



**Records of the Diplomatic Conference
on Certain Copyright
and Neighboring Rights Questions**

Geneva 1996

Volume I

WORLD
INTELLECTUAL
PROPERTY
ORGANIZATION



Geneva 1999

**WORLD INTELLECTUAL PROPERTY ORGANIZATION
(WIPO)**

**RECORDS
OF THE DIPLOMATIC CONFERENCE
ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS**

Geneva 1996

VOLUME I



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WIPO COPYRIGHT TREATY (WCT)

**TEXT OF THE SUBSTANTIVE AND ADMINISTRATIVE PROVISIONS
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**Draft Treaty on Certain Questions Concerning
the Protection of Literary and Artistic Works**

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EDITOR'S NOTE

The part entitled "Participants" (pages 819 to 886) lists the individuals who represented governments and the European Communities (pages 819 to 869), intergovernmental organizations other than the World Intellectual Property Organization (page 869 to 870), international non-governmental organizations (pages 870 to 881) and the World Intellectual Property Organization (page 881). (The reports of the Credentials Committee and its Chairman appear on pages 399 to 404, 497 to 498 and 542). That part also lists the officers of the Diplomatic Conference and the officers and members of the committees of the Diplomatic Conference (pages 883 to 886).

Finally, these *Records* contain six different indexes (pages 889 to 916).

The first two indexes (pages 889 to 897 and 897 to 909) list by number the Articles of the two Treaties, respectively, and indicate for each Article the pages where the text of the draft and the final text appear in these *Records*; the pages where the written proposals for amendments to the Article are reproduced; and, finally, the pages where the summary minutes reflecting the discussion on and adoption of the Article are reproduced.

The third index (pages 910 to 912) is an alphabetical list of the Member States of WIPO participating in the Diplomatic Conference showing, under the name of each State, where to find the names of the members of its delegation as well as the written proposal for amendments submitted and the interventions made on behalf of that State. The fourth index (page 912) is a similar index relating to the Observer Delegations.

The fifth index (page 913) is an alphabetical list of inter-governmental Organizations showing, under the name of each Organization, where to find the interventions made on its behalf.

The sixth index (pages 914 to 916) is an alphabetical list of the participants indicating, under the name of each individual, the State or Organization which he or she represented, as well as the place in these *Records* where his or her name appears as an officer of the Conference or as an officer or a member of a Committee, as a speaker in the Plenary or a Main Committee or as a plenipotentiary signing one of the Treaties adopted at the Diplomatic Conference.

For technical reasons these *Records* have been produced in two volumes, Volume I contains the part entitled "Conference Documents" and Volume II contains the parts entitled "Summary Minutes" and "Participants", and the indexes.

The pages are numbered consecutively in these two volumes.

Geneva, December 1999

EDITOR'S NOTE

The *Records* of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions held in Geneva, from December 2 to 20, 1996, contains documents relating to that Conference which were issued before, during and after the Conference.

The final texts—that is the texts as adopted and signed—of the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) appear on right-hand pages in the first part of this volume (odd number pages 3 to 25 (WCT) and odd number pages 39 to 77 (WPPT)). On the opposite, left-hand pages (even number pages 2 to 24 (WCT) and 38 to 76 (WPPT) appear the texts of the drafts of the said Treaties as presented to the Diplomatic Conference (the basic proposals). Since, in certain cases, substantial changes in the wording were made at the Diplomatic Conference, the full texts of both the drafts and the final Treaties are reproduced.

The agreed statements concerning the WCT and the WPPT, adopted by the Diplomatic Conference, are reproduced on pages 28 to 29 and 79 to 81, respectively, and they are followed (on pages 31 to 35 and 83 to 86, respectively) by lists of the States and the European Community that signed the Treaties by the date until which they were open for signature (that is, December 31, 1997).

Page 89 contains the text of the Final Act adopted and signed by the Diplomatic Conference and the list of States that signed the Final Act on December 20, 1996. Furthermore, page 93 contains the text of the Resolution Concerning Audiovisual Performances, and page 97 contains the text of the Recommendation Concerning Databases, both of which were adopted by the Diplomatic Conference.

The part entitled “Conference Documents” (pages 101 to 562) contains two series of documents distributed before and during the Diplomatic Conference: “CRNR/DC” (100 documents) and “CRNR/DC/INF (10 documents). Documents the full contents of which is reproduced elsewhere in these *Records* are only included by way of reference in the Conference Documents part. A list of the documents, indicating on which page they are reproduced, or referred to, appears in the beginning of the Conference Documents part of these *Records*, on pages 101 to 111.

The Rules of Procedure of the Diplomatic Conference, as adopted and amended during the Conference, appears on pages 378 to 394.

The part entitled “Summary Minutes” (pages 565 to 816) contains the summary minutes of the Plenary of the Diplomatic Conference and of Main Committees I and II. Those minutes were written in their provisional form by the International Bureau on the basis of transcripts of the tape recordings which were made of all interventions. The transcripts are preserved in the archives of the International Bureau. The provisional minutes were then made available to the speakers with the invitation to make suggestions for changes where desired. The final minutes, published in these *Records*, take such suggestions into account.

WIPO Copyright Treaty

Contents

Preamble

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Article 25: Depositary

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties that are not countries of the Union established by the Berne Convention shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

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

[No corresponding Article]

Article 2

Application of Articles 3 to 6 of the Berne Convention

Contracting Parties shall apply the provisions of Articles 3 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

Article 3

Notion and Place of Publication

(1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.

(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public.

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to the expression of a computer program in any form.

Article 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

[No corresponding Article]

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

Article 5

Collections of Data (Databases)

Collections of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any rights subsisting in the data or material contained in the collection.

Article 6

Abolition of Certain Non-Voluntary Licenses

(1) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licenses under Article 11bis(2) of the Berne Convention in respect of the broadcasting of a work.

(2) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer apply the provisions of Article 13 of the Berne Convention.

Article 7

Scope of the Right of Reproduction

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

Article 5**Compilations of Data (Databases)**

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

[No corresponding Article]

[No corresponding Article]

Article 8

Alternative A

Right of Distribution and Right of Importation

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (i) the making available to the public of the original and copies of their works through sale or other transfer of ownership;
- (ii) the importation of the original and copies of their works, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of any work that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

Alternative B

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of works by or pursuant to authorization.

Article 9

Right of Rental

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs, collections of data or other material in machine-readable form, and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

Article 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

Article 7

Right of Rental

(1) Authors of

(i) computer programs;

(ii) cinematographic works; and

(iii) works embodied in phonograms, as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art.

Article 10

Right of Communication

Without prejudice to the rights provided for in Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 11

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall apply the provisions of Articles 7(1), 7(3), 7(5), 7(6), 7(7) and 7(8) of the Berne Convention and shall not apply the provisions of Article 7(4).

Article 12

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Paragraph (1) shall not apply:

(i) in the case of computer programs, where the program itself is not the essential object of the rental; and

(ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive right of reproduction of authors.

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 13

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Article 14

Obligations concerning Rights Management Information

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 12

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Article 15

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 16

Special Provisions on Enforcement of Rights

Alternative A

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.*

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

Article 98

Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation.

[* The Annex is reproduced as part of document CRNR/DC/4, on pages 223 to 231.]

Article 13

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 15

Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 100(3) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) The European Community and any other Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty and whose delegates are present at the time the vote is taken. No such intergovernmental organization shall participate in the vote if any of its Member States exercises its right to vote.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 99

International Bureau

The International Bureau of the World Intellectual Property Organization (hereinafter referred to as "WIPO") shall perform the administrative tasks concerning the Treaty.

Article 100

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 17(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and *vice versa*.

(4)The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5)The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 16

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 17

Eligibility for Becoming Party to the Treaty

(1)Any Member State of WIPO may become party to this Treaty.

(2)The European Community may become party to this Treaty.

(3)The Assembly may decide to admit any other international organization to become party to this Treaty [if the international organization has competence in respect of, and has its own legislation binding on all its Member States on the subject matters covered by this Treaty[, and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty]].

[(4)The European Community, when it deposits its instrument of ratification or accession, and any other intergovernmental organization when asking for admittance to become a party to this Treaty, shall inform the Director General of WIPO of its competence and its legislation with respect to the subject matters covered by this Treaty. It shall do the same also in respect of any subsequent changes in such competence and legislation.]

[No corresponding Article]

Article 101

Signature of the Treaty

This Treaty may be signed until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 102

Entry into Force of the Treaty

This Treaty shall enter into force three months after [five] instruments of ratification or accession by States have been deposited with the Director General of WIPO.

(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 18

Rights and Obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 19

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 20

Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 103

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (i) the [five] States referred to in Article 102, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 102, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 104

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

Article 105

Denunciation of the Treaty

This Treaty may be denounced by any party to this Treaty by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 106

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

Article 21

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (i) the 30 States referred to in Article 20, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 20, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 22

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

Article 23

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 24

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 107

Depositary

The Director General of WIPO is the depositary of this Treaty.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 25

Depositary

The Director General of WIPO is the depositary of this Treaty.

AGREED STATEMENTS CONCERNING THE WIPO COPYRIGHT TREATY

adopted by the Diplomatic Conference on December 20, 1996

Concerning Article 1(4)

The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to 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.

Concerning Article 3

It is understood that in applying Article 3 of this Treaty, the expression “country of the Union” in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression “country outside the Union” in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that “this Convention” in Articles 2(8), 2*bis*(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a “national of one of the countries of the Union” will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.

Concerning Article 4

The scope of protection for computer programs under Article 4 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Article 5

The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Articles 6 and 7

As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 7

It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party’s law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

Concerning Article 8

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).

Concerning Article 10

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Concerning Article 12

It is understood that the reference to “infringement of any right covered by this Treaty or the Berne Convention” includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

SIGNATORIES TO THE WCT

<u>State</u>	<u>Date</u>	<u>Signatorem</u>
Argentina	September 18, 1997	Mr. Manuel Benitez (Minister, Permanent Mission, Geneva)
Austria	December 30, 1997	Mr. Harald Kreid (Ambassador, Permanent Representative, Geneva)
Belarus	December 8, 1997	Mr. Stanislau Sudarikau (Chairman, Committee on Copyright and Neighboring Rights, Ministry of Justice, Minsk)
Belgium	February 19, 1997	Mr. Lodewijk Willems (Ambassador, Permanent Representative, Geneva)
Bolivia	December 20, 1996	Mr. Raúl Medrano Vidal (Director Nacional de Derecho de Autor)
Burkina Faso	December 20, 1996	Mr. Ablassé Ouedraogo (Minister of Foreign Affairs)
Canada	December 22, 1997	Mr. John Weekes (Ambassador, Permanent Representative, Geneva)
Chile	December 20, 1996	Mrs. Cecilia Gallardo (Ministro Consejero, Subdirectora de Política Multilateral, Ministerio de Relaciones Exteriores)
Colombia	October 22, 1997	Mr. Gustavo Castro Guerrero (Ambassador, Permanent Representative, Geneva)
Costa Rica	December 2, 1997	Mrs. Janina Del Vecchio Ugalde (Ambassador, Berne)
Croatia	December 15, 1997	Mr. Nikola Kopčić (Director, State Intellectual Property Office)

<u>State</u>	<u>Date</u>	<u>Signatree</u>
Denmark	October 28, 1997	Mr. Hans Henrik Bruun (Ambassador, Permanent Representative, Geneva)
Ecuador	December 31, 1997	Mr. Luis Gallegos Chiriboga (Ambassador, Permanent Representative, Geneva)
Estonia	December 29, 1997	Mr. Priit Pallum (Chargé d'affaires a.i., Permanent Mission, Geneva)
Finland	May 9, 1997	Mr. Björn Ekblom (Ambassador, Permanent Representative, Geneva)
France	October 9, 1997	Mr. Daniel Bernard (Ambassador, Permanent Representative, Geneva)
Germany	December 20, 1996	Mr. Alfons Schäfers (Director, Federal Ministry of Justice)
Ghana	May 23, 1997	Mrs. Agnes Aggrey-Orleans (Ambassador, Permanent Representative, Geneva)
Greece	January 13, 1997	Mr. Georges Helmis (Ambassador, Permanent Representative, Geneva)
Hungary	January 29, 1997	Mr. Péter Náráy (Ambassador, Permanent Representative, Geneva)
Indonesia	December 20, 1996	Mr. Bambang Kesowo (Vice-Secretary of Cabinet, Cabinet Secretariat)
Ireland	December 19, 1997	Mrs. Anne Anderson (Ambassador, Permanent Representative, Geneva)
Israel	March 25, 1997	Mr. Yosef Lamdan (Ambassador, Permanent Representative, Geneva)
Italy	December 20, 1996	Mr. Raffaele Foglia (Legal Advisor for the Ministry of Foreign Affairs)
Kazakstan	February 28, 1997	Mr. Maral Yskakbay (Chairman, Agency on Copyright and Neighboring Rights)

<u>State</u>	<u>Date</u>	<u>Signatoree</u>
Kenya	December 20, 1996	Mrs. Esther Mshai Tolle (Ambassador, Permanent Representative, Geneva)
Kyrgyzstan	September 19, 1997	Mr. Roman. Omorov (Director, State Agency of Intellectual Property of the Kyrgyz Republic)
Luxembourg	February 18, 1997	Mr. Paul Duhr (Deputy Permanent Representative, Geneva)
Mexico	December 18, 1997	Mr. Antonio de Icaza González (Ambassador, Permanent Representative, Geneva)
Monaco	January 14, 1997	Mr. Bernard Fautrier (Ambassador, Minister Plenipotentiary, Embassy of the Principality of Monaco, Berne)
Mongolia	December 20, 1996	Mr. Jugneegiin Amarsanaa (Minister of Law)
Namibia	December 20, 1996	Mr. Tarah Shinavene (Director of Copyright Services, Ministry of Information and Broadcasting)
Netherlands	December 2, 1997	Mrs. Eveline L. Herfkens (Ambassador, Permanent Representative, Geneva)
Nigeria	March 24, 1997	Mr. Walter Ofonagoro (Minister for Information and Culture)
Panama	December 31, 1997	Mr. Javier Bonagas de Gracia (Representante Permanente Adjunto, Permanent Mission, Geneva)
Portugal	December 31, 1997	Mr. Mario Jesus Dos Santos (Plenipotentiary Minister, Permanent Mission, Geneva)
Republic of Moldova	September 19, 1997	Mr. Mihail Cius (Director General, State Copyright Agency)

<u>State</u>	<u>Date</u>	<u>Signatorem</u>
Romania	December 31, 1997	Mr. Pavel Grecu (Chargé d'affaires a.i., Permanent Mission, Geneva)
Senegal	December 17, 1997	Mrs. Absa Claude Diallo (Ambassador, Permanent Representative, Geneva)
Slovakia	December 29, 1997	Mr. Peter Brňo (Counsellor, Permanent Mission, Geneva)
Slovenia	December 12, 1997	Mr. Bojan Pretnar (Director, Slovenian Intellectual Property Office)
South Africa	December 12, 1997	Mr. Jacob Sello Selebi (Ambassador, Permanent Representative, Geneva)
Spain	December 20, 1996	Mr. Raimundo Pérez-Hernández (Ambassador, Permanent Representative, Geneva)
Sweden	October 31, 1997	Mr. Lars Norberg (Ambassador, Permanent Representative, Geneva)
Switzerland	December 29, 1997	Mr. Carlo Govoni (Chef du service juridique du droit d'auteur et des droits voisins, Institut Fédéral de la Propriété Intellectuelle)
Togo	December 20, 1996	Mr. Agbogboli Ihou (Minister of Youth, Sports and Culture)
United Kingdom	February 13, 1997	Mr. Nigel C.R. Williams (Ambassador, Permanent Representative, Geneva)
United States of America	April 12, 1997	Mr. Bruce Lehman (Assistant Secretary of Commerce and Commissioner of Patents and Trademarks)
Uruguay	January 8, 1997	Ms. Susana Rivero (Minister, Permanent Mission, Geneva)
Venezuela	December 20, 1996	Mr. Naudy Suárez (Chargé d'affaires a.i., Permanent Mission, Geneva)

<u>State</u>	<u>Date</u>	<u>Signatree</u>
European Communities	December 20, 1996	Mr. Heinz Zourek (Deputy-Director General of the Directorate General XV of the Commission of the E.C.)
Total: 51		

WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

**TEXT OF THE SUBSTANTIVE AND ADMINISTRATIVE PROVISIONS
OF THE TREATY AS PRESENTED TO THE DIPLOMATIC CONFERENCE**

TEXT OF THE TREATY AS ADOPTED BY THE DIPLOMATIC CONFERENCE

**AGREED STATEMENTS ADOPTED BY THE
DIPLOMATIC CONFERENCE**

SIGNATORIES

**Draft Treaty for the Protection of the Rights
of Performers and Producers of Phonograms**

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WIPO Performances and Phonograms Treaty

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The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties for the protection of literary and artistic works, and in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors under the Berne Convention for the Protection of Literary and Artistic Works.

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Recognizing the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

Article 2

Definitions

For the purposes of this Treaty:

(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds; an audiovisual fixation, the representation of sounds and images or the sound part of either is not a phonogram;

(c) "fixation" means the embodiment of

Alternative A: sounds,

Alternative B: sounds or images,

or of the representations thereof, from which they can be perceived, reproduced or communicated through an appropriate device;

(d) "producer of a phonogram" means the person, or the legal entity, who or which first fixes the sounds of a performance or other sounds, or the representations of sounds;

(e) "publication" of a fixed performance or a phonogram means

(i) the offering of copies of the fixed performance or the phonogram to the public, or

(ii) the making of the fixed performance or the phonogram available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them,

with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

(f) "rental" of a phonogram means any transfer of the possession of a copy of a phonogram for consideration for a limited period of time;

(g) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals by satellite is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

Article 2

Definitions

For the purposes of this Treaty:

- (a) “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (b) “phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (c) “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
- (d) “producer of a phonogram” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;
- (e) “publication” of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;
- (f) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(h) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of

Alternative A: sounds

Alternative B: the images or sounds

of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Articles 12 and 19, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) or, for the purposes of Article 5, Article 17 of the Rome Convention shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the protection provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty.

(g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

CHAPTER II RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall

Alternative A: , as regards his musical performances, have the right

Alternative B: have the right

to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of

Alternative A: authorizing, as regards their musical performances:

Alternative B: authorizing:

(i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and

(ii) the fixation of their unfixed performances.

CHAPTER II RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 7

Right of Reproduction

(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

in any manner or form.

(2) Subject to the provisions of Article 13(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the fixed performance perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the fixed performance that is authorized by the performer or permitted by law.

Article 8

Right of Modification

Performers shall enjoy the exclusive right of authorizing the modification of their

Alternative A: musical performances fixed in phonograms.

Alternative B: performances fixed in any medium.

Article 9

Alternative E

Right of Distribution and Right of Importation

(1) Performers shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership;

(ii) the importation of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

Article 7

Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

[No corresponding Article.]

[Article 8 follows on page 53.]

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a fixed performance that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

Alternative F

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of performances by or pursuant to an authorization.

Article 10

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the rental of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even after distribution of them by or pursuant to authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

Article 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

Article 9

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Article 11

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[Articles 12, Right of Remuneration for Broadcasting and Communication to the Public, and 13, Limitations and Exceptions, of the Draft are reproduced on pages 58, 60 and 62.]

CHAPTER III RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14

Right of Reproduction

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

(2) Subject to the provisions of Article 20(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the phonogram audible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law.

Article 15

Right of Modification

Producers of phonograms shall enjoy the exclusive right of authorizing the modification of their phonograms.

Article 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

**CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS**

Article 11

Right of Reproduction

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

[No corresponding article.]

Article 16

Alternative A

Right of Distribution and Right of Importation

(1) Producers of phonograms shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership;

(ii) the importation of the original or copies of their phonograms, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a phonogram that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

Alternative B

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of phonograms by or pursuant to an authorization.

Article 17

Right of Rental

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the rental of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

Article 12

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of the phonogram.

Article 13

Right of Rental

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them by, or pursuant to, authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

Article 18

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[CHAPTER II RIGHTS OF PERFORMERS]

Article 12

Right to Remuneration for Broadcasting and Communication to the Public

(1) Performers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

[CHAPTER III RIGHTS OF PRODUCERS OF PHONOGRAMS]

Article 19

Right to Remuneration for Broadcasting and Communication to the Public

(1) Producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

Article 14

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

CHAPTER IV COMMON PROVISIONS

Article 15

Right to Remuneration for Broadcasting and Communication to the Public

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

Article 13**Limitations and Exceptions**

- (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.
- (2) Contracting Parties shall confine any limitations or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.

Article 20**Limitations and Exceptions**

- (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.
- (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the producer of phonograms.

**CHAPTER IV
COMMON PROVISIONS**

Article 21**Term of Protection**

- (1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the
- Alternative A:* musical performance fixed in a phonogram
Alternative B: performance fixed in any medium
- was published, and in case of unpublished fixed performances, from the end of the year in which the performance took place.
- (2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

Article 16

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

Article 17

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 22

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Article 23

Obligations concerning Rights Management Information

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of fixed performances or phonograms from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or a phonogram, or appear in connection with the communication of a fixed performance or a phonogram to the public.

Article 18

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Article 19

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 24

Formalities and Independence of Protection

- (1) The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.
- (2) Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the performance or phonogram.

Article 25

Reservations

Alternative C

(1) Any party upon becoming a Contracting Party to this Treaty, may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of:

- (i) Article 2(c) and Article 2(h) to sounds only;
- (ii) Article 5(1) and Article 6 to musical performances only; and
- (iii) Article 7, Article 8, Article 9(1), Article 10, Article 11, and Article 21(1) to musical performances fixed in phonograms only.

Alternative D

[No such provision]

(2) Subject to the provisions of Article 12(3), 19(3), and paragraph (1) of this Article, no reservations to this Treaty shall be permitted.

Article 26

Application in Time

- (1) Contracting Parties shall also apply provisions of this Treaty to performances that took place and phonograms that were fixed before the date of entry into force of this Treaty for each that Contracting Party. The duration of the protection shall be determined according to the provisions of Article 21.
- (2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

Article 20

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Article 21

Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

Article 22

Application in Time

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

(3) Contracting Parties may provide for conditions under which fixations of performances and copies of phonograms which were lawfully made before the entry into force of this Treaty for each Contracting Party may be distributed to the public or rented during a limited period of time.

Article 27

Special Provisions on Enforcement of Rights

Alternative A

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.*

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

* The Annex is not reproduced here. It is identical to the Annex to document CRNR/DC/4 which is reproduced on pages 223 to 231.]

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

Article 23

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

CHAPTER V
ADMINISTRATIVE AND FINAL CLAUSES

Article 98

Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 100(3) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) The European Community and any other Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty and whose delegates are present at the time the vote is taken. No such intergovernmental organization shall participate in the vote if any of its Member States exercises its right to vote.

(4)The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5)The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

CHAPTER V
ADMINISTRATIVE AND FINAL CLAUSES

Article 24

Assembly

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 99

International Bureau

The International Bureau of the World Intellectual Property Organization (hereinafter referred to as "WIPO") shall perform the administrative tasks concerning the Treaty.

Article 100

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.

(2) The European Community may become party to this Treaty.

(3) The Assembly may decide to admit any other international organization to become party to this Treaty [if the international organization has competence in respect of, and has its own legislation binding on all its Member States on the subject matters covered by this Treaty[, and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty]].

[(4) The European Community, when it deposits its instrument of ratification or accession, and any other intergovernmental organization when asking for admittance to become a party to this Treaty, shall inform the Director General of WIPO of its competence and its legislation with respect to the subject matters covered by this Treaty. It shall do the same also in respect of any subsequent changes in such competence and legislation.]

[No corresponding Article]

Article 101

Signature of the Treaty

This Treaty may be signed until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 25

International Bureau

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 26

Eligibility for Becoming Party to the Treaty

(1) Any Member State of WIPO may become party to this Treaty.

(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 27

Rights and Obligations under the Treaty

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 28

Signature of the Treaty

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Article 102

Entry into Force of the Treaty

This Treaty shall enter into force three months after [five] instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 103

Effective Date of Becoming Party to the Treaty

This Treaty shall bind:

- (i) the [five] States referred to in Article 102, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 102, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 104

No Reservations to the Treaty

No reservation to this Treaty shall be admitted.

Article 105

Denunciation of the Treaty

This Treaty may be denounced by any party to this Treaty by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 29

Entry into Force of the Treaty

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 30

Effective Date of Becoming Party to the Treaty

This Treaty shall bind

(i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

[see Article 21.]

Article 31

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 106

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 107

Depositary

The Director General of WIPO is the depositary of this Treaty.

Article 32

Languages of the Treaty

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 33

Depositary

The Director General of WIPO is the depositary of this Treaty.

**AGREED STATEMENTS CONCERNING
THE WIPO PERFORMANCES AND PHONOGRAMS TREATY**

adopted by the Diplomatic Conference on December 20, 1996

Concerning Article 1

It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa.

It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty.

Concerning Article 2(b)

It is understood that the definition of phonogram provided in Article 2(b) does not suggest that rights in the phonogram are in any way affected through their incorporation into a cinematographic or other audiovisual work.

Concerning Articles 2(e), 8, 9, 12, and 13

As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 3

It is understood that the reference in Articles 5(a) and 16(a)(iv) of the Rome Convention to “national of another Contracting State” will, when applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is a member of that organization.

Concerning Article 3(2)

For the application of Article 3(2), it is understood that fixation means the finalization of the master tape (“bande-mère”).

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.

Concerning Article 15

It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.

Concerning Article 15

It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain.

Concerning Article 16

The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Limitations and Exceptions) of the WIPO Performances and Phonograms Treaty.

Concerning Article 19

The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 19 (on Obligations concerning Rights Management Information) of the WIPO Performances and Phonograms Treaty.

SIGNATORIES TO THE WPPT

<u>State</u>	<u>Date</u>	<u>Signatoree</u>
Argentina	September 18, 1997	Mr. Manuel Benitez (Minister, Permanent Mission, Geneva)
Austria	December 30, 1997	Mr. Harald Kreid (Ambassador, Permanent Representative, Geneva)
Belarus	December 8, 1997	Mr. Stanislau Sudarikau (Chairman, Committee on Copyright and Neighboring Rights, Ministry of Justice, Minsk)
Belgium	February 19, 1997	Mr. Lodewijk Willems (Ambassador, Permanent Representative, Geneva)
Bolivia	December 20, 1996	Mr. Raúl Medrano Vidal (Director Nacional de Derecho de Autor)
Burkina Faso	December 20, 1996	Mr. Ablassé Ouedraogo (Minister of Foreign Affairs)
Canada	December 22, 1997	Mr. John Weekes (Ambassador, Permanent Representative, Geneva)
Chile	December 20, 1996	Mrs. Cecilia Gallardo (Ministro Consejero, Subdirectora de Política Multilateral, Ministerio de Relaciones Exteriores)
Colombia	October 22, 1997	Mr. Gustavo Castro Guerrero (Ambassador, Permanent Representative, Geneva)
Costa Rica	December 2, 1997	Mrs. Janina Del Vecchio Ugalde (Ambassador, Berne)
Croatia	December 15, 1997	Mr. Nikola Kopčić (Director, State Intellectual Property Office)
Denmark	October 28, 1997	Mr. Hans Henrik Bruun (Ambassador, Permanent Representative, Geneva)

<u>State</u>	<u>Date</u>	<u>Signatorem</u>
Ecuador	December 31, 1997	Mr. Luis Gallegos Chiriboga (Ambassador, Permanent Representative, Geneva)
Estonia	December 29, 1997	Mr. Priit Pallum (Chargé d'affaires a.i., Permanent Mission, Geneva)
Finland	May 9, 1997	Mr. Björn Ekblom (Ambassador, Permanent Representative, Geneva)
France	October 9, 1997	Mr. Daniel Bernard (Ambassador, Permanent Representative, Geneva)
Germany	December 20, 1996	Mr. Alfons Schäfers (Director, Federal Ministry of Justice)
Ghana	May 23, 1997	Mrs. Agnes Aggrey-Orleans (Ambassador, Permanent Representative, Geneva)
Greece	January 13, 1997	Mr. Georges Helmis (Ambassador, Permanent Representative, Geneva)
Hungary	January 29, 1997	Mr. Péter Náray (Ambassador, Permanent Representative, Geneva)
Indonesia	December 20, 1996	Mr. Bambang Kesowo (Vice-Secretary of Cabinet, Cabinet Secretariat)
Ireland	December 19, 1997	Mrs. Anne Anderson (Ambassador, Permanent Representative, Geneva)
Israel	March 25, 1997	Mr. Yosef Lamdan (Ambassador, Permanent Representative, Geneva)
Italy	December 20, 1996	Mr. Raffaele Foglia (Legal Advisor for the Ministry of Foreign Affairs)
Kazakhstan	February 28, 1997	Mr. Maral Yskakbay (Chairmant, Agency on Copyright and Neighboring Rights)
Kenya	December 20, 1996	Mrs. Esther Mshai Tolle (Ambassador, Permanent Representative, Geneva)

<u>State</u>	<u>Date</u>	<u>Signatorem</u>
Luxembourg	February 18, 1997	Mr. Paul Duhr (Deputy Permanent Representative, Geneva)
Mexico	December 18, 1997	Mr. Antonio de Icaza González (Ambassador, Permanent Representative, Geneva)
Monaco	January 14, 1997	Mr. Bernard Fautrier (Ambassador, Minister Plenipotentiary, Embassy of the Principality of Monaco, Berne)
Mongolia	December 20, 1996	Mr. Jugneegiin Amarsanaa (Minister of Law)
Namibia	December 20, 1996	Mr. Tarah Shinavene (Director of Copyright Services, Ministry of Information and Broadcasting)
Netherlands	December 2, 1997	Mrs. Eveline L. Herfkens (Ambassador, Permanent Representative, Geneva)
Nigeria	March 24, 1997	Mr. Walter Ofonagoro (Minister for Information and Culture)
Panama	December 31, 1997	Mr. Javier Bonagas de Gracia (Representante Permanente Adjunto, Permanent Mission, Geneva)
Portugal	December 31, 1997	Mr. Mario Jesus Dos Santos (Plenipotentiary Minister, Permanent Mission, Geneva)
Republic of Moldova	September 19, 1997	Mr. Mihail Cius (Director General, State Copyright Agency)
Romania	December 31, 1997	Mr. Pavel Grecu (Chargé d'affaires a.i., Permanent Mission, Geneva)
Senegal	December 17, 1997	Mrs. Absa Claude Diallo (Ambassador, Permanent Representative, Geneva)
Slovakia	December 29, 1997	Mr. Peter Brňo (Counsellor, Permanent Mission, Geneva)

<u>State</u>	<u>Date</u>	<u>Signatorem</u>
Slovenia	December 12, 1997	Mr. Bojan Pretnar (Director, Slovenian Intellectual Property Office)
South Africa	December 12, 1997	Mr. Jacob Sello Selebi (Ambassador, Permanent Representative, Geneva)
Spain	December 20, 1996	Mr. Raimundo Pérez-Hernández (Ambassador, Permanent Representative, Geneva)
Sweden	October 31, 1997	Mr. Lars Norberg (Ambassador, Permanent Representative, Geneva)
Switzerland	December 29, 1997	Mr. Carlo Govoni (Chef du service juridique du droit d'auteur et des droits voisins, Institut Fédéral de la Propriété Intellectuelle)
Togo	December 20, 1996	Mr. Agbogboli Ihou (Minister of Youth, Sports and Culture)
United Kingdom	February 13, 1997	Mr. Nigel C.R. Williams (Ambassador, Permanent Representative, Geneva)
United States of America	April 12, 1997	Mr. Bruce Lehman (Assistant Secretary of Commerce and Commissioner of Patents and Trademarks)
Uruguay	January 8, 1997	Ms. Susana Rivero (Minister, Permanent Mission, Geneva)
Venezuela	December 20, 1996	Mr. Naudy Suárez (Chargé d'affaires a.i., Permanent Mission, Geneva)
European Communities	December 20, 1996	Mr. Heinz Zourek (Deputy-Director General of the Directorate General XV of the Commission of the E.C.)

Total: 50

FINAL ACT OF THE DIPLOMATIC CONFERENCE

FINAL ACT OF THE DIPLOMATIC CONFERENCE

adopted by the Diplomatic Conference on December 20, 1996

In accordance with the decisions by the Governing Bodies of the World Intellectual Property Organization (WIPO) taken at their twenty-eighth series of meetings (May 1996) and following preparations carried out by WIPO, the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions was convened by WIPO and held in Geneva from December 2 to 20, 1996.

The Diplomatic Conference adopted the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty which were opened for signature on December 20, 1996.

The following Delegations signed, on December 20, 1996, the Final Act of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Angola, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Croatia, Cuba, Denmark, Ecuador, El Salvador, Finland, Germany, Honduras, Hungary, Indonesia, Ireland, Italy, Jamaica, Japan, Kazakstan, Kenya, Mexico, Mongolia, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sudan, Sweden, Switzerland, Togo, Trinidad and Tobago, United Kingdom, United States of America, Uzbekistan, Venezuela, Zimbabwe, European Communities (57)

**RESOLUTION CONCERNING AUDIOVISUAL
PERFORMANCES ADOPTED BY THE DIPLOMATIC
CONFERENCE**

RESOLUTION CONCERNING AUDIOVISUAL PERFORMANCES

adopted by the Diplomatic Conference on December 20, 1996

The Delegations participating in the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva,

Noting that the development of technologies will allow for a rapid growth of audiovisual services and that this will increase the opportunities for performing artists to exploit their audiovisual performances that will be transmitted by these services;

Recognizing the great importance of ensuring an adequate level of protection for these performances, in particular when they are exploited in the new digital environment, and that sound and audiovisual performances are increasingly related;

Stressing the urgent need to agree on new norms for the adequate legal international protection of audiovisual performances;

Regretting that, in spite of the efforts of most Delegations, the WIPO Performances and Phonograms Treaty does not cover the rights of performers in the audiovisual fixations of their performance;

Call for the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of the preparatory work on a protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances, with a view to the adoption of such a protocol not later than in 1998.

**RECOMMENDATION CONCERNING DATABASES
ADOPTED BY THE DIPLOMATIC CONFERENCE**

RECOMMENDATION CONCERNING DATABASES

adopted by the Diplomatic Conference on December 20, 1996

The Delegations participating in the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva,

Recognizing that databases are a vital element in the development of a global information infrastructure;

Conscious of the importance of encouraging further development of databases;

Aware of the need to strike a balance between the interests of the producers of databases in protection from unfair copying and the interests of users in having appropriate access to the benefits of a global information infrastructure;

Expressing interest in examining further the possible implications and benefits of a *sui generis* system of protection of databases at the international level;

Noting that a treaty on such a *sui generis* system was not negotiated or adopted at the Conference;

Recommend the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of further preparatory work on a Treaty on Intellectual Property in Respect of Databases.

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CRNR/DC/1

August 30, 1996 (Original: English)

DRAFT AGENDA

*approved by the Preparatory Committee of the Diplomatic Conference
and noted with approval by the General Assembly of WIPO
and the Assembly of the Berne Union*

Observations of the International Bureau

1. The Draft Agenda, set out below, was proposed by the Director General of WIPO to the Preparatory Committee of the Proposed Diplomatic Conference (December 1996) on Certain Copyright and Neighboring Rights Questions and was considered by that Committee in its meeting held in Geneva on May 20 and 21, 1996 (see documents CRNR/PM/5 and 8).
2. The Preparatory Committee approved the draft agenda as proposed to it (see document CRNR/PM/8, paragraph 56).
3. Subsequently, the General Assembly of WIPO (at its eighteenth session (6th extraordinary)) and the Assembly of the Berne Union (at its nineteenth session (7th extraordinary)), in joint meetings held in Geneva on May 21 and 22, 1996, noted with approval the conclusions of the Preparatory Committee (document AB/XXVIII/3, paragraph 7).

AGENDA

1. Opening of the Conference by the Director General of WIPO
2. Consideration and adoption of the Rules of Procedure
3. Election of the President of the Conference
4. Consideration and adoption of the agenda
5. Election of the Vice-Presidents of the Conference

6. Election of the members of the Credentials Committee
7. Election of the members of the Drafting Committee
8. Election of the Officers of the Credentials Committee, the Main Committees and Drafting Committee
9. Consideration of the first report of the Credentials Committee
10. Opening declarations by Delegations and by representatives of Observer Organizations
11. Consideration of the texts proposed by the Main Committees
12. Consideration of the second report of the Credentials Committee
13. Adoption of the Treaty
14. Adoption of any recommendation, resolution, agreed statement or final act
15. Closing declarations by Delegations and by representatives of Observer Organizations
16. Closing of the Conference by the President*

[End of document]

* Immediately after the closing of the Conference, the Final Act, if any, and the Treaty will be open for signature.

CRNR/DC/2

August 30, 1996 (Original: English)

DRAFT RULES OF PROCEDURE OF THE DIPLOMATIC CONFERENCE

*approved by the Preparatory Committee of the Diplomatic Conference
and noted with approval by the General Assembly of WIPO
and the Assembly of the Berne Union*

Observations of the International Bureau

1. The first version of the draft Rules of Procedure was proposed by the Director General of WIPO to the Preparatory Committee of the Proposed Diplomatic Conference (December 1996) on Certain Copyright and Neighboring Rights Questions and was considered by that Committee in its meeting held in Geneva on May 20 and 21, 1996 (see document CRNR/PM/3).
2. The Preparatory Committee approved the draft Rules of Procedure as proposed to it, subject to the following four changes: *First*, it broadened the composition of the Steering Committee by also including the Vice-Presidents of the Conference (Rule 14(2)). *Second*, it decreased the number of Vice-Presidents (from 15) to 10 (Rule 15(1)). *Third*, it included a new provision on the right to vote by the European Community (see Rule 33(3); the paragraph containing this new provision appears within a pair of square brackets and its proviso within another pair of square brackets within the first pair of square brackets). *Fourth*, it decided that the information documents and summary minutes be distributed, whenever practicable, also in Arabic, Chinese, Russian and Spanish (Rule 43(2) and (3)(b)) (see document CRNR/PM/8, paragraphs 31 to 51).
3. Subsequently, the General Assembly of WIPO (at its eighteenth session (6th extraordinary)) and the Assembly of the Berne Union (at its nineteenth session (7th extraordinary)), in joint meetings held in Geneva on May 21 and 22, 1996, noted with approval the conclusions of the Preparatory Committee (document AB/XXVIII/3, paragraph 7).
4. Since the Basic Proposal (see document CRNR/DC/3) now contains provisions on a possible Assembly of the Contracting Parties, Rule 12(1) has been changed to refer not only to the final clauses but also to “any administrative... clauses.”
5. All the above-mentioned changes are included in the Draft Rules of Procedure, as set out below.

DRAFT RULES OF PROCEDURE

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CHAPTER I: OBJECTIVE, COMPETENCE, COMPOSITION AND SECRETARIAT OF THE CONFERENCE

Rule 1: Objective and Competence of the Conference

(1) The objective of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (hereinafter referred to as “the Conference”) is to negotiate and adopt a treaty on certain copyright and neighboring rights questions (hereinafter referred to as “the Treaty”).

(2) The Conference, meeting in Plenary, shall be competent to:

(i) adopt the Rules of Procedure of the Conference (hereinafter referred to as “these Rules”) and to make any amendments thereto;

(ii) adopt the agenda of the Conference;

(iii) decide on credentials, full powers, letters or other documents presented in accordance with Rules 6, 7 and 8 of these Rules;

(iv) adopt the Treaty;

(v) adopt any recommendation or resolution whose subject matter is germane to the Treaty;

(vi) adopt any agreed statements to be included in the Records of the Conference;

(vii) adopt any final act of the Conference;

(viii) deal with all other matters referred to it by these Rules or appearing on its agenda.

Rule 2: Composition of the Conference

(1) The Conference shall consist of:

(i) delegations of the States members of World Intellectual Property Organization (hereinafter referred to as “the Member Delegations”),

(ii) the special delegation of the European Community (hereinafter referred to as the “Special Delegation”),

(iii) the delegations of States members of the United Nations other than the States members of the World Intellectual Property Organization invited to the Conference as observers (hereinafter referred to as “the Observer Delegations”),

(iv) representatives of intergovernmental and non-governmental organizations invited to the Conference as observers (hereinafter referred to as “the Observer Organizations”).

(2) References in these Rules of Procedure to Member Delegations shall be considered, except as otherwise expressly indicated (see Rules 11(2), 33, 34, 35(2) and 36(2)), as references also to the Special Delegation.

(3) References in these Rules of Procedure to “Delegations” shall be considered as references to the three kinds (Member, Special and Observer) of Delegations but not to Observer Organizations.

Rule 3: Secretariat of the Conference

(1) The Conference shall have a Secretariat provided by the International Bureau of the World Intellectual Property Organization (hereinafter referred to as “the International Bureau” and “WIPO,” respectively).

(2) The Director General of WIPO and any official of the International Bureau designated by the Director General of WIPO may participate in the discussions of the Conference, meeting in Plenary, as well as in any committee or working group thereof and may, at any time, make oral or written statements, observations or suggestions to the Conference, meeting in Plenary, and any committee or working group thereof concerning any question under consideration.

(3) The Director General of WIPO shall, from among the staff of the International Bureau, designate the Secretary of the Conference and a Secretary for each committee and for each working group.

(4) The Secretary of the Conference shall direct the staff required by the Conference.

(5) The Secretariat shall provide for the receiving, translation, reproduction and distribution of the required documents, for the interpretation of oral interventions and for the performance of all other secretarial work required for the Conference.

(6) The Director General of WIPO shall be responsible for the custody and preservation in the archives of WIPO of all documents of the Conference. The International Bureau shall distribute the final documents of the Conference after the closing of the Conference.

CHAPTER II: REPRESENTATION

Rule 4: Delegations

- (1) Each Delegation shall consist of one or more delegates and may include advisors.
- (2) Each Delegation shall have a Head of Delegation and may have a Deputy Head of Delegation.

Rule 5: Observer Organizations

An Observer Organization may be represented by one or more representatives.

Rule 6: Credentials and Full Powers

- (1) Each Delegation shall present credentials.
- (2) Full powers shall be required for signing the Treaty. Such powers may be included in the credentials.

Rule 7: Letters of Appointment

The representatives of Observer Organizations shall present a letter or other document appointing them.

Rule 8: Presentation of Credentials, etc.

The credentials and full powers referred to in Rule 6 and the letters or other documents referred to in Rule 7 shall be presented to the Secretary of the Conference, preferably not later than twenty-four hours after the opening of the Conference.

Rule 9: Examination of Credentials, etc.

- (1) The Credentials Committee referred to in Rule 11 shall examine the credentials, full powers, letters or other documents referred to in Rules 6 and 7, respectively, and shall report to the Conference, meeting in Plenary.
- (2) The decision on whether a credential, full powers, letter or other document is in order shall be made by the Conference, meeting in Plenary. Such decision shall be made as soon as possible and in any case before the adoption of the Treaty.

Rule 10: Provisional Participation

Pending a decision upon their credentials, letters or other documents of appointment, Delegations and Observer Organizations shall be entitled to participate provisionally in the deliberations of the Conference as provided in these Rules.

CHAPTER III: COMMITTEES AND WORKING GROUPS

Rule 11: Credentials Committee

(1) The Conference shall have a Credentials Committee.

(2) The Credentials Committee shall consist of seven Member Delegations elected by the Conference, meeting in Plenary, from among the Member Delegations, except that the Special Delegation shall not be eligible for membership in the Credentials Committee.

Rule 12: Main Committees and Their Working Groups

(1) The Conference shall have two Main Committees. Main Committee I shall be responsible for proposing for adoption by the Conference, meeting in Plenary, the substantive law provisions of the Treaty and any recommendation, resolution or agreed statement referred to in Rule 1(2)(v) and (vi). Main Committee II shall be responsible for proposing for adoption by the Conference, meeting in Plenary, any administrative and the final clauses of the Treaty.

(2) Each Main Committee shall consist of all the Member Delegations.

(3) Each Main Committee may create working groups. In creating a working group, the Main Committee creating it shall specify the tasks of the Working Group, decide on the number of the members of the Working Group and elect such members from among the Member Delegations.

Rule 13: Drafting Committee

(1) The Conference shall have a Drafting Committee.

(2) The Drafting Committee shall consist of ten elected members and two *ex officio* members. The elected members shall be elected by the Conference, meeting in Plenary, from among the Member Delegations. The Chairmen of the two Main Committees shall be the *ex officio* members.

(3) The Drafting Committee shall prepare drafts and give advice on drafting as requested by either Main Committee. The Drafting Committee shall not alter the substance of

the texts submitted to it. It shall coordinate and review the drafting of all texts submitted to it by the Main Committees, and it shall submit the texts so reviewed for final approval to the competent Main Committee.

Rule 14: Steering Committee

- (1) The Conference shall have a Steering Committee.
- (2) The Steering Committee shall consist of the President and Vice-Presidents of the Conference, the Chairman of the Credentials Committee, the Chairmen of the Main Committees and the Chairman of the Drafting Committee. The meetings of the Steering Committee shall be presided over by the President of the Conference.
- (3) The Steering Committee shall meet from time to time to review the progress of the Conference and to make decisions for furthering such progress, including, in particular, decisions on the coordinating of the meetings of the Plenary, the committees and the working groups.
- (4) The Steering Committee shall propose the text of any final act of the Conference (see Rule 1(2)(vii)), for adoption by the Conference, meeting in Plenary.

