article 8 of WCT apply to all categories of authors and all kinds of literary and artistic works.

With regard to performers the circle of (probable) beneficiaries of the right to make available to the public is limited in WPPT to three categories of performers:



Performers

The provisions of Article 10 of WPPT
apply to all kinds of performances on any
types of mediums available to aural
perception

WPPT provisions



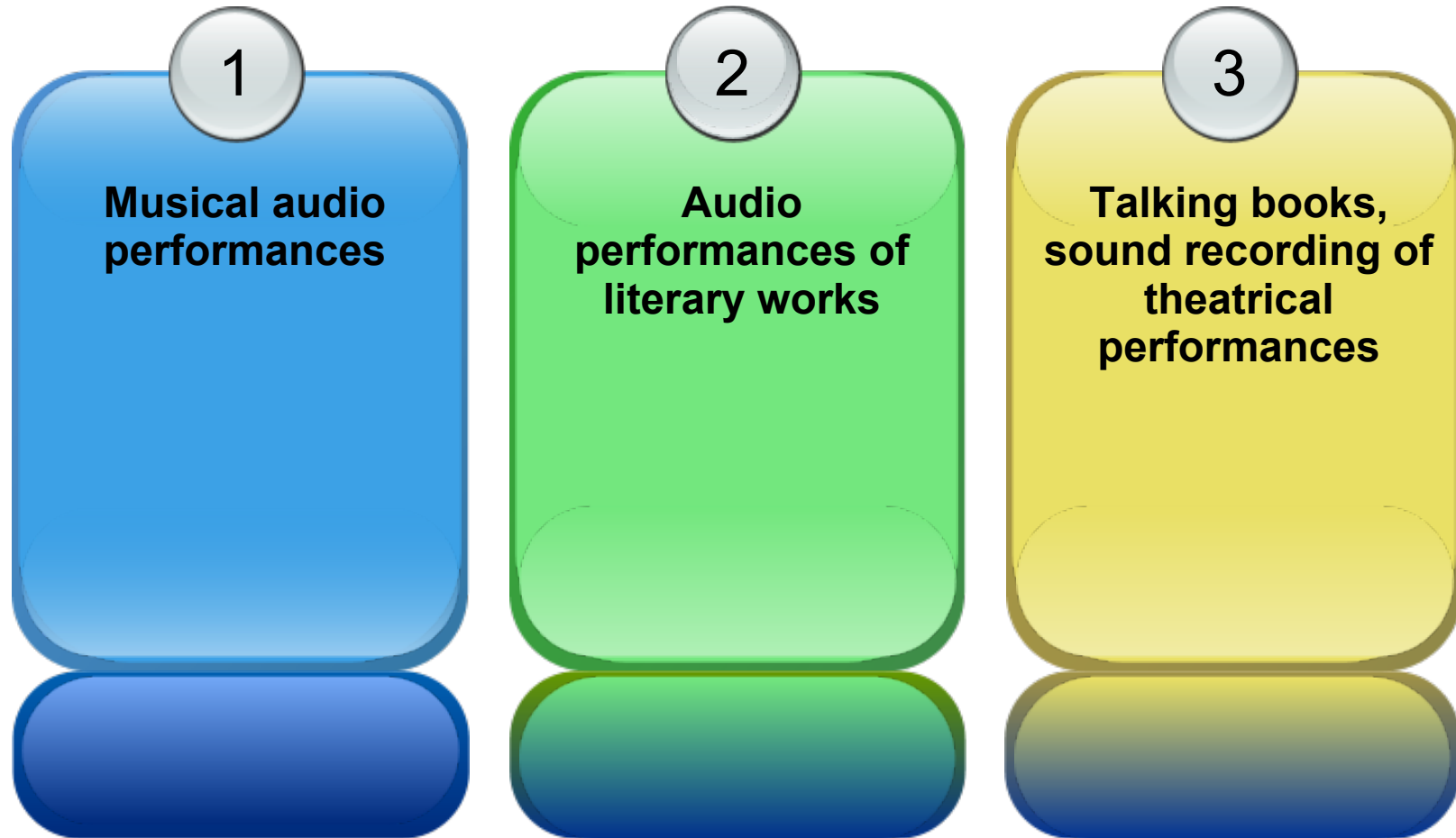
are not applied

WPPT provisions

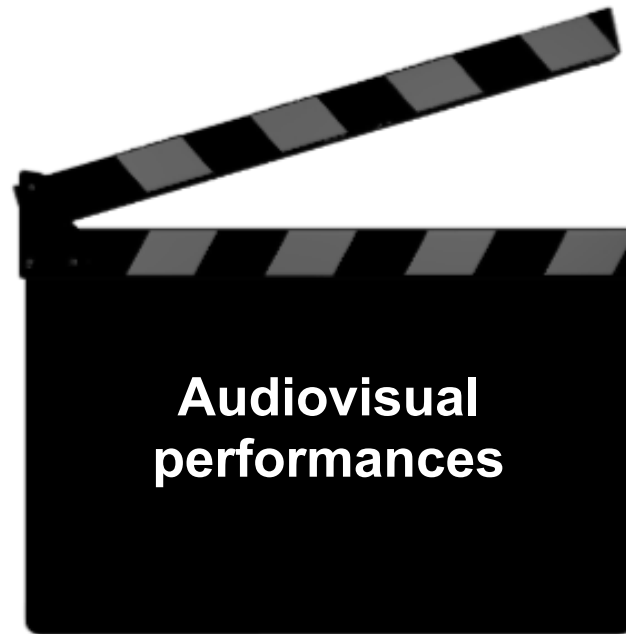


also are not applied

KINDS OF AUDIO PERFORMANCES PROTECTED BY WPPT



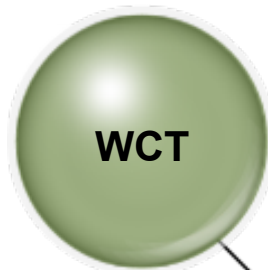
WPPT provisions



also are not applied

Making available right and international protection

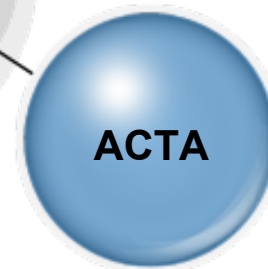
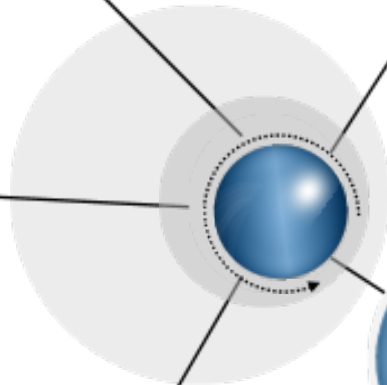
WIPO Copyright Treaty (had entered into force on March 6, 2002)



Draft WIPO Audiovisual Performances Treaty



WIPO Performances and Phonograms Treaty (had entered into force on May 20, 2002)



Secret draft Anti-Counterfeiting Trade Agreement



Working Paper on Webcasting as non-mandatory appendix to the WIPO Treaty on the Protection of Broadcasting Organizations

International level of protection includes both an effective legislation and a drafts at stages of debates and adoption.

ACTA (Anti – Counterfeiting Trade Agreement)

- Secret plurilateral trade agreement.
- **The goal:** to exercise strict supervision over copyright observance in Internet and in market of information and informational technologies and goods based on informational technologies.
- **Countries admitted to discuss an agreement provisions:** USA, Australia, European Union, Japan, Jordan, Korea, Mexico, Morocco, New Zealand, Singapore, Switzerland, United Arab Emirates.
- **Countries which are not admitted to discuss an agreement provisions:** Russian Federation, People's Republic of China

Current situation around drafting and debating a draft ACTA

- United States Department of Commerce in the end of March 2009 had decided to declassify documents on drafting and adopting the new international copyright convention (ACTA).
- What it could do else if European Parliament had adopted on 11th of March 2009 devised by Member of the European Parliament for West Midlands Michael Cashman suggestion to make consideration of new international convention on copyright (initiators of its drafting and adoption are USA and Japan) absolutely transparent and public.