CHAPTER IV: OFFICERS

Rule 15: Officers and their Election; Precedence Among Vice-Presidents and Vice-Chairmen

- (1) The Conference shall have a President and 10 Vice-Presidents.
- (2) The Credentials Committee, each of the two Main Committees and the Drafting Committee shall have a Chairman and three Vice-Chairmen.
- (3) Any Working Group shall have a Chairman and two Vice-Chairmen.
- (4) The Conference, meeting in Plenary, and presided over by the Director General of WIPO, shall elect its President, and, then, presided over by its President shall elect its Vice-Presidents and the officers of the Credentials Committee, the Main Committees and the Drafting Committee.
- (5) The officers of a Working Group shall be elected by the Main Committee that establishes that Working Group.
- (6) Precedence among the Vice-Presidents or Vice-Chairmen of a given body (the Conference, the Credentials Committee, the two Main Committees, any Working Group, the Drafting Committee) shall be determined by the place occupied by the name of the State of

each of them in the list of Member Delegations established in the alphabetical order of the names of the States in French, beginning with the Member Delegation whose name shall have been drawn by lot by the President of the Conference. The Vice-President or Vice-Chairman of a given body who has precedence over all the other Vice-Presidents or Vice-Chairmen of that body shall be called "the ranking" Vice-President or Vice-Chairman of that body.

Rule 16: Acting President; Acting Chairman

(1) If the President or any Chairman is absent from a meeting, the meeting shall be presided over, as Acting President or Acting Chairman, by the ranking Vice-President or Vice-Chairman of that body.

(2) If all the officers of a body are absent from any meeting of the body concerned, that body shall elect an Acting President or Acting Chairman, as the case may be.

Rule 17: Replacement of the President or the Chairman

If the President or any Chairman becomes unable to perform his functions for the remainder of the duration of the Conference, a new President or Chairman shall be elected.

Rule 18: Vote by the Presiding Officer

(1) No President or Chairman, whether elected as such or acting (hereinafter referred to as "the Presiding Officer"), shall take part in voting. Another member of his Delegation may vote for that Delegation.

(2) Where the Presiding Officer is the only member of his Delegation, he may vote, but only in the last place.

CHAPTER V: CONDUCT OF BUSINESS

Rule 19: Quorum

(1) A quorum shall be required in the Conference, meeting in Plenary; it shall, subject to paragraph (3), be constituted by one-half of the Member Delegations represented at the Conference.

(2) A quorum shall be required for the meetings of each Committee (the Credentials Committee, the two Main Committees, the Drafting Committee and the Steering Committee) and any working group; it shall be constituted by one-half of the members of the Committee or working group.

(3) The quorum at the time of the adoption of the Treaty by the Conference, meeting in Plenary, shall be constituted by one half of the Member Delegations whose credentials were found in order by the Conference meeting in Plenary.

Rule 20: General Powers of the Presiding Officer

(1) In addition to exercising the powers conferred upon Presiding Officers elsewhere by these Rules, the Presiding Officer shall declare the opening and closing of the meetings, direct the discussions, accord the right to speak, put questions to the vote, and announce decisions. The Presiding Officer shall rule on points of order and, subject to these Rules, shall have complete control of the proceedings at any meeting and over the maintenance of order thereat.

(2) The Presiding Officer may propose to the body which he presides the limitation of time to be allowed to each speaker, the limitation of the number of times each Delegation may speak on any question, the closure of the list of speakers or the closure of the debate. The Presiding Officer may also propose the suspension or the adjournment of the meeting, or the adjournment of the debate on the question under discussion. Such proposals of the Presiding Officer shall be considered as adopted unless immediately rejected.

Rule 21: Speeches

(1) No person may speak without having previously obtained the permission of the Presiding Officer. Subject to Rules 22 and 23, the Presiding Officer shall call upon persons in the order in which they ask for the floor.

(2) The Presiding Officer may call a speaker to order if the remarks of the speaker are not relevant to the subject under discussion.

Rule 22: Precedence in Receiving the Floor

(1) Member Delegations asking for the floor are generally given precedence over Observer Delegations asking for the floor, and Member Delegations and Observer Delegations are generally given precedence over Observer Organizations.

(2) The Chairman of a Committee or working group may be given precedence during discussions relating to the work of the Committee or working group concerned.

(3) The Director General of WIPO or his representative may be given precedence for making statements, observations or suggestions.

Rule 23: Points of Order

(1) During the discussion of any matter, any Member Delegation may rise to a point of order, and the point of order shall be immediately decided by the Presiding Officer in accordance with these Rules. Any Member Delegation may appeal against the ruling of the Presiding Officer. The appeal shall be immediately put to the vote, and the Presiding Officer's ruling shall stand unless the appeal is approved.

(2) The Member Delegation that has risen to a point of order under paragraph (1) may not speak on the substance of the matter under discussion.

Rule 24: Limit on Speeches

In any meeting, the Presiding Officer may decide to limit the time allowed to each speaker and the number of times each Delegation and Observer Organization may speak on any question. When the debate is limited and a Delegation or Observer Organization has used up its allotted time, the Presiding Officer shall call it to order without delay.

Rule 25: Closing of List of Speakers

(1) During the discussion of any given question, the Presiding Officer may announce the list of participants who have asked for the floor and decide to close the list as to that question. The Presiding Officer may nevertheless accord the right of reply to any speaker if a speech, delivered after the list of speakers has been closed, makes it desirable.

(2) Any decision made by the Presiding Officer under paragraph (1) may be the subject of an appeal under Rule 23.

Rule 26: Adjournment or Closure of Debate

Any Member Delegation may at any time move the adjournment or closure of the debate on the question under discussion, whether or not any other participant has asked for the floor. In addition to the proposer of the motion to adjourn or close the debate, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote. The Presiding Officer may limit the time allowed to speakers under this Rule.

Rule 27: Suspension or Adjournment of the Meeting

During the discussion of any matter, any Member Delegation may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote.

Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions

(1) Subject to Rule 23, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- (i) to suspend the meeting,
- (ii) to adjourn the meeting,
- (iii) to adjourn the debate on the question under discussion,
- (iv) to close the debate on the question under discussion.

(2) Any Member Delegation that has been given the floor on a procedural motion may speak on that motion only, and may not speak on the substance of the matter under discussion.

Rule 29: Basic Proposal; Proposals for Amendment

(1)(a) Documents Nos. CRNR/DC/3 to 6 shall constitute the basis of the discussions in the Conference, and the text of the draft Treaty contained in those documents shall constitute the “basic proposal.”

(b) Where, for any given provision of the draft Treaty, there are two or three alternatives in the basic proposal, consisting of either two or three texts, or one or two texts and an alternative that there should be no such provision, the alternatives shall be designated with the letters A, B and, where applicable, C, and shall have equal status. Discussions shall take place simultaneously on the alternatives and, if voting is necessary and there is no consensus on which alternative should be put to the vote first, each Member Delegation shall be invited to indicate its preference among the two or three alternatives. The alternative supported by more Member Delegations than the other one or two alternatives shall be put to the vote first.

(c) Wherever the basic proposal contains words within square brackets, only the text that is not within square brackets shall be regarded as part of the basic proposal, whereas words within square brackets shall be treated as a proposal for amendment if presented as provided in paragraph (2).

(2) Any Member Delegation may propose amendments to the basic proposal.

(3) Proposals for amendment shall, as a rule, be submitted in writing and handed to the Secretary of the body concerned. The Secretariat shall distribute copies to the Delegations and the Observer Organizations. As a general rule, a proposal for amendment cannot be taken into consideration and discussed or put to the vote at a meeting unless copies of it have been distributed not later than three hours before it is taken into consideration. The Presiding Officer may, however, permit the taking into consideration and discussion of a proposal for amendment even though copies of it have not been distributed or have been distributed less than three hours before it is taken into consideration.

Rule 30: Decisions on the Competence of the Conference

(1) If a Member Delegation moves that a duly seconded proposal should not be taken into consideration by the Conference because it is outside the latter's competence, that motion shall be decided upon by the Conference, meeting in Plenary, before the proposal is taken into consideration.

(2) If the motion referred to in paragraph (1), above, is made in a body other than the Conference, meeting in Plenary, it shall be referred to the Conference, meeting in Plenary, for a ruling.

Rule 31: Withdrawal of Procedural Motions and Proposals for Amendment

Any procedural motion and any proposal for amendment may be withdrawn by the Member Delegation that has made it, at any time before voting on it has commenced, provided that no amendment to it has been proposed by another Member Delegation. Any motion or proposal thus withdrawn may be reintroduced by any other Member Delegation.

Rule 32: Reconsideration of Matters Decided

When any matter has been decided by a body, it may not be reconsidered by that body unless so decided by the majority applicable under Rule 34(2)(ii). In addition to the proposer of the motion to reconsider, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing the motion, after which the motion shall immediately be put to the vote.

CHAPTER VI: VOTING

Rule 33: Right to Vote

(1) The Special Delegation has no right to vote and, for the purposes of paragraph (2) of this Rule and Rules 34, 35(2) and 36(2), the Special Delegation is not covered by the term "Member Delegations."

(2) Each Member Delegation shall have the right to vote. A Member Delegation shall have one vote, may represent itself only and may vote in its name only.

[(3) The Special Delegation may vote in the name of, and instead of, the Member States of the European Community which are represented at the Diplomatic Conference [, provided that the European Community may only vote

(i) in matters that are within its competence;

- (ii) in the name of, and instead of, those Member States that are represented at the Diplomatic Conference and whose Delegations are present at the time of the voting;
- (iii) when none of its Member States participates in the vote]].

Rule 34: Required Majorities

- (1) All decisions of all bodies shall be made as far as possible by consensus.
- (2) If it is not possible to attain consensus, the following decisions shall require a majority of two-thirds of the Member Delegations present and voting:
 - (i) adoption by the Conference, meeting in Plenary, of these Rules, and, once adopted, any amendment to them,
 - (ii) decision by any of the bodies to reconsider, under Rule 32, a matter decided,
 - (iii) adoption by the Conference, meeting in Plenary, of the Treaty,

whereas all other decisions of all bodies shall require a simple majority of the Member Delegations present and voting.

- (3) "Voting" means casting an affirmative or negative vote; express abstention or non-voting shall not be counted.

Rule 35: Requirement of Seconding; Method of Voting

- (1) Any proposal for amendment made by a Member Delegation shall be put to a vote only if seconded by at least one other Member Delegation.
- (2) Voting on any question shall be by show of hands unless a Member Delegation, seconded by at least one other Member Delegation, requests a roll-call, in which case it shall be by roll-call. The roll shall be called in the alphabetical order of the names in French of the States, beginning with the Member Delegation whose name shall have been drawn by lot by the Presiding Officer.

Rule 36: Conduct During Voting

- (1) After the Presiding Officer has announced the beginning of voting, the voting shall not be interrupted except on a point of order concerning the actual conduct of the voting.
- (2) The Presiding Officer may permit a Member Delegation to explain its vote or its abstention, either before or after the voting.

Rule 37: Division of Proposals

Any Member Delegation may move that parts of the basic proposal or of any proposal for amendment be voted upon separately. If the request for division is objected to, the motion for division shall be put to a vote. In addition to the proposer of the motion for division, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it. If the motion for division is carried, all parts of the basic proposal or of the proposal for amendment that have been separately approved shall again be put to the vote, together, as a whole. If all operative parts of the basic proposal or of the proposal for amendment have been rejected, the basic proposal or the proposal for amendment shall be considered rejected as a whole.

Rule 38: Voting on Proposals for Amendment

(1) Any proposal for amendment shall be voted upon before the text to which it relates is voted upon.

(2) Proposals for amendment relating to the same text shall be put to the vote in the order of their substantive remoteness from the said text, the most remote being put to the vote first and the least remote being put to the vote last. If, however, the adoption of any proposal for amendment necessarily implies the rejection of any other proposal for amendment or of the original text, such other proposal or text shall not be put to the vote.

(3) If one or more proposals for amendment relating to the same text are adopted, the text as amended shall be put to the vote.

(4) Any proposal the purpose of which is to add to or delete from a text shall be considered a proposal for amendment.

Rule 39: Voting on Proposals for Amendment on the Same Question

Subject to Rule 38, where two or more proposals relate to the same question, they shall be put to the vote in the order in which they have been submitted, unless the body concerned decides on a different order.

Rule 40: Equally Divided Votes

(1) Subject to paragraph (2), if a vote is equally divided on a matter that calls only for a simple majority, the proposal shall be considered rejected.

(2) If a vote is equally divided on a proposal for electing a given person to a given position as officer and the nomination is maintained, the vote shall be repeated, until either that nomination is adopted or rejected or another person is elected for the position in question.

CHAPTER VII: LANGUAGES AND MINUTES

Rule 41: Languages of Oral Interventions

(1) Subject to paragraph (2), oral interventions made in the meetings of any of the bodies shall be in Arabic, Chinese, English, French, Russian or Spanish, and interpretation shall be provided by the Secretariat into the other five languages.

(2) Any of the Committees and any working group may, if none of its members objects, decide to dispense with interpretation or to limit interpretation to some only of the languages that are referred to in paragraph (1).

Rule 42: Summary Minutes

(1) Provisional summary minutes of the meetings of the Conference, meeting in Plenary, and of the Main Committees shall be drawn up by the International Bureau and shall be made available as soon as possible after the closing of the Conference to all speakers, who shall, within two months after the minutes have been made available, inform the International Bureau of any suggestions for changes in the minutes of their own interventions.

(2) The final summary minutes shall be published in due course by the International Bureau.

Rule 43: Languages of Documents and Summary Minutes

(1) Any written proposal shall be presented to the Secretariat in Arabic, Chinese, English, French, Russian or Spanish. Such proposal shall be distributed by the Secretariat in Arabic, Chinese, English, French, Russian and Spanish.

(2) Reports of the Committees and any working group shall be distributed in Arabic, Chinese, English, French, Russian and Spanish. Information documents of the Secretariat shall be distributed in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

(3)(a) Provisional summary minutes shall be drawn up in the language used by the speaker if the speaker has used English, French or Spanish; if the speaker has used another language, the intervention shall be rendered in English or French at the choice of the International Bureau.

(b) The final summary minutes shall be made available in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

CHAPTER VIII: OPEN AND CLOSED MEETINGS

Rule 44: Meetings of the Conference and of the Main Committees

The meetings of the Conference, meeting in Plenary, and of the Main Committees shall be open to the public unless the Conference, meeting in Plenary, or the interested Main Committee, decides otherwise.

Rule 45: Meetings of Other Committees and of Working Groups

The meetings of the Credentials Committee, the Drafting Committee, the Steering Committee and any working group shall be open only to the members of the Committee or the working group concerned and to the Secretariat.

CHAPTER IX: OBSERVER DELEGATIONS AND OBSERVER ORGANIZATIONS

Rule 46: Status of Observers

(1) Observer Delegations may attend, and make oral statements in, the Plenary meetings of the Conference and the meetings of the Main Committees.

(2) Observer Organizations may attend the Plenary meetings of the Conference and the meetings of the Main Committees. Upon the invitation of the Presiding Officer, they may make oral statements in those meetings on questions within the scope of their activities.

(3) Written statements submitted by Observer Delegations or by Observer Organizations on subjects for which they have a special competence and which are related to the work of the Conference shall be distributed by the Secretariat to the participants in the quantities and in the languages in which the written statements were made available to it.

CHAPTER X: AMENDMENTS TO THE RULES OF PROCEDURE

Rule 47: Possibility of Amending the Rules of Procedure

With the exception of the present Rule, these Rules may be amended by the Conference, meeting in Plenary.

CHAPTER XI: FINAL ACT

Rule 48: Signing of the Final Act

If a final act is adopted, it shall be open for signature by any Delegation.

[End of document]

CRNR/DC/3

August 30, 1996 (Original: English)

**BASIC PROPOSAL
FOR THE ADMINISTRATIVE AND FINAL CLAUSES OF THE TREATY
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Director General of WIPO,
on the basis of the discussions of the Preparatory Committee of the Diplomatic Conference,
noted with approval by the General Assembly of WIPO and the Assembly of the Berne Union*

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Observations of the International Bureau

6. The first version of the Draft Final Clauses submitted by the Director General of WIPO to the Preparatory Committee of the Proposed Diplomatic Conference (December 1996) on Certain Copyright and Neighboring Rights Questions was considered by that Committee in its meeting held in Geneva on May 20 and 21, 1996 (see documents CRNR/PM/2 and 8, containing the said first version and the report of the Preparatory Committee). The Preparatory Committee made decision on most of the proposals but could not agree on some. Neither did the Preparatory Committee decide on the number of treaties to be adopted by the Diplomatic Conference, but it was decided that the Draft Final Clauses should continue to be in the form in which they were submitted to the Preparatory Committee as that form would be equally appropriate for one, two or three treaties.

7. Subsequently, the General Assembly of WIPO, at its eighteenth session (6th extraordinary), and the Assembly of the Berne Union, at its nineteenth session (7th extraordinary), in joint meetings held in Geneva on May 21 and 22, 1996, noted with approval the conclusions of the Preparatory Committee (see document AB/XXVIII/3, paragraph 7).

8. The draft set out below was prepared on the basis of the decisions or discussions of the Preparatory Committee. The two new articles (Articles 98 and 99) are administrative rather than final in their nature. The title of this document reflects this fact.

9. It is to be noted that if there will be more than one treaty, each will have to have its own administrative and final clauses.

10. Furthermore, it is to be noted that the numbering of the articles which were proposed to the Preparatory Committee (Articles 100 to 107) were left, for ease of reference, unchanged, whereas the two Articles that were not the subject of proposals to the Preparatory Committee are given, in this document, numbers 98 and 99, numbers which were not used in the proposals made to the Preparatory Committee.

11. Finally, it is to be noted that draft Articles 98 to 107 constitute a part of what is called "the basic proposal" in the Draft Rules of Procedure (see document CRNR/DC/2, Rule 29(1)(a)).

Notes on Draft Article 98

This Article contains provisions concerning the governing body of the Treaty, namely the Assembly. The provisions, in general, are the same as, or strongly resemble, the corresponding provisions concerning assemblies provided for in comparable WIPO-administered treaties.

[Notes continue on page 138]

ARTICLE 98**ASSEMBLY**

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 100(3) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

[Article 98 continues]

[Notes on Draft Article 98, continued]

Paragraph 3(b) contains special rules in respect of voting by the European Community and any other intergovernmental organization that may become party to the Treaty. The essence of those rules is that such an organization may only exercise the right to vote of its Member States, that is, it would not have a separate additional vote, a vote of its own; in any votation, its vote would be equal to the number of votes of those of its Member States that are party to the Treaty and whose delegates are present at the time the vote is taken; and it could not vote if any of its Member States itself exercises its right to vote.

It is to be noted that the Treaty would not establish any financial obligations: Contracting Parties would not have to pay any contribution to WIPO, neither would the Assembly adopt a program. Any activity concerning the Treaty that would cause an expense to the International Bureau would be borne by WIPO, as is already the case, for example, for the Rome Convention, the Phonograms Convention, the Budapest Treaty and the Trademark Law Treaty or, among the older treaties, the Madrid Agreement for the Repression of False or Deceptive Indications of Source of Goods.

[End of Notes on Draft Article 98]

[Article 98, continued]

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) The European Community and any other Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty and whose delegates are present at the time the vote is taken. No such intergovernmental organization shall participate in the vote if any of its Member States exercises its right to vote.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

[End of Article 98]

Notes on Draft Article 99

The Article follows a tradition established in several WIPO-administered treaties.

[End of Notes on Draft Article 99]

ARTICLE 99

INTERNATIONAL BUREAU

The International Bureau of the World Intellectual Property Organization (hereinafter referred to as “WIPO”) shall perform the administrative tasks concerning the Treaty.

[End of Article 99]

Notes on Draft Article 100

As far as States are concerned, it is proposed that the Member States of WIPO be eligible to become party to the Treaty. Membership in WIPO would be a logical requirement since the initiator of the Treaty is WIPO, since all preparations took place in WIPO and since the subject matter of the Treaty is intellectual property. Furthermore, it is to be noted that, already now, WIPO has 157 member States. All the 119 States party to the Berne Convention and 50 of the 51 States party to the Rome Convention are members of WIPO (the missing one is the Dominican Republic but it is likely to become soon a member of WIPO). In any case, any State not yet member of WIPO can easily become a member of WIPO. The list of the Member States of WIPO on July 1, 1996, appears in Annex I. In that list, it is indicated which States are party to the Berne Convention and/or the Rome Convention.

As far as the European Community is concerned, there was no opposition in the Preparatory Committee concerning its eligibility to become party to the Treaty.

No other intergovernmental organization expressed an interest so far. Nevertheless, paragraph (3) provides for the possibility also for other intergovernmental organizations to become party to the Treaty if the Assembly so decides. The Preparatory Committee did not decide that such a possibility should be provided for in the Treaty but many delegations favored such a possibility (see document CRNR/PM/8, paragraph 13, first sentence).

Neither did the Preparatory Committee decide, whether, if such a possibility is provided for, it should provide for some substantive requirements that the intergovernmental organization must fulfil. Some delegates favored the inclusion of criteria for eligibility. On behalf of the group of African countries, a proposal was submitted which received support from certain other delegations, while some other delegations were of the view that it might have to be further improved and/or simplified (see document CRNR/PM/8, paragraphs 13 to 17). That proposal has been taken into account, with a somewhat simplified language, in that part of paragraph (3) which appears in square brackets. It is to be noted that the conditions appearing in the proposed provision are similar to those which are included in Article 2(x) of the Treaty on Intellectual Property in Respect of Integrated Circuits (article defining "intergovernmental organizations" that could become party to the Treaty). However, the words "and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty" are placed within a second pair of square brackets since they seem to be superfluous: it is unthinkable that an intergovernmental organization would seek admittance when it has not been authorized to do so.

Paragraph (4) also appears in square brackets to indicate that, in the Preparatory Committee, no agreement has been reached on whether or not the European Community, and other intergovernmental organizations that may become party to the Treaty, should be obliged to inform the Director General of their competence and legislation. The said paragraph is partly based on the proposal submitted on behalf of the group of African countries already referred to above (see document CRNR/PM/8, paragraph 15) but it has been somewhat simplified. It is to be noted that this draft provision is also similar to the provision included in Article 15(1)(b) of the Treaty on Intellectual Property in Respect of Integrated Circuits.

[End of Notes on Draft Article 100]

ARTICLE 100**ELIGIBILITY FOR BECOMING PARTY TO THE TREATY**

(1) Any Member State of WIPO may become party to this Treaty.

(2) The European Community may become party to this Treaty.

(3) The Assembly may decide to admit any other international organization to become party to this Treaty [if the international organization has competence in respect of, and has its own legislation binding on all its Member States on the subject matters covered by this Treaty[, and if the international organization has been duly authorized, in accordance with its internal procedures, to become party to this Treaty]].

[(4) The European Community, when it deposits its instrument of ratification or accession, and any other intergovernmental organization when asking for admittance to become a party to this Treaty, shall inform the Director General of WIPO of its competence and its legislation with respect to the subject matters covered by this Treaty. It shall do the same also in respect of any subsequent changes in such competence and legislation.]

[End of Article 100]

Notes on Draft Article 101

It is customary to have treaties open for signature for approximately one year after their adoption. The proposed period will be just about one year if the Treaty is going to be adopted during the diplomatic conference scheduled to end on December 20, 1996.

It is to be noted that intergovernmental organizations other than the European Community could not sign the Treaty since their admission would have to be authorized by the Assembly (see Articles 98(2)(b) and 100 (3)) and the Assembly would start functioning only after the entry into force of the Treaty, and it is very unlikely that the Treaty will enter into force before December 31, 1997 (the time limit for signing).

[End of Notes on Draft Article 101]

ARTICLE 101

SIGNATURE OF THE TREATY

This Treaty may be signed until December 31, 1997, by any Member State of WIPO and by the European Community.

[End of Article 101]

Notes on Draft Article 102

The solution proposed is the same solution as that of the Trademark Law Treaty (TLT), which is the most recent among the treaties adopted by a diplomatic conference convened by WIPO (see TLT, Article 20(2)). That solution disregards, for the purposes of the initial entry into force of the Treaty, a possible instrument of ratification or accession by the European Community and any other intergovernmental organization.

The word “five” appears in square brackets to indicate that, in the Preparatory Committee, there was no agreement on the number of ratifications or accessions needed for the entry into force of the Treaty and to reflect the opinion of some delegations that five is too low a number (see document CRNR/PM/8, paragraph 24).

[End of Notes on Draft Article 102]

ARTICLE 102**ENTRY INTO FORCE OF THE TREATY**

This Treaty shall enter into force three months after [five] instruments of ratification or accession by States have been deposited with the Director General of WIPO.

[End of Article 102]

Notes on Draft Article 103

The three-month period is the customary one (see TLT, Article 20(3)), and it takes into account the fact that the instrument of ratification or accession of the European Community would not be among the five instruments that cause the initial entry into force of the Treaty.

Other intergovernmental organizations could deposit an instrument of accession only after the entry into force of the Treaty, since their request for accession would have to be decided upon by the Assembly and the Assembly would start functioning only after the entry into force of the Treaty.

[End of Notes on Draft Article 103]

ARTICLE 103**EFFECTIVE DATE OF BECOMING PARTY TO THE TREATY**

This Treaty shall bind

(i) the [five] States referred to in Article 102, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 102, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

[End of Article 103]

Notes on Draft Article 104

The present Article assumes that there will be no need for reservations. But if such need should manifest itself during the Diplomatic Conference, the Article under consideration will have to be changed and the Diplomatic Conference will have to find answers, among other questions, to the following: Which are the provisions of the Treaty whose application may be excluded by a Contracting Party? In other words, which of the Treaty's provisions may be subject to reservation? And, in respect of each such provision, one will have to answer, for example, the following questions: May the reservation be made by any Contracting Party or only by some kinds of States (e.g., least developed, other developing, "transition")? May the reservation be made only by a Contracting Party whose present legislation is not compatible with the reserved provision? May the reservation be effective without any limitation in time or only for a limited time and, if so, what length of time?

One can also replace any possibility of making reservations by outright exceptions, automatically applicable to certain kinds of States or by allowing a "grace period" for such States. For example, the TRIPs Agreement provides for such grace periods.

The Berne Convention allows very few reservations, and most of them are not used or are used by very few countries. On the other hand, the contrary is true for the Rome Convention.

[End of Notes on Draft Article 104]

ARTICLE 104

NO RESERVATIONS TO THE TREATY

No reservation to this Treaty shall be admitted.

[End of Article 104]

Notes on Draft Article 105

This Article is of the traditional kind: see for example, TLT, Article 23.

[End of Notes on Draft Article 105]

ARTICLE 105**DENUNCIATION OF THE TREATY**

This Treaty may be denounced by any party to this Treaty by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

[End of Article 105]

Notes on Draft Article 106

This Article corresponds to present trends in WIPO. See, for example, TLT, Article 24(1).

[End of Notes on Draft Article 106]

ARTICLE 106**LANGUAGES OF THE TREATY**

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

[End of Article 106]

Notes on Draft Article 107

This Article corresponds to present trends in WIPO. See, for example, TLT, Article 25.

The depositary functions include the preservation of the signed copy of the Treaty, the placing of the original copy at the disposal of those States which want to and have the right to sign it, the establishment and distribution of certified copies of the Treaty, the receipt of the deposit of instruments of ratification or accession and of notifications of denunciation, as well as the individual notification of those events to all interested parties, and the publication, of all signatures, ratifications, accessions and denunciation and the dates of entry into force of the Treaty.

[End of Notes on Draft Article 107]

ARTICLE 107

DEPOSITARY

The Director General of WIPO is the depositary of this Treaty.

[End of Article 107]

[Annexes follow]

ANNEX I

STATES MEMBERS OF WIPO
WITH AN INDICATION OF WHICH OF THE SAID STATES IS
PARTY TO THE BERNE CONVENTION AND/OR
TO THE ROME CONVENTION

(Status of July 1, 1996)

Albania	B	Cuba	
Algeria		Cyprus	B
Andorra		Czech Republic	B R
Angola		Democratic People's Republic of Korea	
Argentina	B R	Denmark	B R
Armenia		Ecuador	B R
Australia	B R	Egypt	B
Austria	B R	El Salvador	B R
Azerbaijan		Estonia	B
Bahamas	B	Fiji	B R
Bahrain		Finland	B R
Bangladesh		France	B R
Barbados	B R	Gabon	B
Belarus		Gambia	B
Belgium	B	Georgia	B
Benin	B	Germany	B R
Bhutan		Ghana	B
Bolivia	B R	Greece	B R
Bosnia and Herzegovina	B	Guatemala	R
Brazil	B R	Guinea	B
Brunei Darussalam		Guinea Bissau	B
Bulgaria	B R	Guyana	B
Burkina Faso	B R	Haiti	B
Burundi		Holy See	B
Cambodia		Honduras	B R
Cameroon	B	Hungary	B R
Canada	B	Iceland	B R
Central African Republic	B	India	B
Chad	B	Indonesia	
Chile	B R	Iraq	
China	B	Ireland	B R
Colombia	B R	Israel	B
Congo	B R	Italy	B R
Costa Rica	B R	Jamaica	B R
Côte d'Ivoire	B	Japan	B R
Croatia	B	Jordan	

Kazakstan		Saint Lucia	B R
Kenya	B	Saint Vincent and the Grenadines	B
Kyrgyzstan		San Marino	
Laos		Saudi Arabia	
Latvia	B	Senegal	B
Lebanon	B	Sierra Leone	
Lesotho	B R	Singapore	
Liberia	B	Slovakia	B R
Libya	B	Slovenia	B
Liechtenstein	B	Somalia	
Lithuania	B	South Africa	B
Luxembourg	B R	Spain	B R
Madagascar	B	Sri Lanka	B
Malawi	B	Sudan	
Malaysia	B	Suriname	B
Mali	B	Swaziland	
Malta	B	Sweden	B R
Mauritania	B	Switzerland	B R
Mauritius	B	Tajikistan	
Mexico	B R	Thailand	B
Monaco	B R	The former Yugoslav Republic of Macedonia	B
Mongolia		Togo	B
Morocco	B	Trinidad and Tobago	B
Namibia	B	Tunisia	B
Netherlands	B R	Turkey	B
New Zealand	B	Turkmenistan	
Nicaragua		Uganda	
Niger	B R	Ukraine	B
Nigeria	B R	United Arab Emirates	
Norway	B R	United Kingdom	B R
Pakistan	B	United Republic of Tanzania	B
Panama	B R	United States of America	B
Paraguay	B R	Uruguay	B R
Peru	B R	Uzbekistan	
Philippines	B R	Venezuela	B R
Poland	B	Viet Nam	
Portugal	B	Yemen	
Qatar		Yugoslavia	B
Republic of Korea	B	Zaire	B
Republic of Moldova	B R	Zambia	B
Romania	B	Zimbabwe	B
Russian Federation	B		
Rwanda	B		
Saint Kitts and Nevis	B		

ANNEX II

STATES NOT MEMBERS OF WIPO
THAT ARE MEMBERS OF THE UNITED NATIONS

(Status of July 1, 1996)

Afghanistan
Antigua and Barbuda
Belize
Botswana

Cape Verde
Comoros
Djibouti
Dominica

Dominican Republic
Equatorial Guinea
Eritrea
Ethiopia

Grenada
Iran (Islamic Republic of)
Kuwait
Maldives

Marshall Islands
Micronesia (Federal States of)
Mozambique
Myanmar

Nepal
Oman
Palau
Papua New Guinea

Samoa
Sao Tome and Principe
Seychelles
Solomon Islands

Syria
Vanuatu

CRNR/DC/4

August 30, 1996 (Original: English)

**BASIC PROPOSAL
FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY
ON CERTAIN QUESTIONS CONCERNING
THE PROTECTION OF LITERARY AND ARTISTIC WORKS
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Chairman of the Committees of Experts
on a Possible Protocol to the Berne Convention
and
on a Possible Instrument for the Protection of the Rights of Performers
and Producers of Phonograms*

Memorandum Prepared by the Chairman of the Committees of Experts

1. In 1989, the Assembly and the Conference of Representatives of the Berne Union adopted the program of WIPO making a provision for convening a Committee of Experts to examine questions concerning a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Berne Convention"). The objective of convening the Committee of Experts was to examine whether the preparation of a protocol to the Berne Convention should commence. According to the WIPO program for the 1990-91 biennium "[t]he protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies" (document AB/XX/2, Annex A, item PRG.02(2)).
2. The Committee of Experts was convened in two sessions, the first in November 1991 and the second in February 1992. The sessions were started on the basis of working documents covering a broad range of topic areas including the subject matter of copyright, certain particular rights, the applicability of minima, and the obligation of granting national treatment. Among the questions concerning subject matter was the desirability of covering the rights of producers of sound recordings in the protocol.
3. The Assembly and the Conference of Representatives of the Berne Union determined in 1992 that the work of the Committee of Experts would be most effectively advanced by the formation of two Committees of Experts, one for the preparation of a possible protocol to the Berne Convention and the other for the preparation of a possible new instrument on the protection of the rights of performers and producers of phonograms (document B/A/XIII/2).

4. The Committee of Experts on a Possible Protocol to the Berne Convention was charged with the responsibility of considering ten specific items: (1) computer programs, (2) databases, (3) rental rights, (4) non-voluntary licences for sound recordings of musical works, (5) non-voluntary licences for primary broadcasting and satellite communication, (6) distribution rights, including an importation right, (7) duration of the protection of photographic works, (8) communication to the public by satellite broadcasting, (9) enforcement of rights, and (10) national treatment.

5. The Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms was charged with the responsibility of discussing all questions concerning the effective international protection of the rights of performers and producers of phonograms. This broad charge left unresolved whether the Committee should consider the rights of performers to extend exclusively to the fixation of their performances in phonograms or also to audiovisual fixations.

6. The Committee of Experts on a Possible Protocol to the Berne Convention then held five further sessions, the third in June 1993, the fourth in December 1994, the fifth in September 1995, the sixth in February 1996 and the seventh in May 1996.

7. The Committee of Experts on a Possible Instrument for the Protection of the Rights of the Performers and Producers of Phonograms held six sessions, the first in June-July 1993, the second in November 1993, the third in December 1994, the fourth in September 1995, the fifth in February 1996 and the sixth in May 1996.

8. The last three sessions of the two Committees (referred to subsequently as the Committees of Experts) were convened on the same dates, and parts of the sessions were held jointly.

9. The work of the Committees of Experts was based on memoranda prepared by the International Bureau of WIPO until December 1994. Following the recommendation of the Committees of Experts, the Director General of WIPO invited Government members of the Committees and the European Commission to submit proposals for discussion at the September 1995 and February 1996 sessions.

10. As a result of this invitation from the Director General, the International Bureau received written proposals and comments from Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, South Africa, the Sudan, the United States of America, and Uruguay.

11. The Committees of Experts recommended at the February 1996 sessions that a Diplomatic Conference for the conclusion of appropriate treaties be held in December 1996. From May 20 to 24, 1996, meetings were held in Geneva by the Preparatory Committee of the Proposed Diplomatic Conference, the General Assembly of WIPO and the Assembly of the Berne Union. The Preparatory Committee and the Assemblies decided that a WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions would be convened from December 2 to 20, 1996.

12. The Chairman of the Committees of Experts was entrusted at the February 1996 sessions with the task of preparing the draft texts ("the basic proposals") for the Diplomatic

Conference; the WIPO International Bureau was to publish and circulate these draft texts by September 1, 1996, to the States, intergovernmental and non-governmental organizations to be invited to the Diplomatic Conference. The Director General of WIPO proposed that the International Bureau would prepare the draft of the final clauses of the treaty or treaties. The draft Final Clauses prepared by the Director General (document CRNR/PM/2) were examined by the Preparatory Committee of the Proposed Diplomatic Conference in May 1996.

13. In the introduction to the draft Final Clauses, the Director General of WIPO stated: "On the basis of the deliberations of the Committees of Experts, it is assumed that the aim of the Diplomatic Conference will be to adopt one or more multilateral treaty or treaties on questions of copyright, on questions of two branches (one concerning performing artists, the other concerning producers of phonograms) of neighboring rights and, perhaps, also on questions concerning a *sui generis* protection of data bases."

14. There is no decision on the number of treaties to be proposed for adoption by the Diplomatic Conference in December 1996. The Committees of Experts have made no recommendation on this issue, and after extensive discussion, the question was left open in the May 1996 meetings of the Preparatory Committee, the General Assembly of WIPO and the Assembly of the Berne Union. In this respect, the mandate given to the Chairman of the Committees of Experts was therefore open and included the possibility of establishing draft texts for one, two or three treaties.

15. Basic Proposals for the substantive provisions of three treaties are proposed by the Chairman of the Committees of Experts:

1. "Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works",
2. "Treaty for the Protection of the Rights of Performers and Producers of Phonograms",
3. "Treaty on Intellectual Property in Respect of Databases".

16. It is the assessment of the Chairman of the Committees of Experts that the expectations of the majority of Delegations participating in the meetings referred to in paragraphs 6, 7 and 11 are most closely met by proposing three draft texts. The Diplomatic Conference has the power to combine separate draft treaties into one single treaty should it find this course of action appropriate. A combined text would have several advantages, and such an option may be viewed as one of legal technique; on the other hand, a single text approach would entail certain political and doctrinal considerations. For example, Governments contemplating ratification of or accession to such a single text would have to analyze and consider implementation of the whole contents of the combined instrument.

17. The present set of draft substantive provisions of the Basic Proposals referred to in paragraph 15, of which the present document is one, have been prepared by the Chairman of the Committees of Experts according to decisions made by the Committees at their February 1996 sessions. The Basic Proposal for the Administrative and Final Clauses of all these proposed Treaties have been submitted by the Director General of WIPO in a separate document.

18. The present document sets forth the substantive provisions of the Basic Proposal of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works. There are 16 Articles preceded by a Preamble. Each provision is accompanied by explanatory Notes.

19. The purpose of the explanatory Notes is:

- (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions,
- (ii) to indicate the reasoning behind the proposals, and
- (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.

20. The present Basic Proposal has been prepared on the basis of the proposals made during the work of the Committees of Experts and taking into account discussions in the Committees of Experts. These proposals have been carefully studied, and portions of them appear in several places in the proposed Treaty, sometimes in a reformulated or combined format. Additional elements have been introduced where necessary, and not all elements of all proposals are reflected in the proposed Treaty. In some instances, alternative solutions are proposed, but the number of proposed alternatives is limited. Alternatives have been designated in the text using capital letters in accordance with Rule 29(b) of the draft Rules of Procedure for the Diplomatic Conference. One of the proposed alternative solutions includes an Annex with special provisions on enforcement.

21. In the present Basic Proposal reference is often made without the document number to the proposals presented by the Government members and the European Community and its Member States for the sessions of the Committees of Experts. The proposals presented for the session of February 1 to 9, 1996 of the Committee of Experts on a Possible Protocol to the Berne Convention were the following:

- The European Community and its Member States (BCP/CE/VI/2)
- Argentina (BCP/CE/VI/3)
- China (BCP/CE/VI/4)
- Uruguay (BCP/CE/VI/5)
- Australia (BCP/CE/VI/6)
- Brazil (BCP/CE/VI/7)
- The United States of America (BCP/CE/VI/8)
- Japan (BCP/CE/VI/9)
- Canada (BCP/CE/VI/10)
- The Republic of Korea (BCP/CE/VI/11)
- The Republic of Korea (BCP/CE/VI/11 Corr.)

22. Further contribution to the work of the Committees of Experts was brought about in the proposals presented by the participants in the African consultation meeting and the consultation meeting of the countries of Latin America and the Caribbean before the February 1996 sessions of the Committees of Experts. The documents are the following:

- Burkina Faso, Cameroon, Côte d'Ivoire, Egypt, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Senegal, Sudan, Togo, Tunisia and Zambia (BCP/CE/VI/14)

Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela (BCP/CE/VI/15)

23. For the session of May 22 to 24, 1996 of the Committees of Experts the following proposals were presented:

The European Community and its Member States (BCP/CE/VII/1-INR/CE/VI/1)

The Republic of Korea (BCP/CE/VII/3-INR/CE/VI/3)

**Draft Treaty
on Certain Questions Concerning
the Protection of Literary and Artistic Works**

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ANNEX

Notes on the Title and the Preamble

0.01 During the preparatory stages that led to the production of this proposed Treaty, the expression "protocol" to the Berne Convention had been used tentatively to identify the new instrument under consideration. The proposed Treaty is, however, not an accessory to the Berne Convention. Its objective is rather to supplement and update the international regime of protection for literary and artistic works based fundamentally on the Berne Convention and recently also on the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter referred to in these Notes as "the TRIPS Agreement"). In addition, membership of the Berne Union is not a requirement for becoming a party to the proposed Treaty. Consequently, no reference to the Berne Convention has been included in the title.

0.02 The Preamble sets forth the objective of the Treaty and the main arguments and considerations relating thereto.

0.03 The first paragraph of the Preamble expresses the most general objective of the proposed Treaty. It reflects the language of the Preamble of the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works.

0.04 The second paragraph pronounces the recognition that new international rules and clarification of the interpretation of certain existing rules are needed to achieve the objective identified in the first paragraph, having regard to the manifold developments that call for improved protection in the field covered by the proposed Treaty.

0.05 The third paragraph acknowledges the connection of the proposed Treaty to the evolution of the overall environment of the intellectual property system: the accelerating development and convergence of information and communication technologies. This evolution extends its effects even to the convergence of the structures of industries and the content they produce, i.e. protected works and performances, and it has a profound impact on the production and distribution of the results of creative work by authors. While introducing certain provisions on "traditional issues", the proposed Treaty also includes solutions to urgent questions raised by the technological developments referred to above. The proposed Treaty is therefore part of a series of simultaneously published draft Treaties which could be characterized as "Global Information Infrastructure Treaties" in the field of copyright and rights related to copyright.

0.06 The Preamble of this proposed Treaty has been drafted in parallel with the Preamble of the simultaneously published proposed Treaty for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to in these Notes as "the New Instrument").

[End of Notes on the Title and the Preamble]

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Article 1 contains general provisions governing the relationship between the Berne Convention and the proposed Treaty.

1.02 Paragraph (1) states explicitly that the proposed Treaty is a special agreement under Article 20 of the Berne Convention, which provides that "[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention". Thus, the proposed Treaty could not contain provisions that would diminish the existing rights of authors under the Berne Convention.

1.03 Paragraph (2) contains a "Berne safeguard" clause modelled after Article 2.2 of the TRIPS Agreement, which is the most recent of such provisions in existing treaties.

1.04 Paragraph (3) is self-explanatory.

1.05 Articles 1 to 21 of the Berne Convention form the bedrock of all international norms setting authors' rights in literary and artistic works. Pursuant to paragraph (4), Contracting Parties of the proposed Treaty shall undertake to comply with the obligations of those Articles. This obligation binds Contracting Parties that are not countries of the Union established by the Berne Convention, including Contracting Parties that have not joined the Paris Act of the Berne Convention. A similar structure has been adopted in the TRIPS Agreement, with an exception for Article *6bis* of the Berne Convention concerning the moral rights of authors. Moreover, the obligation of compliance extends to all Members of the TRIPS Agreement. The reference in paragraph (4) covers Article *6bis* because the proposed Treaty is not limited to trade-related aspects of copyright. As in the TRIPS Agreement, the provision extends not only to Articles 1 to 21 but also to the Appendix of the Berne Convention.

[End of Notes on Article 1]

Article 1**Relation to the Berne Convention**

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties that are not countries of the Union established by the Berne Convention shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

[End of Article 1]

Notes on Article 2

2.01 The basic rules and principles of the Berne Convention are presently (August 1, 1996) applied by the 119 countries of the Berne Union. These rules and principles include conditions for protection, the basic principle of national treatment, principles of automatic protection and independence of protection and a mechanism for identification of the country of origin of a work. Since these principles are definitely established and such a great number of States have adapted their laws and legislative practices to them, it seems feasible and well-founded to build new protection for literary and artistic works upon these same principles.

2.02 It is therefore proposed in Article 2 that the provisions of Articles 3 to 6 of the Berne Convention, containing these central principles, should be applied in respect of the protection provided for in the present draft Treaty. Thus, these provisions would be applied to all new rights and aspects of protection introduced in the present draft without reproducing or "re-inventing" them. This is an economical solution as regards the negotiations on the proposed Treaty, the implementation of its obligations in national laws and in terms of the legal certainty that flows from the availability of established and well-known interpretations.

2.03 According to the proposed Treaty, the provisions of Article 3 of the Berne Convention would be applied in respect of the protection afforded by this Treaty. Paragraph (1) of Article 3 of the Berne Convention includes provisions on the main points of attachment: the nationality of the author and the place of publication of the work. Paragraph (2) assimilates habitual residence of an author to nationality. Paragraph (3) defines the expression "published works". Paragraph (4) defines simultaneous publication. Article 4 of the Berne Convention extends the protection of the Convention to authors of cinematographic works, works of architecture and certain other artistic works, even where the conditions of Article 3 are not met. Article 5 of the Berne Convention confirms in its paragraph (1) the principle of national treatment and the obligation to grant the rights specially granted in the Convention and in paragraph (2) the principles of formality-free or automatic protection and independence of protection. Paragraph (3) specifies that national law governs protection in the country of origin. Paragraph (4) lays down the rules that determine the country of origin of a work. In addition, a reference to Article 6 of the Berne Convention has been made in order to provide for the possibility of restricting in certain cases the protection given to works of non-nationals of other Contracting Parties.

2.04 All the rules listed in the preceding paragraph would be applicable to the protection provided for in the proposed Treaty.

2.05 Some of these rules might be considered to be superfluous or unnecessary in the context of the proposed Treaty. In spite of this, it is submitted that the incorporation of the four provisions by reference helps to place the rights contemplated by the proposed Treaty in the proper context of a comprehensive system.

2.06 Perhaps the greatest significance of this provision is that Contracting Parties restate on a high international level the cornerstone principle for the protection of literary and artistic works: the principle of national treatment.

Article 2

Application of Articles 3 to 6 of the Berne Convention

Contracting Parties shall apply the provisions of Articles 3 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

[End of Article 2]

2.07 The provisions of this Article are similar to the provisions proposed in Article 3 of the draft New Instrument as far as the criteria for eligibility for protection are concerned; provisions of an existing Treaty are applied by reference.

[End of Notes on Article 2]

[Article 3 starts on page 179]

Notes on Article 3

3.01 Article 3(3) of the Berne Convention contains a definition of "published works". The first half of this provision offers the definition in positive terms: "The expression 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work". The second half offers certain exclusions from the coverage of the definition: "The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication".

3.02 The definition of "published works" and the determination of "the country of origin" of a work according to Article 5(4) of the Berne Convention have an impact on the application of certain important operative clauses of the Convention. These include: application of the protection of the Convention to authors who are not nationals of one of the countries of the Union but whose works have been first published in one of those countries (Article 3(1)(b)); the comparison of terms of protection (Article 7(8)); and application of the Convention to works already in existence when their country of origin first joins the Convention (Article 18(1)).

3.03 One of the objectives of the proposed Treaty is to offer solutions to certain questions concerning the impact of new technologies on authors' rights. Numerous questions are posed, for example, by the interactive, on-demand transmission of works to the public directly into their homes or offices. New forms of electronic publishing have already replaced some forms of traditional dissemination of works. As far as the public is concerned, these new forms of publishing are functionally no different than the traditional forms: the works are available.

3.04 Inevitably, the question has arisen as to whether these new forms of publication should be subject and entitled to the same legal treatment as the traditional forms. Are works that have been disseminated by means of databases and communication networks "published works" in the sense of the Berne Convention? Is a new extended definition of "published works" needed?

3.05 In fact, the provisions of Article 3(3) of the Berne Convention may be applied quite satisfactorily to new forms of electronic publication. The key requirement of Article 3(3) is the availability of copies sufficient to satisfy the reasonable requirements of the public. Electronic publishing over a computer network may easily satisfy this requirement. In an open network environment, any member of the public may have access to copies that can be downloaded into the memory of his computer. Different technical and commercial conditions may, of course, apply in respect of access.

3.06 The conclusion above is further supported by another clause in the same provision of the Berne Convention according to which " 'published works' means works ... , whatever may be the means of manufacture of the copies". In traditional publishing, copies are first manufactured and then distributed. In electronic publication through networks, copies are produced at the recipient end after the act of dissemination. "The means of manufacture" in

[Article 3 starts on page 179]

the former case is local production and in the latter case is "tele-reproduction". Nothing precludes the interpretation of Article 3 of the Berne Convention to include decentralized production of copies by means of communication networks.

3.07 The meaning of these provisions has become central to the question of whether and how the Berne Convention can continue to protect works in the new digital environment. To the extent that any nations may now have different opinions on the meaning of these provisions there are certainly well-founded reasons to require that all Contracting Parties interpret and apply these provisions in a uniform manner. This is why, in order to exclude any uncertainty, it is proposed that the interpretation presented in Notes 3.05 and 3.06 above should be confirmed by an explicit clause in the proposed Treaty.

3.08 After this interpretation of published works has been adopted, one further essential question arises: What is the place of publication? There are two possible answers. The place of publication could be any place where copies are available; this might include all countries of the world simultaneously. On the other hand, the place of publication could be considered to be the location of the "source" of the work. There is good reason to adopt the latter interpretation. The identification of a place of publication in the traditional framework is an acknowledgement that certain practical and economic activities have occurred in that location, and the same is true in the electronic publishing framework: the product of the author's efforts, although available anywhere, is located in only one place.

3.09 If, however, a work were considered to be published in all countries where copies of it are available, many unintended consequences would result. All works published electronically through networks in countries outside the Berne Union would be considered to have been published in every country of the Union. Members of the Union would thus be obligated to protect these works even in the absence of protection for their own works. When applying the Berne Convention rule on comparison of terms of protection, simultaneous publication in all countries of the Union would lead to problematic results. In the case of simultaneous publication in several countries of the Union, the country of origin is considered to be the country whose legislation grants the shortest term of protection. This would reduce the term of protection for works electronically published to the shortest term available anywhere in the Union.

3.10 The consequences discussed in the previous Note are unsatisfactory and lead to legal uncertainty. To leave this interpretation open would not encourage joining the Convention.

3.11 In paragraph (1) of Article 3, it is proposed that Contracting Parties should consider as "published works" such literary or artistic works which have been made available to the public by wire or wireless means so that it may fairly be said that copies are available. In particular, it is required that the works have been made available in such a way that members of the public may access these works from a place and at a time individually chosen by them. The wording of paragraph (1) follows closely the clause in Article 10 of the proposed Treaty concerning the making available aspect of the right of communication. A natural requirement is that the conditions specified in Article 3(3) of the Berne Convention must be fulfilled. Publication shall take place with the consent of the author, and the nature of the work must be taken into account when considering whether the availability of copies satisfies the reasonable requirements of the public.

Article 3**Notion and Place of Publication**

(1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.

[Article 3 continues]

3.12 In paragraph (2), it is proposed that Contracting Parties shall consider works identified in paragraph (1) to have been published in the Contracting Party where the necessary arrangements were made for availability of the works to the public. The place of publication is the country where the source data file is established and where access to the work has been provided for. The expression "necessary arrangements" is intended to mean such steps as are an absolute *conditio sine qua non* for the availability of the work. Mere linking or routing arrangements are not sufficient.

3.13 The European Community and its Member States took the view in their submission for the May 1996 session of the Committee of Experts that the question of the impact of new technologies on the provisions of Article 3(3) of the Berne Convention could be examined.

3.14 The definition of published works in the Berne Convention exists exclusively to effectuate the functioning of the international system of protection under the Convention. Nothing precludes the enactment of national laws that define this term quite differently to serve national purposes.

[End of Notes on Article 3]

[Article 3, continued]

(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public.

[End of Article 3]

Notes on Article 4

4.01 Article 4 confirms that computer programs are protected as literary works, as that term is used in Article 2 of the Berne Convention. The provision is of a declaratory nature, and it explicitly codifies the established interpretation. The protection applies to the expression of a computer program in any form, including source code and object code.

4.02 This provision combines the proposals of Canada, the European Community and its Member States, the People's Republic of China, the United States of America, and Uruguay. The proposed Article does not include a second paragraph concerning exceptions as had been proposed by the European Community and its Member States, the United States of America, and Uruguay, because provisions to the same effect are proposed in Article 1(2) and in Article 12 as general rules.

4.03 Article 4 embodies the essential contents of the provisions of Article 10.1 of the TRIPS Agreement.

[End of Notes on Article 4]

Article 4**Computer Programs**

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to the expression of a computer program in any form.

[End of Article 4]

Notes on Article 5

5.01 The wording of Article 5 follows closely the provision on the protection of databases in Article 10.2 of the TRIPS Agreement. The term "collection" has been used in the proposal while the TRIPS Agreement uses the term "compilation". No substantive difference is intended; "collection" is a term used in Article 2(5) of the Berne Convention for a protectable collection of works, while in the proposed Article 5 the term "collection" refers to all collections or compilations of data or other materials, including works. It should be understood that protection under this Article arises by virtue of the creative efforts of the author in selecting or arranging such materials.

5.02 This provision is of a declaratory nature. It confirms what is already covered by the Berne Convention.

[End of Notes on Article 5]

Article 5**Collections of Data (Databases)**

Collections of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any rights subsisting in the data or material contained in the collection.

[End of Article 5]

Notes on Article 6

6.01 Paragraph (1) of Article 6 includes an obligation to abolish non-voluntary licences for primary broadcasting within three years of ratifying or acceding to the proposed Treaty. Broadcasting may be either terrestrial or by satellite. The obligation does not extend to communication to the public by wire or to rebroadcasting in the sense of Article 11 *bis*(1)(ii). The possibility of making so-called "minor reservations" is discussed in the Notes on Article 12 concerning limitations and exceptions.

6.02 Paragraph (1) comprises a converging of the main parts of the proposals made by Argentina, Australia, Canada, the European Community and its Member States, the Republic of Korea, the United States of America, Uruguay, and the group of countries of Latin America and the Caribbean.

6.03 No exceptions or conditions concerning the existence or operation of organizations for the collective management of rights has been included in the provision. In all circumstances, the establishment of collective management of rights is a matter which deserves encouragement wherever rights management organizations do not exist.

6.04 Paragraph (2) contains an obligation to abolish, within three years of ratifying or acceding to the proposed Treaty, non-voluntary licences provided for in Article 13 of the Berne Convention. The proposal combines the proposals made by Argentina, Canada, the European Community and its Member States, the Republic of Korea, Uruguay, and the group of countries of Latin America and the Caribbean.

6.05 The People's Republic of China and the group of African countries expressed disagreement with the abolition proposed to eliminate non-voluntary licences in both cases. The African group stated that if elimination becomes necessary a phasing out period of between 10 - 15 years would rather be suggested.

[End of Notes on Article 6]

Article 6**Abolition of Certain Non-Voluntary Licenses**

(1) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licenses under Article 11bis(2) of the Berne Convention in respect of the broadcasting of a work.

(2) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer apply the provisions of Article 13 of the Berne Convention.

[End of Article 6]

Notes on Article 7

7.01 The author's right of reproduction in literary and artistic works has been laid down in Article 9 of the Berne Convention. According to paragraph (1) of that Article, "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form". The scope of the right of reproduction is already broad. The expression "in any manner or form" could not be more expansive in scope. It clearly includes the storage of a work in any electronic medium; it likewise includes such acts as uploading and downloading a work to or from the memory of a computer. Digitization, i.e. the transfer of a work embodied in an analog medium to a digital one constitutes always an act of reproduction.

7.02 Article 7 of the proposed Treaty contains a proposal on the scope of the right of reproduction laid down in Article 9 of the Berne Convention. It is proposed that Contracting Parties would agree on their understanding of the provisions in the Convention.

7.03 In paragraph (1) of the present draft, it is proposed that Contracting Parties would articulate their agreement that the right of reproduction in the Berne Convention includes direct and indirect reproduction, whether permanent or temporary, in any manner or form.

7.04 The first element in this provision is the explicit inclusion of direct and indirect reproduction. This language may already be found in Article 10 of the Rome Convention concerning the rights of producers of phonograms. The purpose of this provision in the proposed Article 7 is to make it clear that the exclusive right may not be diminished simply because of the distance between the place where an original work is situated and the place where a copy is made of it. Recording from a broadcast or wire transmission is as relevant as copying locally from one cassette to another. Any form of remote copying that is made possible by a communication network between the original and the copy is intended to come within the reach of this provision.

7.05 The second element in the proposal is intended to clarify the widely held understanding that both permanent and temporary reproduction constitute reproduction within the meaning of Article 9(1) of the Berne Convention. The result of reproduction may be a tangible, permanent copy like a book, a recording or a CD-ROM. It may as well be a copy of the work on the hard disk of a PC, or in the working memory of a computer. A work that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device.

7.06 It is emphasized that both of these elements described in the preceding Notes are well within any fair interpretation of Article 9(1) of the Berne Convention.

7.07 According to paragraph (2) of the present proposal, it would be a matter for the legislation of Contracting Parties to limit the right of reproduction in the case of temporary reproduction of a work, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the work perceptible or where the reproduction is of a transient or incidental nature. Moreover, the temporary reproduction must always take place in the course of use of the work that is authorized by the author or permitted

Article 7**Scope of the Right of Reproduction**

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

[End of Article 7]

by law. The purpose of this provision is to make it possible to exclude from the scope of the right of reproduction acts of reproduction that are not relevant in economic terms. By reference to Article 9(2) of the Berne Convention, the limitations are further confined to cases that pass the three-step test of that provision.

7.08 The European Community and its Member States proposed for the May 1996 session of the Committees of Experts (document BCP/CE/VII/1-INR/CE/VI/1) that the existing treaty language in the Berne Convention should not be modified. The European Community and its Member States also proposed that the following points should be included in the "Records of the Conference"/"General Report": "Contracting Parties confirm that the permanent or temporary storage of a protected work in any electronic medium constitutes a reproduction within the meaning of Article 9(1) of the Berne Convention. This includes acts such as uploading and downloading of a work to or from the memory of a computer."

7.09 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committees. In the discussions at the May 1996 session, several Delegations proposed that a provision with the same contents should be included in the proposed Treaty.

7.10 The proposal included in paragraph (1) of this Article 7 is in substantial conformity with the proposal of the European Community and its Member States. At the same time, it meets the proposals referred to above in the discussions of the Committees of Experts.

7.11 As further support for the proposal in Article 7 the following points may be made.

7.12 Technological developments have had a great impact on the means that may be used for reproduction. Complete and accurate reproductions may be made quickly and in such a way that the material reproduced resides only a short while in the memory of a computer. In some cases, a certain work or piece of data may never be reproduced as a whole in the memory of a computer; only those parts of the material that are necessary to achieve a certain result may be reproduced, for instance in order to make a work perceptible. In such cases, successive reproduction of portions of a work may, over a period of time, cover the whole work.

7.13 Some relevant uses may, now or in the future, become totally based on a temporary reproduction.

7.14 Today, the countries of the Berne Union may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction the results of which live only a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary interpretation.

7.15 The interpretation of a right of such importance as the right of reproduction should be in fair and reasonable harmony all over the world. A uniform interpretation is necessary. Already, the need for legal certainty and predictability has been felt and found lacking in concrete cases. The need for a uniform interpretation is dictated by the need to secure the functioning of the copyright system in a digital future.

[Article 8 starts on page 195]

7.16 The only way to harmonize effectively the interpretation of the scope of the right of reproduction is to confirm that temporary reproduction falls within the scope of the right.

7.17 It has been asserted in the discussions in the Committees of Experts that a reproduction right of wide scope might have some unintended and problematic effects. In principle, there are two ways to avoid such effects. The first is to narrow the definition of reproduction. The second is by way of limitations of the right. It seems that the countries of the Berne Union, having freedom of interpretation with respect to Article 9(1), have already excluded the first possibility. This leaves only the second option: designing a limitations clause that makes it possible to avoid any problematic and unintended effects.

7.18 The provisions proposed in paragraph (2) are intended to focus on incidental, technical, and in some cases technically indispensable instances of reproduction which form part of another authorized or otherwise lawful use of a protected work. The cases shall pass the three-step test of Article 9(2) of the Berne Convention.

[End of Notes on Article 7]

[Article 8 starts on page 195]

Notes on Article 8

8.01 Authors of literary and artistic works have not been granted a general right of distribution under any existing international agreements. The Berne Convention contains a right of distribution only in respect of cinematographic works.

8.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a broad right of distribution has gained wide international acceptance. However, no convergence of views has developed in respect of the scope or extent of the right of distribution after the first sale or other transfer of ownership of a copy of a work. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a work the right of distribution ceases to exist, i.e. is exhausted, after the first sale of that copy. Views differ as to whether the exhaustion should be national, regional or global.

8.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even in an international instrument be dealt with in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 8 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

8.04 Article 8 provides an exclusive right of distribution to authors of literary and artistic works. Because of the differences described in Note 8.02, two alternatives are offered. Alternative A is based on the principle of national or regional exhaustion. Alternative B allows global or international exhaustion. The basic provision on the right of distribution is identical in both alternatives: authors shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. Public lending falls outside the scope of this provision since it does not involve a sale or other transfer of ownership.

8.05 Alternative A also provides a right of importation, in addition to the general right of distribution, to the authors of literary and artistic works.

8.06 Paragraph (1) of Alternative A provides the exclusive right. Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of a work that have been distributed with the consent of the rightholder in the territory of a Contracting Party. The right of importation is not affected by the first sale or other transfer of ownership. Paragraph (3) excludes from the scope of the right of importation those situations where the importation is effected by a person solely for his own personal and non-commercial use.

8.07 Some proposals presented for the February 1996 session of the Committee of Experts suggested that regional economic integration areas with their own legislation in this field might be explicitly mentioned in the clause concerning national or regional exhaustion. The obligations of the Treaty apply only to regional economic integration areas or organizations that are Contracting Parties to the Treaty. The territories of these Contracting Parties consist of the territories of their member countries. There is thus no need to make separate mention of regional economic integration areas.

Article 8*Alternative A***Right of Distribution and Right of Importation**

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
- (i) the making available to the public of the original and copies of their works through sale or other transfer of ownership;
 - (ii) the importation of the original and copies of their works, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.
- (2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of any work that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.
- (3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

[Article 8 continues]

8.08 Alternative B allows for international exhaustion. Contracting Parties may, in their national legislation, provide that the right of distribution will not extend to distribution after the first sale or other transfer of ownership of the original or copies of a work by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

8.09 No right of importation is provided for in Alternative B.

8.10 The two Alternatives presented in Article 8 reflect the genuine diverging views of many nations in this matter. On the level of an international agreement the Alternatives seem to exclude each other, are apparently contradictory and impossible to reconcile. As an intermediate solution the introduction of agreed conditional limitations of the right of distribution and right of importation, based on Alternative A in Article 8(1), could be explored. National legislation of a Contracting Party could for example provide that these rights do not apply to the distribution or importation of copies of works that have been sold with the consent of the author anywhere in the world, if copies of that work have not been made available in a Contracting Party in a quantity sufficient to satisfy the reasonable needs of the public, within an agreed period of time, e.g. one year, calculated from the publication of that work outside that Contracting Party. An alternative along these lines has not, however, been presented. Any third alternative would have required extensive international consultations which it would not have been possible to organize during the preparation of the proposed Treaty.

8.11 The rights provided for in the proposed Treaty, including the right of distribution, are minimum rights. Contracting Parties may provide a higher level of protection. A more restricted concept of exhaustion than international exhaustion represents a higher level of protection. Thus, the solution in Alternative B would not preclude any Contracting Party from applying any conditions or restrictions to the circumstances giving rise to exhaustion. National or regional exhaustion is in full conformity with this provision for those Contracting Parties that take this approach to the distribution right. Introduction of a right of importation is not excluded either.

8.12 The main contents of Alternative A follow the proposal made by the United States of America for the February 1996 session of the Committees of Experts. As far as the basic right is concerned, Argentina and Uruguay presented proposals with the same effect but without offering a proposal concerning exhaustion. Alternative B is based on the main approach taken in the proposals made by Australia, Brazil, Canada, Japan, and the Republic of Korea. The group of African countries favoured the international exhaustion of the right of distribution and supported the proposal made by Australia.

[End of Notes on Articles 8]

[Article 8, continued]

Alternative B

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of works by or pursuant to authorization.

[End of Article 8]

Notes on Article 9

9.01 The Berne Convention does not contain any provisions on the rental of copies of literary and artistic works.

9.02 Rental rights concerning computer programs and cinematographic works were included in the TRIPS Agreement. Members of the TRIPS Agreement shall provide authors (and their successors in title) the right to authorize or prohibit the commercial rental to the public of originals or copies of their copyrighted works. As far as cinematographic works are concerned, the TRIPS Agreement provides for an impairment test: a Member shall be excepted from according the right in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors. Computer programs are excluded, under the TRIPS Agreement, from the scope of the right of rental in a single case: if the program is not the essential object of the rental, the obligation to grant a rental right does not apply.

9.03 The right of rental has been discussed in the Committees of Experts on several occasions. The trend has been towards a broad rental right covering all, or almost all, categories of works as an exclusive right.

9.04 Paragraph (1) of Article 9 provides authors of literary and artistic works with the exclusive right of authorizing the rental of the original and copies of their works. The right of rental differs from the right of distribution as laid down in Article 8. Paragraph (1) explicitly provides that the right of rental survives distribution, i.e. the first sale or other transfer of ownership. In principle, this right could cover all categories of works. However, in order to design a proposal that would be acceptable to as many Contracting Parties as possible, such a far reaching solution has not been proposed.

9.05 Paragraph (2) would maintain the exclusive right of rental for three specific types of works: computer programs, collections of data or other material, within the meaning of Article 5, in machine-readable form, and musical works embodied in phonograms. Contracting Parties could exempt other categories of works from this right, but they would not have this option if such rental led to widespread copying that materially impaired the exclusive right of reproduction. Thus, these categories of works would be accorded the same level of rental right as is accorded to cinematographic works in the TRIPS Agreement. The right of rental would be subject to the impairment test.

9.06 Paragraph (3) would allow Contracting Parties to exclude architectural works and works of applied art from the scope of this right.

9.07 The proposal is formulated in such a way that it would, compared to the TRIPS Agreement, raise the level of the right of rental for databases in machine-readable form and musical works embodied in phonograms by providing an unconditional exclusive right. Computer programs and these types of works would enjoy the same treatment. As regards databases in machine-readable form, this proposal would bring the protection of authors to the same level provided for the makers of databases according to the proposed new Treaty on the Intellectual Property in respect of Databases. The makers of databases would enjoy the exclusive right of rental as a part of the right of utilization. On the other hand, authors would

Article 9**Right of Rental**

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs, collections of data or other material in machine-readable form, and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art.

[End of Article 9]

enjoy the right of rental in respect of the musical works embodied in phonograms while, according to the New Instrument, the producers of phonograms would enjoy the right of rental in respect of phonograms.

9.08 Proposals in favour of the right of rental were presented for the February 1996 session of the Committees of Experts by Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, the United States of America, and Uruguay. The proposal made by Australia was supported by the group of African countries. A broad right of rental was favoured by Argentina, Brazil, the European Community and its Member States, Uruguay, and the group of countries of Latin America and the Caribbean. The minimum level of protection in other proposals was based on the TRIPS Agreement, in some cases with additional elements, including an exclusive rental right of musical works embodied in phonograms and the extension of the impairment test to all categories of works.

9.09 In the TRIPS Agreement, computer programs have been excluded from the scope of the right of rental where the program is not the essential object of the rental. This aspect was included in some of the proposals made. However, this detail has not been included in the present proposal. The question of the essentiality of the object of rental may also concern other categories of works, such as databases. The proposed Treaty takes the position that this matter may most feasibly be settled at the national level.

[End of Notes on Article 9]

[Article 10 starts on page 205]

Notes on Article 10

10.01 In the Berne Convention the exclusive right of communication to the public of works has been regulated in a fragmented manner.

10.02 The most comprehensive provision is found in Article 11(1)(ii) of the Berne Convention. This provision grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing any communication to the public of the performance of their works, and paragraph (2) confirms that these authors enjoy the same rights in translations as they enjoy in their original works. Similar provisions concerning the communication to the public of recitations of literary works are set forth in Article 11ter.

10.03 According to Article 14(1)(ii) of the Berne Convention, authors of literary or artistic works have the exclusive right of authorizing the communication to the public by wire of their works adapted or reproduced by means of cinematography. Article 14*bis*(1) grants the same protection to the cinematographic works themselves.

10.04 The exclusive right in certain forms of communication to the public has been provided for in a special provision in Article 11*bis*(1) concerning all categories of literary and artistic works. These rights are (1) the right of broadcasting, (2) the right of communication to the public by wire and the right of rebroadcasting of a broadcast, and (3) the right of public communication of the broadcast by loudspeaker, etc. The provisions of paragraph (1)(i) of that Article cover, in addition to the right of broadcasting, the communication of works to the public "by any other means of wireless diffusion of signs, sounds or images".

10.05 Technological developments have made it possible to make protected works available in many ways that differ from traditional methods. This is a source of concern in connection with the categories of works that are not covered by the provisions on the right of communication in the Berne Convention. In addition, the interpretation of these provisions may differ. It has become evident that the relevant obligations need to be clarified and that the rights currently provided under the Berne Convention need to be supplemented by extending the field of application of the right of communication to the public to cover all categories of works.

10.06 The right of communication does not presently extend to literary works, except in the case of recitations thereof. Literary works, including computer programs, are presently one of the main objects communicated over networks. Other affected categories of works are also not covered by the right of communication, significant examples being photographic works, works of pictorial art and graphic works.

10.07 The European Community and its Member States made a proposal on the right of communication to the public for the May 1996 session of the Committees of Experts (document BCP/CE/VII/1-INR/CE/VI/1). The wording of the proposal was as follows: "Without prejudice to the rights provided for in Articles 11, 11*bis*, 11ter, 14 and 14*bis* of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them".

[Article 10 starts on page 205]

10.08 The proposal made by the European Community and its Member States received a positive reaction from many Government members of the Committee. The proposal included in Article 10 reproduces the proposal of the European Community and its Member States.

10.09 The provisions of Article 10 consist of two parts. The first part extends the exclusive right of communication to the public to all categories of works, including any communication by wire or wireless means. It leaves the provisions of Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) applicable as they are in the Berne Convention.

10.10 The second part of Article 10 explicitly states that communication to the public includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. The relevant act is the making available of the work by providing access to it. What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user.

10.11 One of the main objectives of the second part of Article 10 is to make it clear that interactive on-demand acts of communication are within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public may have access to the works from different places and at different times. The element of individual choice implies the interactive nature of the access.

10.12 The features described in the preceding Note entail important delimitations of the relevant acts. The provision excludes mere private communication by using the term "public". Furthermore, the requirement of individual choice excludes broadcasting from the scope of the provision.

10.13 Article 10 leaves intact the rights provided for in the listed Berne Convention provisions. The proposal supplements existing Berne Convention protection by adding a right of communication to the public for all categories of works, including literary works, to which the existing right of communication does not apply. These elements in the proposal constitute new rights or an additional dimension to the right of communication. However, the features that have been confirmed in the second half, the "making available" part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention. Nevertheless, other interpretations may also exist concerning obligations under the Convention. The objective of the proposal is to harmonize the obligations and to avoid any discrepancies that may be caused by different interpretations.

10.14 The expression "communication to the public" of a work means making a work available to the public by any means or process other than by distributing copies. This includes communication by wire or wireless means. The technology used may be analog or digital, and it may be based on electromagnetic waves or guided optical beams. The use of the non-restrictive term "any" in front of the word "communication" in Article 10, and in certain provisions of the Berne Convention, emphasizes the breadth of the act of communication. "Communication" implies transmission to a public not present in the place where the communication originates. Communication of a work can involve a series of acts of

Article 10**Right of Communication**

Without prejudice to the rights provided for in Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

[End of Article 10]

transmission and temporary storage, such incidental storage being a necessary feature of the communication process. If, at any point, the stored work is made available to the public, such making available constitutes a further act of communication which requires authorization. It should be noted that storage falls within the scope of the right of reproduction (see Notes on Article 7).

10.15 As communication always involves transmission, the term "transmission" could have been chosen as the key term to describe the relevant act. The term "communication" has been maintained, however, because it is the term used in all relevant Articles of the Berne Convention in its English text. It deserves to be mentioned that in the French text the expression "la transmission publique" has been used in Articles 11 and 11*ter*, and the expression "la transmission par fil au public" has been used in Article 14 while "communication to the public" and "communication to the public by wire" are the English expressions. In Article 11*bis* of the French text of the Convention, the corresponding expression is "la communication publique".

10.16 It seems clear that, at the treaty level, the term "communication" can be used as a bridging term to ensure the international interoperability and mutual recognition of exclusive rights that have been or will be provided in national legislations using either the term "transmission" or the term "communication". The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant. What is transferred or communicated is the work.

10.17 The term "public" has been used in Article 10 as it has been used in the present provisions of the Berne Convention. It is a matter for national legislation and case law to define what is "public". However, the aspects dealt with in Note 10.10 should be taken into account. The "public" consists of individual "members of the public" who may access the works from different places and at different times.

10.18 It is stated in Note 10.13 that one of the purposes of Article 10 is to "complete" the right of communication, extending it to all works. One may note that the proposed language of Article 10 does not explicitly include the limiting terms "performance" or "recitation" of a work as included in Article 11(1)(ii) and Article 11*ter*(1)(ii) of the Berne Convention. This is not an omission but a more modern formulation of the provision. The wording "communication ... of their works" also covers the communication of performances and recitations of works. It may be recalled, for example, that when Article 9 and Article 11*bis* were introduced into the Berne Convention, no corresponding clauses were considered to be necessary.

10.19 No specific reference is made to Article 11(2) or Article 11*ter*(2) of the Berne Convention, and no corresponding provisions have been proposed. It goes without saying that authors have the same rights with respect to translations, adaptations, arrangements and other alterations of their works. The work is the work even in translation, adaptation, etc. The example concerning Article 9 and Article 11*bis* may be reiterated here.

10.20 It should be pointed out that no rights are exhausted in connection with communication to the public. Should communication of a work result in the reproduction of a copy at the

[Article 11 starts on page 211]

recipient end, the work may not be communicated further to the public or distributed to the public without authorization. Exhaustion of rights is only associated with the distribution of tangible copies.

10.21 It is strongly emphasized that Article 10 does not attempt to define the nature or extent of liability on a national level. This proposed international agreement determines only the scope of the exclusive rights that shall be granted to authors in respect of their works. Who is liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.

10.22 In respect of rights provided for in Article 10, Contracting Parties may apply certain limitations and exceptions traditionally considered acceptable under the Berne Convention. The proposal is not intended to impair the ability of Contracting Parties to maintain in their national laws exceptions that have traditionally been viewed as "minor reservations".

10.23 Proposals on the rights of transmission, communication to the public, public performance and the right of digital transmission were presented for the February 1996 session of the Committee of Experts by Argentina, Australia, Canada, Japan, and the United States of America. The group of countries of Latin America and the Caribbean expressed a recognition of a general right of communication to the public by any means or process.

[End of Notes on Article 10]

[Article 11 starts on page 211]

Notes on Article 11

11.01 Article 11 contains a proposal according to which the duration of the protection of photographic works would be governed by the general rules on the term of protection provided under Article 7 of the Berne Convention. This proposal combines the proposals made by Argentina, Australia, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, the United States of America, and Uruguay.

[End of Notes on Article 11]

Article 11**Duration of the Protection of Photographic Works**

In respect of photographic works, the Contracting Parties shall apply the provisions of Articles 7(1), 7(3), 7(5), 7(6), 7(7) and 7(8) of the Berne Convention and shall not apply the provisions of Article 7(4).

[End of Article 11]

Notes on Article 12

12.01 Provisions on limitations of and exceptions to the rights of authors in literary and artistic works are laid down in Article 12.

12.02 Paragraph (1) permits Contracting Parties to provide for limitations of or exceptions to the rights granted to authors in this Treaty, subject to conditions that are identical to those of Article 9(2) of the Berne Convention. The provision includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with normal exploitation of the protected subject matter. Finally, any limitations or exceptions may never unreasonably prejudice the legitimate interests of the author.

12.03 Paragraph (2) introduces an obligation for Contracting Parties to apply these same conditions to any limitations that they would make to the rights provided for in the Berne Convention. This provision limits the permissible scope of limitations under the Berne Convention. By virtue of Article 9(2) of the Berne Convention, these conditions already apply to the right of reproduction.

12.04 The conditions of Article 9(2) of the Berne Convention concerning the right of reproduction have been incorporated in Article 13 of the TRIPS Agreement as general principles governing limitations of and exceptions to rights.

12.05 Interpretation of the provisions of Article 12 should follow the established interpretation of Article 9(2) of the Berne Convention. In the Report on the Work of the Main Committee I of the Stockholm Conference (1967), the following explanation was given (page 1145, paragraph 85): "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

12.06 In the context of the provisions on limitations and exceptions in the proposed Treaty, there is reason to make a reference to the so-called "minor reservations". In Brussels (1948) and in Stockholm (1967) this issue was touched upon. The Report on the Work of the Main Committee I of the Stockholm Conference states the following (page 1166, paragraph 209): "In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions permitted in respect of religious ceremonies, performances by military bands and the requirements of education and popularization. The exceptions also apply to Articles 11*bis*,

Article 12**Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

[End of Article 12]

11^{ter}, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle of the right (cf. *Documents de la Conférence de Bruxelles*, page 100)."

12.07 The proposed provisions of Article 12 are applicable to any limitations. No limitations, not even limitations that belong to the category of minor reservations, may exceed the limits set by the three-step test.

12.08 It bears mention that this Article is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason. The purpose of the protection must be kept in mind.

12.09 When a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.

12.10 No proposals on limitations were submitted by Governments for the February 1996 session of the Committees of Experts.

[End of Notes on Article 12]

[Article 13 starts on page 217]

Notes on Article 13

13.01 Article 13 contains provisions on obligations concerning technological measures.

13.02 According to paragraph (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression "knowing or having reasonable grounds to know" has the same meaning as the expression "knowingly or with reasonable grounds to know" in the provisions on enforcement in the TRIPS Agreement.

13.03 Paragraph (2) includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 16 of the proposed Treaty, only concern "any act of infringement of intellectual property rights covered by this Agreement". The obligations established in the proposed Article 13 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

13.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

13.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

13.06 Paragraph (3) contains the definition of a "protection-defeating device". It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase "primary purpose or primary effect of which is to circumvent..." has been used rather than "specifically designed or adapted to circumvent...".

13.07 Proposals concerning the obligations of Contracting Parties in connection with protection-defeating devices and other technological measures were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, and the United States of America. The People's Republic of China suggested that matters such as technical measures should be studied further. The European Community and its Member States, and the Republic of Korea also made proposals on this issue for the May 1996 session of the Committees of Experts.

[End of Notes on Article 13]

Article 13**Obligations concerning Technological Measures**

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

[End of Article 13]

Notes on Article 14

14.01 Article 14 contains provisions on obligations with regard to rights management information.

14.02 According to paragraph (1) Contracting Parties shall make it unlawful for any person to remove or alter any electronic rights management information without authority, or to distribute, import for distribution or communicate to the public, without authority, copies of works from which such information has been removed or in which it has been altered. A requirement for proscription is that the person who performs these acts does so knowingly. The obligation of Contracting Parties covers rights management information in electronic form only.

14.03 Paragraph (2) identifies the information that is within the scope of this Article. The scope has been limited to information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information. The obligations of this provision cover such information only when it is attached to a copy of a work or appear in connection with the communication of a work to the public. Nothing precludes a broader field of application for provisions on rights management information in national legislation.

14.04 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

14.05 Contracting Parties may, when implementing the obligations established by this Article, specifically limit the scope of the provisions in their national law in such a way that technically non-feasible requirements are not imposed on broadcasting organizations and other users engaged in the duly authorized communication of works or retransmission of broadcasts.

14.06 It should be pointed out that the use of electronic rights management information is voluntary. The obligations of Contracting Parties concerning rights management information only apply in cases where such information has been given.

14.07 It should be observed that the wilful removal or alteration of rights management information in order to achieve financial gain is a matter which falls within the scope of the provisions of the penal codes in most countries. This may be taken into account when the obligations of the Contracting Parties are considered by the Diplomatic Conference.

14.08 Proposals on rights management information were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, and the United States of America.

[End of Notes on Article 14]

Article 14**Obligations concerning Rights Management Information**

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

[End of Article 14]

Notes on Article 15

15.01 Article 15 incorporates by reference Article 18 of the Berne Convention.

[End of Notes on Article 15]

Article 15

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

[End of Article 15]

Notes on Article 16

16.01 Two alternatives on enforcement are presented in Article 16. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement.

16.02 Alternative A consists of the text of Article 16 and an Annex. Paragraph (1) introduces the Annex which contains the substantive provisions on enforcement. Paragraph (2) states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

16.03 Alternative B incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

[End of Notes on Article 16]

Article 16**Special Provisions on Enforcement of Rights**

Alternative A (continues on page 225)

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

[End of Article 16]

Notes on the Annex

17.01 The Annex forms the second part of Alternative A of Article 16. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.

17.02 No detailed Notes are offered on the specific provisions of the Annex.

[End of Notes on the Annex]

Alternative A (continued from page 223)

ANNEX

Enforcement of Rights

SECTION 1

GENERAL OBLIGATIONS

Article 1

1. Contracting Parties shall ensure that enforcement procedures as specified in this Annex are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
2. Procedures concerning the enforcement of rights covered by this Treaty shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Contracting Party's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. It is understood that this Annex does not create any obligation to put in place a judicial system for the enforcement of rights covered by this Treaty distinct from that for the enforcement of law in general, nor does it affect the capacity of Contracting Parties to enforce their law in general. Nothing in this Annex creates any obligation with respect to the distribution of resources as between enforcement of rights covered by this Treaty and the enforcement of law in general.

SECTION 2**CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES****Article 2****Fair and Equitable Procedures**

Contracting Parties shall make available to the right holders* civil judicial procedures concerning the enforcement of any right covered by this Treaty. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 3**Evidence**

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.
2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Contracting Party may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

* For the purpose of this Annex, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 4

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of a right covered by this Treaty, immediately after customs clearance of such goods. Contracting Parties are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of a right covered by this Treaty.

[Paragraph 2 of Article 44 of the TRIPS Agreement is not reproduced here.]

Article 5

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's right covered by this Treaty by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Contracting Parties may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 6

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. [A clause not reproduced here.]

Article 7

Right of Information

Contracting Parties may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 8

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.
2. In respect of the administration of any law pertaining to the protection or enforcement of rights covered by this Treaty, Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 9

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3**PROVISIONAL MEASURES****Article 10**

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

- (a) to prevent an infringement of any right covered by this Treaty from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
- (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures *inaudita altera parte* where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted *inaudita altera parte*, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Contracting Party's law so permit or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of a right covered by this Treaty, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4

SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES[†]

Article 11

Suspension of Release by Customs Authorities

Contracting Parties shall, in conformity with the provisions set out below, adopt procedures[‡] to enable a right holder, who has valid grounds for suspecting that the importation of [words omitted] pirated goods[§] may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. [A clause omitted]. Contracting Parties may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 12

Application

Any right holder initiating the procedures under Article 11 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's right covered by this Treaty and to supply a sufficiently detailed description of the goods to make them readily recognisable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

[†] Where a Contracting Party has dismantled substantially all controls over movement of goods across its border with another Contracting Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

[‡] It is understood that there shall be no obligation to apply such procedures to imports of goods put on the Market in another country by or with the consent of the right holder, or to goods in transit.

[§] For the purposes of this Annex:
"pirated goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a right covered by this Treaty under the law of the country of importation.

Article 13

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

[Paragraph 2 of Article 53 of the TRIPS Agreement is not reproduced here.]

Article 14

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 11.

Article 15

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 10 shall apply.

Article 16

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 15.

Article 17

Right of Inspection and Information

Without prejudice to the protection of confidential information, Contracting Parties shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Contracting Parties may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of goods in question.

Article 18

Ex Officio Action

Where Contracting Parties require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that a right covered by this Treaty is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, mutatis mutandis, set out at Article 15;
- (c) Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 19

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 6. [A clause not reproduced here.]

Article 20**De Minimis Imports**

Contracting Parties may exclude from the application of above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5**CRIMINAL PROCEDURES****Article 21**

Contracting Parties shall provide for criminal procedures and penalties to be applied at least in cases of wilful [words omitted] piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. [A clause not reproduced here.]

[End of document]

CRNR/DC/5

August 30, 1996 (Original: English)

**BASIC PROPOSAL
FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY
FOR THE PROTECTION OF THE RIGHTS
OF PERFORMERS AND PRODUCERS OF PHONOGRAMS
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Chairman of the Committees of Experts
on a Possible Protocol to the Berne Convention
and
on a Possible Instrument for the Protection of the Rights of Performers
and Producers of Phonograms*

Memorandum Prepared by the Chairman of the Committees of Experts

1. In 1989, the Assembly and the Conference of Representatives of the Berne Union adopted the program of WIPO making a provision for convening a Committee of Experts to examine questions concerning a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Berne Convention"). The objective of convening the Committee of Experts was to examine whether the preparation of a protocol to the Berne Convention should commence. According to the WIPO program for the 1990-91 biennium "[t]he protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies" (document AB/XX/2, Annex A, item PRG.02(2)).
2. The Committee of Experts was convened in two sessions, the first in November 1991 and the second in February 1992. The sessions were started on the basis of working documents covering a broad range of topic areas including the subject matter of copyright, certain particular rights, the applicability of minima, and the obligation of granting national treatment. Among the questions concerning subject matter was the desirability of covering the rights of producers of sound recordings in the protocol.
3. The Assembly and the Conference of Representatives of the Berne Union determined in 1992 that the work of the Committee of Experts would be most effectively advanced by the formation of two Committees of Experts, one for the preparation of a possible protocol to the Berne Convention and the other for the preparation of a possible new instrument on the protection of the rights of performers and producers of phonograms (document B/A/XIII/2).
4. The Committee of Experts on a Possible Protocol to the Berne Convention was charged with the responsibility of considering ten specific items: (1) computer programs, (2) databases, (3) rental rights, (4) non-voluntary licences for sound recordings of musical works, (5) non-voluntary licences for primary broadcasting and satellite communication, (6) distribution rights, including an importation right, (7) duration of the protection of photographic works, (8) communication to the public by satellite broadcasting, (9) enforcement of rights, and (10) national treatment.
5. The Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms was charged with the responsibility of discussing all questions concerning the effective international protection of the rights of performers and producers of phonograms. This broad charge left unresolved whether the Committee should consider the rights of performers to extend exclusively to the fixation of their performances in phonograms or also to audiovisual fixations.
6. The Committee of Experts on a Possible Protocol to the Berne Convention then held five further sessions, the third in June 1993, the fourth in December 1994, the fifth in September 1995, the sixth in February 1996 and the seventh in May 1996.
7. The Committee of Experts on a Possible Instrument for the Protection of the Rights of the Performers and Producers of Phonograms held six sessions, the first in June-July 1993, the

second in November 1993, the third in December 1994, the fourth in September 1995, the fifth in February 1996 and the sixth in May 1996.

8. The last three sessions of the two Committees (referred to subsequently as the Committees of Experts) were convened on the same dates, and parts of the sessions were held jointly.

9. The work of the Committees of Experts was based on memoranda prepared by the International Bureau of WIPO until December 1994. Following the recommendation of the Committees of Experts, the Director General of WIPO invited Government members of the Committees and the European Commission to submit proposals for discussion at the September 1995 and February 1996 sessions.

10. As a result of this invitation from the Director General, the International Bureau received written proposals and comments from Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, South Africa, the Sudan, the United States of America, and Uruguay.

11. The Committees of Experts recommended at the February 1996 sessions that a Diplomatic Conference for the conclusion of appropriate treaties be held in December 1996. From May 20 to 24, 1996, meetings were held in Geneva by the Preparatory Committee of the Proposed Diplomatic Conference, the General Assembly of WIPO and the Assembly of the Berne Union. The Preparatory Committee and the Assemblies decided that a WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions would be convened from December 2 to 20, 1996.

12. The Chairman of the Committees of Experts was entrusted at the February 1996 sessions with the task of preparing the draft texts ("the basic proposals") for the Diplomatic Conference; the WIPO International Bureau was to publish and circulate these draft texts by September 1, 1996, to the States, intergovernmental and non-governmental organizations to be invited to the Diplomatic Conference. The Director General of WIPO proposed that the International Bureau would prepare the draft of the final clauses of the treaty or treaties. The draft Final Clauses prepared by the Director General (document CRNR/PM/2) were examined by the Preparatory Committee of the Proposed Diplomatic Conference in May 1996.

13. In the introduction to the draft Final Clauses, the Director General of WIPO stated: "On the basis of the deliberations of the Committees of Experts, it is assumed that the aim of the Diplomatic Conference will be to adopt one or more multilateral treaty or treaties on questions of copyright, on questions of two branches (one concerning performing artists, the other concerning producers of phonograms) of neighboring rights and, perhaps, also on questions concerning a *sui generis* protection of data bases."

14. There is no decision on the number of treaties to be proposed for adoption by the Diplomatic Conference in December 1996. The Committees of Experts have made no recommendation on this issue, and after extensive discussion, the question was left open in the May 1996 meetings of the Preparatory Committee, the General Assembly of WIPO and the Assembly of the Berne Union. In this respect, the mandate given to the Chairman of the Committees of Experts was therefore open and included the possibility of establishing draft texts for one, two or three treaties.

15. Basic Proposals for the substantive provisions of three treaties are proposed by the Chairman of the Committees of Experts:

1. "Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works",
2. "Treaty for the Protection of the Rights of Performers and Producers of Phonograms",
3. "Treaty on Intellectual Property in Respect of Databases".

16. It is the assessment of the Chairman of the Committees of Experts that the expectations of the majority of Delegations participating in the meetings referred to in paragraphs 6, 7 and 11 are most closely met by proposing three draft texts. The Diplomatic Conference has the power to combine separate draft treaties into one single treaty should it find this course of action appropriate. A combined text would have several advantages, and such an option may be viewed as one of legal technique; on the other hand, a single text approach would entail certain political and doctrinal considerations. For example, Governments contemplating ratification of or accession to such a single text would have to analyze and consider implementation of the whole contents of the combined instrument.