- For the Michael Cashman proposition voted 439 deputies, against 200 and 57 abstained from voting. Thus European Parliament adopted resolution on ACTA: **“In accordance with Article 255(1) of the EC Treaty, the Commission should immediately make all documents related to the ongoing international negotiations on the Anti-Counterfeiting Trade Agreement (ACTA) publicly available.”**
- Early USA by reason of government secret denied general public access to any documentation relevant both to international convention text and to materials on international negotiations for its conclusion.
- It is first incident in international copyright history, when developing and adoption an international copyright convention are declared as government secret equally with nuclear secrets.
- Another main intrigue of this secret convention is that Russia and China are not involved in developing and debating of it. At the same time it was emphasized that international convention would not unfavourably affect Russia and China.
- Many foreign analysts hardly believe it. In their opinion this secret convention is intended for creation the new international structure in the field of copyright bypassing already existing international organizations: World Intellectual Property Organization and WTO.
- Russia and China are WIPO members, and China is even WTO member.
- From leaked information it became known that ACTA will not be opened for accession to this agreement of any other state of world as opposed to all existing conventions in the field of intellectual property. It will be like closed community, accession to which is possible only by offer of countries from this community.

Position of Russian Federation

in relation to ACTA is expressed in clause 17 of following document:

- **Main final document.** *It is adopted by heads of states and governments from G8 on July 8, 2008.*
- **Protection of intellectual property rights:** *“We encourage the acceleration of negotiations to establish a new international legal framework, the Anti-Counterfeiting Trade Agreement (ACTA), and seek to complete the negotiation by the end of this year. We will promote practical cooperation between our countries to develop tools to combat new techniques in counterfeiting and piracy and spread best practices.”*



How get to know other parts of dissertation?

Is it necessary to change anything in russian copyright legislation, especially in the field of collective management.

Evolutionary development of copyright and neighbouring rights in the system of russian civil law with regard to digital technologies.

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Bringing the russian legislation to conformity with universally recognized international standards.