17. The present set of draft substantive provisions of the Basic Proposals referred to in paragraph 15, of which the present document is one, have been prepared by the Chairman of the Committees of Experts according to decisions made by the Committees at their February 1996 sessions. The Basic Proposal for the Administrative and Final Clauses of all these proposed Treaties have been submitted by the Director General of WIPO in a separate document.

18. The present document sets forth the substantive provisions of the Basic Proposal of the Treaty for the Protection of Rights of Performers and Producers of Phonograms. There are 27 Articles preceded by a Preamble. Each provision is accompanied by explanatory Notes.

19. The purpose of the explanatory Notes is:

- (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions,
- (ii) to indicate the reasoning behind the proposals, and
- (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.

20. The substantive provisions of the proposed Treaty have been organized in four Chapters. Chapter I includes general provisions, Chapter II and Chapter III contain provisions of the rights of performers and producers of phonograms respectively, and Chapter IV includes common provisions. In Chapters II and III, most Articles and Notes are parallel. This solution has led to certain repetitiveness. It has, however, been necessary in order to enable a discussion on each of the Articles and to take into consideration the requests expressed during the work of the Committee of Experts.

21. The present Basic Proposal has been prepared on the basis of the proposals made during the work of the Committees of Experts and taking into account discussions in the Committees of Experts. These proposals have been carefully studied, and portions of them appear in several places in the proposed Treaty, sometimes in a reformulated or combined format. Additional elements have been introduced where necessary, and not all elements of all proposals are

reflected in the proposed Treaty. In some instances, alternative solutions are proposed, but the number of proposed alternatives is limited. Alternatives have been designated in the text using capital letters in accordance with Rule 29(b) of the draft Rules of Procedure for the Diplomatic Conference. One of the proposed alternative solutions includes an Annex with special provisions on enforcement.

22. In the present Basic Proposal reference is often made without the document number to the proposals presented by the Government members and the European Community and its Member States for the sessions of the Committees of Experts. The proposals presented for the session of February 1 to 9, 1996 of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms were the following:

The European Community and its Member States (INR/CE/V/2)
Argentina (INR/CE/V/3)
Argentina (INR/CE/V/3 Corr.)
The Sudan (INR/CE/V/4)
China (INR/CE/V/5)
Uruguay (INR/CE/V/6)
Brazil (INR/CE/V/7)
The United States of America (INR/CE/V/8)
Japan (INR/CE/V/9)
Canada (INR/CE/V/10)

23. Further contribution to the work of the Committees of Experts was brought about in the proposals presented by the participants in the African consultation meeting and the consultation meeting of the countries of Latin America and the Caribbean before the February 1996 sessions of the Committees of Experts. The documents are the following:

Burkina Faso, Cameroon, Côte d'Ivoire, Egypt, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Senegal, the Sudan, Togo, Tunisia, and Zambia (INR/CE/V/12)

Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela (INR/CE/V/13)

24. For the session of May 22 to 24, 1996 of the Committees of Experts the following proposals were presented:

The European Community and its Member States (BCP/CE/VII/1-INR/CE/VI/1)
The Republic of Korea (BCP/CE/VII/3-INR/CE/VI/3)

**Draft Treaty
for the Protection of the Rights
of Performers and Producers of Phonograms**

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ANNEX

Notes on the Title and the Preamble

0.01 During the preparatory stages that led to the production of this proposed Treaty, the expression "Possible Instrument" had been used as a working title. Since the term "instrument" is commonly used as a generic expression for any unspecified contract, deed or other document, it is suggested that this term should not be used in the official title of the proposed Treaty. The title "Treaty for the Protection of the Rights of Performers and Producers of Phonograms" is offered as an accurate characterization of the contents of this proposed Treaty.

0.02 The Preamble sets forth the objective of the proposed Treaty and the main arguments and considerations relating thereto.

0.03 The first paragraph of the Preamble expresses the most general objective of the proposed Treaty. It reflects the language of the Preamble of the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the Berne Convention").

0.04 The second paragraph pronounces the recognition that new international rules are needed to achieve the objective identified in the first paragraph, having regard to the manifold developments that call for improved protection in the field covered by the proposed Treaty.

0.05 The third paragraph acknowledges the connection of the proposed Treaty to the evolution of the overall environment of the intellectual property system: the accelerating development and convergence of information and communication technologies. This evolution extends its effects even to the convergence of the structures of industries and the content they produce, i.e. protected subject matter, and it has a profound impact on the production and distribution of the results of work by performers and producers of phonograms. While introducing certain provisions on "traditional issues", the proposed Treaty also includes solutions to urgent questions raised by the technological development referred to above. The proposed Treaty is therefore part of a series of simultaneously published draft Treaties which could be characterized as "Global Information Infrastructure Treaties" in the field of copyright and rights related to copyright.

0.06 The Preamble of this proposed Treaty has been drafted in parallel with the Preamble of the simultaneously published proposed Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the New Copyright Treaty"). However, in the present proposed Treaty no reference is made to the need to clarify the interpretation of certain existing rules. The present proposed Treaty is intended to be a comprehensive instrument rather than an instrument that clarifies existing norms.

[End of Notes on the Title and the Preamble]

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Paragraph (1) of Article 1 contains a "Rome safeguard" clause modelled after Article 2.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter referred to in these Notes as "the TRIPS Agreement"), which is the most recent of such provisions made in existing treaties. Nothing in the proposed Treaty shall derogate from existing obligations that Contracting Parties may have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to in these Notes as "the Rome Convention").

1.02 Paragraph (2) contains a corresponding clause which confirms that the proposed Treaty shall not interfere with the obligations that Contracting Parties may have to each other under treaties in the field of copyright in general, and in particular under the Berne Convention.

[End of Notes on Article 1]

CHAPTER I
GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties for the protection of literary and artistic works, and in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors under the Berne Convention for the Protection of Literary and Artistic Works.

[End of Article 1]

Notes on Article 2

2.01 When preparation of the proposed Treaty began in 1993, a set of definitions was drafted by the International Bureau and submitted to the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to in these Notes as "the Committee of Experts" or "the Committee") in document INR/CE/I/2. In 1994, after the first two meetings of the Committee of Experts, the International Bureau, having taken into account suggestions made during discussions, resubmitted the draft definitions to the Committee (document INR/CE/III/2). At its third session, the Committee further discussed the proposed definitions. On the basis of these discussions a summary of all interventions on definitions was published as a supplement to the report of the meeting (INR/CE/III/3-Suppl.). In the proposals for the fifth session, in February 1996, Argentina submitted a comprehensive set of definitions and the United States of America took the view that the issue of definitions must be addressed. The European Community and its Member States indicated that discussions should proceed on the basis of agreements reached at previous meetings of the Committee of Experts and on the basis of the memoranda prepared by the International Bureau.

2.02 Article 2 contains definitions of the key terms used in the proposed Treaty. The definitions have been prepared on the basis of the proposals by the International Bureau and the February 1996 submission by Argentina taking into account comments and suggestions made in Committee sessions.

2.03 Item (a) defines the term "performers". A model for the definition of this term is found in Article 3(a) of the Rome Convention: " 'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works". The definition in the Rome Convention is thus entirely built on the performances of literary and artistic works. Article 9 of the Rome Convention contains a provision that permits Contracting States to extend the scope of protection: "Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary and artistic works."

2.04 The proposed definition in item (a) follows the wording of the definition in the Rome Convention. It includes, however, two modifications. The first modification is the insertion, in accordance with the proposal made by Argentina, of the word "interpret" in the list of examples of the types of activities susceptible of performance. The second modification is an extension of the scope of artists covered by the definition. In accord with the suggestions made by Argentina and the International Bureau, the proposed definition of "performers" would include persons who perform expressions of folklore. In some cases, of course, the object of a performance may be a literary or artistic work, and performers of these works would enjoy protection even without the proposed extension. The effect of the proposed definition would be that this added group of performers would enjoy protection irrespective of the nature of the object of the performance.

Article 2**Definitions**

For the purposes of this Treaty:

(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

[Article 2 continues]

2.05 As regards the need for protection of expressions of folklore, a reference should be made to discussions within the Committees of Experts. The proposed definition would extend international protection to a category of performance that is important to the cultural fabric of many nations.

2.06 Item (b) defines the term "phonogram". In Article 3(b) of the Rome Convention, the term was defined as follows: " 'phonograms' means any exclusively aural fixation of the sounds of a performance or of other sounds". This definition has been developed further in two respects in the proposed Treaty.

2.07 First, the definition of a phonogram is modernized by extending its coverage to phonograms that are not fixations of sounds. Phonograms may be produced for instance using digital technology that fixes data which can be used to generate sounds even though no "real" sounds have yet been produced. The data, of course, can be made audible by means of appropriate electronic equipment. Argentina, and earlier the International Bureau, suggested that the proposed definition include "digital representations of sounds". This approach would serve to modernize the Rome Convention definition, but the qualification "digital" may itself become obsolete as technology evolves. Accordingly, this qualification has been omitted.

2.08 Second, the expression "exclusively aural", as used in the Rome Convention, has been replaced for the reasons discussed above, namely that sounds may be fixed in the form of data before they have been even aurally perceptible. According to the second clause of the definition, audiovisual fixations, representations of sounds and images and the sound portion of either of these are not phonograms.

2.09 In item (c), two alternatives are presented for the definition of "fixation". Alternative A confines the definition solely to the fixations of sounds or representations thereof. This corresponds to the meaning of the word "fixation" as it has been used in the definition of "phonogram" in Article 3(b) of the Rome Convention. In Alternative B, the definition extends, in addition, to images and representations thereof. The definition uses the word "embodiment" for the material form of "fixation". The last part of the definition, "from which they can be perceived, reproduced or communicated", has been transferred from the first version of the definition presented by the International Bureau in 1993. It is apparent that the perceiving, reproducing or communicating may take place only with the aid of a machine or device. As this element was explicitly included in the proposal made by Argentina and in the 1994 proposals of the International Bureau, it has also been included. The definition does not qualify or quantify the duration of the life of the embodiment necessary to result in fixation. This is to say, the definition does not set any conditions regarding the requisite permanence or stability of the embodiment; there is no set requirement in the proposed Treaty.

2.10 It may be observed that no definition of "reproduction" has been proposed. This is because the meaning of the term is developed fully in Articles 7 and 14.

2.11 A substantial issue that must be considered by the Diplomatic Conference is whether to accord rights to performers in audiovisual fixations of their performances. In the provisions on rights of performers in the proposed Treaty, alternatives are presented in such a manner as to permit the Conference to visualize a Treaty with or without this new right. As noted above, item (c) contains the first instance of this presentation of alternatives. Corresponding alternatives are included in nine other provisions, namely

[Article 2, continued]

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds; an audiovisual fixation, the representation of sounds and images or the sound part of either is not a phonogram;

(c) "fixation" means the embodiment of

Alternative A: sounds,

Alternative B: sounds or images,

or of the representations thereof, from which they can be perceived, reproduced or communicated through an appropriate device;

[Article 2 continues on page 251]

paragraph (h) of Article 2, definition of "communication to the public"; Article 5, moral rights of performers; Article 6, economic rights of performers in their unfixed performances; Article 7, right of reproduction; Article 8, right of modification; Article 9, right of distribution and right of importation; Article 10, right of rental; Article 11, right of making available of fixed performances; and Article 21, term of protection.

2.12 It may be recalled that the issue of the scope of the rights of performers has come to the fore as a result of some five years of discussion in the area. The International Bureau of WIPO prepared a memorandum for the first session of the Committee of Experts on a Possible Protocol to the Berne Convention in November 1991 (document BCP/CE/I/2). The memorandum proposed (in paragraphs 56 to 70) that the Committee consider including the rights of producers of phonograms in the Protocol. While there was broad support for improving the level of protection accorded to these producers, most delegations and observers took the view that phonograms were not appropriate subject matter for a Protocol to the Berne Convention (see document BCP/CE/I/4, paragraph 110). It was also recognized that improvements in the rights of producers of phonograms could not be effectively discussed without also discussing the rights of the performers whose performances were included in the phonograms.

2.13 On September 29, 1992, the Assembly and the Conference of Representatives of the Berne Union established and set terms of reference for a Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms. Subparagraph (viii) of the decision set the terms of reference for the Committee of Experts as covering "all questions concerning the effective protection of rights of performers and producers of phonograms". In the memorandum prepared by the International Bureau for the first session of the Committee, the International Bureau stated that there seemed to be two possible interpretations of the terms of reference (document INR/CE/I/2, paragraphs 8 and 9).

2.14 The first possible interpretation was that the protection of the rights of performers should only be discussed as far as the fixation of their performances in phonograms and the exploitation of such fixations were concerned. This would have excluded any consideration of a new right of performers in respect of audiovisual fixations of their performances. The second possible interpretation was that all issues concerning the rights of performers should be discussed, including the questions surrounding audiovisual fixations; in support of this interpretation, the observation was made that the terms of reference included no restriction or qualification as to what rights should be discussed.

2.15 The Committee held its first session in June-July 1993, and at the conclusion of the general debate in the first session, a consensus developed in favour of the second interpretation, following the observation that "nothing in the terms of reference determined by the Governing Bodies precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions...". The Director General of WIPO then stated that in due time the International Bureau would prepare a document on audiovisual fixations (see document INR/CE/I/3, paragraphs 63 and 64).

[Article 2 continues on page 251]

2.16 During the third session of the Committee of Experts, many delegations expressed support for the inclusion in the new instrument of a right of performers in audiovisual fixations (see document INR/CE/III/3, paragraph 31). A discussion paper on this subject was prepared by the International Bureau of WIPO for the fourth session of the Committee of Experts, held in September 1995 (document INR/CE/IV/3). Arguments were presented in favour of and in opposition to the inclusion of these new rights, and a review of the relevant provisions of the Rome Convention, the TRIPS Agreement and various national laws and regional instruments was undertaken.

2.17 For the fourth session in September 1995 and the fifth session in February 1996, Government members of the Committee and the European Community and its Member States were invited to deliver proposals for circulation as working documents in the Committee sessions. In the fourth session, two proposals were presented: the European Community and its Member States suggested that certain rights of performers should be extended to audiovisual fixations, and the United States of America presented a proposal confining the protection of performers to sound recordings only. In the fifth session of the Committee, Argentina, Brazil, the European Community and its Member States, the People's Republic of China, and the Sudan presented proposals that extended the protection of performers in audiovisual fixations of their performances to varying degrees. Canada, Japan, the United States of America, and Uruguay presented proposals that, with limited exceptions, were confined to sound recordings.

2.18 It became clear from these proposals and the deliberations of the Committee of Experts that it would not be possible to present a proposal that would reasonably satisfy the interests of the advocates on each side of this issue. Accordingly, the proposed Treaty presents each position as an alternative. This was discussed in some detail in Note 2.11 above. In each instance, Alternative A contains a proposal that is confined to sound, musical performances or musical performances fixed in phonograms only, and Alternative B contains a proposal extending protection to audiovisual fixations. This method of drafting acknowledges the disagreement and calls upon the participants in the Diplomatic Conference to negotiate toward a resolution. In order to further facilitate consideration of this matter and provide another model for the possible resolution of this issue a further alternative, Alternative C in Article 25(1), is presented. This alternative solution is based on the possibility of making a reservation concerning the scope of the rights of performers. This alternative could be used only if the Diplomatic Conference bases its decision on this matter on Alternatives B. The provisions concerning rights of performers would in that case extend the protection to audiovisual fixations of performances. By making the reservation provided for in Alternative C of Article 25(1), a party becoming a Contracting Party to the Treaty could limit the protection it grants according to the Treaty to sounds, musical performances and musical performances fixed in phonograms only.

2.19 "Producer of phonograms" was defined in Article 3(c) of the Rome Convention as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds". Item (d) adds only one element to this definition: for the reasons identified in Note 2.07, "representations of sounds" have been explicitly included. In all other respects, the definition follows the established provisions of the Rome Convention. The producer is the person who takes the initiative, coordinates and assumes economic and other responsibility for the first fixation of a phonogram, regardless of the technology used. It is worth pointing out that

[Article 2, continued]

(d) "producer of a phonogram" means the person, or the legal entity, who or which first fixes the sounds of a performance or other sounds, or the representations of sounds;

[Article 2 continues]

digitizing or "re-mastering" of existing fixations of performances is not a "first fixation", irrespective of the investment made in corrections, noise removal and other such alterations.

2.20 Item (e) defines the term "publication". In Article 3(d) of the Rome Convention, "publication" has been defined as follows: " 'publication' means the offering of copies of a phonogram to the public in reasonable quantity". The proposed definition includes two additional elements. First, it adds a consent requirement such that a performance or phonogram cannot be "published" under the proposed Treaty without the consent of the relevant rightholder; this makes the concept of publication in the proposed Treaty similar to that in the Berne Convention. Second, the proposed definition adds language to take into account the new technological environment in which publication now may take place. This addition reflects the proposals made by Argentina and the International Bureau of WIPO. The making available of copies to the public through the means referred to in Articles 11 and 18 of the proposed Treaty has been added as an act that constitutes publication. In these Articles, an exclusive right is proposed to cover the making available of phonograms by interactive on-demand transmissions. Making performances and phonograms available in the on-line context may be compared to the establishment of a global record shop, offering copies to everyone, everywhere, and still satisfying the condition of "reasonable quantity" because the availability of copies is virtually unlimited.

2.21 According to the proposed definition in item (f), "rental" of a phonogram means any transfer for consideration of the possession of a copy of a phonogram for a limited period of time. The definition corresponds the proposal made by Argentina. No definition of the "public lending" of a phonogram has been incorporated in the proposed Treaty. Normally, "public lending" means the transfer of the possession of an object for a limited period of time, free of charge, in a not-for-profit transaction.

2.22 The first part of the definition of "broadcasting" in item (g) follows the definition found in Article 3(f) of the Rome Convention, according to which " 'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds". For the reason discussed in Note 2.07, transmissions of the representations of sounds or of images and sounds have been added to the proposed definition. The second part of the definition confirms in explicit terms that transmission for public reception by satellite is "broadcasting", if it fulfils the same requirements. The third part of the definition deals with encrypted satellite broadcasting. In situations where means for decrypting are made available to the public, the effect of the transmission corresponds to the effect of any traditional broadcasting from the point of view of both the public and the rightholders phonograms. Encrypted transmissions may be broadcasts just as transmissions of open signals are. A condition is that the means for decrypting are provided to the public by the broadcasting organization or with its consent.

2.23 The proposed definitions do not include a definition of "rebroadcasting"; this is a simplification as compared to the Rome Convention. According to Article 3(g) of the Rome Convention, "rebroadcasting" means the simultaneous broadcasting by one broadcasting organization of a broadcast by another broadcasting organization. Rebroadcasting is broadcasting. In rebroadcasting, the relevant sounds or sounds and images have already been broadcast. To import the definition from the Rome Convention does not seem necessary. It may be noted that the right of broadcasting in Article 7 does not cover rebroadcasting. This has been explicitly noted in the provision.

[Article 2, continued]

(e) "publication" of a fixed performance or a phonogram means

(i) the offering of copies of the fixed performance or the phonogram to the public, or

(ii) the making of the fixed performance or the phonogram available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them,

with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

(f) "rental" of a phonogram means any transfer of the possession of a copy of a phonogram for consideration for a limited period of time;

(g) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals by satellite is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

[Article 2 continues]

2.24 There is no definition of "communication to the public" in the Rome Convention. In item (h) a definition of "communication to the public" is offered. The definition has been tailored to the specific purposes of Articles 6, 12 and 19 of the proposed Treaty, which relate to rights in respect of communication. The definition has two parts. The first part defines "communication to the public" as transmission to the public by any medium other than broadcasting. The definition thus excludes wireless transmissions for public reception and covers any transmission by wire of an actual performance or a performance played from a phonogram to the public, when the public is not present in the place where the performance or the playing of the phonogram occurs. The definition also covers all retransmissions by wire of any other transmissions. Further examples are given in the Notes concerning each of the respective rights.

2.25 The distinction between broadcasting and communication is maintained simply by excluding broadcasting from the scope of communication to the public, as now defined. This is done purely for practical purposes and to avoid any confusion relating to the rights of performers in broadcasting and communication to the public of phonograms. These provisions lay the foundation for important economic rights accorded to the performers and producers of phonograms in the Rome Convention even if the level of protection they are accorded varies due to the reservations permitted under the Rome Convention.

2.26 Item (h) includes one of the presentations of the alternatives discussed in Note 2.11. Alternative A covers only the sounds of a performance, whereas Alternative B extends coverage to images in addition to sounds. It should be noted that this alternative is relevant only insofar as the rights of performers in their unfixed performances under Article 6 are concerned.

2.27 The second part of the definition in item (h) is included in the provision solely for the purposes of Articles 12 and 19. "Communication to the public" includes under these Articles making the sounds or the representations of sounds fixed in a phonogram audible to the public. Communication of this type may include the direct playing of phonograms to the public in a discotheque, by means of a jukebox, etc. This part of the definition is also meant to include making sounds fixed in phonograms audible to the public in an indirect way, such as through a radio or television set located in a cafe, restaurant, hotel lobby or other premises open to the public.

[End of Notes on Article 2]

[Article 2, continued]

(h) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of

Alternative A: sounds

Alternative B: the images or sounds

of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Articles 12 and 19, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

[End of Article 2]

Notes on Article 3

3.01 The basic rules and principles of the Rome Convention are presently (as of August 1, 1996) applied by 51 Contracting States that have ratified or acceded to the Convention. The rules concerning the conditions for protection are in Articles 4 and 5. Article 4 establishes points of attachment for granting national treatment to performers, and Article 5 establishes points of attachment for granting national treatment to producers of phonograms.

3.02 These conditions for protection are quite well established. Moreover, a significant number of States have conformed their national legislation to them. It is therefore both feasible and sound to use these conditions when developing further the protection of performers and producers of phonograms.

3.03 In fact, this method was used when 117 states concluded the TRIPS Agreement. According to Article 1.3, Members of the Agreement shall accord the treatment provided for in the Agreement to the nationals of other Members, and "[i]n respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all members of the WTO members of those Conventions". In the same provision, the TRIPS Agreement even adopted the mechanism of notification provided for in Article 5.3 of the Rome Convention in respect of the choice of certain criteria for the protection of producers of phonograms.

3.04 It is proposed in Article 3 that a solution similar to that adopted in the TRIPS Agreement should be adopted in this proposed Treaty.

3.05 According to paragraph (1), the protection provided for in this Treaty would be accorded to the performers and producers of phonograms who are nationals of other Contracting Parties.

3.06 Paragraph (2) reproduces the language and method used in the TRIPS Agreement to incorporate the criteria for eligibility for protection contained in the Rome Convention. A clause is added to paragraph (2) obligating Contracting Parties to apply the relevant definitions in Article 2 of the proposed Treaty with respect to the criteria of eligibility in the Rome Convention. The relevant definitions are those of "publication", "fixation", "performers", "producer of a phonogram" and "phonogram".

3.07 Paragraph (3) permits Contracting Parties to make the choices permitted by Article 5.3 of the Rome Convention, but it obligates them to make a notification to the Director General of WIPO. For the sake of completeness, a similar obligation is set concerning Article 17.

3.08 The system created in Article 3 employs the established rules on points of attachment without reproducing or "re-inventing" them and, even more importantly, without deviating from them. This should streamline the negotiations on the proposed Treaty, the implementation of its obligations in national laws, and its legal interpretation, since it is based on well-known, established interpretations of an existing treaty.

Article 3**Beneficiaries of Protection under this Treaty**

- (1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.
- (2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.
- (3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) or, for the purposes of Article 5, Article 17 of the Rome Convention shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

[End of Article 3]

3.09 Article 2 of the proposed New Copyright Treaty employs a similar device. However, it does not address the principle of national treatment laid down in the proposed Article 4 of the present document.

[End of Notes on Article 3]

[Article 4 starts on page 261]

Notes on Article 4

4.01 Performers and producers of phonograms who fulfil the criteria of eligibility shall enjoy, in respect of performances and phonograms for which they are protected under the proposed Treaty, the rights granted by Contracting Parties to their own nationals. This basic clause on national treatment is laid down in Article 4.

4.02 The provisions of paragraph (1) have been formulated to put into use the framework proposed in Article 3. Each Contracting Party shall accord to the nationals of other Contracting Parties the treatment that it accords to its own nationals. Nationals of other Contracting Parties must be understood as defined in Article 3(2). National treatment is confined to the protection provided for in the proposed Treaty. These two points have been explicitly included in the provision. The provisions concerning eligibility for protection follow those in the TRIPS Agreement.

4.03 Paragraph (2) provides a clause formulated in accordance with Article 2.2 of the Rome Convention. According to these terms, national treatment for performers and producers of phonograms is subject to protection as set out in the relevant Articles of the proposed Treaty. It is also explicitly provided for in this provision that national treatment is subject to the limitations and exceptions specifically allowed in the proposed Treaty. The interpretation of this provision is intended to follow the interpretation of Article 2.2 of the Rome Convention.

[End of Notes on Article 4]

Article 4**National Treatment**

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the protection provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty.

[End of Article 4]

Notes on Article 5

5.01 Presently, performers do not enjoy moral rights under the Rome Convention or any other international agreement.

5.02 Article 5 lays down basic provisions on the moral rights of performers. They are modelled on Article *6bis* of the Berne Convention, subject only to *mutatis mutandis* changes.

5.03 Paragraph (1) sets out the right of the performer to be identified as the performer of his performances and to object to any distortion, etc. of them that would be prejudicial to his honour or reputation. As with authors' rights, alteration or modification *per se* does not concern moral rights: the question is whether the author's or performer's honour or reputation is damaged.

5.04 Paragraph (1) offers a choice of two alternatives concerning whether the rights of performers should extend to audiovisual fixations of their performances; this is one of the points discussed in Note 2.11 above that will require a decision by the Diplomatic Conference. Alternative A confines the protection of moral rights to musical performances only. Alternative B would extend the protection to all performances.

5.05 Paragraph (2) reproduces *mutatis mutandis* Article *6bis(2)* of the Berne Convention, which concerns moral rights after the death of a performer.

CHAPTER II
RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall

Alternative A: , as regards his musical performances, have the right

Alternative B: have the right

to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

[Article 5 continues]

5.06 Paragraph (3) reproduces the provisions of Article *6bis*(3) of the Berne Convention.

5.07 Moral rights exist "independently of the performer's economic rights, and even after the transfer of those rights". No language regarding inalienability or *inter vivos* transfer of these rights is included in the proposal. The performer may exercise his moral rights, and he has the option not to exercise these rights; he may even waive them. To take an example, a performer may, in a contract, agree to refrain indefinitely from identifying himself as the performer of a particular performance. The position of a performer as the performer of a given performance cannot, of course, be transferred; no one can step into his shoes in this sense. The moral rights provisions in this Article have been formulated closely in line with Article *6bis* of the Berne Convention, and the established interpretation of that Article should be used directly in construing the present Article.

5.08 Argentina, Brazil, Canada, the People's Republic of China, and the Sudan made proposals on moral rights for the February 1996 session of the Committees of Experts. The proposals made by Argentina and Brazil were the most detailed ones and were parallel in substance to Article *6bis* of the Berne Convention.

[End of Notes on Article 5]

[Article 5, continued]

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

[End of Article 5]

Notes on Article 6

6.01 The Rome Convention and the TRIPS Agreement guarantee certain rights to performers in their unfixed performances. Article 7 of the Rome Convention provides performers with the right to prevent (1) the broadcasting and communication to the public of their unfixed performances without their consent except where the performance is already a broadcast performance, and (2) the fixation of their performance without their consent. Under the TRIPS Agreement, performers have the right to control the fixation of their unfixed performances in a phonogram.

6.02 Article 6 of the proposed Treaty provides performers with an exclusive right to control the fixation of their unfixed performances in any medium, and as is discussed below, the right may or may not be limited to musical performances.

6.03 The right under item (i) covers broadcasting and communication to the public as defined in Article 2, except that the right does not include rebroadcasting and retransmission by wire of a broadcast which are explicitly excluded from the scope of the right. The right of communication thus covers cable-originated transmissions and any other "original" wire or communication network transmissions of live performances, such as net radio, as well as communication by wire of a performance to another public not present in the hall where the performance takes place.

6.04 Item (ii) extends the right to the fixation of unfixed performances.

6.05 This Article contains, as do most of the other Articles pertaining to rights of performers, one of the presentations of the "2.11 alternatives". Alternative A confines the exclusive right to unfixed musical performances. It should be noted that Alternative A would cover broadcasting by radio and television, communication to the public and fixation of musical performances by audiovisual means. Alternative B would extend protection to cover all performances.

[End of Notes on Article 6]

Article 6**Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of

Alternative A: authorizing, as regards their musical performances:

Alternative B: authorizing:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

[End of Article 6]

Notes on Article 7

7.01 Article 7 of the Rome Convention accords to performers the right of reproduction. The protection provided to performers by the Convention includes "the possibility of preventing" the reproduction of a fixation of their performances without their consent. This "possibility of preventing" is subject to certain specific conditions. The right applies (1) if the original fixation was made without the consent of the performer, (2) if the reproduction is made for purposes different from those for which the performer gave his consent, or (3) if the original fixation was permitted to be made on the basis of a limitation to the performer's rights and the reproduction of it is made for a different purpose.

7.02 Article 7 of the proposed Treaty contains provisions on performers' rights of reproduction.

7.03 In paragraph (1), it is proposed that performers shall enjoy the exclusive right of authorizing direct and indirect reproduction of their fixed performances, whether permanent or temporary, in any manner or form.

7.04 There are several elements in the proposal that differ from the provisions of the Rome Convention and that imply an improvement in the level of protection. Instead of providing "the possibility of preventing", it is proposed that an exclusive right would be granted to performers in clear terms and without any specific conditions.

7.05 One of these elements in this provision is the explicit inclusion of direct and indirect reproduction. This language may already be found in Article 10 of the Rome Convention concerning the rights of producers of phonograms. The purpose of this provision in proposed Article 7 is to make it clear that the exclusive right may not be diminished simply because of the distance between the place where an original fixed performance is situated and the place where a copy is made of it. Recording from a broadcast or wire transmission is as relevant as copying locally from one cassette to another. Any form of remote copying that is made possible by a communication network between the original and the copy is intended to come within the reach of this provision.

7.06 Another element in the provision is intended to clarify the widely held understanding that both permanent and temporary reproduction constitute reproduction. The result of reproduction may be a tangible, permanent copy like a phonogram, a recording or a CD-ROM. It may as well be a copy of the fixed performance on the hard disk of a PC, or in the working memory of a computer. A fixed performance that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device.

7.07 Under proposed Article 7, performers would enjoy the exclusive right of authorizing reproduction "in any manner or form". This element manifests the broad scope of the right. Thus, storage of a fixed performance in any electronic medium, for instance, constitutes reproduction. Reproduction includes such acts as uploading and downloading a fixed performance to or from the memory of a computer. Digitization, i.e. the transfer of a fixed performance embodied in an analog medium to a digital one constitutes always an act of reproduction. The expression "in any manner or form" is already found in Article 9(1) of the Berne Convention concerning the right of reproduction enjoyed by authors. It has been

Article 7**Right of Reproduction**

(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

in any manner or form.

[Article 7 continues]

included in the present proposal to make it clear that there is no difference between the rights of performers and authors in this respect.

7.08 Paragraph (1) contains one of the presentations of the "2.11 alternatives". According to Alternative A the right of reproduction would apply only to musical performances fixed in phonograms, whereas Alternative B would extend the right to cover all performances fixed in any medium.

7.09 According to paragraph (2) of the present proposal, it would be a matter for the legislation of Contracting Parties to limit the right of reproduction in the case of temporary reproduction of a fixed performance, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the fixed performance perceptible or where the reproduction is of a transient or incidental nature. Moreover, the temporary reproduction must always take place in the course of use of the fixed performance that is authorized by the performer or permitted by law. The purpose of this provision is to make it possible to exclude from the scope of the right of reproduction acts of reproduction that are not relevant in economic terms. By reference to Article 13(2), limitations are further confined to cases that pass the three-step test in that Article, which corresponds to the test in Article 9(2) of the Berne Convention.

7.10 For the May 1996 session of the Committees of Experts the European Community and its Member States proposed that the proposed Treaty include a clause on the right of reproduction of performers (document BCP/CE/VII/1-INR/CE/VI/1). The European Community and its Member States also proposed that the following points should be included in the "Records of the Conference"/"General Report": "Contracting Parties confirm that the permanent or temporary storage of a protected fixed performance in any electronic medium constitutes a reproduction. This includes acts such as uploading and downloading of a fixed performance to or from the memory of a computer."

7.11 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committee. In the discussions at the May 1996 session, several Delegations proposed that a provision with the same contents should be included in the proposed Treaty.

7.12 The proposal included in paragraph (1) of this Article is in substantial conformity with the proposal of the European Community and its Member States. At the same time, it meets the proposals referred to above in the discussions of the Committees of Experts.

7.13 For the February 1996 session of the Committees of Experts Argentina made a proposal on the definition of "reproduction": "'Reproduction' of a phonogram or of a performance fixed on a phonogram means the fact of making one or more originals or copies of all or a substantial part thereof, regardless of the method used to make the copy or the medium in which it is made, including storage of the phonogram or of the performance fixed on a phonogram in electronic form, regardless of the duration of the storage." The proposal corresponds in substance with the earlier proposal made by the International Bureau of WIPO. As was stated in Note 2.10, above no definition of "reproduction" is included in the proposed Treaty. It appears, however, that the operative clause on the right of reproduction includes all the essential aspects of the proposal made by Argentina.

[Article 7, continued]

(2) Subject to the provisions of Article 13(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the fixed performance perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the fixed performance that is authorized by the performer or permitted by law.

[End of Article 7]

7.14 As further support for the proposal in Article 7, the following points may be made.

7.15 Technological developments have had a great impact on the means that may be used for reproduction. Complete and accurate reproductions may be made quickly and in such a way that the material reproduced resides only a short while in the memory of a computer. In some cases, a certain fixed performance or piece of data may never be reproduced as a whole in the memory of a computer; only those parts of the material that are necessary to achieve a certain result may be reproduced, for instance in order to make a fixed performance perceptible. In such cases, successive reproduction of portions of a fixed performance may, over a period of time, cover the whole fixed performance.

7.16 Some relevant uses may, now or in the future, become totally based on a temporary reproduction.

7.17 Today, different countries may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction the results of which live a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary position. The Rome Convention does not serve to harmonize the right of reproduction among the Contracting States of that Convention.

7.18 The interpretation of a right of such importance as the right of reproduction should be in fair and reasonable harmony all over the world. A uniform interpretation is necessary. Already, the need for legal certainty and predictability has been felt and found lacking in concrete cases. The need for a uniform interpretation is dictated by the need to secure the functioning of the system of rights in a digital future.

7.19 The only way to harmonize effectively the interpretation of the scope of the right of reproduction is to confirm that temporary reproduction falls within the scope of the right.

7.20 It has been asserted in the discussions in the Committees of Experts that a reproduction right of wide scope might have some unintended and problematic effects. In principle, there are two ways to avoid such effects. The first is to narrow the definition of reproduction. The second is by way of limitations of the right. It seems that many countries, having freedom of interpretation with respect to these rights, have already excluded the first possibility. This leaves only the second option: designing a limitations clause that makes it possible to avoid any problematic and unintended effects.

7.21 The provisions proposed in paragraph (2) are intended to focus on incidental, technical, and in some cases technically indispensable instances of reproduction which form part of another authorized or otherwise lawful use of a protected fixed performance. The cases shall pass the three-step test of Article 13(2).

7.22 Note 11.07, concerning liability issues, applies with equal force to this Article.

7.23 Proposals concerning the performers' right of reproduction were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the People's Republic of China, the Sudan, the United States of America, and Uruguay. Canada suggested that economic rights for performers in their performances fixed in phonograms would be included in the Treaty. The European

[Article 8 starts on page 277]

Community and its Member States made a further proposal on this issue for the May 1996 session of the Committee of Experts.

7.24 Article 14 contains provisions concerning the right of reproduction of producers of phonograms; it corresponds closely to this Article. The Notes on Article 14 concerning comparable elements are parallel to those above.

[End of Notes on Article 7]

[Article 8 starts on page 277]

Notes on Article 8

8.01 Article 8 provides performers with the exclusive right to control modification of their performances.

8.02 The Article combines proposals made by Argentina, the United States of America, and Uruguay. Argentina used the term "modification" in its proposal, whereas the other proposals used the terms "adaptation" and "alteration". The term "modification" has been used in proposed Article 8 because it is sufficiently neutral and general and because it does not imply any interference with Article 2(3) of the Berne Convention, according to which certain adaptations and alterations of works may be protected.

8.03 The Article includes another instance of the "2.11 alternatives". Alternative A confines the right of modification to musical performances fixed in phonograms. Alternative B would extend the protection to any performances fixed in any medium.

8.04 It was suggested in sessions of the Committees of Experts that no separate right of alteration, adaptation or modification is necessary. It has been argued that any alteration or modification of a performance or a phonogram cannot occur without reproducing the fixation of the performance or the phonogram. This modification right is proposed, however, in order to cover any possible situation in which digital or other technological manipulation might be used to circumvent traditional notions of reproduction.

8.05 Article 15 contains provisions concerning the rights of producers of phonograms; it corresponds closely to this Article. The Notes on Article 15 concerning comparable elements are parallel to those above.

[End of Notes on Article 8]

Article 8

Right of Modification

Performers shall enjoy the exclusive right of authorizing the modification of their

Alternative A: musical performances fixed in phonograms.

Alternative B: performances fixed in any medium.

[End of Article 8]

Notes on Article 9

9.01 Performers do not have rights in respect of the distribution of their fixed performances or phonograms under any existing international agreement.

9.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a general right of distribution for performers, accompanied by appropriate provisions on exhaustion has gained wide international acceptance. However, no convergence of views has developed in respect of the scope or extent of the right of distribution after the first sale or other transfer of ownership of a copy of a fixed performance. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a fixed performance the right of distribution ceases to exist, i.e. is exhausted, after the first sale of that copy. Views differ as to whether the exhaustion should be national, regional or global.

9.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even be dealt with in an international instrument in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 10 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

9.04 Article 9 provides an exclusive right of distribution to performers in their fixed performances. Because of the differences described in Note 9.02, two alternatives are offered. Alternative E is based on the principle of national or regional exhaustion. Alternative F allows global or international exhaustion. The basic provision on the right of distribution is identical in both alternatives: performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their fixed performances through sale or other transfer of ownership. Public lending falls outside the scope of this provision since it does not involve a sale or other transfer of ownership.

9.05 Alternative E also provides a right of importation, in addition to the general right of distribution, to performers in respect of copies of their fixed performances.

9.06 Paragraph (1) of Alternative E provides for the exclusive right. Item (i), on the right of distribution, and item (ii), on the right of importation, in paragraph (1) of Alternative E both contain a set of "2.11 alternatives". According to both Alternatives A the right of distribution would apply only to musical performances fixed in phonograms, whereas in both Alternatives B any performances fixed in any medium would be covered.

9.07 Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of fixed performances that have been distributed with the consent of the rightholder in the territory of a Contracting Party. The right of importation is not affected by the first sale or other transfer of ownership. Paragraph (3) excludes from the scope of the right of importation those situations where the importation is effected by a person solely for personal and non-commercial use.

9.08 Some proposals presented for the February 1996 session of the Committee of Experts suggested that regional economic integration areas with their own legislation in this field might be explicitly mentioned in the clause concerning national or regional exhaustion. The obligations of the Treaty apply only to regional economic integration areas or organizations

Article 9*Alternative E***Right of Distribution and Right of Importation**

(1) Performers shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership;

(ii) the importation of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a fixed performance that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

[Article 9 continues]

that are Contracting Parties to the Treaty. The territories of these Contracting Parties consist of the territories of their member countries. Thus, there is no need to make separate mention of regional economic integration areas.

9.09 Alternative F allows for international exhaustion. Contracting Parties may, in their national legislation, provide that the right of distribution will not extend to distribution after the first sale or other transfer of ownership of the original or copies of a fixed performance by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

9.10 No right of importation is provided for in Alternative F.

9.11 Paragraph (1) of Alternative F provides the exclusive right. It contains another presentation of the "2.11 alternatives". According to Alternative A the right of distribution would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

9.12 The rights provided for in the proposed Treaty, including the right of distribution, are minimum rights. Contracting Parties may provide a higher level of protection. A more restricted concept of exhaustion than international exhaustion represents a higher level of protection. Thus, the solution in Alternative F would not preclude any Contracting Party from applying any conditions or restrictions to the circumstances giving rise to exhaustion. National or regional exhaustion is in full conformity with this provision for those Contracting Parties that take this approach to the distribution right. Introduction of a right of importation is not excluded either.

9.13 The main contents of Alternative E follow the proposals made by Argentina, Brazil, the European Community and its Member States, the Sudan, the United States of America, and Uruguay for the February 1996 session of the Committees of Experts. Alternative F is based on the main approach taken in the proposal made by Japan.

9.14 Article 16 contains provisions concerning the right of distribution of producers of phonograms; it corresponds closely to this Article. The Notes on Article 16 concerning comparable elements are parallel to those above.

[End of Notes on Article 9]

[Article 9, continued]

Alternative F

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of performances by or pursuant to an authorization.

[End of Article 9]

Notes on Article 10

10.01 The Rome Convention does not contain any provisions on the rental of copies of fixed performances or phonograms.

10.02 Article 10 provides performers with the exclusive right to authorize rental of the original and copies of their fixed performances. The rental of phonograms has been defined in Article 2.

10.03 Paragraph (1) contains another presentation of the "2.11 alternatives". According to Alternative A, the right of rental would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

10.04 Paragraph (2) contains a clause permitting Contracting Parties to maintain, for a limited period of time, any systems they may have for providing equitable remuneration to performers for the rental of copies. This clause has been modelled on Article 14.4 of the TRIPS Agreement. According to the TRIPS Agreement, Members "may maintain such systems provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders". Contracting Parties that, on April 15, 1994, had and continue to have such systems may maintain them; however, instead of leaving this possibility open for an indefinite period of time, a three-year time limit is proposed, beginning from the entry into force of the proposed Treaty.

10.05 The performers' right of rental in respect of their fixed performances was included in the proposals submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay. Japan confined its proposals to the rental of phonograms, and the United States of America confined its proposals to phonograms and musical performers only.

10.06 Article 17 contains provisions concerning the right of rental of producers of phonograms; it corresponds closely to this Article. The Notes on Article 17 concerning comparable elements are parallel to those above.

[End of Notes on Article 10]

Article 10**Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the rental of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even after distribution of them by or pursuant to authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

[End of Article 10]

Notes on Article 11

11.01 Article 11 introduces a new right for performers: the exclusive right of making their fixed performances available to the public. Article 11 is based on the May 1996 proposal made by the European Community and its Member States.

11.02 The proposed new right covers the making available of fixed performances by wire or wireless means. A distinction is thus made between the distribution of copies of fixed performances in physical, tangible form, which is covered by the right of distribution under Article 9, and the making available of fixed performances by transmission.

11.03 The right of making available is limited to situations where members of public may access fixed performances from a place and at a time individually chosen by them. Thus, availability is based on interactivity and on on-demand access.

11.04 The proposed new right is designed to operate as a basic rule for the proper functioning of the electronic marketplace. The electronic or digital "record shop" can be compared to a record manufacturing plant or a CD factory. The functions of the manufacturing and distribution portions of the music industry and retail record shops may be replaced by a database open to the public for the direct delivery of music productions via communication networks to home computers.

11.05 The exclusive right laid down in Article 11 covers the making available of fixed performances through systems that permit direct access to a certain performance stored in a database. The expressions "may access" and "from a place and at a time individually chosen" cover directly all situations that are interactive.

11.06 There are, however, systems and services based on particular technical arrangements and programming structures which make it possible to access the fixed performances provided by the service without such access being fully interactive. Such services are offered on a subscription basis. From the point of view of the members of the public these services are "near to interactive". In many cases the only difference between interactive and "near to interactive" is in the time required for access. For both members of the public and rightholders, the shorter the delay, the closer the effect of such practices is to those of services that enable immediate access. The volume of protected subject matter that may be offered to the public in this way, combined with the fact that it may be made available through a number of parallel channels may add significantly to the ease of access. As the technical capacity of storage devices and communication networks grows these services are likely to develop further. They can be established by using cable or wire networks or by wireless means.

11.07 Practices described in the preceding Note could conflict with the normal exploitation of fixed performances and unreasonably prejudice the legitimate interests of rightholders. Single channels offered on a subscription basis without being part of such services do not have these effects.

11.08 The proposed right of making available of fixed performances in Article 11 is intended to cover both directly interactive ways of making available and services with similar effects,

Article 11**Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[End of Article 11]

as described above. Both types of service fulfil the criteria laid down in Article 11 since members of the public may access fixed performances from a place and at a time individually chosen by theme.

11.09 The right proposed in Article 11 is an exclusive right. This is fundamental.

11.10 Article 11 contains another presentation of the "2.11 alternatives". According to Alternative A the right of making available would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

11.11 It is strongly emphasized that Article 11 does not attempt to define the nature or extent of liability on a national level. The proposed international agreement determines only the scope of the exclusive rights that shall be granted to performers in respect of their fixed performances. The question of who shall be liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.

11.12 Proposals concerning digital transmission were presented for the February 1996 session of the Committees of Experts by Argentina, the United States of America, and Uruguay. The group of countries of Latin America and the Caribbean considered that an exclusive right of digital transmission might be adopted by national legislation as a form of communication to the public or as a right of distribution by transmission. The European Community and its Member States made a proposal on this issue for the May 1996 session of the Committees of Experts.

11.13 Article 18 contains provisions concerning the right of making available of producers of phonograms; it corresponds closely to this Article. The Notes on Article 18 concerning comparable elements are parallel to those above.

[End of Notes on Article 11]

[Article 12 starts on page 289]

Notes on Article 12

12.01 Article 12 of the Rome Convention grants to performers and to producers of phonograms the right to a single equitable remuneration if their phonogram is published for commercial purposes or if a reproduction of the phonogram is used for broadcasting or any communication to the public. The remuneration is paid by the user to the performer or to the producer of the phonogram or to both. In the absence of an agreement between these parties, national legislation may lay down the rules that govern the sharing of this remuneration.

12.02 The right to remuneration is subject to the reservations permitted in Article 16 of the Rome Convention. Under Article 16, any state may declare that it will not apply the provisions of that Article or that it will not apply them in respect of certain uses. Furthermore, a state may declare that it will not apply the right to remuneration in respect of phonograms the producer of which is not a national of another Contracting State. A Contracting State may also make the right to remuneration subject to reciprocity as regards the extent to which, and the term for which, another state grants protection to phonograms fixed by a national of the state making such a reservation.

12.03 Article 12 of the proposed Treaty accords to performers a right to equitable remuneration for the use of phonograms (in which their performances are fixed) published for commercial purposes or the use of a reproduction of such phonograms for broadcasting or any communication to the public. In general, this right corresponds to the right provided for in Article 12 of the Rome Convention.

12.04 Paragraph (1) does, however, propose additional elements that are not included in Article 12 of the Rome Convention. The right to remuneration would cover not only direct uses of phonograms but also indirect uses for broadcasting or for communication to the public. Remuneration should always be received both by performers and producers. In this way, the proposed Article 12 excludes the possibility that performers would not receive at least a single equitable remuneration.

12.05 "Broadcasting" and "communication" are defined in Article 2. The definition of broadcasting covers rebroadcasting as discussed in Note 2.23 above. Communication covers all cases of cable or wire transmission, such as cable-originated television transmissions and sound radio by cable or in communication networks. Because the right covers both direct and indirect uses of phonograms, all forms of retransmission by cable and wire also fall within the scope of the right. The definition of communication also covers situations where a phonogram is played directly to the public present at the same location. Indirect communication of a phonogram covers situations where a radio or television set or other apparatus is used to make a phonogram that is included in a broadcast or wire communication audible to the public in a cafe, restaurant, hotel lobby or other place that is open to the public.

12.06 Paragraph (2) permits Contracting Parties to establish rules governing the way in which remuneration is shared between performers and producers of phonograms and the way in which users pay the required remuneration. These are logistical concerns that are beyond the scope of international agreements.

Article 12**Right to Remuneration for Broadcasting and Communication to the Public**

(1) Performers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

[Article 12 continues]

12.07 As noted above, the right to remuneration under the Rome Convention is subject to reservations. This basic structure has been reproduced in the proposed Treaty. The reservations clause in paragraph (3) leaves the degree of reservation open, subject to the provisions of paragraph (4). Contracting Parties may make minute or more extensive reservations to the right of remuneration. Contracting Parties may even set reciprocity (as to particular terms, such as duration of protection, or complete reciprocity) as a condition for according the remuneration right to performers and producers of phonograms who fulfil the criteria of eligibility in relation to another Contracting Party. Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16.1(a)(iv) of the Rome Convention. However, Contracting Parties may not make any reservations to this Article, or the rights provided for therein, that would derogate from their obligations to each other under the Rome Convention; Article 1(1) of the proposed Treaty makes this clear.

12.08 In paragraph (4) it is proposed that the possibility of making a reservation to the right of remuneration laid down in this Article would not apply to broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription-based services. The reason for this proposal is that in the context of such services, fixed performances of performers are exploited directly for commercial gain.

12.09 The remuneration right proposed in this Article is an attempt to reconcile two extremes: on the one hand, there is the position that performers and producers of phonograms are not entitled to any right to remuneration in respect of the fruits of their labour; on the other hand, there is the position that the right to remuneration should be broad or even that the right should be exclusive. Written proposals concerning this matter were submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

12.10 Article 19 contains provisions concerning the right of remuneration of producers of phonograms; it corresponds closely to this Article. The Notes on Article 19 concerning comparable elements are parallel to those above.

[End of Notes on Article 12]

[Article 12, continued]

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

[End of Article 12]

Notes on Article 13

13.01 Article 13 sets forth limitations of and exceptions to the rights of performers provided for in this Treaty.

13.02 Paragraph (1) reproduces the main principle of Article 15.2 of the Rome Convention. Contracting Parties may provide at the national level the same kinds of limitations or exceptions with regard to the protection of performers under the proposed Treaty as they provide with regard to the protection of copyright in literary and artistic works.

13.03 As drafted, the proposed Treaty incorporates (in this Article) the structure employed in Article 9(2) of the Berne Convention to limit the scope of permitted limitations of and exceptions to authors' reproduction rights. The proposed Treaty applies this structure to all limitations and exceptions permitted to be taken hereunder. The structure includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with the normal exploitation of the protected subject matter. Finally, any limitations or exceptions may never unreasonably prejudice the legitimate interests of the performer.

13.04 Paragraph (2) contains these provisions. Interpretation of them may follow the established interpretation of Article 9(2) of the Berne Convention.

13.05 Written proposals on limitations and exceptions were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, the European Community and its Member States, Japan, the Sudan, and the United States of America.

13.06 Article 20 contains provisions concerning limitations and exceptions to the rights of producers of phonograms; it corresponds closely to this Article. The Notes on Article 20 concerning comparable elements are parallel to those above.

[End of Notes on Article 13]

Article 13**Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.

[End of Article 13]

Notes on Article 14

14.01 Article 10 of the Rome Convention accords a right of reproduction to producers of phonograms. It provides that "producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms".

14.02 Article 14 of the proposed Treaty contains a proposal concerning the right of reproduction of producers of phonograms.

14.03 In paragraph (1), it is proposed that producers of phonograms shall enjoy the exclusive right of authorizing direct and indirect reproduction of their phonograms, whether permanent or temporary, in any manner or form.

14.04 The language of this provision is in harmony with the corresponding provision on performers' rights. It is proposed that producers of phonograms would be granted "the exclusive right of authorizing" direct or indirect reproduction. In this respect, there are no differences between the proposal and Article 10 of the Rome Convention.

14.05 There are two elements in the proposal that differ from the provisions of the Rome Convention and that imply an improvement in the level of protection. According to an explicit clause in the Article, the reproduction right would extend to both permanent and temporary reproduction. The result of reproduction may be a tangible permanent copy like a phonogram, a recording or a CD-ROM. It may as well be a copy of the phonogram on the hard disk of a PC, or in the working memory of a computer. Phonograms that are stored for a very short time may be reproduced or communicated further, or they may be made perceptible by an appropriate device.

14.06 Under the proposed Article 14, producers of phonograms would enjoy the exclusive right of authorizing reproduction "in any manner or form". This element manifests the broad scope of the right. Thus, storage of a phonogram in any electronic medium, for instance, constitutes reproduction. Reproduction includes such acts as uploading and downloading a phonogram to or from the memory of a computer. Digitization, i.e. the transfer of a phonogram embodied in an analog medium to a digital one constitutes always an act of reproduction. The expression "in any manner or form" is already found in Article 9(1) of the Berne Convention concerning the right of reproduction enjoyed by authors. It has been included in the present proposal to make it clear that there is no difference between the rights of producers of phonograms and authors in this respect.

14.07 According to paragraph (2) of the present proposal, it would be a matter for the legislation of Contracting Parties to limit the right of reproduction in the case of temporary reproduction of a phonogram, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the phonogram perceptible or where the reproduction is of a transient or incidental nature. Moreover, the temporary reproduction must always take place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law. The purpose of this provision is to make it possible to exclude from the scope of the right of reproduction acts of reproduction that are not relevant in economic terms. By reference to Article 20(2), the limitations are further confined to cases that pass the three-step test in that Article, which corresponds to the test in Article 9(2) of the Berne Convention.

CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14

Right of Reproduction

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

(2) Subject to the provisions of Article 20(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the phonogram audible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law.

[End of Article 14]

14.08 The European Community and its Member States proposed at the May 1996 session of the Committees of Experts that the proposed Treaty include a clause on the right of reproduction of producers of phonograms (document BCP/CE/VII/1-INR/CE/VI/1). The European Community and its Member States also proposed that the following points should be included in the "Records of the Conference"/"General Report": "Contracting Parties confirm that the permanent or temporary storage of a protected phonogram in any electronic medium constitutes a reproduction. This includes acts such as uploading and downloading of a phonogram to or from the memory of a computer."

14.09 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committee. In the discussions at the May 1996 session, several Delegations proposed that a provision with the same contents should be included in the proposed Treaty.

14.10 The proposal included in paragraph (1) of this Article is in substantial conformity with the proposal of the European Community and its Member States. At the same time, it meets the proposals referred to above in the discussions of the Committees of Experts.

14.11 For the February 1996 session of the Committees of Experts Argentina made a proposal on the definition of "reproduction": " 'Reproduction' of a phonogram or performance fixed on a phonogram means the act of making one or more originals or copies of all or a substantial part thereof, regardless of the method used to make the copy or the medium in which it is made, including storage of the phonogram or of the performance fixed on a phonogram in electronic form, regardless of the duration of the storage." The proposal corresponds in substance to the earlier proposal made by the International Bureau of WIPO. As was stated in Note 2.10 above, no definition of "reproduction" is included in the proposed Treaty. It appears, however, that the operative clause on the right of reproduction includes all the essential aspects of the proposal made by Argentina.

14.12 As further support for the proposal in Article 14, the following points may be made.

14.13 Technological developments have had a great impact on the means that may be used for reproduction. Complete and accurate reproductions may be made quickly and in such a way that the material reproduced resides only a short while in the memory of a computer. In some cases, a certain phonogram or piece of data may never be reproduced as a whole in the memory of a computer; only those parts of the material that are necessary to achieve a certain result may be reproduced, for instance in order to make a phonogram perceptible. In such cases, the successive reproduction of portions of a phonogram may, over a period of time, cover the whole phonogram.

14.14 Some relevant uses may, now or in the future, become totally based on a temporary reproduction.

14.15 Today, different countries may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction the results of which live a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary position. The Rome Convention does not serve to harmonize the right of reproduction among the Contracting States of that Convention.

[Article 15 starts on page 301]

14.16 The interpretation of a right of such importance as the right of reproduction should be in fair and reasonable harmony all over the world. A uniform interpretation is necessary. Already, the need for legal certainty and predictability has been felt and found lacking in concrete cases. The need for a uniform interpretation is dictated by the need to secure the functioning of the system of rights in a digital future.

14.17 The only way to harmonize effectively the interpretation of the scope of the right of reproduction is to confirm that temporary reproduction falls within the scope of the right.

14.18 It has been asserted in the discussions in the Committees of Experts that a reproduction right of wide scope might have some unintended and problematic effects. In principle, there are two ways to avoid such effects. The first is to narrow the definition of the reproduction. The second is by way of limitations of the right. It seems that many countries, having freedom of interpretation with respect to these rights, have already excluded the first possibility. This leaves only the second option: designing a limitations clause which makes it possible to avoid any problematic and unintended effects.

14.19 The provisions proposed in paragraph (2) are intended to focus on incidental, technical, and in some cases technically indispensable instances of reproduction which form part of another authorized or otherwise lawful use of a protected phonogram. The cases shall pass the three-step test of Article 20(2).

14.20 Note 18.06, concerning liability issues, applies with equal force to this Article.

14.21 Proposals concerning the right of reproduction of producers of phonograms were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the People's Republic of China, the Sudan, the United States of America, and Uruguay. Canada suggested that economic right for producers of phonograms in their phonograms would be included in the Treaty. The European Community and its Member States made a further proposal on this issue for the May 1996 session of the Committee of Experts.

14.22 Article 7 contains provisions concerning the right of reproduction of performers; it corresponds closely to this Article. The Notes on Article 7 concerning comparable elements are parallel to those above.

[End of Notes on Article 14]

[Article 15 starts on page 301]

Notes on Article 15

15.01 Article 15 provides producers of phonograms with the exclusive right to control modification of their phonograms.

15.02 The Article combines proposals made by Argentina, the United States of America, and Uruguay. Argentina used the term "modification" in its proposal, whereas the other proposals used the terms "adaptation" and "alteration". The term "modification" has been used in proposed Article 8 because it is sufficiently neutral and general and because it does not imply any interference with Article 2(3) of the Berne Convention, according to which certain adaptations and alterations of works may be protected.

15.03 It was suggested in sessions of the Committees of Experts that no separate right of alteration, adaptation, or modification is necessary. It has been argued that any alteration or modification of a performance or a phonogram cannot occur without reproducing the fixation of the performance or the phonogram. This modification right is proposed, however, in order to cover any possible situation in which digital or other technological manipulation might be used to circumvent traditional notions of reproduction.

15.04 Article 8 contains provisions concerning the right of modification of performers; it corresponds closely to this Article. The Notes on Article 8 concerning comparable elements are parallel to those above.

[End of Notes on Article 15]

Article 15

Right of Modification

Producers of phonograms shall enjoy the exclusive right of authorizing the modification of their phonograms.

[End of Article 15]

Notes on Article 16

16.01 Producers of phonograms do not have a general right of distribution of their phonograms under any existing international agreement. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done in Geneva, October 29, 1971, provides producers of phonograms with protection against unauthorized duplication and against unauthorized importation and distribution of duplicates of their phonograms.

16.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a general right of distribution for producers of phonograms, accompanied by appropriate provisions on exhaustion has gained wide international acceptance. However, no convergence of views has developed in respect of the scope or extent of the right of distribution after the first sale or other transfer of ownership of a copy of a phonogram. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a phonogram the right of distribution ceases to exist, i.e. is exhausted, after the first sale of that copy. Views differ as to whether the exhaustion should be national, regional or global.

16.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even be dealt with in an international instrument in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 17 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

16.04 Article 16 provides an exclusive right of distribution to producers of phonograms. Because of the differences described in Note 16.02, two alternatives are offered. Alternative A is based on the principle of national or regional exhaustion. Alternative B allows global or international exhaustion. The basic provision on the right of distribution is identical in both alternatives: producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership. Public lending falls outside the scope of this provision since it does not involve a sale or other transfer of ownership.

16.05 Alternative A also provides a right of importation, in addition to the general right of distribution, to the producers of phonograms in respect of copies of their phonograms.

16.06 Paragraph (1) of Alternative A provides for the exclusive right; item (i) delineates the right of distribution, and item (ii) delineates the right of importation.

16.07 Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of phonograms that have been distributed with the consent of the rightholder in the territory of a Contracting Party. The right of importation is not affected by the first sale or other transfer of ownership. Paragraph (3) excludes from the scope of the right of importation those situations where the importation is effected by a person solely for personal and non-commercial use.

Article 16*Alternative A***Right of Distribution and Right of Importation**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership;

(ii) the importation of the original or copies of their phonograms, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a phonogram that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

[Article 16 continues]

16.08 Some proposals presented for the February 1996 session of the Committee of Experts suggested that regional economic integration areas with their own legislation in this field might be explicitly mentioned in the clause concerning national or regional exhaustion. The obligations of the Treaty apply only to regional economic integration areas or organizations that are Contracting Parties to the Treaty. The territories of these Contracting Parties consist of the territories of their member countries. Thus, there is no need to make separate mention of regional economic integration areas.

16.09 Alternative B allows for international exhaustion. Contracting Parties may, in their national legislation, provide that the right of distribution will not extend to distribution after the first sale or other transfer of ownership of the original or copies of a phonogram by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

16.10 No right of importation is provided for in Alternative B.

16.11 The rights provided for in the proposed Treaty, including the right of distribution, are minimum rights. Contracting Parties may provide a higher level of protection. A more restricted concept of exhaustion than international exhaustion represents a higher level of protection. Thus, the solution in Alternative B would not preclude any Contracting Party from applying any conditions or restrictions to the circumstances giving rise to exhaustion. National or regional exhaustion is in full conformity with this provision for those Contracting Parties that take this approach to the distribution right. Introduction of a right of importation is not excluded either.

16.12 The main contents of Alternative A follow the proposal of Argentina, Brazil, the European Community and its Member States, the Sudan, the United States of America, and Uruguay for the February 1996 session of the Committees of Experts. Alternative B is based on the main approach taken in the proposals made by Canada and Japan.

16.13 Article 9 contains provisions concerning the right of distribution of performers; it corresponds closely to this Article. The Notes on Article 9 concerning comparable elements are parallel to those above.

[End of Notes on Article 16]

[Article 16, continued]

Alternative B

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of phonograms by or pursuant to an authorization.

[End of Article 16]

Notes on Article 17

17.01 The Rome Convention does not contain any provisions on the rental of copies of fixed performances or phonograms.

17.02 In the TRIPS Agreement, producers of phonograms were accorded a right of rental. Article 14.4 of the Agreement obligates Members to apply *mutatis mutandis* the provisions of TRIPS Article 11, which concerns rental, for the benefit of producers of phonograms and any other rightholders as may exist in phonograms under a Member's national law.

17.03 Paragraph (1) of Article 17 provides producers of phonograms with the exclusive right of authorizing the rental of the original and copies of their phonograms. The rental of phonograms has been defined in Article 2.

17.04 Paragraph (2) contains a clause permitting Contracting Parties to maintain, for a limited period of time, any systems they may have for providing equitable remuneration to producers of phonograms for the rental of copies. This clause has been modelled on Article 14.4 of the TRIPS Agreement. According to the TRIPS Agreement, Members "may maintain such systems provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders". Contracting Parties that, on April 15, 1994, had and continue to have such systems may maintain them; however, instead of leaving this possibility open for an indefinite period of time, a three-year time limit is proposed, beginning from the entry into force of the proposed Treaty.

17.05 The rental right for producers of phonograms was included in the proposals submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

17.06 Article 10 contains provisions concerning the right of rental of performers; it corresponds closely to this Article. The Notes on Article 10 concerning comparable elements are parallel to those above.

[End of Notes on Article 17]

Article 17**Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the rental of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

[End of Article 17]

Notes on Article 18

18.01 Article 18 introduces a new right for producers of phonograms: the exclusive right of making their phonograms available to the public. Article 18 is based on the May 1996 proposal made by the European Community and its Member States.

18.02 The proposed new right covers the making available of phonograms by wire or wireless means. A distinction is thus made between the distribution of copies of phonograms in physical, tangible form, which is covered by the right of distribution under Article 16, and the making available of phonograms by transmission.

18.03 The right of making available is limited to situations where members of public may access phonograms from a place and at a time individually chosen by them. Thus, the availability is based on interactivity and on on-demand access.

18.04 The proposed new right is designed to operate as a basic rule for the proper functioning of the electronic marketplace. The electronic or digital "record shop" can be compared to a record manufacturing plant or a CD factory. The functions of the manufacturing and distribution portions of the music industry and retail record shops may be replaced by a database open to the public for the direct delivery of music productions via communication networks to home computers.

18.05 The exclusive right laid down in Article 18 covers the making available of phonograms through systems that permit direct access to a certain phonogram stored in a database. The expressions "may access" and "from a place and at a time individually chosen" cover directly all situations that are interactive.

18.06 There are, however, systems and services based on particular technical arrangements and programming structures which make it possible to access the phonograms provided by the service without such access being fully interactive. Such services are offered on a subscription basis. From the point of view of the members of the public these services are "near to interactive". In many cases the only difference between interactive and "near to interactive" is in the time required for access. For both members of the public and rightholders, the shorter the delay, the closer the effect of such practices is to those of services that enable immediate access. The volume of protected subject matter that may be offered to the public in this way, combined with the fact that it may be made available through a number of parallel channels may add significantly to the ease of access. As the technical capacity of storage devices and communication networks grows these services are likely to develop further. They can be established by using cable or wire networks or by wireless means.

18.07 Practices described in the preceding Note could conflict with the normal exploitation of phonograms and unreasonably prejudice the legitimate interests of rightholders. Single channels offered on a subscription basis without being part of such services do not have these effects.

18.08 The proposed right of making available of phonograms in Article 18 is intended to cover both directly interactive ways of making available and services with similar effects, as described above. Both types of service fulfil the criteria laid down in Article 18 since members of the public may access phonograms from a place and at a time individually chosen by them.

Article 18**Right of Making Available of Phonograms**

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[End of Article 18]

18.09 The right proposed in Article 18 is an exclusive right. This is fundamental.

18.10 It is strongly emphasized that Article 18 does not attempt to define the nature or extent of liability on a national level. The proposed international agreement determines only the scope of the exclusive rights that shall be granted to producers of phonograms in respect of their phonograms. The question of who shall be liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.

18.11 Proposals concerning digital transmission were presented for the February 1996 session of the Committees of Experts by Argentina, the United States of America, and Uruguay. The European Community and its Member States made a proposal on this issue for the May 1996 session of the Committees of Experts.

18.12 Article 11 contains provisions concerning the right of making available of performers; it corresponds closely to this Article. The Notes on Article 11 concerning comparable elements are parallel to those above.

[End of Notes on Article 18]

[Article 19 starts on page 313]

Notes on Article 19

19.01 Article 12 of the Rome Convention grants to performers and to producers of phonograms the right to a single equitable remuneration if their phonogram is published for commercial purposes or if a reproduction of the phonogram is used for broadcasting or any communication to the public. The remuneration is paid by the user to the performer or to the producer of the phonogram or to both. In the absence of an agreement between these parties, national legislation may lay down the rules that govern the sharing of this remuneration.

19.02 The right to remuneration is subject to the reservations permitted in Article 16 of the Rome Convention. Under Article 16, any state may declare that it will not apply the provisions of that Article or that it will not apply them in respect of certain uses. Furthermore, a state may declare that it will not apply the right to remuneration in respect of phonograms the producer of which is not a national of another Contracting State. A Contracting State may also make the right to remuneration subject to reciprocity as regards the extent to which, and the term for which, another state grants protection to phonograms fixed by a national of the state making such a reservation.

19.03 Article 19 of the proposed Treaty accords to the producers of phonograms a right to equitable remuneration for the use of their phonograms that are published for commercial purposes or the use of a reproduction of such phonograms for broadcasting or any communication to the public. In general, this right corresponds to the right provided for in Article 12 of the Rome Convention.

19.04 Paragraph (1) does, however, propose additional elements that are not included in Article 12 of the Rome Convention. The right to remuneration would cover not only direct uses of phonograms but also indirect uses for broadcasting or for communication to the public. Remuneration should always be received both by performers and producers. In this way, the proposed Article 19 excludes the possibility that producers of phonograms would not receive at least a single equitable remuneration.

19.05 "Broadcasting" and "communication" are defined in Article 2. The definition of broadcasting covers rebroadcasting as discussed in Note 2.23 above. Communication covers all cases of cable or wire transmission, such as cable-originated television transmissions and sound radio by cable or in communication networks. Because the right covers both direct and indirect uses of phonograms, all forms of retransmission by cable and wire also fall within the scope of the right. The definition of communication also covers situations where a phonogram is played directly to the public present at the same location. Indirect communication of a phonogram covers situations where a radio or television set or other apparatus is used to make a phonogram that is included in a broadcast or wire communication audible to the public in a cafe, restaurant, hotel lobby or other place that is open to the public.

19.06 Paragraph (2) permits Contracting Parties to establish rules governing the way in which remuneration is shared between performers and producers of phonograms and the way in which users pay the required remuneration. These are logistical concerns that are beyond the scope of international agreements.

Article 19**Right to Remuneration for Broadcasting and Communication to the Public**

(1) Producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

[Article 19 continues]

19.07 As noted above, the right to remuneration under the Rome Convention is subject to reservations. This basic structure has been reproduced in the proposed Treaty. The reservations clause in paragraph (3) leaves the degree of reservation open, subject to the provisions of paragraph (4). Contracting Parties may make minute or more extensive reservations to the right of remuneration. Contracting Parties may even set reciprocity (as to particular terms, such as duration of protection, or complete reciprocity) as a condition for according the remuneration right to performers and producers of phonograms who fulfil the criteria of eligibility in relation to another Contracting Party. Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16.1(a)(iv) of the Rome Convention. However, Contracting Parties may not make any reservations to this Article, or the rights provided for therein, that would derogate from their obligations to each other under the Rome Convention; Article 1(1) of the proposed Treaty makes this clear.

19.08 In paragraph (4) it is proposed that the possibility of making a reservation to the right of remuneration laid down in this Article would not apply to broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription-based services. The reason for this proposal is that in the context of such services, phonograms are exploited directly for commercial gain.

19.09 The remuneration right proposed in this Article is an attempt to reconcile two extremes: on the one hand, there is the position that performers and producers of phonograms are not entitled to any right to remuneration in respect of the fruits of their labour, on the other hand, there is the position that the right to remuneration should be broad or even that the right should be exclusive. Written proposals concerning this matter were submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

19.10 Article 12 contains provisions concerning the right to remuneration of performers; it corresponds closely to this Article. The Notes on Article 12 concerning comparable elements are parallel to those above.

[End of Notes on Article 19]

[Article 19, continued]

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

[End of Article 19]

Notes on Article 20

20.01 Article 20 sets forth limitations of and exceptions to the rights of producers of phonograms provided for in this Treaty.

20.02 Paragraph (1) reproduces the main principle of Article 15.2 of the Rome Convention. Contracting Parties may provide at the national level the same kinds of limitations or exceptions with regard to the protection of producers of phonograms under the proposed Treaty as they provide with regard to the protection of copyright in literary and artistic works.

20.03 As drafted, the proposed Treaty incorporates (in this Article) the structure employed in Article 9(2) of the Berne Convention to limit the scope of permitted limitations of and exceptions to authors' reproduction rights. The proposed Treaty applies this structure to all limitations and exceptions permitted to be taken hereunder. The structure includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with the normal exploitation of the protected subject matter. Finally, limitations or exceptions may never unreasonably prejudice the legitimate interests of producers of phonograms.

20.04 Paragraph (2) contains these provisions. Interpretation of them may follow the established interpretation of Article 9(2) of the Berne Convention.

20.05 Written proposals on limitations and exceptions were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, the European Community and its Member States, Japan, the Sudan, and the United States of America.

20.06 Article 13 contains provisions concerning limitations and exceptions of rights of performers; it corresponds closely to this Article. The Notes on Article 13 concerning comparable elements are parallel to those above.

[End of Notes on Article 20]

Article 20**Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the producer of phonograms.

[End of Article 20]

Notes on Article 21

21.01 The Rome Convention sets a minimum term of protection for performers and producers of phonograms of twenty years. According to Article 14, the term is calculated from the year in which the fixation was made, or in which the performance took place.

21.02 The TRIPS Agreement sets a term of protection for performers and producers of phonograms of fifty years. According to Article 14.5 of the Agreement, the term shall last at least until the end of a period of fifty years calculated from the end of the calendar year in which the fixation was made or in which the performance took place.

21.03 Article 21 proposes a general term of protection for performers and producers of phonograms of fifty years.

21.04 According to paragraph (1), the term of protection for performers would be calculated from the end of the year in which a fixed performance was published. In the case of unpublished fixed performances, the term would be calculated from the end of the year in which the performance took place. This paragraph contains another presentation of the "2.11 alternatives". Alternative A would be the proper selection if the Diplomatic Conference determined that the protection of performers ought to be confined to musical performances only. Alternative B would be the proper selection if the protection of the proposed Treaty were extended to performances fixed in any medium.

21.05 According to paragraph (2), the term of protection for producers of phonograms would be calculated from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

21.06 The reasons for setting the term of protection at this proposed level are obvious. There is a clear trend towards a fifty-year term of protection for performers and for producers of phonograms. The International Bureau of WIPO proposed this term in its memoranda to the first session of the Committee of Experts in 1993 (document INR/CE/I/2) and to the third session in 1994 (document INR/CE/III/2).

21.07 A fifty-year term of protection for performers and producers of phonograms was suggested by Argentina, Canada, the European Community and its Member States, Japan, the United States of America, and Uruguay. Argentina and Uruguay proposed a term of fifty years *post mortem* for performers. In other proposals, the method of calculation was attached in different ways to the years of publication, fixation and/or performance. The proposal in the proposed Treaty makes an attempt to combine these approaches.

[End of Notes on Article 21]

CHAPTER IV
COMMON PROVISIONS

Article 21

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the

Alternative A: musical performance fixed in a phonogram

Alternative B: performance fixed in any medium

was published, and in case of unpublished fixed performances, from the end of the year in which the performance took place.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

[End of Article 21]

Notes on Article 22

22.01 Article 22 contains provisions on obligations concerning technological measures.

22.02 According to paragraph (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression "knowing or having reasonable grounds to know" has the same meaning as the expression "knowingly or with reasonable grounds to know" in the provisions on enforcement in the TRIPS Agreement.

22.03 Paragraph (2) includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 27 of the proposed Treaty, only concern "any act of infringement of intellectual property rights covered by this Agreement". The obligations established in the proposed Article 22 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

22.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

22.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

22.06 Paragraph (3) contains the definition of a "protection-defeating device". It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase "primary purpose or primary effect of which is to circumvent..." has been used rather than "specifically designed or adapted to circumvent...".

22.07 Proposals concerning the obligations of Contracting Parties in connection with protection-defeating devices and other technological measures were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, and the United States of America. The European Community and its Member States, and the Republic of Korea made a proposal on this issue for the May 1996 session of the Committees of Experts.

[End of Notes on Article 22]

Article 22**Obligations concerning Technological Measures**

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

[End of Article 22]

Notes on Article 23

23.01 Article 23 contains provisions on obligations with regard to rights management information.

23.02 According to paragraph (1) Contracting Parties shall make it unlawful for any person to remove or alter any electronic rights management information without authority, or to distribute, import for distribution or communicate to the public, without authority, copies of fixed performances or phonograms from which such information has been removed or in which it has been altered. A requirement for proscription is that the person who performs these acts does so knowingly. The obligation of Contracting Parties covers rights management information in electronic form only.

23.03 Paragraph (2) identifies the information that is within the scope of this Article. The scope has been limited to information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram and any numbers or codes that represent such information. The obligations of this provision cover such information only when it is attached to a copy of a fixed performance or a phonogram, or appear in connection with the communication of a fixed performance or phonogram to the public. Nothing precludes a broader field of application for provisions on rights management information in national legislation.

23.04 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

23.05 Contracting Parties may, when implementing the obligations established by this Article, specifically limit the scope of the provisions in their national law in such a way that technically non-feasible requirements are not imposed on broadcasting organizations and other users engaged in the duly authorized communication of fixed performances or phonograms or retransmission of broadcasts.

23.06 It should be pointed out that the use of electronic rights management information is voluntary. The obligations of Contracting Parties concerning rights management information only apply in cases where such information has been given.

23.07 It should be observed that the wilful removal or alteration of rights management information in order to achieve financial gain is a matter which falls within the scope of the provisions of the penal codes in most countries. This may be taken into account when the obligations of the Contracting Parties are considered by the Diplomatic Conference.

23.08 Proposals on rights management information were presented for the February 1996 session of the Committees of Experts by Brazil, Canada, and the United States of America.

[End of Notes on Article 23]

Article 23**Obligations concerning Rights Management Information**

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of fixed performances or phonograms from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or a phonogram, or appear in connection with the communication of a fixed performance or a phonogram to the public.

[End of Article 23]

Notes on Article 24

24.01 Article 24 states the fundamental principles of formality-free protection and independence of protection which follow the model of the Berne Convention. The provisions are to be interpreted in an equivalent manner to those of the Berne Convention.

24.02 Paragraph (1) sets forth the principle of automatic protection. No formalities may be set as a condition for the enjoyment and exercise of rights provided for in the proposed Treaty. The wording of the provision follows the wording of Article 5(2) of the Berne Convention.

24.03 Paragraph (2) includes a provision on the independence of protection which is in line with the second half of the first sentence of Article 5(2) of the Berne Convention.

[End of Notes on Article 24]

Article 24**Formalities and Independence of Protection**

(1) The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

(2) Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the performance or phonogram.

[End of Article 24]

Notes on Article 25

25.01 The driving principle behind this Article is that no reservations are permitted to the proposed Treaty.

25.02 It has, however, been necessary to propose that reservations would be permitted in respect of two issues. These provisions have been taken in Article 25.

25.03 As was discussed in Note 2.18 above, an alternative solution is offered based on the possibility of limiting the scope of the rights of performers. It is proposed that any party, upon becoming a Contracting Party, could make a reservation and confine the protection accorded by them to performers to musical performances or to musical performances fixed in phonograms only. This proposal is included in paragraph (1) of Article 25 as Alternative C. This Alternative may be selected only if the Diplomatic Conference should decide to adopt Alternatives B in all the Articles listed in Alternative C of Article 25(1). (See also Note 2.18.)

25.04 Alternative D is presented in Article 25(1) for the case where the Diplomatic Conference does not base its decision on the scope of performers' rights on Alternatives B in the Articles listed in Alternative C of Article 25(1), and decides not to use the technique of reservation in this issue. In such a case the proposed paragraph (2) of Article 25 would replace the proposed paragraph (1).

25.05 The right to remuneration for broadcasting and communication to the public may be subject to reservation according to Article 12(3) and Article 19(3), subject to the provisions of Article 12(4) and Article 19(4) concerning subscription-based services.

25.06 The possibility of making reservations referred to in the preceding Note has been taken into the proposed Treaty in order to achieve the widest possible acceptance of the Treaty as a whole. Different degrees of reservation are permitted. Over a period of years there has been a substantial opportunity to observe the operation of Article 12 of the Rome Convention. Most Contracting States of that Convention have chosen not to make a total reservation to the right of remuneration. By constructing the proposed Treaty in a manner likely to achieve the widest acceptance, it may be possible to establish not only an important general level of international protection but also bring together countries that, between themselves, wish to maintain a higher level of protection.

[End of Notes on Article 25]

Article 25**Reservations***Alternative C*

(1) Any party upon becoming a Contracting Party to this Treaty, may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of:

- (i) Article 2(c) and Article 2(h) to sounds only;
- (ii) Article 5(1) and Article 6 to musical performances only; and
- (iii) Article 7, Article 8, Article 9(1), Article 10, Article 11, and Article 21(1) to musical performances fixed in phonograms only.

Alternative D

[No such provision]

(2) Subject to the provisions of Article 12(3), 19(3), and paragraph (1) of this Article, no reservations to this Treaty shall be permitted.

[End of Article 25]

Notes on Article 26

26.01 Article 26 contains the provisions that govern application of the proposed Treaty in respect of performances, phonograms, rights and obligations that came into being before the proposed Treaty would come into force. By including these provisions in the proposed Treaty, more uniform worldwide application will be achieved.

26.02 According to paragraph (1), the proposed Treaty would be applicable to performances that took place and phonograms that were fixed before the date on which the Treaty would enter into force for the respective Contracting Parties. This approach differs from that adopted in the Rome Convention, but it is similar to the approach taken in the TRIPS Agreement. The objective of the provision is a wide harmonization of protection at least insofar as the time aspect is concerned. The reproduction and distribution of protected subject matter does not follow national or regional boundaries and the market has become truly international. It is therefore critical to avoid the discrepancies that might result from a less comprehensive solution.

26.03 The provisions of paragraph (1) are intended to be as clear as possible in order to avoid any legal uncertainty. Even though it goes without saying, an explicit statement has been included at the end of paragraph (1) repeating the fact that the duration of the protection granted to existing subject matter follows the provisions of Article 21.

26.04 Paragraph (2) makes clear that the protection accorded by the proposed Treaty shall not be retroactive. It safeguards previously acquired rights in the same way as Article 20.1 of the Rome Convention. In addition, it specifies that the protection accorded by the proposed Treaty is without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of the proposed Treaty for each Contracting Party.

26.05 Paragraph (3) allows transitional arrangements concerning fixations of performances and copies of phonograms lawfully made before the entry into force of the Treaty for each Contracting Party. Contracting Parties may fix a term during which the sale and rental of previously made fixations of performances or copies of phonograms may continue. Contracting Parties that avail themselves of this option should nonetheless take into consideration the economic implications of the term they fix. Contracting Parties should take into account both the legitimate interests of users who have invested in good faith in the production of copies at a time when fixed performances and phonograms were not protected, and the purpose of the proposed Treaty, which is to provide rightholders with effective protection.

[End of Notes on Article 26]

Article 26**Application in Time**

(1) Contracting Parties shall also apply provisions of this Treaty to performances that took place and phonograms that were fixed before the date of entry into force of this Treaty for each that Contracting Party. The duration of the protection shall be determined according to the provisions of Article 21.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(3) Contracting Parties may provide for conditions under which fixations of performances and copies of phonograms which were lawfully made before the entry into force of this Treaty for each Contracting Party may be distributed to the public or rented during a limited period of time.

[End of Article 26]

Notes on Article 27

27.01 Two alternatives on enforcement are presented in Article 27. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement on enforcement.

27.02 Alternative A consists of the text of Article 27 and an Annex. Paragraph (1) introduces the Annex which contains the substantive provisions on enforcement. Paragraph (2) states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

27.03 Alternative B incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

[End of Notes on Article 27]

Article 27**Special Provisions on Enforcement of Rights**

Alternative A (continues on page 103)

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

[End of Article 27]

Notes on the Annex

28.01 The Annex forms the second part of Alternative A of Article 27. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.

28.02 No detailed Notes are offered on the specific provisions of the Annex.

[End of Notes on the Annex]

[The Annex is not reproduced here. It is identical to the Annex to document CRNR/DC/4, reproduced on pages 225 to 233.]

[End of document]

CRNR/DC/6

August 30, 1996 (Original: English)

**BASIC PROPOSAL
FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY
ON INTELLECTUAL PROPERTY IN RESPECT OF DATABASES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Chairman of the Committees of Experts
on a Possible Protocol to the Berne Convention
and
on a Possible Instrument for the Protection of the Rights of Performers
and Producers of Phonograms*

Memorandum prepared by the Chairman of the Committees of Experts

1. In the program of WIPO for the 1990-1991 biennium provision was made to convene a Committee of Experts to examine questions concerning a possible protocol to the Berne

Convention for the Protection of Literary and Artistic Works. The Committee was convened in two sessions, the first in November 1991 and the second in February 1992. In 1992 two Committees of Experts were set up, one to continue the work started by the first Committee and the other to begin preparation of a possible new instrument for the protection of the rights of performers and producers of phonograms. The Committee of Experts on a Possible Protocol to the Berne Convention then held five further sessions, the third in June 1993, the fourth in December 1994, the fifth in September 1995, the sixth in February 1996 and the seventh in May 1996. The Committee of Experts on a Possible Instrument for the Protection of the Rights of the Performers and the Producers of Phonograms held six sessions, the first in June-July 1993, the second in November 1993, the third in December 1994, the fourth in September 1995, the fifth in February 1996 and the sixth in May 1996. The last three sessions of the two Committees (referred to subsequently as the Committees of Experts) were convened on the same dates and parts of the sessions were held jointly.

2. Until the December 1994 sessions of the Committees of Experts work was based on memoranda prepared by the International Bureau of WIPO. Following the decisions by the Committees of Experts the Director General of WIPO invited Government members and the European Commission to submit proposals for discussion at the September 1995 and February 1996 sessions.

3. In the December 1994 sessions of the Committees of Experts the Delegation of the European Commission informed the Committees about the progress of work in the European Community on a proposal for a Directive on the legal protection of databases which included a proposal for creating a *sui generis* right to be granted to the maker of a non-original database. In the September 1995 sessions the European Community and its Member States submitted to the Committees of Experts a discussion paper on "The *sui generis* right provided for in the Proposal for a Directive on the legal protection of databases" (document BCP/CE/V/5). After additional comments by the Delegation of the European Commission the Committees of Experts accepted the conclusion that the issue of such a possible *sui generis* system would be discussed further at the next sessions of the Committees on the basis of the proposals that might be made by Governments and the European Commission.

4. The European Community and its Member States submitted a proposal for the international harmonization of the *sui generis* protection of databases (document BCP/CE/VI/13) at the February 1996 sessions of the Committees of Experts. The proposal included draft provisions for the substantive clauses of a treaty. The Committees considered the proposal and several Delegations expressed positive interest in the *sui generis* right and in the continuation of work. At the same time, however, both further study and the clarification of certain concepts were requested.

5. The United States of America submitted a proposal on the *sui generis* protection of databases (document BCP/CE/VII/2-INR/CE/VI/2) in the May 1996 sessions of the Committees of Experts. The proposal included draft substantive provisions of a treaty. The Committees considered this proposal together with the previous proposal made by the European Community and its Member States (see paragraph 4). Several Delegations took the position that the question of the *sui generis* protection of databases could be submitted for consideration by the Diplomatic Conference in December 1996. Several other Delegations held the view that further study was still necessary.

6. In their February 1996 sessions the Committees of Experts had recommended that a Diplomatic Conference for the conclusion of the appropriate treaties should be held in December 1996. A meeting of the Preparatory Committee of the Proposed Diplomatic Conference, the General Assembly of WIPO and the Assembly of the Berne Union were held in Geneva from May 20 to 24, 1996. The Preparatory Committee and the Assemblies decided that a WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions would be convened from December 2 to 20, 1996.

7. The Chairman of the Committees of Experts was entrusted at the February 1996 sessions with the task of preparing the draft texts ("the basic proposals") for the Diplomatic Conference; the WIPO International Bureau was to publish and circulate these draft texts by September 1, 1996, to the States, intergovernmental and non-governmental organizations to be invited to the Diplomatic Conference. The Director General of WIPO proposed that the International Bureau would prepare the draft of the final clauses of the treaty or treaties. The draft Final Clauses prepared by the Director General (document CRNR/PM/2) were examined by the Preparatory Committee of the Proposed Diplomatic Conference in May 1996.

8. In the introduction to the draft Final Clauses, the Director General of WIPO stated: "On the basis of the deliberations of the Committees of Experts, it is assumed that the aim of the Diplomatic Conference will be to adopt one or more multilateral treaty or treaties on questions of copyright, on questions of two branches (one concerning performing artists, the other concerning producers of phonograms) of neighboring rights and, perhaps, also on questions concerning a *sui generis* protection of data bases."

9. There is no decision on the number of treaties to be proposed for adoption by the Diplomatic Conference in December 1996. The Committees of Experts have made no recommendation on this issue, and after extensive discussion, the question was left open in the May 1996 meetings of the Preparatory Committee, the General Assembly of WIPO and the Assembly of the Berne Union. In this respect, the mandate given to the Chairman of the Committees of Experts was therefore open and included the possibility of establishing draft texts for one, two or three treaties.

10. Basic Proposals for the substantive provisions of three treaties are proposed by the Chairman of the Committees of Experts:

1. "Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works",
2. "Treaty for the Protection of the Rights of Performers and Producers of Phonograms",
3. "Treaty on Intellectual Property in Respect of Databases".

11. It is the assessment of the Chairman of the Committees of Experts that the expectations of the majority of Delegations participating in the meetings referred to in paragraph 9 are most closely met by proposing three draft texts. The Diplomatic Conference has the power to combine separate draft treaties into one single treaty should it find this course of action appropriate. A combined text would have several advantages, and such an option may be viewed as one of legal technique; on the other hand, a single text approach would entail certain political and doctrinal considerations. For example, Governments contemplating ratification of or accession to such a single text would have to analyze and consider implementation of the whole contents of the combined instrument.

12. The present set of draft substantive provisions of the Basic Proposals referred to in paragraph 10, of which the present document is one, have been prepared by the Chairman of the Committees of Experts according to decisions made by the Committees at their February 1996 sessions. The Basic Proposal for the Administrative and Final Clauses of all these proposed Treaties have been submitted by the Director General of WIPO in a separate document.

13. The present document sets forth the substantive provisions of the Basic Proposal of the Treaty on Intellectual Property in Respect of Databases. There are 13 Articles preceded by a Preamble. Each provision is accompanied by explanatory Notes.

14. The purpose of the explanatory Notes is:

- (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions,
- (ii) to indicate the reasoning behind the proposals, and
- (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.

15. The present Basic Proposal has been prepared on the basis of the proposals referred to paragraphs 4 and 5, taking into account discussions in the Committees of Experts. These proposals have been carefully studied, and portions of them appear in several places in the proposed Treaty, sometimes in a reformulated or combined format. Additional elements have been introduced where necessary, and not all elements of all proposals are reflected in the proposed Treaty. In some instances, alternative solutions are proposed, but the number of proposed alternatives is limited. Alternatives have been designated in the text using capital letters in accordance with Rule 29(b) of the draft Rules of Procedure for the Diplomatic Conference. One of the proposed alternative solutions includes an Annex with special provisions on enforcement.

**Draft Treaty
on Intellectual Property
in Respect of
Databases**

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ANNEX

Notes on the Title and on the Preamble

0.01 The proposed Treaty complements the existing treaties in the field of intellectual property. For this reason, the expression "intellectual property" has been included in the title of the proposed Treaty. The Treaty extends protection to databases that qualify according to the provisions of the Treaty. The expression "database" has been included in the title without further qualification.

0.02 The first paragraph of the Preamble expresses the primary objective of Contracting Parties in concluding the Treaty.

0.03 The second paragraph indicates the main reasons behind the objective stated in the first paragraph.

0.04 The third paragraph indicates the main reasons why Contracting Parties think databases ought to be protected as intellectual property.

0.05 The fourth paragraph refers to the means by which Contracting Parties seek to obtain their objective, namely to establish a new form of protection which, by enabling recovery of investments in databases, encourages investment in this field.

0.06 The fifth paragraph underlines the principle that the proposed Treaty does not interfere with other forms of intellectual property protection at the international level. Because many databases are already protected as literary or artistic works under the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the Berne Convention"), a specific reference to the Convention has been made. The provisions of the proposed Treaty leave unaffected the protection provided under existing treaties for other intellectual property rightholders, including authors, performers, producers of phonograms, and broadcasting organizations.

[End of Notes on the Title and the Preamble]

Preamble**The Contracting Parties,**

Desiring to enhance and stimulate the production, distribution and international trade in databases,

Recognizing that databases are a vital element in the development of a global information infrastructure and an essential tool for promoting economic, cultural and technological advancement,

Recognizing that the making of databases requires the investment of considerable human, technical and financial resources but that such databases can be copied or accessed at a fraction of the cost needed to design them independently,

Desiring to establish a new form of protection for databases by granting rights adequate to enable the makers of databases to recover the investment they have made in their databases and by providing international protection in a manner as effective and uniform as possible,

Emphasizing that nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties in the field of intellectual property, and in particular, that nothing in this Treaty shall in any way prejudice the rights granted to authors in the Berne Convention for the Protection of Literary and Artistic Works,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Article 1 sets out the scope of the proposed Treaty. It provides that Contracting Parties shall protect all databases that represent a substantial investment.

1.02 The production and distribution of databases has become a broad economic activity which is expanding rapidly worldwide. The production and distribution of databases may be viewed as a "content industry" within the information industry, and it may be expected that this industry will be a major source of employment. The development of a content industry has both direct and indirect effects on the development of the information infrastructure at a national and international level. In this connection, the database industry plays a significant role in fostering new industries and new jobs.

1.03 The production and distribution of databases requires considerable investment. At the same time, exact copies of whole databases or their essential parts can be made at practically no cost. The increasing use of digital recording technology exposes database makers to the risk that the contents of their databases may be copied and rearranged electronically, without their authorization, to produce similar competing databases or databases with identical content.

1.04 Unauthorized retrieval and copying of the contents of a database has serious consequences for the economics of database production. Protection against unauthorized copying and other unauthorized use has been sought through the copyright system. According to the prevailing view, a significant proportion of existing databases may already be protected by copyright. A condition for this protection is that a database meet the requirements for copyright protection, i.e. that it be the result of its creator's own intellectual effort and that it achieve a sufficient level of originality. It has, however, become evident that copyright does not provide sufficient protection. Many valuable databases do not qualify for copyright protection. It should be noted that in some countries specific *sui generis* forms of intellectual property protection now apply to databases or are presently being established. In some other countries, copyright seems to provide all the protection needed by databases. Nonetheless, these national or regional solutions remain insufficient. In the network environment of the global information infrastructure the database market is truly international and does not respect national boundaries.

1.05 In all countries, continued investment is an essential factor for the development and refinement of databases. Such investment will not take place unless a stable and uniform regime of legal protection is established to protect the rights of makers of databases.

1.06 The proposed Treaty seeks to safeguard makers of databases against misappropriation of the fruits of their financial and professional investment in collecting, verifying and presenting the contents of databases. It does this by proposing protection that covers the whole or substantial parts of a database against certain acts by a user or by a competitor, for the limited duration of the right. The investment, of course, may comprise financial resources, human resources or both.

1.07 On March 11, 1996, the European Parliament and the Council of the European Union adopted a Directive on the legal protection of databases (96/9/EC). This Directive harmonizes certain aspects of the copyright protection provided for databases and creates an exclusive

[Article 1 starts on page 345]

sui generis right for the makers of databases. The general objective of this right is to protect the investment of time, money and effort by the maker of a database, irrespective of whether the database is in itself innovative. According to the Directive, a database is protected if there has been a substantial investment, in qualitative or quantitative terms, in obtaining, verifying or presenting the contents of the database. The duration of the protection provided by the Directive is 15 years. The date by which the Member States of the European Union must implement the Directive in their national legislation is January 1, 1998. The proposal submitted by the European Community and its Member States for the February 1996 session of the Committees of Experts follows closely the substantive provisions of this Directive.

1.08 In May 1996, a bill was introduced in the United States Congress (H.R. 3531) that would amend title 15 of the United States Code to create a new federal statute for database protection. The proposed "Database Investment and Intellectual Property Antipiracy Act of 1996" is aimed at preventing actual or threatened competitive injury by the misappropriation of databases or their contents; it is not targeted at non-competitive uses. A database would be subject to protection under the Act if the collection, assembly, verification, organization or presentation of the database contents were the result of a qualitatively or quantitatively substantial investment of human, technical, financial or other resources.

1.09 An important part of the background to the United States bill was the United States Supreme Court decision in *Feist Publications, Inc. v. Rural Telephone Service Co., Inc.*, 499 U.S. 340 (1991). The bill was introduced in the U.S. Congress with the statement that "While reaffirming that most — although not all — commercially significant databases satisfy the 'originality' requirement for protection under copyright, the Court [in *Feist*] emphasized that this protection is 'necessarily thin'. Several subsequent lower court decisions have underscored that copyright cannot stop a competitor from lifting massive amounts of factual material from a copyrighted database to use as the basis for its own competing product."

1.10 The United States bill draws on the fundamental elements of the European Directive and is parallel to its Trans-Atlantic counterpart in its most crucial points. The most significant difference between the United States bill and the European Directive is that the former proposes a 25-year term of protection. When the bill was introduced, its sponsors emphasized that the existing protection for databases afforded by copyright and contract law would not be affected. The bill is intended to supplement these legal rights, not replace them. Furthermore, it was emphasized that the bill avoids conferring any monopoly on facts. The bill is intended to be fully consistent with the proposal on *sui generis* protection of databases which was submitted by the Delegation of the United States of America for the May 1996 sessions of the Committees of Experts (document BCP/CE/VII/2-INR/CE/VI/2).

1.11 The proposed Treaty is based on the aforementioned proposals made by the European Community and its Member States and by the United States of America, taking into account discussions within the Committees of Experts. The scope of the proposed Treaty is laid down in the provisions of Article 1 in a manner that is fully consistent with these proposals.

[Article 1 starts on page 345]

1.12 Paragraph (1) identifies the protected subject matter and sets out the general condition for protection. The protected subject matter is databases. The condition for protection is that a substantial investment has been made in the formation of the database. The expressions "database" and "substantial investment" are defined in Article 2.

1.13 Paragraph (2) makes it clear that protection shall be granted to databases irrespective of the form or medium in which they are embodied. Protection extends to databases in both electronic and non-electronic form. Moreover, this wording embraces all forms or media now known or later developed. Paragraph (2) also makes it clear that protection shall be granted to databases regardless of whether they are made available to the public. This means that databases that are made generally available to the public, commercially or otherwise, as well as databases that remain within the exclusive possession and control of their developers enjoy protection on the same footing.

1.14 Paragraph (3) expresses the principle that the protection accorded by the proposed Treaty is independent of any other form of protection. The protection would therefore be of a new or independent nature. Consequently, the proposed Treaty provides cumulative protection by the attachment of different rights to the database or to its contents. It should be pointed out that the proposed new protection does not replace any of the existing forms of protection that apply to databases or their contents.

1.15 Paragraph (4) provides that protection does not extend to any computer programs as such. A computer program is a set of programming instructions that may cause a computer to perform certain functions or achieve certain results. A computer program can include collections of data or other materials that are not part of the set of instructions that form the operative core of the computer program. According to the proposed Treaty, such databases incorporated in computer programs are protected in the same way as any other databases.

[End of Notes on Article 1]

Article 1

Scope

(1) Contracting Parties shall protect any database that represents a substantial investment in the collection, assembly, verification, organization or presentation of the contents of the database.

(2) The legal protection set forth in this Treaty extends to a database regardless of the form or medium in which the database is embodied, and regardless of whether or not the database is made available to the public.

(3) The protection granted under this Treaty shall be provided irrespective of any protection provided for a database or its contents by copyright or by other rights granted by Contracting Parties in their national legislation.

(4) The protection under this Treaty shall not extend to any computer program as such, including without limitation any computer program used in the manufacture, operation or maintenance of a database.

[End of Article 1]

Notes on Article 2

2.01 Article 2 contains definitions of the key terms used in the proposed Treaty.

2.02 Item (i) defines the term "database". The term should be understood to include collections of literary, musical or audiovisual works or any other kind of works, or collections of other materials such as texts, sounds, images, numbers, facts, or data representing any other matter or substance. It is worth pointing out that in addition to many kinds of works and other information materials, databases may contain collections of expressions of folklore.

2.03 In a database, the works or other materials are systematically or methodically arranged, and each of these works or other materials can be individually accessed by electronic or other means. It is not necessary that the materials in a database be stored physically in an organized manner. The arrangement of the materials may be laid down in the addresses and indexes of the material that make it possible to directly access any of the materials in a systematic or methodical way. The requirement that the contents of a database be independent works, data or other materials, and that items in the database are individually accessible excludes any recording of an audiovisual, cinematographic, literary or musical work as such from the definition of a database and the protection of this proposed Treaty.

2.04 The term "collection" has been used in the definition of the term "database", whereas the term "compilation" is used in Article 10.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter referred to in these Notes as the TRIPS Agreement) concerning copyright protection for databases. The term "collections" has been used in Article 2(5) of the Berne Convention, defining the copyright protection available for collections of works, and in Article 5 of the draft "Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works". It is not intended that the proposed Treaty make any distinction between the two terms; rather, the proposed Treaty, compared to the Berne Convention, adds certain conditions for protection and removes others.

2.05 Item (ii) defines the term "extraction" as meaning the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form. The act of extraction is the transfer of some material to another medium; the original material on the medium in which the database is embodied remains on that medium. In this sense, the term "extraction" is a synonym for "copying" or "reproduction". The expression "another medium" does not refer to any particular medium. Transfer to the same type or any other type of medium, device, instrument or contrivance capable of recording the transferred material, is a transfer within the meaning of this provision. Reference in the provision to "any means" or "any form" is meant to cover all means and forms now known or later developed.

2.06 According to item (iii), the "maker of the database" means the natural or legal person or persons with control and responsibility for the undertaking of a substantial investment in making a database. The expression "control and responsibility for the undertaking of a substantial investment" is intended to exclude the possibility that the protection of the proposed Treaty might flow to the employees who execute the tasks required to produce a database; it is clear that the rights and protection flow to their employer, be it a company, enterprise or other organization, which makes the investment. Likewise, the definition

Article 2

Definitions

For the purposes of this Treaty:

(i) "database" means a collection of independent works, data or other materials arranged in a systematic or methodical way and capable of being individually accessed by electronic or other means;

(ii) "extraction" means the permanent or temporary transfer of all or a substantial part of the contents of a database to another medium by any means or in any form;

(iii) "maker of the database" means the natural or legal person or persons with control and responsibility for the undertaking of a substantial investment in making a database;

[Article 2 continues]

excludes subcontractors who may be commissioned to execute such tasks. In the same way that the term "author" in the Berne Convention applies to the successors in title of the author, the term "maker of a database" applies to the successors in title of the maker of a database. The successors in title of the maker of a database enjoy the full protection of the proposed Treaty.

2.07 Item (iv) defines the term "substantial investment". The investment may be in human, financial, technical or other resources essential to the production of a database. The human resources may, in addition to the "sweat of the brow", consist of the contribution of ideas, innovation and efforts that add to the quality of the product. The protection of a database does not, however, depend upon innovation or quality; mere investment is sufficient. The fact that the main requirement for protection is investment does not, however, reduce the value of the proposed system of protection since it also encourages innovation as well as industrious efforts in the production of databases. The investment must be sufficient, or "substantial", to qualify the database for protection. The substantiality requirement has been characterized in the expression "qualitatively or quantitatively significant"; this expression should be understood to mean qualitatively, quantitatively or both together. The measurement of significance must be based on objective criteria. In any dispute, it is the burden of the maker of the database to demonstrate the necessary investment.

2.08 The activities listed in Article 1(1) that may comprise the investment are the collection, assembly, verification, organization or presentation of the contents of the database. In practice, these are the steps in the production of a database that are most likely to involve substantial investments. A substantial investment in any one of the listed activities will fulfil the requirements for protection. It is recognized that "collection" and "assembly" are often interlinked, and "organization" and "presentation" of the contents may take place simultaneously. Any subsequent verification or re-verification is considered to be "verification" in the sense of Article 1(1).

2.09 Item (v) defines the term "substantial part". The substantiality of any portion of the database is assessed against the value of the database. This assessment should evaluate the qualitative and quantitative aspects of the portion, although neither aspect is more important than the other. As noted in connection with item (iv), "qualitatively or quantitatively" must be understood to mean either or both together. The value of the database refers to its commercial value. This value consists on one hand of direct investments made in the database and on the other hand of the market value or expected market value of the database. This assessment may also take into account the diminution in market value that may result from the use of the portion, including the added risk that the investment in the database will not be recoverable. It may even include an assessment of whether a new product using the portion could serve as a commercial substitute for the original, diminishing the market for the original.

2.10 According to item (v), "substantial part" means any portion of the database, "including an accumulation of small portions". In practice, repeated or systematic use of small portions of the contents of a database may have the same effect as extraction or utilization of a large, or substantial, part of the contents of the database. This construction is intended to ensure the effective functioning of the right and to avoid misappropriation.

[Article 2, continued]

(iv) "substantial investment" means any qualitatively or quantitatively significant investment of human, financial, technical or other resources in the collection, assembly, verification, organization or presentation of the contents of the database;

(v) "substantial part", in reference to the contents of a database, means any portion of the database, including an accumulation of small portions, that is of qualitative or quantitative significance to the value of the database;

[Article 2 continues]

2.11 In item (vi) a definition is provided for the term "utilization". Utilization is a broad concept that covers all forms of making a database or its contents available to the public. It comprises both tangible and intangible dissemination and diffusion, including the distribution of physical copies and all forms of transmission by wire or wireless means. Utilization covers the making of a database available to the public by both on-line and "local" means; it encompasses interactive on-line, on-demand operations where members of the public have access to the database at a place and at a time individually chosen by them, and it encompasses such local means as showing, "playing", demonstrating or otherwise making the contents of a database (such as a CD-ROM) perceptible to the public, even when no transmission is involved. Broadcasting and cable transmissions, whether subscription-based or not, may also be utilization of a database.

2.12 The term "public" has been used in the provision. The purpose for this is to make a distinction between relevant utilization and non-relevant communication between private parties. Utilization includes making available to the public by any means. No list of examples can be exhaustive. The expression "any means" includes all means now known or later developed. A database may be made available to the public even in the absence of any direct or indirect commercial advantage or financial gain.

[End of Notes on Article 2]

[Article 2, continued]

(vi) "utilization" means the making available to the public of all or a substantial part of the contents of a database by any means, including by the distribution of copies, by renting, or by on-line or other forms of transmission, including making the same available to the public at a place and at a time individually chosen by each member of the public.

[End of Article 2]

Notes on Article 3

3.01 Paragraph (1) contains the most important operative provision of the proposed Treaty. It accords to the maker of a database the right to authorize or prohibit the relevant acts of extraction and utilization. The right is by its nature an exclusive right. The contents of the provision have, to a great extent, already been determined by the definitions of "extraction", "substantial part" and "utilization" in Article 2.

3.02 The protection provided does not preclude any person from independently collecting, assembling or compiling works, data or materials from any source other than a protected database.

3.03 The right of utilization granted to the maker of a database covers, according to the definition of "utilization", the making available to the public of all or a substantial part of the contents of a database *inter alia* by the distribution of copies. Paragraph (2) allows Contracting Parties to provide for the exhaustion of the right of distribution on a national basis.

3.04 If it is possible for regional economic integration areas with their own legislation in this field to become parties to the Treaty the effect of the exhaustion of the right of distribution may be regional. The territories of such Contracting Parties consist of the territories of their member countries. There is thus no need to make separate mention of regional economic integration areas.

[End of Notes on Article 3]

Article 3**Rights**

(1) The maker of a database eligible for protection under this Treaty shall have the right to authorize or prohibit the extraction or utilization of its contents.

(2) Contracting Parties may, in their national legislation, provide that the right of utilization provided for in paragraph (1) does not apply to distribution of the original or any copy of any database that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

[End of Article 3]

Notes on Article 4

4.01 Paragraph (1) determines the first owner of the rights provided for in this Treaty. The expression "maker of the database" has been used in singular form in many provisions of the proposed Treaty. This expression must be understood to include its plural wherever there has been more than one maker of a database. When the rights in respect of a database belong to several makers, they own the rights jointly and the authorization of each rightholder is necessary for the extraction or utilization of a substantial part of the database. Likewise, when there is joint ownership of rights in a database, the consent of each of the rightholders is necessary for the assignment, transfer or licensing of the database.

4.02 Paragraph (2) provides that the rights established by the proposed Treaty are freely transferable. No limitations apply to this freedom of contract. National laws, of course, may impose certain requirements in connection with contracts generally, such as a requirement that they be embodied in written documents. Requirements of this type may also be imposed in connection with contracts concerning rights in databases.

4.03 A transferee of rights under paragraph (2) may enjoy all the same protection as the original maker of the database. The maker of a database may transfer all of the rights he has therein.

[End of Notes on Article 4]

Article 4

Rightholders

(1) The rights provided under this Treaty shall be owned by the maker of the database.

(2) The rights provided under this Treaty shall be freely transferable.

[End of Article 4]

Notes on Article 5

5.01 According to paragraph (1), Contracting Parties may provide, in their national legislation, exceptions to or limitations of the rights provided in this Treaty. This freedom is limited by the criteria originally introduced in Article 9(2) of the Berne Convention. First, the criteria permit exceptions only in certain special cases. Second, the exceptions may never conflict with normal exploitation of the database, and third, the exceptions may not unreasonably impair or prejudice the legitimate interests, including economic interests, of the rightholder. The provisions of paragraph (1) allow limitations on the rights of both extraction and utilization.

5.02 Paragraph (2) sets forth a specific rule permitting national legislation to determine whether and how to protect databases made by governmental entities, their agents and employees.

5.03 The rights and exceptions in the proposed Treaty are norms for minimum protection. Article 5 does not preclude national legislation that imposes stricter or narrower rules in respect of exceptions. For example, a Contracting Party may enact national legislation that excludes any limitation of the right to extract the contents of a database in electronic form for private purposes.

[End of Notes on Article 5]

Article 5

Exceptions

(1) Contracting Parties may, in their national legislation, provide exceptions to or limitations of the rights provided in this Treaty in certain special cases that do not conflict with the normal exploitation of the database and do not unreasonably prejudice the legitimate interests of the rightholder.

(2) It shall be a matter for the national legislation of Contracting Parties to determine the protection that shall be granted to databases made by governmental entities or their agents or employees.

[End of Article 5]

Notes on Article 6

6.01 According to paragraph (1), the benefit of protection is granted to nationals of Contracting Parties. According to the provisions of Article 7(4) makers of databases who have their habitual residence in a Contracting Party are assimilated to nationals of that Contracting Party.

6.02 By a reference to the provisions of paragraph (1), paragraph (2) contains a provision laying down the same principle for the benefit of companies, firms and other legal entities having certain points of attachment to a Contracting Party. The expression "companies, firms and other legal entities" is intended to cover all companies, firms, corporations, unions, associations, non-profit institutions and other legal persons.

6.03 Protection is given to the persons identified in paragraph (1) and paragraph (2) if they meet the criteria set forth in those provisions at the time of the making of the database, which is the moment when the database meets the requirements of Article 1(1).

[End of Notes on Article 6]

Article 6

Beneficiaries of Protection

(1) Each Contracting Party shall protect according to the terms of this Treaty makers of databases who are nationals of a Contracting Party.

(2) The provisions of paragraph (1) shall also apply to companies, firms and other legal entities formed in accordance with the laws of a Contracting Party or having their registered office, central administration or principal place of business within a Contracting Party; however, where such a company, firm or other legal entity has only its registered office in the territory of a Contracting Party, its operations must be genuinely linked on an on-going basis with the economy of a Contracting Party.

[End of Article 6]

Notes on Article 7

7.01 Article 7 contains rules on national treatment and independence of protection. The provisions closely follow the corresponding clauses in Article 5 of the Berne Convention. In accordance with the language in Article 6, these rules refer to the Contracting Party of which the maker of a database is a national, whereas the Berne Convention refers to the country of origin which is defined in the Convention.

7.02 It is proposed that global and unlimited national treatment shall be applied to the rights granted in the proposed Treaty. Paragraph (1) sets out the fundamental principle of national treatment, which is modelled on Article 5(1) of the Berne Convention. In addition, paragraph (1) guarantees all the rights specially granted by this Treaty in a manner similar to the aforementioned clause of the Berne Convention.

7.03 Paragraph (2) contains the rule governing protection of the maker of a database in the Contracting Party of which he is a national. Such protection shall be governed by national legislation. The provision follows the principle of the first sentence of Article 5(3) of the Berne Convention.

7.04 Paragraph (3) adds a provision on independence of protection. This provision corresponds to the language of Article 5(2) of the Berne Convention.

7.05 Paragraph (4) contains a provision according to which the criterion of habitual residence is assimilated to the criterion of nationality for the purposes of the proposed Treaty.

[End of Notes on Article 7]

Article 7**National Treatment and Independence of Protection**

(1) The maker of a database shall enjoy in respect of the protection provided for in this Treaty, in Contracting Parties other than the Contracting Party of which he is a national, the rights which their respective laws do now or may hereafter grant to their nationals as well as the rights specially granted by this Treaty.

(2) Protection of a database in the Contracting Party of which the maker of the database is a national shall be governed by national legislation.

(3) The enjoyment and the exercise of rights under this Treaty shall be independent of the existence of protection in the Contracting Party of which the maker of a database is a national. Apart from the provisions of this Treaty, the extent of protection, as well as the means and extent of redress, shall be governed exclusively by the laws of the Contracting Party where protection is claimed.

(4) Makers of databases who are not nationals of a Contracting Party but who have their habitual residence in a Contracting Party shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

[End of Article 7]

Notes on Article 8

8.01 The intellectual property protection provided for in the proposed Treaty is limited in duration. Provisions on the term of protection are found in Article 8. Two alternatives are offered in the Article concerning the term of protection. Alternative A follows the proposal made by the United States of America (document BCP/CE/VII/2-INR/CE/VI/2) according to which the term of protection would be at least 25 years, calculated according to Article 6 of that proposal. Alternative B is based on the term of 15 years proposed by the European Community and its Member States (document BCP/CE/VI/13).

8.02 The determination of the proper duration of any form of intellectual property protection is bound to depend on many factors, including the nature of the subject matter protected, the prevailing economic and technical circumstances and the interests of rightholders, users and society at large. In the case of databases, the need for protection in the first instance is connected to the ability of makers of databases to recover the investment they make in a database. The economic life-span of different databases varies depending on their content and the structure of the marketplace. For dynamic databases that are constantly changed and developed, a shorter term of protection could be justified. New versions may be protected under the proposed Treaty and old versions rapidly become outdated and useless. In the case of static databases, such as encyclopaedic, historical and cartographic databases, protection may be needed for a longer period of time. Indeed, the recovery of the heavy investments required by the production of such databases may justify or even necessitate a longer term of protection. For practical reasons, it would be advisable to adopt a single term of protection for all types of databases.

8.03 The 25-year and 15-year alternatives are found in paragraph (1) and paragraph (2) of Article 8. The decision on the term of protection has been left to the Diplomatic Conference.

8.04 In paragraph (1), it is proposed that the calculation of the term of protection should start from the time when the database first meets the requirements of Article 1(1). It is proposed that the term of protection laid down in the proposed Treaty would be a minimum term of protection. This is indicated by the words "at least" in the provision. As is customary in the field of copyright, it is proposed that the rights would endure for a fixed number of years starting from January 1 of the year following the date when the database first met the above-mentioned requirements.

8.05 According to the provisions of paragraph (2), the calculation of the term of protection would start from the date when the database was first made available to the public, if the database is made available to the public in any manner before the expiration of the term provided for in paragraph (1).

8.06 Paragraph (3) establishes the principle that when a database is substantially changed it becomes a new database, entitled to its own term of protection. The substantiality of the change is to be evaluated qualitatively, quantitatively or both qualitatively and quantitatively. The kinds of changes that will lead to the formation of a new database with its own term of protection are those substantial changes in the contents of the database that involve a new substantial investment. Such changes may result from an accumulation of successive acts, such as those included in the non-exhaustive list in the provision.

[End of Notes on Article 8]

Article 8

Term of Protection

(1) The rights provided for in this Treaty shall attach when a database meets the requirements of Article 1(1) and shall endure for at least

Alternative A: 25

Alternative B: 15

years from the first day of January in the year following the date when the database first met the requirements of Article 1(1).

(2) In the case of a database that is made available to the public, in whatever manner, before the expiry of the period provided for in paragraph (1), the term of protection shall endure for at least

Alternative A: 25

Alternative B: 15

years from the first day of January in the year following the date when the database was first made available to the public.

(3) Any substantial change to the database, evaluated qualitatively or quantitatively, including any substantial change resulting from the accumulation of successive additions, deletions, verifications, modifications in organization or presentation, or other alterations, which constitute a new substantial investment, shall qualify the database resulting from such investment for its own term of protection.

[End of Article 8]

Notes on Article 9

9.01 Article 9 sets forth the principle of formality-free protection. The protection provided for in the proposed Treaty may not be subject to registration, notice, marking, or any other formality.

[End of Notes on Article 9]

Article 9**Formalities**

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

[End of Article 9]

Notes on Article 10

10.01 Article 10 contains provisions on obligations concerning technological measures.

10.02 According to paragraph (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression "knowing or having reasonable grounds to know" has the same meaning as the expression "knowingly or with reasonable grounds to know" in the provisions on enforcement in the TRIPS Agreement.

10.03 Paragraph (2) includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 14 of the proposed Treaty, only concern "any act of infringement of intellectual property rights covered by this Agreement". The obligations established in the proposed Article 10 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

10.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

10.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

10.06 Paragraph (3) contains the definition of a "protection-defeating device". It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase "primary purpose or primary effect of which is to circumvent..." has been used rather than "specifically designed or adapted to circumvent...".

10.07 A proposal on this issue was made for the May 1996 session of the Committees of Experts by the United States of America (document BCP/CE/VII/2-INR/CE/VI/2). The ongoing international discussion has led to a number of modifications and these are incorporated in Article 10.

[End of Notes on Article 10]

Article 10**Obligations concerning Technological Measures**

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

[End of Article 10]

Notes on Article 11

11.01 According to Article 11, the introduction of the new form of protection provided for in the proposed Treaty adheres to a principle that is familiar from the field of copyright.

11.02 In paragraph (1), the right is introduced in such a way that all existing databases become protected from the moment of the entry into force of the proposed Treaty for each Contracting Party. The normal term of protection under Article 6 applies. A database that met the requirements of Article 1(1) before the entry into force of the proposed Treaty for a given Contracting Party, but within the term prescribed in Article 6, will be protected for the remainder of the Article 6 term. A database that met the requirements of Article 1(1) a longer time ago than the term prescribed in Article 6 will remain unprotected.

11.03 Paragraph (2) makes clear that the protection accorded by the proposed Treaty shall not be retroactive and shall not disrupt existing agreements. The protection is without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of the proposed Treaty for each Contracting Party.

11.04 Paragraph (3) allows transitional arrangements for a limited period of time. The purpose of these provisions is to protect investments made in the making copies by persons who in good faith engaged in the exploitation of databases in a situation where no protection existed. The provision makes it possible for Contracting Parties to provide for conditions under which copies made before the entry into force of the Treaty may continue to be distributed to the public after the entry into force of the Treaty. The time limit for such provisions is two years. Transitional arrangements only concern distribution of copies and do not extend to the reproduction of new copies by extraction, or to utilization of the database by making it available to the public by transmission.

[End of Notes on Article 11]

Article 11**Application in Time**

(1) Contracting Parties shall also grant protection pursuant to this Treaty in respect of databases that met the requirements of Article 1(1) at the date of the entry into force of this Treaty for each Contracting Party. The duration of such protection shall be determined by the provisions of Article 8.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty in each Contracting Party.

(3) A Contracting Party may provide for conditions under which copies of databases which were lawfully made before the date of the entry into force of this Treaty for that Contracting Party may be distributed to the public, provided that such provisions do not allow distribution for a period longer than two years from that date.

[End of Article 11]

Notes on Article 12

12.01 Article 12 deals with the relationship between the protection accorded under the proposed Treaty and existing or future rights and obligations. The protection granted under the proposed Treaty shall leave intact and shall in no way affect any "conventional" rights in the database or its contents. This principle is extended as well to any obligations that might exist with respect to the database or its contents. The Article contains a non-exhaustive list of rights and obligations.

[End of Notes on Article 12]

Article 12**Relation to Other Legal Provisions**

The protection accorded under this Treaty shall be without prejudice to any other rights in, or obligations with respect to, a database or its contents, including laws in respect of copyright, rights related to copyright, patent, trademark, design rights, antitrust or competition, trade secrets, data protection and privacy, access to public documents and the law of contract.

[End of Article 12]

Notes on Article 13

13.01 Two alternatives on enforcement are presented in Article 13. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement.

13.02 Alternative A consists of the text of Article 13 and an Annex. Paragraph (1) introduces the Annex which contains the substantive provisions on enforcement. Paragraph (2) states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

13.03 Alternative B incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

[End of Notes on Article 13]

Article 13**Special Provisions on Enforcement of Rights**

Alternative A (continues on page 43)

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

[End of Article 13]

Notes on the Annex

14.01 The Annex forms the second part of Alternative A of Article 13. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.

14.02 No detailed Notes are offered on the specific provisions of the Annex.

[End of Notes on the Annex]

[The Annex is not reproduced here. It is identical to the Annex to document CRNR/DC/4, reproduced on pages 225 to 233.]

[End of document]

CRNR/DC/7

December 2, 1996 (Original: English)

COMMUNICATION BY THE EUROPEAN COMMISSION

The Director General of WIPO has received the following letter from Ambassador, R.E. Abbott, Deputy Head of Delegation, European Commission, Permanent Delegation to the International Organizations in Geneva:

“I am writing to you in connection with the Diplomatic Conference organised by the *World Intellectual Property Organisation* in Geneva next month concerning certain copyright and neighbouring rights questions.

“As you know, one of the issues for consideration at the Conference concerns the status and voting rights of the European Community in the Conference and eventual treaties under negotiation. In this connection the European Community and its Member States have recently communicated their position to the members of *WIPO* which participated in the meeting in May this year of the Assembly of the Berne Union.

I attach a copy of this letter.

“I shall be grateful if you will ensure the distribution of this text as a document of the Conference”.

The text of the letter the copy of which is attached to Ambassador R.E. Abbott's letter is dated October 28, 1996, and which is signed by Ambassador Anne Anderson, Permanent Representative of Ireland and by Mr. Ian Wilkinson, Deputy Head, Chargé d'Affaires a.i., European Commission, Permanent Delegation to the International Organizations in Geneva, is as follows:

“Dear Ambassador,

“We are writing to you on behalf on the European Community and its Member States in connection with the WIPO Diplomatic Conference on certain copyright and neighbouring rights questions which will take place in Geneva from December 2 to 20, 1996.

“We would like, in particular, to follow up on some of the issues that were examined in the context of the Preparatory Committee for the Diplomatic Conference (Geneva, 20-22 May, 1996) and which have been reflected in the Basic Proposal for the Final Clauses of the treaties and the Draft Rules of Procedure of the Diplomatic Conference published by the WIPO International Bureau (documents CRNR/DC/3 and CRNR/DC/2, respectively).

“The issues in question concern the status of the European Community as a contracting party to the treaties and its voting rights both in the Assembly of the future treaties and in the Diplomatic Conference.

“First of all, we would like to confirm that the EC and its Member States welcome the Contracting Party status provided for the EC in the Basic Proposal for the Final Clauses as a practical and legally sound solution. The basis for this status resides in the existing state of Community competence. This competence stems from the authority which the member States have given to the institutions of the Community to adopt legislation having binding effect within their territories. A significant number of EC legislative measures have been adopted over recent years in the Copyright and Related Rights area (including the sui generis protection of databases). These legislative measures cover a number of the issues in the current negotiations in WIPO (included in annex to this letter is a list of this legislation and the references to the text as published in the *Official Journal of the European Communities**). To that extent that the provisions of the proposed agreements affect these legislative measures, or alter their scope, the European Community has, under the Treaties establishing the European Community, exclusive competence to enter into the agreements.

“As to the question of the voting rights of the European Community both under the Assembly of the future treaties and at the Diplomatic Conference, as well as the question of any conditions relating to the exercise of such voting rights, the European

* The annex has not been attached to the copy of the letter received by the Director General.

Community and its Member States would like to restate that no extra or additional vote for the EC is being requested. The idea is that the EC should be able to vote, in place of its Member States, on matters that are within its exclusive competence. This is the logical consequence of the EC having its own legal status under international law and having exclusive competence over a number of the issues which will be covered by the future treaties. In no case will the votes exercised by the Community and its Member States exceed the total number of its member States party to the treaties.

“As to the question of any conditions relating to the exercise of the vote by the EC, we consider that a recent relevant example regarding the status and voting rights granted to the European Community is the Marrakech Agreement establishing the World Trade Organisation applicable to the Agreement on Trade Related Aspects of Intellectual Property Rights - the so called TRIPS Agreement. There are no conditions applicable to the exercise of the Community’s right to vote on matters within its competence in the context of the WTO.

“On a related issue, we would also like to take this opportunity to explain a little further the position of the EC and its Member States with regard to the possibility of other intergovernmental organisations becoming contracting parties to the eventual treaties. We have no objections to such a provision being included. Our position is that it is inherent in contracting party status in an international treaty under traditional rules of international law that the party has exclusive competence and authority over some or all of the subject matter of the treaty in question with regard to certain nationals and with respect to a certain territory. An intergovernmental organisation should also have the authority to enter into international relations in the place of its Member States on the issue in question. Only on these grounds will any intergovernmental organisation have the necessary legal authority to warrant contracting party status. This is the reasoning which supported the position adopted during the recent meetings in Geneva and which will underline the position to be taken in the Diplomatic Conference in December this year”.

[End of document]

CRNR/DC/8

December 3, 1996 (Original: English)

**PROPOSED AMENDMENT OF RULES 2(2) AND 33
of the draft rules of procedure***submitted by the Delegation of the United States of America*

The Delegation of the United States of America proposes that the following text replace current draft Rule 2(2) and draft Rules 33(1) and 33(3) to address the question of voting rights of the Special Delegation of the European Community. The text of Rule 33(2) would remain as is found in document CRNR/DC/2, but is reproduced below for convenience.

Rule 2(2): Composition of the Conference

(2) References in these Rules of Procedure to Member Delegations shall be considered, except as otherwise provided (see Rules 11(2), 33 and 34), as references also to the Special Delegation.

Rule 33: Right to vote

(1) The Special Delegation has no right to vote and, for purposes of paragraph (2) of this Rule and Rule 34, the Special Delegation is not covered by the term "Member Delegations."

(2) Each Member Delegation shall have the right to vote. A Member Delegation shall have one vote, may represent itself only and may vote in its name only.

(3) The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that

(i) the Special Delegation shall not exercise the rights to vote of the Member States of the European Community if the Member States exercise their rights to vote and vice versa, and

(ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote.

[End of document]

CRNR/DC/9

December 3, 1996 (Original: English)

RULES OF PROCEDURE OF THE DIPLOMATIC CONFERENCE*as adopted on December 3, 1996, by the Diplomatic Conference*

[The text of this document is identical to document CRNR/DC/9 Rev., except for Rule 13(2) which state 13 elected members, instead of 18, and Rule 15(1) which state 14 Vice Presidents, instead of 18.]

CRNR/DC/9 Rev.

December 5, 1996 (Original: English)

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CHAPTER I: OBJECTIVE, COMPETENCE, COMPOSITION AND SECRETARIAT OF THE CONFERENCE**Rule 1: Objective and Competence of the Conference**

(1) The objective of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (hereinafter referred to as “the Conference”) is to negotiate and adopt a treaty or treaties on certain copyright and neighboring rights questions (hereinafter referred to as “the Treaty or Treaties”).

(2) The Conference, meeting in Plenary, shall be competent to:

(i) adopt the Rules of Procedure of the Conference (hereinafter referred to as “these Rules”) and to make any amendments thereto;

(ii) adopt the agenda of the Conference;

(iii) decide on credentials, full powers, letters or other documents presented in accordance with Rules 6, 7 and 8 of these Rules;

- (iv) adopt the Treaty or Treaties;
- (v) adopt any recommendation or resolution whose subject matter is germane to the Treaty or Treaties;
- (vi) adopt any agreed statements to be included in the Records of the Conference;
- (vii) adopt any final act of the Conference;
- (viii) deal with all other matters referred to it by these Rules or appearing on its agenda.

Rule 2: Composition of the Conference

- (1) The Conference shall consist of:
 - (i) delegations of the States members of World Intellectual Property Organization (hereinafter referred to as “the Member Delegations”),
 - (ii) the special delegation of the European Community (hereinafter referred to as the “Special Delegation”),
 - (iii) the delegations of States members of the United Nations other than the States members of the World Intellectual Property Organization invited to the Conference as observers (hereinafter referred to as “the Observer Delegations”),
 - (iv) representatives of intergovernmental and non-governmental organizations invited to the Conference as observers (hereinafter referred to as “the Observer Organizations”).
- (2) References in these Rules of Procedure to Member Delegations shall be considered, except as otherwise provided (see Rules 11(2), 33 and 34), as references also to the Special Delegation.
- (3) References in these Rules of Procedure to “Delegations” shall be considered as references to the three kinds (Member, Special and Observer) of Delegations but not to Observer Organizations.

Rule 3: Secretariat of the Conference

- (1) The Conference shall have a Secretariat provided by the International Bureau of the World Intellectual Property Organization (hereinafter referred to as “the International Bureau” and “WIPO,” respectively).
- (2) The Director General of WIPO and any official of the International Bureau designated by the Director General of WIPO may participate in the discussions of the Conference, meeting in Plenary, as well as in any committee or working group thereof and

may, at any time, make oral or written statements, observations or suggestions to the Conference, meeting in Plenary, and any committee or working group thereof concerning any question under consideration.

(3) The Director General of WIPO shall, from among the staff of the International Bureau, designate the Secretary of the Conference and a Secretary for each committee and for each working group.

(4) The Secretary of the Conference shall direct the staff required by the Conference.

(5) The Secretariat shall provide for the receiving, translation, reproduction and distribution of the required documents, for the interpretation of oral interventions and for the performance of all other secretarial work required for the Conference.

(6) The Director General of WIPO shall be responsible for the custody and preservation in the archives of WIPO of all documents of the Conference. The International Bureau shall distribute the final documents of the Conference after the closing of the Conference.

CHAPTER II: REPRESENTATION

Rule 4: Delegations

(1) Each Delegation shall consist of one or more delegates and may include advisors.

(2) Each Delegation shall have a Head of Delegation and may have a Deputy Head of Delegation.

Rule 5: Observer Organizations

An Observer Organization may be represented by one or more representatives.

Rule 6: Credentials and Full Powers

(1) Each Delegation shall present credentials.

(2) Full powers shall be required for signing the Treaty or Treaties. Such powers may be included in the credentials.

Rule 7: Letters of Appointment

The representatives of Observer Organizations shall present a letter or other document appointing them.

Rule 8: Presentation of Credentials, etc.

The credentials and full powers referred to in Rule 6 and the letters or other documents referred to in Rule 7 shall be presented to the Secretary of the Conference, preferably not later than twenty-four hours after the opening of the Conference.

Rule 9: Examination of Credentials, etc.

(1) The Credentials Committee referred to in Rule 11 shall examine the credentials, full powers, letters or other documents referred to in Rules 6 and 7, respectively, and shall report to the Conference, meeting in Plenary.

(2) The decision on whether a credential, full powers, letter or other document is in order shall be made by the Conference, meeting in Plenary. Such decision shall be made as soon as possible and in any case before the adoption of the Treaty or Treaties.

Rule 10: Provisional Participation

Pending a decision upon their credentials, letters or other documents of appointment, Delegations and Observer Organizations shall be entitled to participate provisionally in the deliberations of the Conference as provided in these Rules.

CHAPTER III: COMMITTEES AND WORKING GROUPS

Rule 11: Credentials Committee

(1) The Conference shall have a Credentials Committee.

(2) The Credentials Committee shall consist of seven Member Delegations elected by the Conference, meeting in Plenary, from among the Member Delegations, except that the Special Delegation shall not be eligible for membership in the Credentials Committee.

Rule 12: Main Committees and Their Working Groups

(1) The Conference shall have two Main Committees. Main Committee I shall be responsible for proposing for adoption by the Conference, meeting in Plenary, the substantive law provisions of the Treaty or Treaties and any recommendation, resolution or agreed statement referred to in Rule 1(2)(v) and (vi). Main Committee II shall be responsible for proposing for adoption by the Conference, meeting in Plenary, any administrative and the final clauses of the Treaty or Treaties.

(2) Each Main Committee shall consist of all the Member Delegations.

(3) Each Main Committee may create working groups. In creating a working group, the Main Committee creating it shall specify the tasks of the Working Group, decide on the number of the members of the Working Group and elect such members from among the Member Delegations.

Rule 13: Drafting Committee

(1) The Conference shall have a Drafting Committee.

(2) The Drafting Committee shall consist of 18 elected members and two *ex officio* members. The elected members shall be elected by the Conference, meeting in Plenary, from among the Member Delegations. The Chairmen of the two Main Committees shall be the *ex officio* members.

(3) The Drafting Committee shall prepare drafts and give advice on drafting as requested by either Main Committee. The Drafting Committee shall not alter the substance of the texts submitted to it. It shall coordinate and review the drafting of all texts submitted to it by the Main Committees, and it shall submit the texts so reviewed for final approval to the competent Main Committee.

Rule 14: Steering Committee

(1) The Conference shall have a Steering Committee.

(2) The Steering Committee shall consist of the President and Vice-Presidents of the Conference, the Chairman of the Credentials Committee, the Chairmen of the Main Committees and the Chairman of the Drafting Committee. The meetings of the Steering Committee shall be presided over by the President of the Conference.

(3) The Steering Committee shall meet from time to time to review the progress of the Conference and to make decisions for furthering such progress, including, in particular, decisions on the coordinating of the meetings of the Plenary, the committees and the working groups.

(4) The Steering Committee shall propose the text of any final act of the Conference (see Rule 1(2)(vii)), for adoption by the Conference, meeting in Plenary.

CHAPTER IV: OFFICERS

Rule 15: Officers and their Election; Precedence Among Vice-Presidents and Vice-Chairmen

(1) The Conference shall have a President and 18 Vice-Presidents.

(2) The Credentials Committee, each of the two Main Committees and the Drafting Committee shall have a Chairman and three Vice-Chairmen.

(3) Any Working Group shall have a Chairman and two Vice-Chairmen.

(4) The Conference, meeting in Plenary, and presided over by the Director General of WIPO, shall elect its President, and, then, presided over by its President shall elect its Vice-Presidents and the officers of the Credentials Committee, the Main Committees and the Drafting Committee.

(5) The officers of a Working Group shall be elected by the Main Committee that establishes that Working Group.

(6) Precedence among the Vice-Presidents or Vice-Chairmen of a given body (the Conference, the Credentials Committee, the two Main Committees, any Working Group, the Drafting Committee) shall be determined by the place occupied by the name of the State of each of them in the list of Member Delegations established in the alphabetical order of the names of the States in French, beginning with the Member Delegation whose name shall have been drawn by lot by the President of the Conference. The Vice-President or Vice-Chairman of a given body who has precedence over all the other Vice-Presidents or Vice-Chairmen of that body shall be called "the ranking" Vice-President or Vice-Chairman of that body.

Rule 16: Acting President; Acting Chairman

(1) If the President or any Chairman is absent from a meeting, the meeting shall be presided over, as Acting President or Acting Chairman, by the ranking Vice-President or Vice-Chairman of that body.

(2) If all the officers of a body are absent from any meeting of the body concerned, that body shall elect an Acting President or Acting Chairman, as the case may be.

Rule 17: Replacement of the President or the Chairman

If the President or any Chairman becomes unable to perform his functions for the remainder of the duration of the Conference, a new President or Chairman shall be elected.

Rule 18: Vote by the Presiding Officer

(1) No President or Chairman, whether elected as such or acting (hereinafter referred to as "the Presiding Officer"), shall take part in voting. Another member of his Delegation may vote for that Delegation.

(2) Where the Presiding Officer is the only member of his Delegation, he may vote, but only in the last place.

CHAPTER V: CONDUCT OF BUSINESS

Rule 19: Quorum

(1) A quorum shall be required in the Conference, meeting in Plenary; it shall, subject to paragraph (3), be constituted by one-half of the Member Delegations represented at the Conference.

(2) A quorum shall be required for the meetings of each Committee (the Credentials Committee, the two Main Committees, the Drafting Committee and the Steering Committee) and any working group; it shall be constituted by one-half of the members of the Committee or working group.

(3) The quorum at the time of the adoption of the Treaty or Treaties by the Conference, meeting in Plenary, shall be constituted by one half of the Member Delegations whose credentials were found in order by the Conference meeting in Plenary.

Rule 20: General Powers of the Presiding Officer

(1) In addition to exercising the powers conferred upon Presiding Officers elsewhere by these Rules, the Presiding Officer shall declare the opening and closing of the meetings, direct the discussions, accord the right to speak, put questions to the vote, and announce decisions. The Presiding Officer shall rule on points of order and, subject to these Rules, shall have complete control of the proceedings at any meeting and over the maintenance of order thereat.

(2) The Presiding Officer may propose to the body which he presides the limitation of time to be allowed to each speaker, the limitation of the number of times each Delegation may speak on any question, the closure of the list of speakers or the closure of the debate. The Presiding Officer may also propose the suspension or the adjournment of the meeting, or the adjournment of the debate on the question under discussion. Such proposals of the Presiding Officer shall be considered as adopted unless immediately rejected.

Rule 21: Speeches

(1) No person may speak without having previously obtained the permission of the Presiding Officer. Subject to Rules 22 and 23, the Presiding Officer shall call upon persons in the order in which they ask for the floor.

(2) The Presiding Officer may call a speaker to order if the remarks of the speaker are not relevant to the subject under discussion.

Rule 22: Precedence in Receiving the Floor

(1) Member Delegations asking for the floor are generally given precedence over Observer Delegations asking for the floor, and Member Delegations and Observer Delegations are generally given precedence over Observer Organizations.

(2) The Chairman of a Committee or working group may be given precedence during discussions relating to the work of the Committee or working group concerned.

(3) The Director General of WIPO or his representative may be given precedence for making statements, observations or suggestions.

Rule 23: Points of Order

(1) During the discussion of any matter, any Member Delegation may rise to a point of order, and the point of order shall be immediately decided by the Presiding Officer in accordance with these Rules. Any Member Delegation may appeal against the ruling of the Presiding Officer. The appeal shall be immediately put to the vote, and the Presiding Officer's ruling shall stand unless the appeal is approved.

(2) The Member Delegation that has risen to a point of order under paragraph (1) may not speak on the substance of the matter under discussion.

Rule 24: Limit on Speeches

In any meeting, the Presiding Officer may decide to limit the time allowed to each speaker and the number of times each Delegation and Observer Organization may speak on any question. When the debate is limited and a Delegation or Observer Organization has used up its allotted time, the Presiding Officer shall call it to order without delay.

Rule 25: Closing of List of Speakers

(1) During the discussion of any given question, the Presiding Officer may announce the list of participants who have asked for the floor and decide to close the list as to that question. The Presiding Officer may nevertheless accord the right of reply to any speaker if a speech, delivered after the list of speakers has been closed, makes it desirable.

(2) Any decision made by the Presiding Officer under paragraph (1) may be the subject of an appeal under Rule 23.

Rule 26: Adjournment or Closure of Debate

Any Member Delegation may at any time move the adjournment or closure of the debate on the question under discussion, whether or not any other participant has asked for the floor. In addition to the proposer of the motion to adjourn or close the debate, permission to speak

on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote. The Presiding Officer may limit the time allowed to speakers under this Rule.

Rule 27: Suspension or Adjournment of the Meeting

During the discussion of any matter, any Member Delegation may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote.

Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions

(1) Subject to Rule 23, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- (i) to suspend the meeting,
- (ii) to adjourn the meeting,
- (iii) to adjourn the debate on the question under discussion,
- (iv) to close the debate on the question under discussion.

(2) Any Member Delegation that has been given the floor on a procedural motion may speak on that motion only, and may not speak on the substance of the matter under discussion.

Rule 29: Basic Proposal; Proposals for Amendment

(1)(a) Documents Nos. CRNR/DC/3 to 6 shall constitute the basis of the discussions in the Conference, and the text of the draft Treaty or Treaties contained in those documents shall constitute the “basic proposal.”

(b) Where, for any given provision of the draft Treaty or Treaties, there are two or three alternatives in the basic proposal, consisting of either two or three texts, or one or two texts and an alternative that there should be no such provision, the alternatives shall be designated with the letters A, B and, where applicable, C, and shall have equal status. Discussions shall take place simultaneously on the alternatives and, if voting is necessary and there is no consensus on which alternative should be put to the vote first, each Member Delegation shall be invited to indicate its preference among the two or three alternatives. The alternative supported by more Member Delegations than the other one or two alternatives shall be put to the vote first.

(c) Wherever the basic proposal contains words within square brackets, only the text that is not within square brackets shall be regarded as part of the basic proposal, whereas words within square brackets shall be treated as a proposal for amendment if presented as provided in paragraph (2).

(2) Any Member Delegation may propose amendments to the basic proposal.

(3) Proposals for amendment shall, as a rule, be submitted in writing and handed to the Secretary of the body concerned. The Secretariat shall distribute copies to the Delegations and the Observer Organizations. As a general rule, a proposal for amendment cannot be taken into consideration and discussed or put to the vote at a meeting unless copies of it have been distributed not later than three hours before it is taken into consideration. The Presiding Officer may, however, permit the taking into consideration and discussion of a proposal for amendment even though copies of it have not been distributed or have been distributed less than three hours before it is taken into consideration.

Rule 30: Decisions on the Competence of the Conference

(1) If a Member Delegation moves that a duly seconded proposal should not be taken into consideration by the Conference because it is outside the latter's competence, that motion shall be decided upon by the Conference, meeting in Plenary, before the proposal is taken into consideration.

(2) If the motion referred to in paragraph (1), above, is made in a body other than the Conference, meeting in Plenary, it shall be referred to the Conference, meeting in Plenary, for a ruling.

Rule 31: Withdrawal of Procedural Motions and Proposals for Amendment

Any procedural motion and any proposal for amendment may be withdrawn by the Member Delegation that has made it, at any time before voting on it has commenced, provided that no amendment to it has been proposed by another Member Delegation. Any motion or proposal thus withdrawn may be reintroduced by any other Member Delegation.

Rule 32: Reconsideration of Matters Decided

When any matter has been decided by a body, it may not be reconsidered by that body unless so decided by the majority applicable under Rule 34(2)(ii). In addition to the proposer of the motion to reconsider, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing the motion, after which the motion shall immediately be put to the vote.

CHAPTER VI: VOTING

Rule 33: Right to Vote

(1) Each Member Delegation shall have the right to vote. A Member Delegation shall have one vote, may represent itself only and may vote in its name only.

(2) The Special Delegation has no right to vote and, for the purposes of paragraph (1) of this Rule and Rule 34, the Special Delegation is not covered by the term "Member Delegations."

(3) The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that

- (i) the Special Delegation shall not exercise the rights to vote of the Member States of the European Community if the Member States exercise their rights to vote and vice versa, and
- (ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote.

Rule 34: Required Majorities

- (1) All decisions of all bodies shall be made as far as possible by consensus.
- (2) If it is not possible to attain consensus, the following decisions shall require a majority of two-thirds of the Member Delegations present and voting:
 - (i) adoption by the Conference, meeting in Plenary, of these Rules, and, once adopted, any amendment to them,
 - (ii) decision by any of the bodies to reconsider, under Rule 32, a matter decided,
 - (iii) adoption by the Conference, meeting in Plenary, of the Treaty or Treaties,

whereas all other decisions of all bodies shall require a simple majority of the Member Delegations present and voting.

(3) "Voting" means casting an affirmative or negative vote; express abstention or non-voting shall not be counted.

Rule 35: Requirement of Seconding; Method of Voting

- (1) Any proposal for amendment made by a Member Delegation shall be put to a vote only if seconded by at least one other Member Delegation.
- (2) Voting on any question shall be by show of hands unless a Member Delegation, seconded by at least one other Member Delegation, requests a roll-call, in which case it shall be by roll-call. The roll shall be called in the alphabetical order of the names in French of the States, beginning with the Member Delegation whose name shall have been drawn by lot by the Presiding Officer.

Rule 36: Conduct During Voting

(1) After the Presiding Officer has announced the beginning of voting, the voting shall not be interrupted except on a point of order concerning the actual conduct of the voting.

(2) The Presiding Officer may permit a Member Delegation to explain its vote or its abstention, either before or after the voting.

Rule 37: Division of Proposals

Any Member Delegation may move that parts of the basic proposal or of any proposal for amendment be voted upon separately. If the request for division is objected to, the motion for division shall be put to a vote. In addition to the proposer of the motion for division, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it. If the motion for division is carried, all parts of the basic proposal or of the proposal for amendment that have been separately approved shall again be put to the vote, together, as a whole. If all operative parts of the basic proposal or of the proposal for amendment have been rejected, the basic proposal or the proposal for amendment shall be considered rejected as a whole.

Rule 38: Voting on Proposals for Amendment

(1) Any proposal for amendment shall be voted upon before the text to which it relates is voted upon.

(2) Proposals for amendment relating to the same text shall be put to the vote in the order of their substantive remoteness from the said text, the most remote being put to the vote first and the least remote being put to the vote last. If, however, the adoption of any proposal for amendment necessarily implies the rejection of any other proposal for amendment or of the original text, such other proposal or text shall not be put to the vote.

(3) If one or more proposals for amendment relating to the same text are adopted, the text as amended shall be put to the vote.

(4) Any proposal the purpose of which is to add to or delete from a text shall be considered a proposal for amendment.

Rule 39: Voting on Proposals for Amendment on the Same Question

Subject to Rule 38, where two or more proposals relate to the same question, they shall be put to the vote in the order in which they have been submitted, unless the body concerned decides on a different order.

Rule 40: Equally Divided Votes

(1) Subject to paragraph (2), if a vote is equally divided on a matter that calls only for a simple majority, the proposal shall be considered rejected.

(2) If a vote is equally divided on a proposal for electing a given person to a given position as officer and the nomination is maintained, the vote shall be repeated, until either that nomination is adopted or rejected or another person is elected for the position in question.

CHAPTER VII: LANGUAGES AND MINUTES**Rule 41: Languages of Oral Interventions**

(1) Subject to paragraph (2), oral interventions made in the meetings of any of the bodies shall be in Arabic, Chinese, English, French, Russian or Spanish, and interpretation shall be provided by the Secretariat into the other five languages.

(2) Any of the Committees and any working group may, if none of its members objects, decide to dispense with interpretation or to limit interpretation to some only of the languages that are referred to in paragraph (1).

Rule 42: Summary Minutes

(1) Provisional summary minutes of the meetings of the Conference, meeting in Plenary, and of the Main Committees shall be drawn up by the International Bureau and shall be made available as soon as possible after the closing of the Conference to all speakers, who shall, within two months after the minutes have been made available, inform the International Bureau of any suggestions for changes in the minutes of their own interventions.

(2) The final summary minutes shall be published in due course by the International Bureau.

Rule 43: Languages of Documents and Summary Minutes

(1) Any written proposal shall be presented to the Secretariat in Arabic, Chinese, English, French, Russian or Spanish. Such proposal shall be distributed by the Secretariat in Arabic, Chinese, English, French, Russian and Spanish.

(2) Reports of the Committees and any working group shall be distributed in Arabic, Chinese, English, French, Russian and Spanish. Information documents of the Secretariat shall be distributed in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

(3)(a) Provisional summary minutes shall be drawn up in the language used by the speaker if the speaker has used English, French or Spanish; if the speaker has used another

language, the intervention shall be rendered in English or French at the choice of the International Bureau.

(b) The final summary minutes shall be made available in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

CHAPTER VIII: OPEN AND CLOSED MEETINGS

Rule 44: Meetings of the Conference and of the Main Committees

The meetings of the Conference, meeting in Plenary, and of the Main Committees shall be open to the public unless the Conference, meeting in Plenary, or the interested Main Committee, decides otherwise.

Rule 45: Meetings of Other Committees and of Working Groups

The meetings of the Credentials Committee, the Drafting Committee, the Steering Committee and any working group shall be open only to the members of the Committee or the working group concerned and to the Secretariat.

CHAPTER IX: OBSERVER DELEGATIONS AND OBSERVER ORGANIZATIONS

Rule 46: Status of Observers

(1) Observer Delegations may attend, and make oral statements in, the Plenary meetings of the Conference and the meetings of the Main Committees.

(2) Observer Organizations may attend the Plenary meetings of the Conference and the meetings of the Main Committees. Upon the invitation of the Presiding Officer, they may make oral statements in those meetings on questions within the scope of their activities.

(3) Written statements submitted by Observer Delegations or by Observer Organizations on subjects for which they have a special competence and which are related to the work of the Conference shall be distributed by the Secretariat to the participants in the quantities and in the languages in which the written statements were made available to it.

CHAPTER X: AMENDMENTS TO THE RULES OF PROCEDURE

Rule 47: Possibility of Amending the Rules of Procedure

With the exception of the present Rule, these Rules may be amended by the Conference, meeting in Plenary.

CHAPTER XI: FINAL ACT

Rule 48: Signing of the Final Act

If a final act is adopted, it shall be open for signature by any Delegation.

[End of document]

CRNR/DC/10

December 4, 1996 (Original: English)

AMENDMENT TO ARTICLE 104 OF DRAFT TREATIES

proposed by the Delegation of Israel

The Delegation of Israel proposes that the following text replace current draft article 104 to address the question of reservations to the Treaties.

1. The present text be deleted.
2. Reservations may be made where specifically permitted.

[End of document]

CRNR/DC/11

December 4, 1996 (Original: English)

AMENDMENT TO ARTICLE 6 OF DRAFT TREATY No. 1

proposed by the Delegation of Israel

The Delegation of Israel proposes that the following sub-article be added to Article 6:

(3) By means of a notification deposited with the Director General of the World Intellectual Property Organization at the time of ratification, acceptance or accession, any Contracting Party may declare that it will not apply the provisions of sub-articles (1) and (2) of this Article.

[End of document]

CRNR/DC/12

December 6, 1996 (Original: English)

AMENDMENTS TO ARTICLES 6, 7, 8, 10, 12, 13 AND 14 OF DRAFT TREATY No. 1

*proposed by the Delegation of Singapore***Article 6: Abolition of non-voluntary Licenses**

1. **First proposal:** Delete Article 6.
2. **Alternative proposal:**

Replace Article 6(1) by the following:

- (1) "Within 7 years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licences under Article 11 bis(2) of the Berne Convention in respect of the broadcasting of a work."

Replace Article 6(2) by the following:

(2) Within 7 years of ratifying or acceding to this Treaty, Contracting Parties shall no longer apply the provisions of Article 13 of the Berne Convention.”

Article 7: Scope of Right of Reproduction

Article 7(1): The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorising the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary in any manner or form. [Same text as in Basic Proposal].

Replace paragraph (2) by the following:

“Article 7(2): It shall be permissible to make temporary reproductions of works where such reproductions-

- (a) have the purpose of making perceptible an otherwise imperceptible work; or
- (b) are of a transient or incidental nature; or
- (c) facilitate transmission of a work and have no economic value independent from facilitating transmission;

these being special cases where such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.”

Article 8: Right of Distribution/Right of Importation

Delete Alternative A in the Article.

Article 10: Right of Communication

The provision is amended by numbering the existing text as paragraph (1) and by inserting the following as a new paragraph (2):

“(2): The mere provision of facilities for enabling or making any such communication shall not constitute an infringement.”

Article 12: Limitations and Exceptions

1. It is proposed that paragraph (1) be amended as follows:

- (a) Delete the words “only” in line 2;
- (b) Replace the word “that” by “which” in line 3.

The first is to make the provision consistent with Berne and TRIPS by avoiding any change in meaning. The second change is consequential.

Article 13: Obligations concerning Technological Measures

Delete the expression “primary purpose or primary effect” in line 2 of paragraph 3 and replace by the expression “sole intended purpose”.

Article 14: Obligations concerning Rights Management Information

The applicability of “Limitations and Exceptions” to this provision has to be considered.

[End of document]

CRNR/DC/13

December 6, 1996 (Original: English)

AMENDMENTS TO ARTICLES 5 AND 9 OF TREATY No. 2

proposed by the Delegation of Singapore

Article 5: Moral Rights of Performers

Delete the provision.

Article 9: Right of Distribution/Right of Importation

Delete Alternative E.

[End of document]

CRNR/DC/14

December 6, 1996 (Original: English)

AMENDMENT TO ARTICLE 6 OF TREATY No. 1*proposed by the Delegation of the Republic of Korea*

The Delegation of the Republic of Korea proposes that the following text be added to Article 6 as new paragraph (3):

(3) *Any Contracting Party which does not consider itself, at the time of depositing its instrument of ratification or accession, in a position to abolish the non-voluntary licenses, may, by notification deposited with the Director General of the World Intellectual Property Organization, declare that it will delay the abolition of such non-voluntary licenses for the period of additional four years.*

[End of document]

CRNR/DC/15

December 9, 1996 (Original: English)

AMENDMENT TO ARTICLES 10 AND 17 OF TREATY No. 2*proposed by the Delegation of Japan*

The Delegation of Japan proposes the following:

To delete the following phrase from paragraph (2) of Article 10 and from paragraph (2) of Article 17:

“ for a period of 3 years from the entry into force of this Treaty. ”

[End of document]

CRNR/DC/16

December 9, 1996 (Original: Russian)

AMENDMENT TO ARTICLE 10 OF DRAFT TREATY No. 2

proposed by the Delegation of the Russian Federation

The Delegation of the Russian Federation proposes the addition in paragraph (2) of Article 10 of the words "for this Contracting Party" after the words "the entry into force of this Treaty."

[End of document]

CRNR/DC/17

December 9, 1996 (Original: English)

FIRST REPORT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. The Credentials Committee (hereinafter referred to as "the Committee"), established on December 5, 1996, by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, met on December 9, 1996.
2. The Delegations of the following States, elected members of the Committee by the Diplomatic Conference, attended the meeting: Azerbaijan, China, Croatia, Italy, Jordan, Senegal and Trinidad and Tobago.
3. The Chairman of the Committee, elected by the Diplomatic Conference, was Mrs. Ndèye Abibatou Youm Diabe Siby (Senegal). The Vice-Chairmen, elected by the Diplomatic Conference, were Mr. Nikola Kopčić (Croatia), Mr. Corrado Milesi Ferretti (Italy) and Ms. Mary Ann Richards (Trinidad and Tobago).
4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on December 3, 1996, and amended on December 5, 1996 (document CRNR/DC/9 Rev.; hereinafter referred to as "the Rules of Procedure"), the Committee examined the credentials, full powers, letters or other documents of appointment presented for the purposes of Rules 6 and 7 by delegations of States members of the World Intellectual Property Organization

(hereinafter referred to as “WIPO”), participating in the Conference in accordance with Rule 2(1)(i) of the Rules of Procedure (hereinafter referred to as “Member Delegations”), by the special delegation of the European Communities, participating in the Conference in accordance with Rule 2(1)(ii) of the Rules of Procedure (hereinafter referred to as the “Special Delegation”), and by delegations of States members of the United Nations other than the States members of WIPO, participating in the Conference in accordance with Rule 2(1)(iii) of the Rules of Procedure (hereinafter referred to as “Observer Delegations”), as well as by the representatives of intergovernmental and non-governmental organizations, participating in the Conference in accordance with Rule 2(1)(iv) of the Rules of Procedure (hereinafter referred to as “representatives of Observer Organizations”).

5. On the basis of the information provided by the Secretariat as to the practice prevailing in other diplomatic conferences and in particular in diplomatic conferences convened by WIPO, the Committee decided to recommend to the Conference, meeting in Plenary, that the following criteria should be applied by the Committee in its examination of, and should govern the decision of the Conference on, the credentials, full powers, letters or other documents presented for the purposes of Rules 6 and 7 of the Rules of Procedure:

(i) as far as any State is concerned, its delegation’s credentials and full powers should be accepted if they were signed by that State’s Head of State, Head of Government or Minister for Foreign Affairs; credentials, but not full powers, should be accepted if they were contained in a *note verbale* or letter of that State’s Permanent Representative in Geneva or in a *note verbale* of that State’s Ministry of Foreign Affairs or its Permanent Mission in Geneva and should not otherwise be accepted; in particular, a communication emanating from a Minister other than the Minister for Foreign Affairs, or from an official other than the Permanent Representative or Chargé d’affaires a.i. in Geneva, should not be treated as credentials;

(ii) as far as any Organization is concerned, its representative’s letter or other document of appointment should be accepted if it is signed by the Head (Director General, Secretary General or President) or Deputy Head or official responsible for external affairs of the Organization;

(iii) facsimile and telex communications should be accepted if, as to their source, the requirements stated in points (i) and (ii) were fulfilled.

6. Pending a final decision by the Conference, meeting in Plenary, on the said criteria, the Committee decided to apply those criteria to the documents received by it.

7. Accordingly, the Committee found in order

(a) as far as *Member Delegations* are concerned,

(i) the *credentials and full powers* (that is, credentials for participating in the Conference and full powers to sign one or several of the treaties to be adopted by the Diplomatic Conference) of the delegations of the following 32 States:

Argentina	Malta
Bolivia	Monaco
Burkina Faso	Morocco
China	Republic of Moldova
Denmark	Romania
Ghana	Senegal
Greece	Singapore
Iceland	Slovenia
India	South Africa
Indonesia	Spain
Israel	Sudan
Italy	Switzerland
Jamaica	The former Yugoslav Republic of Macedonia
Kazakstan	Uzbekistan
Liechtenstein	Venezuela
Mali	Zambia

(ii) the *credentials* (without full powers) of the delegations of the following 82 States:

Albania	Croatia
Algeria	Cuba
Andorra	Cyprus
Angola	Czech Republic
Australia	Democratic People's Republic of Korea
Austria	Ecuador
Azerbaijan	Egypt
Bangladesh	El Salvador
Belarus	Fiji
Belgium	Finland
Bhutan	France
Bosnia and Herzegovina	Gabon
Brazil	Germany
Bulgaria	Guatemala
Canada	Haiti
Chad	Holy See
Chile	Honduras
Colombia	Hungary
Costa Rica	Ireland
Côte d'Ivoire	Japan

Jordan	Poland
Kenya	Portugal
Latvia	Qatar
Libya	Republic of Korea
Luxembourg	Saudi Arabia
Malawi	Slovakia
Mauritius	Sri Lanka
Mexico	Sweden
Mongolia	Thailand
Namibia	Togo
Netherlands	Trinidad and Tobago
New Zealand	Tunisia
Nicaragua	Ukraine
Niger	United Kingdom
Nigeria	United Republic of Tanzania
Norway	United States of America
Pakistan	Uruguay
Panama	Viet Nam
Paraguay	Yemen
Peru	Zaire
Philippines	Zimbabwe

(b) as far as the Special Delegation is concerned, the *credentials* of the Delegation of the European Communities (1).

(c) as far as *Observer Delegations* are concerned, the *credentials* of the delegations of the following three States:

Dominican Republic
Ethiopia
Nepal

(d) as far as the *representatives of Observer Organizations* are concerned, the *letters or documents of appointment* of representatives of the following Observer Organizations (listed in the alphabetical order of the name of the organization according to its name in French if it exists or, if it does not exist, according to its name in another language):

(i) *intergovernmental organizations*: Organization of African Unity (OAU), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Labour Office (ILO), International Maritime Organization (IMO), World Meteorological Organization (WMO), World Trade Organization (WTO), International Telecommunications Union (ITU) (7).

(ii) *non-governmental organizations*: Agence pour la protection des programmes (APP), American Bar Association (ABA), American Intellectual Property Law Association (AIPLA), Asociación Argentina de Interpretes (AADI), American Film Marketing Association (AFMA), Association of European Performers' Organisations (AEPO), Association of Commercial Television in Europe (ACT), International Association of Broadcasting (IAB), International Association of Art (IAA), International Association of Audiovisual Writers and

Directors (AIDAA), International Association for the Protection of Industrial Property (AIPPI), International Literary and Artistic Association (ALAI), Business Software Alliance (BSA), International Chamber of Commerce (ICC), Comité "Actores, Intérpretes" (CSAI), Commercial Internet Exchange Association (CIX), Computer and Communications Industry Association (CCIA), International Confederation of Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), European Writers' Congress (EWC), European Council of American Chambers of Commerce (ECACC), Conseil francophone de la chanson (CFC), International Council on Archives (ICA), International Council of Graphic Design Associations (ICOGRADA), International Council of Societies of Industrial Design (ICSID), International Council of Scientific Unions (ICSU), Copyright Research and Information Center (CRIC), Educator's Ad Hoc Committee on Copyright Law (ECCL), Electronic Industries Association (EIA), European Bureau of Library, Information and Documentation Associations (EBLIDA), European Cable Communications Association (ECCA), European Committee for Interoperable Systems (ECIS), European Project-Digital Video Broadcasting (DVB), Federation of European Audiovisual Directors (FERA), Ibero-Latin-American Federation of Performers (FILAIE), International Federation for Information and Documentation (FID), International Federation of the Phonographic Industry (IFPI), International Video Federation (IVF), International Federation of Actors (FIA), International Federation of Library Associations and Institutions (IFLA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Newspaper Publishers (FIEJ), International Federation of Musicians (FIM), International Federation of Reproduction Rights Organizations (IFFRO), International Federation of Translators (FIT), World Federation of Music Schools (WFMS), Groupement européen représentant les organismes de gestion collective des droits des artistes interprètes ou exécutants (ARTIS GEIE), Information Industry Association (IIA), Information Technology Association of America (ITAA), Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Institute of Intellectual Property (IIP), Intellectual Property Institute (CLIP), Intellectual Property Owners (IPO), Interactive Services Association (ISA), International Affiliation of Writers' Guilds (IAWG), International Alliance of Orchestra Associations (IAOA), Intellectual Copyright Round Table (ICRT), International Intellectual Property Alliance (IIPA), Media and Entertainment International (MEI), Japan Electronic Industry Development Association (JEIDA), National Association of Broadcasters (NAB), National Music Publishers' Association (NMPA), North American National Broadcasters Association (NANBA), Sociedad de Autores y Compositores de Música (SACM), Software Information Center (SOFTIC), Software Publishers Association (SPA), Caribbean Broadcasting Union (CBU), Union of National Radio and Television Organizations of Africa (URTNA), European Broadcasting Union (EBU), International Publishers Association (IPA), United States Telephone Association (USTA), Video Software Dealers Association (VSDA) (73).

8. The Committee noted that, in accordance with established practices, a designation of representation implied, in principle, in the absence of any express reservation, the right of signature, and that it should be left to each delegation to interpret the scope of its credentials.

9. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph (7)(a)(i), above, the credentials of the delegations mentioned in paragraph 7(a)(ii), above, the credentials of the delegations mentioned in paragraph 7(b) and (c), above, and the letters or documents of appointment of the representatives of the organizations mentioned in paragraph 7(d), above.

10. The Committee expressed the wish that the Secretariat should bring Rule 6 (“Credentials and Full Powers”), 7 (“Letters of Appointment”) and 10 (“Provisional Participation”) of the Rules of Procedure to the attention of Member Delegations or Observer Delegations not having presented credentials or full powers and of the representatives of Observer Organizations not having presented letters or other documents of appointment.

11. The Committee decided that a report on its meeting should be prepared by the Secretariat and issued as its report, to be presented by the Chairman of the Committee to the Conference, meeting in Plenary.

12. The Committee decided that it would re-convene to examine any further communications concerning Member Delegations, Observer Delegations, the Special Delegation or Observer Organizations which might be received by the Secretariat after the close of its meeting.

[End of document]

CRNR/DC/18

December 9, 1996 (Original: English)

AMENDMENT TO ARTICLE 4 OF TREATY No. 1

proposed by the Delegation of India on behalf of itself and Jordan, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka and Thailand

During discussions in the Main Committee I on 6th December 1996, it was clarified that the intention of Article 4 was not to add to or detract from the substance of Article 10 of the TRIPS Agreement, that Article 4 should be interpreted in exactly the same manner as Article 10 of the TRIPS and that the provisions of Article 4 did not impose any obligation on member States over and above those under Article 10 of the TRIPS. In order to definitively incorporate this interpretation in the text the following editorial changes are suggested:

“Computer Programs:

“Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies only to expressions of a computer program in source or object code.”

[End of document]

CRNR/DC/19

December 9, 1996 (Original: English)

AMENDMENT TO ARTICLE 5 OF DRAFT TREATY No. 1

proposed by the Delegation of India on behalf of itself and Jordan, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka and Thailand

During the discussion in the Main Committee I on 6th December 1996 it was clarified that the intention of Article 5 was not to add to or detract from the substance of Article 10 of the TRIPS Agreement, that Article 5 should be interpreted in exactly the same manner as Article 10 of TRIPS, and that the provisions of Article 5 did not impose any obligation on member states over and above those under Article 10 of the TRIPS. In order to definitively incorporate this interpretation in the text and to prevent premature international recognition of a sui generis protection of databases, the following editorial changes are suggested:

“Compilations of Data (Databases):

“Compilations of data or other material, whether in machine readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material itself.”

[End of document]

CRNR/DC/20

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLES 7 AND 12 OF DRAFT TREATY N° 1

proposed by the Delegation of Israel

The Delegation of Israel proposes the following:

To delete paragraph (2) of Article 7 and to add the following new paragraph (3) to Article 12:

“(3) Subject to the provisions of Article 9(2) of the Berne Convention Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct

or indirect in any manner or form, has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction is effected by the end user in the course of use of the work that is authorized by the author or permitted by law.”

[End of document]

CRNR/DC/21

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLES 7 AND 13 OF TREATY N° 2

proposed by the Delegation of Israel

The Delegation of Israel proposes the following:

To delete paragraph (2) of Article 7 and to add the following new paragraph (3) to Article 13:

“(3) Subject to the provisions of Article 13(2) Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct or indirect in any manner or form, has the sole purpose of making the fixed performance perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction is effected by the end user in the course of use of the fixed performance that is authorized by the author or permitted by law.”

[End of document]

CRNR/DC/22

December 10, 1996 (Original: English)

**AMENDMENT TO ARTICLE 7 OF DRAFT TREATY N° 1
AND TO ARTICLES 7 AND 14 OF DRAFT TREATY N° 2***proposed by the Delegation of Norway***In Article 7 of Treaty N° 1, and in Articles 7 and 14 of Treaty N° 2:****1. Add to paragraph 1:**

“Temporary reproduction made for the sole purpose of making a work perceptible, or which are of a purely transient or incidental character as part of a technical process, does not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention.”

2. Delete paragraph 2.**[End of document]****CRNR/DC/23**

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLES 14 AND 20 OF DRAFT TREATY N° 2*proposed by the Delegation of Israel***To delete paragraph (2) of Article 14 and to add the following new paragraph (3) to Article 20:**

“(3) Subject to the provisions of Article 20(2), Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct or indirect in any manner or form, has the sole purpose of making the phonogram audible or where the reproduction is of a transient or incidental nature, provided that such reproduction is effected by the end user in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law.”

CRNR/DC/24

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLE 13 OF DRAFT TREATY N° 1*proposed by the Delegation of the Republic of Korea*

The Delegation of the Republic of Korea proposes that the following text be added to Article 13 as the second sentence of paragraph (1).

It shall, however, be a matter for legislation in the Contracting Parties to lay down conditions on technological measures designed to protect productions which are not original nor protected by law and productions in which the exclusive rights are limited by law, only to the extent permitted by the Berne Convention and this Treaty.

[End of document]

CRNR/DC/25

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLE 22 OF DRAFT TREATY N° 2*proposed by the Delegation of the Republic of Korea*

The Delegation of the Republic of Korea proposes that the following text be added to Article 22 as the second sentence of paragraph (1):

It shall, however, be a matter for legislation in the contracting Parties to lay down conditions on technological measures designed to protect performances or phonograms which are not protected by law and performances or phonograms in which the exclusive rights are limited by law, only to the extent permitted by the Rome Convention and this Treaty.

[End of document]

CRNR/DC/26

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLE 26 OF DRAFT TREATY N° 2*proposed by the Delegation of the Republic of Korea*

The Delegation of the Republic of Korea proposes that the following text replace current draft Article 26:

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

[End of document]

CRNR/DC/27

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLE 2(a) OF DRAFT TREATY N° 2*proposed by the Delegation of Jamaica*

It is proposed that Article 2(a) which contains a definition of “performers” be amended by the deletion of the word “interpret” from the text. If the word “interpret” remains in the text, it may broaden the application in English-speaking territories. Further, it is noted that this word does not appear in the definition of “performers” in the Rome Convention, 1961, at Article 3(a). If necessary, the word “interpret” could be retained in the Spanish and French texts of the Draft Treaty.

[End of document]

CRNR/DC/28

December 10, 1996 (Original: English)

AMENDMENT TO THE PREAMBLE AND TO ARTICLE 1 OF DRAFT TREATY N° 1

proposed by the Delegation of Colombia on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

1. Insert the following in the Preamble:

Emphasizing that, for the countries of the Union, this Treaty is a special agreement as provided for in Article 20 of the Berne Convention for the Protection of Literary and Artistic Works.

2. Delete paragraph (1) of Article 1 as currently drafted, and insert the following:

This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works as regards Contracting Parties that are countries of the Union established by the said Convention. This Treaty shall have no connection, either explicit or implicit, with other treaties or conventions that are directly or indirectly concerned with the same subject matter.

3. Delete paragraph (4) of Article 1 as currently drafted, and insert the following:

The States that become party to this Treaty shall comply with the provisions of the Berne Convention and of the Appendix thereto.

4. Add the following paragraph at the end of Article 1:

(5) The intergovernmental organizations party to this Treaty shall comply with the provisions of Articles 1 to 21 of the Berne Convention and with those of the Appendix thereto.

[End of document]

CRNR/DC/29

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLES 3, 9 AND 12 OF DRAFT TREATY N° 1

proposed by the Delegation of the United States of America[Additions are indicated by underlining, deletions are indicated by ~~striking through~~]3. *Article 3--Notion and Place of Publication*

Amend paragraph (1) to read as follows:

(1) When literary or artistic works are made available to the public by wire or wireless means with the consent of their authors in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works, for purposes of applying the provisions of the Berne Convention.

4. *Article 9--Rental Right*

Amend paragraph (2) to read as follows:

(2) Except in the case of computer programs, collections of data or other material in machine-readable form subject to protection under Article 5 of this treaty, and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

5. *Article 12--Exceptions and Limitations*

Amend paragraphs (1) and (2) to read as follows:

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty ~~only~~ in certain special cases that do not conflict with ~~the~~ a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with ~~the~~ a normal exploitation of

the work and do not unreasonably prejudice the legitimate interests of the author.

[End of document]

CRNR/DC/30

December 10, 1996 (Original: English)

AMENDMENT TO ARTICLES 13, 20 AND 21 OF DRAFT TREATY N° 2

proposed by the Delegation of the United States of America

[Amendments are indicated by underlining, deletions are indicated by ~~striking through~~]

1. *Article 13--Exceptions and Limitations*

Amend paragraph (2) to read as follows:

(2) Contracting Parties shall confine any limitations or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.

2. *Article 20--Exceptions and Limitations*

Amend paragraph (2) to read as follows:

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the a normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the producer of phonograms.

3. *Article 21--Term of Protection for Phonograms*

Amend paragraph (2) to read as follows:

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published ~~and in the case of unpublished phonogram, or failing such publication within fifty years from~~

fixation of the phonogram, fifty years from the end of the year in which the fixation was made.

[End of document]

CRNR/DC/31

December 10, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 5 OF DRAFT TREATY N° 2

proposed by the Delegation of Argentina

The Delegation of Argentina proposes to delete Article 5 as currently drafted, and substitute the following:

Article 5

Moral Rights of Performers

(1) *Independently of the performer's economic rights, and even after the transfer of those rights, the performer shall*

ALTERNATIVE A: as regards his musical performances, have the right

ALTERNATIVE B: have the right

(a) to demand that his name be mentioned. Such mention may be omitted where omission is dictated by the manner of use of the performance.

(b) to object to any type of unauthorized distortion, mutilation or other modification of his performances that would be seriously prejudicial to his reputation.

Where the performance has been given by two or more performers in such a way that it is impracticable to mention all the names, the obligation under subparagraph (a) shall be considered fulfilled if the name of the choir or orchestra, or the collective designation by which the group is known, is mentioned.

The merging, omission or deletion of the names of the performers shall have no effect on the identification required in other media for collective administration or collective bargains.

(2) *The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.*

(3) *The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.*

[End of document]

CRNR/DC/32

December 11 1996 (Original: English)

**AMENDMENT TO ARTICLES 4 AND 25, AND DELETION OF ALTERNATIVE A
IN DRAFT TREATY N° 2**

proposed by the European Community and its Member States

1. Delete Alternative A throughout the text.
2. Delete Article 25 as now drafted, and substitute the following:

*Article 25:
Reservations*

(1) *Any party upon becoming a Contracting Party to this Treaty may, in a notification deposited with the Director General of WIPO, declare that it will apply:*

(i) *one, several or all of the following provisions to sound performances fixed in phonograms only: Article 7, Article 9, Article 10, Article 11 and Article 21(1); and/or*

[(ii) the provisions of Article 5 to sound performances only.]

(2) *Subject to the provisions of Article 12(3) and 19(3) and paragraph 1 of this Article, no reservations to this Treaty shall be permitted.*

Note to Article 25: It is suggested that consideration of whether or not subparagraph (ii) of paragraph (1) should be included among the reservation possibilities should be deferred until the question of moral rights has been discussed in Main Committee I.

3. Add the following paragraph to Article 4 (National Treatment):

(3) The obligation provided for in paragraph (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Article 25(1), 12(3) and 19(3) of this Treaty.

Note to the addition to Article 4: In making this proposal in connection with Article 25 (Reservations), the European Community and its Member States reserve the right to make other proposals in respect of other aspects of national treatment.

[End of document]

CRNR/DC/33

December 11, 1996 (Original: English)

AMENDMENT TO PREAMBLE OF DRAFT TREATIES N° 1 AND N° 2

proposed by the Delegation of India

During the discussion in the Plenary on 5th December 1996, several delegations stressed the need for balancing the rights of the owners of copyright and neighboring rights and others. To incorporate this point of view, the following amendment is proposed as a last paragraph in the Preamble in Draft Treaty N° 1 and in Draft Treaty N° 2, as follows:

Add to Preamble of Draft Treaty No. 1:

“Recognizing the need to maintain a balance between the interests of the authors and the larger public interest, particularly education, research and access to information.”

Add to Preamble of Draft Treaty No. 2:

“Recognizing the need to maintain a balance between the interests of the performers and producers of Phonograms and the larger public interest, particularly education, research and access to information.”

[End of document]

CRNR/DC/34

December 11, 1996 (Original: English)

SCOPE OF COVERAGE FOR AUDIOVISUAL PERFORMERS*proposed by the Delegation of the United States of America*

The Delegation of the United States of America offers the following proposal to address the issue of protection for audiovisual performers in Draft Treaty N° 2.

Element One—Rights Granted

- (a) Select Alternative B in Articles 2(c), 2(h), 6, 7, 9, 11 and 21.
- (b) Select Alternative A in Article 10.
- (c) Delete Articles 5, 8 and 15.
- (d) Select Alternative D in Article 25.

Element Two—Transferability

Insert new Article 13*bis* that would read as follows:

Transferability of Rights

- (1) The exclusive rights provided under this Treaty shall be freely transferable.
- (2) Once a performer has consented to the fixation of his performance in an audiovisual fixation, he shall be presumed to have transferred all rights granted under this Treaty to the producer of the fixation, subject to contractual clauses to the contrary. Contracting Parties may provide that such presumptions are irrebutable.
- (3) In the absence of a determination by the parties as to the applicable law, a contract concerning rights granted under this Treaty shall be governed by the law of the Contracting Party most closely connected to the contract.

Element Three—Implementation

Each Contracting Party, including the United States, would have an obligation to provide the treaty rights to nationals of other Contracting Parties. Accordingly, the United States proposes inserting a new Article 26*bis* that would read as follows:

Implementation of Treaty Obligations

Each Contracting Party may determine the means by which it will give effect to the provisions of this Treaty, including by means of the grant of a copyright or other related right, or, with respect to performers who are nationals of that Contracting Party or whose performance is fixed by a national of that Contracting Party, by the application of collective bargaining agreements where such agreements provide the equivalent of the protection required by this Treaty to a substantial majority of performers who are nationals of that Contracting Party.

Element Four–National Treatment

Replace existing Article 4 with the following text:

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, in respect of the subject matter protected under this Treaty, the treatment it accords to its own nationals as well as the rights specially granted by this Treaty.

(2) The obligation provided for in paragraph (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Articles 12(3) and 19(3) of this Treaty.

Related Amendments

1. Amend the first line of paragraph (2) of Article 3 (Beneficiaries of Protection) by substituting the word “include” for the word “be.”

2. Amend the definition of “performer” in Article 2 to add the following clause at the end: “but, with respect to audiovisual fixations, does not include background performers who do not speak words of scripted dialogue.”

[End of document]

CRNR/DC/35

December 10, 1996 (Original: French)

AMENDMENT TO ARTICLE 11 OF DRAFT TREATY NO. 1*proposed by the Delegation of Croatia*

The Delegation of Croatia proposes that the following wording should replace the current wording of Article 11 of Treaty No. 1:

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

[End of document]

CRNR/DC/36

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 9 OF DRAFT TREATY N° 1*proposed by the Delegation of India*

In our general statement made at the Plenary meeting of the Conference, the Delegation of India had expressed its reservation on extending rental rights beyond the TRIPS Agreement. Accordingly, it is proposed that Article 9 of Draft Treaty N° 1, be deleted as currently drafted, and the following is substituted therefor:

*Article 9
Right of Rental*

(1) *Authors of computer programs and cinematographic works shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.*

(2) *Paragraph (1) shall not apply:*

(i) in case of a computer program where the program itself is not the essential object of the rental; and

(ii) *in case of a cinematographic work, unless such commercial rental has led to widespread copying of such work materially impairing the exclusive right of reproduction.*

[End of document]

CRNR/DC/37

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 13 OF TREATY N° 1
AND ARTICLE 22 OF TREATY N° 2

proposed by the Delegation of Jamaica

Obligations Concerning Technological Measures

1. It is proposed that Article 13(1) of Treaty N° 1 and the corresponding Article 22(1) of Treaty N° 2, be amended by the deletion of the words “to know” in line 3 and by adding in their place the words “for knowing” so that this portion of the text would read as follows:

... by any person knowing or having reasonable grounds for knowing...

2. It is proposed that Article 13(3) of Treaty N° 1 and the corresponding Article 22(3) of Treaty N° 2, be amended by the deletion of the words “any of the acts covered by” in lines 3 to 4 and by adding in their place the words “the contravention of” or the words “the infringement of” so that this portion of the text would read as follows:

... mechanism or system that prevents or inhibits the contravention/infringement of the rights under this Treaty.

It is felt that the formulation “any of the acts covered by the rights under this Treaty” is broad and un-precise.

[End of document]

CRNR/DC/38

December 11, 1996 (Original: French)

AMENDMENTS TO ARTICLES 6 AND 12 OF DRAFT TREATY N° 2*proposed by the Delegation of Switzerland***Article 6: Economic Rights of Performers in their Unfixed Performances.**

The Delegation of Switzerland considers that the economic rights of performers in their unfixed performances should be extended to apply also to rebroadcasting, retransmission by wire and communication to the public of a broadcast. It therefore proposes an Alternative C, as follows:

Alternative C: *authorizing:*

- (i) *the broadcasting and communication to the public of their unfixed performances;*
and
- (ii) *the fixation of their unfixed performances.*

Article 12: Right to Remuneration for Broadcasting and Communication to the Public

Draft Treaty No. 2 generally proposes two alternatives with respect to the rights of performers. The first considers a limitation of those rights to musical performances. The second, on the other hand, extends protection of performers to the audiovisual field. However, the Swiss Delegation is of the opinion that, even if alternative B is chosen throughout the text, there remains a gap with regard to videograms, that is to say audiovisual fixations. Therefore, with a concern for coherence and to ensure that the differentiated approach is also maintained in the context of the right to remuneration for broadcasting and communication to the public, it proposes that Article 12(1) be supplemented by a second alternative.

Alternative A:

The wording of Article 12(1) as given in the Basic Proposal.

Alternative B:

- (1) Performers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms *or videograms (audiovisual fixations)* published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

[End of document]

CRNR/DC/39

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 14 OF DRAFT TREATY N° 1 AND TO ARTICLE 23 OF
DRAFT TREATY N° 2

proposed by the Delegation of Hungary

The Delegation of Hungary proposes the addition in subparagraphs (ii) of paragraph (1) of both Articles 14 and 23, respectively, of the words “works or” after the words “without authority.”

[End of document]

CRNR/DC/40

December 11, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 23 OF DRAFT TREATY N° 2

proposed by the Delegations of Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

Introduce the phrase “or make available” in sub-paragraph (ii) of paragraph (1) of Article 23 of Draft Treaty N° 2, so that it reads as follows:

(ii) to distribute, import for distribution, communicate or make available to the public, without authority, copies of fixed performances or phonograms from which electronic rights management information has been removed or altered without authority.

[End of document]

CRNR/DC/41

December 11, 1996 (Original: English)

**AMENDMENT TO ARTICLE 16 IN DRAFT TREATY N° 1 AND
TO ARTICLE 27 IN DRAFT TREATY N° 2***proposed by the Delegation of Jamaica*

It is proposed that Article 16 and the Annex of Draft Treaty N° 1, and Article 27 and the Annex of Draft Treaty N° 2, be amended as follows:

(i) delete Articles 16 and 27 in their present form;

(ii) delete the Annex in both Draft Treaties;

(iii) replace Articles 16 and 27 by the following provision adopted from Article 1(1) of each Annex and modified as follows:

“Contracting Parties shall ensure that enforcement procedures are available under their laws so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.”

It is felt that this proposed provision is sufficient to impose a general obligation on Contracting Parties with respect to enforcement, at the same time leaving implementation to national laws.

[End of document]

CRNR/DC/42

December 11, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 3 OF DRAFT TREATY N° 1*proposed by the Delegation of Mexico*

It is proposed that the words shown below in square brackets be deleted from the text of the Basic Proposal and that the words shown in underlined italics be added.

Article 3
Notion and Place of Publication

(1) When *by means of storage* literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may [access] *obtain tangible copies of* these works from a place and at a time individually chosen by them, [so that copies of these works are available,] Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.

(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of *tangible copies of* these works to members of the public.

Explanatory Note:

The present wording of Articles 3 and 10 makes no distinction between the acts of publication and communication.

A number of delegations and NGOs have expressed concern over the possibility that the present wording of Article 10 of Draft Treaty N° 1, Right of Communication, might limit access to information in teaching centers and for research purposes, and also in libraries, etc. Such access to information for the purposes mentioned does however have to be ensured through the act of publication and not that of communication; it is indeed through publication that originals or copies of works are obtained. It is for that reason that we propose the clarification in Article 3(1) of the idea of possible “storage” and “obtaining tangible copies,” which could be a means of overcoming the concerns mentioned without in any way altering either the sense or the intent of Article 3, the purpose of which in fact is to determine the place of publication.

As far as the place of publication is concerned, it is proposed that the concept of tangible copies be likewise incorporated in order to align the second paragraph on the amendments suggested for the first.

[End of document]

CRNR/DC/43

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 9 OF DRAFT TREATY N° 1

proposed by the Delegation of Canada

Paragraphs (1) and (2) of Article 9 should be deleted and replaced with the following:

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction. In the case of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

Paragraph (3) of Article 9 should remain unchanged.

[End of document]

CRNR/DC/44

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLES 4, 6, 12, 19 AND 26 OF DRAFT TREATY N° 2

*proposed by the Delegation of Canada*Article 4:

The following paragraph should be added after paragraph (2):

(3) Paragraph (1) does not apply to any regime under which a Contracting Party provides remuneration to performers or producers of phonograms for the private copying of phonograms or the performances embodied therein.

Article 6:

The following wording should be added after paragraph (ii):

(iii) the broadcasting and communication to the public of performances fixed in phonograms contrary to paragraph (ii);

(iv) Contracting Parties may limit either or both of the rights provided in paragraph (iii) to a right of equitable remuneration.

Articles 12 and 19:

In paragraph (3) of Articles 12 and 19, delete the words “subject to the provisions of paragraph (4).”

Delete paragraph (4) of Articles 12 and 19.

Article 26:

The following paragraph should be added after paragraph (3):

(4) Notwithstanding paragraph (1), Contracting Parties may limit the application of Article 5 of this Treaty to performances which occurred after the coming into force of this Treaty in that Contracting Party.

[End of document]

CRNR/DC/45

December 11, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 2 OF DRAFT TREATY N° 2

*proposed by the Delegation of Argentina***Article 2
Definitions****For the purposes of this Treaty:**

- (a) *“performer” means any actor, singer, musician, dancer and any other person who acts, sings, delivers, declaims or in any way executes or interprets a literary or artistic work, a variety work or an expression of folklore;*
- (b) *“phonogram” means any fixation of the sounds of a performance or of other sounds, or of a representation of sounds;*
- (d) *“producer of phonograms” means the natural person or legal entity on whose initiative and responsibility, and under whose coordination, the sounds of a performance or other sounds, or the representations of sounds, are first fixed;*

[End of document]**CRNR/DC/46**

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 25 OF DRAFT TREATY N° 2

*proposed by the Delegation of New Zealand***The Delegation of New Zealand proposes the following:****To add a new paragraph (2) to Article 25 as follows:**

“(2) Any Party upon becoming a Contracting Party to this Treaty, may, in a notification deposited with the Director General of WIPO, declare that it will not apply the provisions of Article 5.

To renumber the present paragraph (2) as paragraph (3); and to delete the words “paragraph (1)” therefrom, and to substitute the following words for the deleted words:

“... paragraphs (1) and (2) of this Article.”

[End of document]

CRNR/DC/47

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 14 OF DRAFT TREATY N° 1

proposed by the Delegation of the United States of America

[Additions are indicated by underlining, deletions are indicated by ~~striking through~~]

1. *Article 14 -- Obligations concerning Rights Management Information*

Amend Article 14 as follows:

(1) Contracting parties shall ~~make it unlawful for~~ provide adequate and effective legal remedies against any person knowingly ~~to perform~~ performing any of the following acts which induces, enables or facilitates infringement or the avoidance of payment to a right holder:

(i) to remove or alter any ~~electronic~~ rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of works ~~from which~~ knowing that ~~electronic~~ rights management information has been removed from the copies or altered without authority;

(iii) to file fraudulent rights management information with a public authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the

work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

(3) Contracting Parties shall not mandate the use of rights management information by a right holder.

[End of document]

CRNR/DC/48

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLES 1, 12, 19 AND 23 OF DRAFT TREATY N° 2

proposed by the Delegation of the United States of America

[Deletions are indicated by ~~striking through~~]

Article 1 -- Relation to Other Conventions

Amend paragraph (2) as follows:

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other ~~under treaties for the protection of literary and artistic works, and in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors~~ under the Berne Convention for the Protection of Literary and Artistic Works.

Article 12 -- Right to Remuneration for Broadcasting and Communication to the Public

Delete paragraph (4) and replace it with the following three paragraphs:

(4) Notwithstanding paragraphs (1) - (3) of this Article, performers shall enjoy, with respect to their musical performances fixed in phonograms, the exclusive right of authorizing the broadcasting or communication to the public of their performances by digital means by subscription and against payment of a fee for the reception of the broadcast or communication.

(5) Contracting Parties may limit the right established in paragraph (4) to a right of remuneration with respect to broadcasts and communications where the structure and sequence of programming ensures that such broadcasts and

communications do not prejudice the performers' right of distribution under Article 9, or their right of making their musical performances fixed in phonograms available to the public under Article 11.

(6) Contracting Parties may in special cases adopt limited exceptions to the right established in paragraph (4), where such exceptions do not materially impair primary economic uses or the value of the phonograms in which the performers' performances are fixed.

Article 19 -- Right to Remuneration for Broadcasting and Communication to the Public

Delete paragraph (4) and replace it with the following three paragraphs:

(4) Notwithstanding paragraphs (1) - (3) of this article, producers of phonograms shall enjoy the exclusive right of authorizing the broadcasting or communication to the public of their phonograms by digital means by subscription and against payment of a fee for the reception of the broadcast or communication.

(5) Contracting Parties may limit the right established in paragraph (4) to a right of remuneration with respect to broadcasts and communications where the structure and sequence of programming ensures that such broadcasts and communications do not prejudice the producers' right of distribution under Article 16, or their right of making their phonograms available to the public under Article 18.

(6) Contracting parties may in special cases adopt limited exceptions to the right established in paragraph (4), where such exceptions do not materially impair primary economic uses or the value of the phonograms.

[Additions are indicated by underlining, deletions are indicated by ~~striking through~~]

Article 23 -- Obligations concerning Rights Management Information

Amend Article 23 as follows:

(1) Contracting Parties shall ~~make it unlawful for~~ provide adequate and effective legal remedies against any person knowingly ~~to perform~~ performing any of the following acts which induces, enables or facilitates infringement or the avoidance of payment to a right holder:

(i) to remove or alter any ~~electronic~~ rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of fixed performances or phonograms ~~from which~~ knowing that ~~electronic~~ rights management information has been removed from the copies or altered without authority;

(iii) to file fraudulent rights management information with a public authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram or information about the terms and conditions of use of the fixed performance or phonograms, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or phonogram or appear in connection with the communication of a fixed performance or a phonogram to the public.

(3) Contracting Parties shall not mandate the use of rights management information by a right holder.

[End of document]

CRNR/DC/49

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLES 2 AND 15 OF DRAFT TREATY N° 1

proposed by the Delegation of Brazil

Article 2:

Transcribe Articles 3 to 6 of the Berne Convention in place of the present text of Article 2.

Article 15:

Transcribe Article 18 of the Berne Convention in place of the present text of Article 15.

[End of document]

CRNR/DC/50

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 14 OF DRAFT TREATY N° 1

proposed by the Delegation of the Republic of Korea

The Delegation of the Republic of Korea proposes that Article 14 of Draft Treaty N° 1 be deleted as currently drafted, and replaced by the following:

Article 14

Obligations concerning Rights Management Information

Contracting Parties shall make it unlawful for any person knowingly to perform for the purpose of infringing any of the rights under the Berne Convention and this Treaty, any of the following acts:

- (i) to remove or alter rights management information which appears in connection with the communication of a work to the public in a standardized manner recognized by the competent national authorities or relevant international body, without authority.*

- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which rights management information which is attached to a copy of a work, or appears in connection with the communication of a work to the public in a standardized manner recognized by the competent national authorities or relevant international body, has been removed or altered without authority*

[End of document]

CRNR/DC/51

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLE 23 OF DRAFT TREATY N° 2

proposed by the Delegation of the Republic of Korea

The Delegation of the Republic of Korea proposes that Article 23 of Draft Treaty N° 2 be deleted as currently drafted, and replaced by the following:

Article 23

Obligations concerning Rights Management Information

Contracting Parties shall make it unlawful for any person knowingly to perform for the purpose of infringing any of the rights under the Rome Convention and this Treaty, any of the following acts:

- (i) to remove or alter rights management information which appears in connection with the communication of a fixed performance or a phonogram to the public in a standardized manner recognized by the competent national authorities or relevant international body, without authority.*
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which rights management information which is attached to a copy of a fixed performance or a phonogram, or appears in connection with the communication of a fixed performance or a phonogram to the public by means of the standardized manner recognized by the competent national authorities or relevant international body, has been removed or altered without authority.*

[End of document]

CRNR/DC/52

December 11, 1996 (Original: English)

AMENDMENT TO ARTICLES 4 AND 9 OF DRAFT TREATY N° 1

proposed by the Delegation of Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

Introduce the following changes in the text of Article 4:

Computer programs *shall be* protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection *shall apply* to the expression of a computer program in any form.

Introduce the following new paragraph after paragraph (3) in the Article 9:

(4) The provisions of paragraph (1) do not apply when a computer program itself is not the essential object of the rental.

[End of document]

CRNR/DC/53

December 12, 1996 (Original: English)

AMENDMENTS TO ARTICLES 2, 7, 9 AND 10 OF DRAFT TREATY N° 1

proposed by the Delegation of Australia

Article 2

The Delegation of Australia proposes that Article 2 be amended by substituting “Articles 2-6 of the Berne Convention” for “Articles 3-6 of the Berne Convention”.

The change is proposed to ensure that “literary and artistic works” as used in the Treaty (see, e.g. Articles 3(1), 7(1), 8(1), 9(1), 10 and 12(1)) have the same meaning as in the Berne Convention.

Article 7

The Delegation of Australia proposes that Article 7 be amended by:

- inserting at the beginning of paragraph (1) the words, "*Subject to paragraph (2)*"; and
- replacing paragraph (2) with the following paragraph:

"Paragraph (1) shall not apply to indirect or temporary reproductions that have the sole purpose of making a work perceptible or which are of a purely transient or incidental character as part of a technical process".

Article 9

The Delegation of Australia proposes that Article 9 be amended so that it reads as follows, the new wording being shown in bold underlined and the words proposed to be omitted from the Basic Proposal being contained within square brackets and italicized:

"(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the **commercial** rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs [*collections of data or other material in machine-readable form,*] and [*musical*] works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph

(1) unless the **commercial** rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art.

(4) In respect of computer programs, paragraph (1) does not apply to rentals where the program itself is not the essential object of the rental".

Article 10

The Delegation of Australia proposes that Article 10 be amended so that it reads as follows, the new wording being shown in bold underlined and the words proposed to be omitted from the Basic Proposal being contained within square brackets and italicized:

“Right of Communication and Making Available to the Public

Without prejudice to [*the rights provided for in*] Articles 11(1)(ii), 11bis[(i)]**(1) and (2)**, 11ter(1)(ii), 14(1)[(i)]**(ii)** of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing:

- (a) any communication to the public of their works **by wire or wireless means; and** [*including*]
- (b) the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them”.

[End of document]

CRNR/DC/54

December 12, 1996 (Original: English)

AMENDMENT TO ARTICLES 2, 7, 10, 12, 14, 17, 19 AND 21 OF DRAFT TREATY N° 2

proposed by the Delegation of Australia

The Delegation of Australia proposes that Article 2 be amended as follows:

- (1) substitute “any” for “appropriate” in paragraph (c);
- (2) omit paragraph (f);
- (3) substitute “such” for the words “by satellite” (second occurring) in paragraph (g).

The Delegation of Australia proposes that Articles 7 and 14 be amended as follows:

inserting at the beginning of paragraph (1) the words, “Subject to paragraph (2);”
and
replacing paragraph (2) with the following paragraph:

“Paragraph (1) shall not apply to indirect or temporary reproductions that have the sole purpose of making a [fixed performance / phonogram] perceptible or which are of a purely transient or incidental character as part of a technical process.”

The Delegation of Australia proposes that Articles 10 and 17 be amended by inserting in paragraph (1) the word “commercial” before “rental.”

The Delegation of Australia proposes that Articles 12 and 19 be merged into a single article to be located in Chapter IV and to read as follows, the new working being shown in bold underlined and the words proposed to be omitted from the Basic Proposal being contained within square brackets and italicized:

“(1) **Performers and producers of phonograms** shall enjoy a right to a single equitable remuneration for the direct or indirect use of phonograms [*published for commercial purposes or reproductions of such phonograms*] for broadcasting and for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

(3) Any Contracting Party may, [*subject to the provisions of paragraph (4),*] in a notification deposited with the Director-General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) [*The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.*]

Article 21 of Draft Treaty N° 2

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the

Alternative A: musical performance **was** fixed in a phonogram

Alternative B: performance **was** fixed in any medium

[*was published, and in case of unpublished fixed performances, from the end of the year in which the performance took place.*]

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of

the year in which [*the phonogram was published, and in case of unpublished phonograms, from the end of the year in which*] the fixation was made.

[End of document]

CRNR/DC/55

December 12, 1996 (Original: English)

PARTLY CONSOLIDATED TEXT OF TREATY N° 1

prepared by the Chairman of Main Committee I

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ANNEX

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Recognizing the need to maintain a balance between the interests of the authors and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties ~~that are not countries of the Union established by the Berne Convention~~ shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Article 2

Application of Articles 3 to 6 of the Berne Convention

(1) Contracting Parties shall apply the provisions of Articles 3 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

(2) When "nationals" are referred to in the provisions mentioned in paragraph (1), they shall be deemed, in the case of a separate customs territory party to this Treaty, to mean persons, natural or legal, who are domiciled or who have a real and effective industrial or commercial establishment in that customs territory.

Article 3

Notion and Place of Publication

(1) When literary or artistic works are made available to the public by wire or wireless means with the consent of their authors in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works, for purposes of applying the provisions of the Berne Convention.

(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public.

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to ~~the expression of a computer program in any form~~ computer programs, whatever may be the mode or form of their expressions.

Article 5

Collections Compilations of Data (Databases)

Collections Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any rights copyright subsisting in the data or material contained in the ~~collection~~ compilation.

Article 6

Abolition of ~~Certain Non-Voluntary~~ Non-Voluntary Broadcasting Licenses

~~(1) Within three~~ Within five years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licenses under Article 11~~bis~~(2) of the Berne Convention in respect of the broadcasting of a work.

~~(2) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer apply the provisions of Article 13 of the Berne Convention.~~

Article 7

Scope of the Right of Reproduction

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works ~~shall include~~, in any manner or form, includes direct and indirect reproduction of their works, whether permanent or temporary, ~~in any manner or form~~.

(2) ~~Subject to the provisions of~~ to the conditions under, and without prejudice to the scope of applicability of, Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where ~~the~~ a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of

use of the work that is authorized by the author or permitted by law in accordance with the Berne Convention and this Treaty.

Article 8

Alternative A

Right of Distribution and Right of Importation

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their works through sale or other transfer of ownership;

(ii) the importation of the original and copies of their works, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of any work that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

Alternative B

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of works by or pursuant to authorization.

Article 9

Right of Rental

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs, ~~collections~~ compilations of data or other material in machine-readable form subject to the protection under Article 5, and musical works

embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction. In the case of computer programs, this obligation does not apply to rentals where the program itself is not the essential object of the rental.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art.

Article 10

Right of Communication

Without prejudice to the rights provided for in Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 11

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall apply the provisions of Articles 7(1), 7(3), 7(5), 7(6), 7(7) and 7(8) of the Berne Convention and shall not apply the provisions of Article 7(4).

Article 12

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty ~~only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author~~ a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) ~~Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.~~

Article 13

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, “protection-defeating device” means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Article 14

Obligations concerning Rights Management Information

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

Article 15

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 16

Special Provisions on Enforcement of Rights

Alternative A

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty. [See the Annex of Document CRNR/DC/4.]

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, ~~Including Trade in Counterfeit Goods~~, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

Alternative C

(1) Contracting Parties undertake to adopt, in accordance with their constitutions, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of Document]

CRNR/DC/56

December 12, 1996 (Original: English)

AMENDMENT TO ARTICLES 7, 10, 13 AND 14 OF DRAFT TREATY N° 1

proposed by the Delegations of Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

The following amendments are proposed:

1. Replace the current paragraph (2) of Article 7 with the following text:

Temporary reproduction does not as such constitute a reproduction within the meaning of Article 9(1) of the Berne Convention and this Treaty where—

(i) such temporary reproduction is made for the sole purpose of making a work perceptible, or

(ii) such temporary reproduction is part of a technical process incidental to the transmission or utilization of the work concerned; or

(iii) such reproduction is incidental to the use of the work as authorized by the right holder concerned or permitted by law.

2. Renumber the current draft Article 10 as paragraph (1) and insert the following text as paragraph (2):

For the purposes of this Article, the phrase “communication to the public,” in respect of any communication, means the initial act of making the work available to the public and does not include merely providing facilities or the means for enabling or making such communication.

3. Replace the current draft Article 13 with the following text:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by rights holders in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their works, which are not authorized by the rights holders concerned or permitted by law.

4. Replace the current draft paragraph (1) of Article 14 with the following text:

(1) Contracting Parties shall provide appropriate and effective legal remedies against any person who knowingly performs any of the following acts knowing that by doing so such

person is enabling, facilitating or concealing an infringement of any of the rights under this Treaty:

- (i) to remove or alter any rights management information without authority;*
- (ii) to distribute, import for distribution, broadcast, or communicate to the public, without authority, copies of works from which the rights management information has been removed or altered without authority.*

[End of document]

CRNR/DC/57 Rev.*
December 12, 1996 (Original: English)

AMENDMENT TO ARTICLES 2, 7, 11, 14, 18, 19, 22 AND 23 OF TREATY N° 2

proposed by the Delegations of Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

The following amendments are proposed:

- 1 Replace the current draft paragraph (2)(d) of Article 2 with the following text:

“producer of a phonogram” means the person who, or the legal entity which, is responsible for making the arrangements for the first fixation of the sounds of a performance or other sounds, or the representation of sounds.

- 2 Replace the current draft paragraph (2) of Article 7 with the following text:

Reproduction does not as such constitute a reproduction within the meaning of this Treaty where -

- (i) such reproduction is temporary and made for the sole purpose of making a fixed performance perceptible; or*
- (ii) such reproduction is temporary and part of a technical process incidental to the transmission or utilization of the fixed performance concerned; or*

[* Revised and corrected version of document CRNR/DC/57, which contained a printing anomaly.]

(iii) such reproduction is incidental to the use of the fixed performance as authorized by the right holder concerned or permitted by law.

3 Renumber the current draft Article 11 as paragraph (1) of Article 11 and insert the following text as paragraph (2):

For the purposes of paragraph (1), the phrase “making available” means the initial act of making the performance available to the public and does not include merely providing facilities or the means for enabling or performing such act.

4 Delete the phrase “for commercial purposes” from the current draft paragraph (1) of Article 12.

5 Replace the current draft paragraph 2 of Article 14 with the following text:

Reproduction does not as such constitute a reproduction within the meaning of this Treaty where -

(i) such reproduction is temporary and made for the sole purpose of making a phonogram audible; or

(ii) such reproduction is temporary and part of a technical process incidental to the transmission or utilization of the phonogram concerned; or

(iii) such reproduction is incidental to the use of the phonogram as authorized by the right holder concerned or permitted by law.

6 Renumber the current draft Article 18 as paragraph (1) of Article 18 and insert the following text as paragraph (2):

For the purposes of paragraph (1), the phrase “making available” means the initial act of making the phonogram available to the public and does not include merely providing facilities or the means for enabling or performing such act.

7 Delete the phrase “for commercial purposes” from the current draft paragraph (1) of Article 19.

8 Replace the current draft Article 22 with the following text:

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by rights holders in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their works, which are not authorized by the rights holders concerned or permitted by law.

9 Replace the current draft paragraph (1) of Article 23 with the following text:

(1) Contracting Parties shall provide appropriate and effective legal remedies against any person who knowingly performs any of the following acts knowing that by doing so such person is enabling, facilitating or concealing an infringement of any of the rights under this Treaty:

(i) to remove or alter any rights management information without authority;

(ii) to distribute, import for distribution, broadcast, or communicate to the public, without authority, copies of works from which the rights management information has been removed or altered without authority.

[End of document]

CRNR/DC/58

December 12, 1996 (Original: English)

PARTLY CONSOLIDATED TEXT OF TREATY N° 2

prepared by the Chairman of Main Committee I

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ANNEX

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Recognizing the need to maintain a balance between the interests of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under ~~treaties for the protection of literary and artistic works, and in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors under the Berne Convention for the Protection of Literary and Artistic Works.~~

Article 2

Definitions

For the purposes of this Treaty:

(a) “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) “phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds; ~~an audiovisual fixation, the representation of sounds and images or the sound part of either is not a phonogram;~~

(c) “fixation” means the embodiment of

Alternative A: sounds,

Alternative B: sounds or images,

or of the representations thereof, from which they can be perceived, reproduced or communicated through an appropriate device;

(d) “producer of a phonogram” means the person, or the legal entity, who or which ~~first fixes~~ takes the initiative and has the economic responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) “publication” of a fixed performance or a phonogram means

(i) the offering of copies of the fixed performance or the phonogram to the public, or

(ii) the making of the fixed performance or the phonogram available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them,

with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity; in the case referred to in item (ii) above, “publication” takes place in the Contracting Party where the necessary arrangements have been made for availability of the fixed performances or the phonograms to members of the public;

(f) “rental” of a phonogram means any transfer of the possession of a copy of a phonogram for consideration for a limited period of time;

(g) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals by satellite is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(h) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of

Alternative A: sounds

Alternative B: the images or sounds

of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Articles 12 and 19, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) or, for the purposes of Article 5, Article 17 of the Rome Convention shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the protection provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty.

CHAPTER II RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall

Alternative A: , as regards his musical performances, have the right

Alternative B: have the right

to claim to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of

Alternative A: authorizing, as regards their musical performances:

Alternative B: authorizing:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 7**Right of Reproduction**

(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

in any manner or form.

(2) Subject to the ~~provisions of conditions~~ under, and without prejudice to the scope of applicability of, Article 13(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the fixed performance perceptible or where ~~the~~ a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the fixed performance that is authorized by the performer or permitted by law in accordance with this Treaty.

Article 8

Alternative G

Right of Modification

Performers shall enjoy the exclusive right of authorizing the modification of their

Alternative A: musical performances fixed in phonograms.

Alternative B: performances fixed in any medium.

Alternative H

[No such provision.]

Article 9

Alternative E

Right of Distribution and Right of Importation

(1) Performers shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership;

(ii) the importation of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a fixed performance that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

Alternative F

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of performances by or pursuant to an authorization.

Article 10

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even after distribution of them by or pursuant to authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty for that Contracting Party.

Article 11

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

~~Article 12~~

~~Right to Remuneration for Broadcasting and Communication to the Public~~

[No Article 12, see Article 20a.]

~~Article 13~~

~~Limitations and Exceptions~~

[No Article 13, see Article 20b.]

CHAPTER III RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14

Right of Reproduction

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

(2) Subject to the provisions of conditions under, and without prejudice to the scope of applicability of, Article 20(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the phonogram audible or where the a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law in accordance with this Treaty.

Article 15

Alternative A

Right of Modification

Producers of phonograms shall enjoy the exclusive right of authorizing the modification of their phonograms.

Alternative B

[No such provision.]

Article 16

Alternative A

Right of Distribution and Right of Importation

(1) Producers of phonograms shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership;

(ii) the importation of the original or copies of their phonograms, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of a phonogram that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

*Alternative B***Right of Distribution**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of phonograms by or pursuant to an authorization.

Article 17**Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty for that Contracting Party.

Article 18**Right of Making Available of Phonograms**

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 19**~~Right to Remuneration for Broadcasting and Communication to the Public~~**

[No Article 19, see Article 20a.]

Article 20**Limitations and Exceptions**

[No Article 20, see Article 20b.]

**CHAPTER IV
COMMON PROVISIONS****Article 20a****Right to Remuneration for Broadcasting and Communication to the Public**

- (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.
- (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration between them. ~~In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.~~
- (3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

Article 20b**Limitations and Exceptions**

- (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.
- (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms.

Article 21

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the

Alternative A: musical performance fixed in a phonogram

Alternative B: performance fixed in any medium

was published, and in case of unpublished fixed performances, from the end of the year in which the performance took place.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

Article 22

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

Article 23

Obligations concerning Rights Management Information

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, or communicate or make available to the public, without authority, copies of fixed performances or phonograms from which electronic rights management information has been removed or altered without authority,

knowing that such an act induces, enables or facilitates an infringement of a right provided for in this Treaty.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or a phonogram, or appear in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 24

Formalities and Independence of Protection

(1) The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

~~(2) Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the performance or phonogram.~~

Article 25

Reservations

Alternative C

(1) Any party upon becoming a Contracting Party to this Treaty, may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of:

(i) Article 2(c) and Article 2(h) to sounds only;

(ii) Article 5(1) and Article 6 to musical performances only; and

(iii) Article 7, Article 8, Article 9(1), Article 10, Article 11, and Article 21(1) to musical performances fixed in phonograms only.

Alternative D

[No such provision]

[2] Subject to the provisions of Article ~~12(3), 19(3)~~ 20(a), [and paragraph (1) of this Article], no reservations to this Treaty shall be permitted.

Article 26

Application in Time

Alternative A

(1) Contracting Parties shall also apply provisions of this Treaty to performances that took place and phonograms that were fixed before the date of entry into force of this Treaty for each Contracting Party. The duration of the protection shall be determined according to the provisions of Article 21.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(3) Contracting Parties may provide for conditions under which fixations of performances and copies of phonograms which were lawfully made before the entry into force of this Treaty for each Contracting Party may be distributed to the public or rented during a limited period of time.

Alternative B

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

Article 27

Special Provisions on Enforcement of Rights

Alternative A

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty. [See the Annex of Document CRNR/DC/5]

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, ~~Including Trade in Counterfeit Goods~~, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of

infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

Alternative C

- (1) Contracting Parties undertake to adopt, in accordance with their constitutions, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of document]

CRNR/DC/59

December 12, 1996 (Original: English)

AMENDMENT TO ARTICLE 4 OF DRAFT TREATY N° 2

proposed by the European Community and its Member States

Article 4
National treatment

- (1) *Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the rights provided for by this Treaty.*
- (2) *The treatment provided for in paragraph (1) shall be subject to the rights specifically provided for, and the limitations and exceptions specifically provided for, in this Treaty.*
- (3) *The obligation provided for in paragraph (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Articles 25(1), 12(3) and 19(3) of this Treaty.*
- (4) *A Contracting Party shall not be obliged to accord to nationals, as defined in Article 3(2), of another Contracting Party the treatment provided for in paragraph (1)*

in respect of rights which do not derive from express provisions of this Treaty or which might be recognized by national legislation in the context of limitations and exceptions under Articles 13 and 20 of this Treaty.

[End of document]

CRNR/DC/59 Corr.

December 13, 1996 (Original: English)

**CORRIGENDUM TO DOCUMENT CRNR/DC/59
(ENGLISH AND FRENCH VERSIONS ONLY)**

prepared by the Secretariat

The previously distributed English and French language versions of Document CRNR/DC/59 (proposal by the European Community and its Member States) bore the indication of English as the original language, in the English version, and French as the original language, in the French version. The indication should have been, in both languages, that the original version was English/French, since the document was received by the Secretariat in both languages.

[End of document]

CRNR/DC/60

December 12, 1996 (Original: English)

AMENDMENTS TO ARTICLES 6, 8, 9 AND 16 OF DRAFT TREATY N° 1

proposed by the Delegation of the United States of America

[Additions are indicated by underlining, deletions are indicated by ~~strike-through~~.]

Article 6: Abolition of Certain Non-Voluntary Licenses

Change to paragraph (2) only:

Delete Paragraph (2).

Article 8: Right of Distribution and Right of Importation [Alternative A]

Changes to paragraphs (1)(i), (1)(ii) and (2), no change to paragraph (3):

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:
 - (i) the making available to the public of the original and permanent copies of their works through sale or other transfer of ownership;
 - (ii) the importation of the original and permanent copies of their works, even following any sale or other transfer of ownership of the original or permanent copies by or pursuant to authorization.
- (2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any permanent copy of any work that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

Article 9: Rental Right

These are in addition to changes indicated in our previous proposal, and concern paragraph (1) of the Article.

- (1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the rental of the original and permanent copies of their works even after distribution of them by or pursuant to authorization by the author.

Article 16: Special Provisions on Enforcement of Rights and the ANNEX

Delete Article 16 and the ANNEX.

[End of document]

CRNR/DC/61

December 12, 1996 (Original: English)

AMENDMENTS TO ARTICLES 9, 10, 16, 17 AND 27 OF DRAFT TREATY N° 2

proposed by the Delegation of the United States of America

[Additions are indicated by underlining, deletions are indicated by ~~strike-through~~.]

Article 9: Right of Distribution and Right of Importation [Alternative E]

Changes to paragraph (1)(i), (1)(ii) and (2); no change to paragraph (2).

- (1) Performers shall enjoy the exclusive right of authorizing:
 - (i) the making available to the public of the original and permanent copies of their
Alternative A: musical performances fixed in phonograms
Alternative B: performances fixed in any medium
through sale or other transfer of ownership;
 - (ii) the importation of the original and permanent copies of their
Alternative A: musical performances fixed in phonograms,
Alternative B: performances fixed in any medium,
even following any sale or other transfer of ownership of the original or permanent copies by or pursuant to authorization.
- (2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any permanent copy of a fixed performance that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

Article 10: Right of Rental

These are in addition to changes previously proposed, and concern paragraphs (1) and (2).

- (1) Performers shall enjoy the exclusive right of authorizing the rental of the original and permanent copies of their
Alternative A: musical performances fixed in phonograms,
Alternative B: performances fixed in any medium,
even after distribution of them by or pursuant to authorization by the performer.
- (2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of permanent copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

Article 16: Right of Distribution and Right of Importation [Alternative A]

Changes to paragraph (1)(i), (1)(ii) and (2); no change to paragraph (2).

- (1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and permanent copies of their
Alternative A: musical performances fixed in phonograms
Alternative B: performances fixed in any medium
through sale or other transfer of ownership.
- (2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or permanent copies of performances by or pursuant to an authorization.

Article 17: Right of Rental

These are in addition to changes previously proposed, and concern paragraphs (1) and (2).

- (1) Producers of phonograms shall enjoy the exclusive right of authorizing the rental of the original and permanent copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.
- (2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of permanent copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

Article 27: Special Provisions on Enforcement of Rights and the ANNEX

Delete Article 27 and the ANNEX.

[End of document]

CRNR/DC/62 Rev.*

December 13, 1996 (Original: English)

LIST OF PROPOSALS CONCERNING TREATY No. 1

prepared by the Secretariat

The present document contains an article-by-article list of those documents of the Diplomatic Conference which include proposals concerning Draft Treaty No. 1. The source of each proposal is indicated.

Preamble

CRNR/DC/28	Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela
CRNR/DC/33	India
CRNR/DC/64	China

Article 1

Relations to the Berne Convention

CRNR/DC/28	Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras,
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[* Revised and corrected version of document CRNR/DC/62, which contained a printing anomaly.]

Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

CRNR/DC/64 China

Article 2

Application of Articles 3 to 6 of the Berne Convention

CRNR/DC/49 Brazil

CRNR/DC/53 Australia

CRNR/DC/64 China

CRNR/DC/67 Russian Federation

Article 3

Notion and Place of Publication

CRNR/DC/29 United States of America

CRNR/DC/42 Mexico

CRNR/DC/64 China

CRNR/DC/67 Russian Federation

Article 4

Computer programs

CRNR/DC/18 India, on behalf of itself and Jordan, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka and Thailand

CRNR/DC/52 Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

CRNR/DC/64 China

Article 5

Collections of Data (Databases)

CRNR/DC/19 India, on behalf of itself and Jordan, Pakistan, Philippines, Qatar, Republic of Korea, Singapore, Sri Lanka and Thailand

CRNR/DC/64 China

Article 6

Abolition of Certain Non-Voluntary Licenses

CRNR/DC/11 Israel
CRNR/DC/12 Singapore
CRNR/DC/14 Republic of Korea
CRNR/DC/60 United States of America
CRNR/DC/64 China
CRNR/DC/68 Israel

Article 7

Scope of the Right of Reproduction

CRNR/DC/12 Singapore
CRNR/DC/20 Israel
CRNR/DC/22 Norway
CRNR/DC/53 Australia
CRNR/DC/56 Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/64 China
CRNR/DC/68 Israel
CRNR/DC/73 Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

Article 8***Alternative A* Right of Distribution and Right of Importation*****Alternative B* Right of Distribution**

CRNR/DC/12	Singapore
CRNR/DC/60	United States of America
CRNR/DC/64	China
CRNR/DC/65	India
CRNR/DC/76	Australia, Canada and New Zealand

Article 9**Right of Rental**

CRNR/DC/29	United States of America
CRNR/DC/36	India
CRNR/DC/43	Canada
CRNR/DC/52	Colombia, on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela
CRNR/DC/53	Australia
CRNR/DC/60	United States of America
CRNR/DC/64	China
CRNR/DC/67	Russian Federation
CRNR/DC/78	Cameroon, Mali, Morocco, Niger, Senegal and Tunisia

Article 10**Right of Communication**

CRNR/DC/12	Singapore
CRNR/DC/53	Australia
CRNR/DC/56	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya,

Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

CRNR/DC/64

China

Article 11

Duration of the Protection of Photographic Works

CRNR/DC/35

Croatia

CRNR/DC/64

China

Article 12

Limitations and Exceptions

CRNR/DC/12

Singapore

CRNR/DC/20

Israel

CRNR/DC/29

United States of America

CRNR/DC/68

Israel

CRNR/DC/74

Israel

Article 13

Obligations concerning Technological Measures

CRNR/DC/12

Singapore

CRNR/DC/24

Republic of Korea

CRNR/DC/37

Jamaica

CRNR/DC/56

Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

CRNR/DC/64

China

Article 14
Obligations concerning Rights Management Information

CRNR/DC/12	Singapore
CRNR/DC/39	Hungary
CRNR/DC/47	United States of America
CRNR/DC/50	Republic of Korea
CRNR/DC/56	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/64	China
CRNR/DC/72	European Community and its Member States

Article 15
Application in Time

CRNR/DC/49	Brazil
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Article 16
Special Provisions on Enforcement of Rights

CRNR/DC/41	Jamaica
CRNR/DC/60	United States of America
CRNR/DC/64	China

ANNEX

CRNR/DC/60	United States of America
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[End of document]

CRNR/DC/63 Rev.

December 13, 1996 (Original: English)

LIST OF PROPOSALS CONCERNING DRAFT TREATY No. 2*prepared by the Secretariat*

The present document contains an article-by-article list of those documents of the Diplomatic Conference which include proposals concerning Draft Treaty No. 2. The source of each proposal is indicated.

Preamble

CRNR/DC/33	India
CRNR/DC/71	China

**CHAPTER I
GENERAL PROVISIONS****Article 1
Relation to other Conventions**

CRNR/DC/48	United States of America
CRNR/DC/70	Brazil
CRNR/DC/71	China

**Article 2
Definitions***Article 2(a)*

CRNR/DC/27	Jamaica
CRNR/DC/45	Argentina
CRNR/DC/77	Peru

Article 2(b)

CRNR/DC/45	Argentina
CRNR/DC/77	Peru

Article 2(c)

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/54	Australia
CRNR/DC/71	China
CRNR/DC/77	Peru

Article 2(d)

CRNR/DC/45	Argentina
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/77	Peru

Article 2(f)

CRNR/DC/54	Australia
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Article 2(g)

CRNR/DC/54	Australia
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Article 2(h)

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America

CRNR/DC/71 China

Article 3
Beneficiaries of Protection under this Treaty

CRNR/DC/34 United States of America

CRNR/DC/71 China

Article 4
National Treatment

CRNR/DC/32 European Community and its Member States

CRNR/DC/34 United States of America

CRNR/DC/44 Canada

CRNR/DC/59 European Community and its Member States

CRNR/DC/71 China

CHAPTER II
RIGHTS OF PERFORMERS

Article 5
Moral Rights of Performers

CRNR/DC/13 Singapore

CRNR/DC/31 Argentina

CRNR/DC/32 European Community and its Member States

CRNR/DC/34 United States of America

CRNR/DC/71 China

Article 6
Economic Rights of Performers in their Unfixed Performances

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/38	Switzerland
CRNR/DC/44	Canada
CRNR/DC/71	China

Article 7
Right of Reproduction

CRNR/DC/21	Israel
CRNR/DC/22	Norway
CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/54	Australia
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/69	Israel
CRNR/DC/71	China

Article 8
Right of Modification

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/71	China

Article 9***Alternative E* Right of Distribution and Right of Importation*****Alternative F* Right of Distribution**

CRNR/DC/13	Singapore
CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/61	United States of America
CRNR/DC/65	India
CRNR/DC/71	China
CRNR/DC/76	Australia, Canada and New Zealand

Article 10**Right of Rental**

CRNR/DC/15	Japan
CRNR/DC/16	Russian Federation
CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/54	Australia
CRNR/DC/61	United States of America
CRNR/DC/71	China
CRNR/DC/75	Japan

Article 11**Right of Making Available of Fixed Performances**

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya,

Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

CRNR/DC/66 Argentina

CRNR/DC/71 China

Article 12

Right to Remuneration for Broadcasting and Communication to the Public

CRNR/DC/38 Switzerland

CRNR/DC/44 Canada

CRNR/DC/48 United States of America

CRNR/DC/54 Australia

CRNR/DC/57 Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe

Article 13

Limitations and Exceptions

CRNR/DC/21 Israel

CRNR/DC/30 United States of America

CRNR/DC/69 Israel

Article 13bis

Transferability of Rights

CRNR/DC/34 United States of America

CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14
Right of Reproduction

CRNR/DC/22	Norway
CRNR/DC/23	Israel
CRNR/DC/54	Australia
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/69	Israel
CRNR/DC/71	China

Article 15
Right of Modification

CRNR/DC/34	United States of America
CRNR/DC/71	China

Article 16
***Alternative A* Right of Distribution and Right of Importation**
***Alternative B* Right of Distribution**

CRNR/DC/61	United States of America
CRNR/DC/65	India
CRNR/DC/71	China
CRNR/DC/76	Australia, Canada and New Zealand

Article 17
Right of Rental

CRNR/DC/15	Japan
CRNR/DC/54	Australia
CRNR/DC/61	United States of America
CRNR/DC/71	China
CRNR/DC/75	Japan

Article 18
Right of Making Available of Phonograms

CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/66	Argentina
CRNR/DC/71	China

Article 19
Right to Remuneration for Broadcasting and Communication to the Public

CRNR/DC/44	Canada
CRNR/DC/48	United States of America
CRNR/DC/54	Australia
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/71	China

Article 20
Limitations and Exceptions

CRNR/DC/23	Israel
CRNR/DC/30	United States of America
CRNR/DC/69	Israel
CRNR/DC/71	China

CHAPTER IV
COMMON PROVISIONS

Article 21
Term of Protection

CRNR/DC/30	United States of America
CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/54	Australia
CRNR/DC/71	China

Article 22
Obligations concerning Technological Measures

CRNR/DC/25	Republic of Korea
CRNR/DC/37	Jamaica
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/71	China

Article 23
Obligations concerning Rights Management Information

CRNR/DC/39	Hungary
CRNR/DC/40	Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela
CRNR/DC/48	United States of America
CRNR/DC/51	Republic of Korea
CRNR/DC/57	Algeria, Angola, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ethiopia, Gabon, Gambia, Ghana, Kenya, Lesotho, Libya, Madagascar, Malawi, Mali, Mauritius, Morocco, Namibia, Niger, Nigeria, Senegal, South Africa, Sudan, Togo, Tunisia, United Republic of Tanzania, Zambia and Zimbabwe
CRNR/DC/71	China

Article 24
Formalities and Independence of Protection

CRNR/DC/71	China
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Article 25
Reservations

CRNR/DC/32	European Community and its Member States
CRNR/DC/34	United States of America
CRNR/DC/46	New Zealand
CRNR/DC/71	China

Article 26
Application in Time

CRNR/DC/26	Republic of Korea
CRNR/DC/44	Canada
CRNR/DC/71	China

Article 26bis
Implementation of Treaty Obligations

CRNR/DC/34 United States of America

Article 27
Special Provisions on Enforcement of Rights

CRNR/DC/41 Jamaica

CRNR/DC/61 United States of America

CRNR/DC/71 China

ANNEX

CRNR/DC/61 United States of America

[End of document]

CRNR/DC/64
December 13, 1996 (Original: Chinese)

AMENDMENTS TO PARTLY CONSOLIDATED TEXT OF DRAFT TREATY NO. 1
(CRNR/DC/55)

proposed by the Delegation of the People's Republic of China

1. **The Delegation accepts the following provisions of the consolidated text:**

Preamble

Article 1. Relation to the Berne Convention.

Article 3. Notion and place of publication.

Article 4. Computer programs.

Article 5. Compilations of data.

Article 8. Right of distribution (Alternative B).

Article 10. Right of communication.

Article 11. Duration of the protection of photographic works.

Article 14. Obligations concerning rights management information.

Article 16. Special provisions on enforcement of rights (Alternative C).

2. **It is proposed that Article 2 and Article 13 be deleted.**

3. **It is proposed that Article 6 be deleted.**

If this Article cannot be deleted, it is proposed that the present text become paragraph (1), and that the following be added as paragraph (2): “Any Contracting Party may, by means of a notification deposited with the Director General of the World Intellectual Property Organization at the time of ratification, acceptance or accession, declare that it will not apply the provisions of paragraph (1) of this Article.”

4. **It is proposed that Article 7 be replaced by:** “The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works in any manner or form shall include direct and indirect permanent reproduction of their works.”

5. It is proposed that the phrase “compilations of data or other material in machine-readable form” in Article 9(2) be deleted.

[End of document]

CRNR/DC/65

December 13, 1996 (Original: English)

**AMENDMENT TO ARTICLE 8 OF DRAFT TREATY N° 1 AND
TO ARTICLES 9 AND 16 OF DRAFT TREATY N° 2**

proposed by the Delegation of India

1. Delete Alternative A in Article 8 of Draft Treaty N° 1.

2. Delete Alternative E in Article 9 and Alternative A in Article 16 of Draft Treaty N° 2.

[End of document]

CRNR/DC/66

December 13, 1996 (Original: Spanish)

AMENDMENT TO ARTICLES 11 AND 18 OF DRAFT TREATY NO. 2

proposed by the Delegation of Argentina

The Delegation of Argentina proposes the completion of Articles 11 and 18 with the following:

Article 11

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them *or where communication to the public is on demand or by subscription.*

Article 18

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them *or where communication to the public is on demand or by subscription.*

[End of document]

CRNR/DC/67

December 13, 1996 (Original: Russian)

AMENDMENTS TO ARTICLES 2, 3 AND 9 OF THE PARTLY CONSOLIDATED TEXT
OF DRAFT TREATY NO. 1

proposed by the Delegation of the Russian Federation

In view of the fact that States and international organizations, but not separate customs territories, may become Contracting Parties to this Treaty, the Delegation of the Russian Federation proposes that paragraph (2) of Article 2 as currently drafted be amended as follows:

“When provisions mentioned in paragraph (1) contain references to “nationals,” they shall be deemed, in the case of a separate customs territory to which this Treaty applies...”

the rest of the text remaining unchanged.

In Article 3(1) delete the words “for purposes of applying the provisions of the Berne Convention,” as they do not have any particular bearing on the text.

Replace the words “this obligation” in the last sentence of Article 9(2) with the phrase “*the obligation referred to in paragraph (1).*”

[End of document]

CRNR/DC/68

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLES 6, 7 AND 12 OF DRAFT TREATY N° 1

proposed by the Delegation of Israel

Amending previous proposal CRNR/DC/11

The Delegation of Israel proposes the following sub-article be added to Article 6:

(3) *By means of a notification deposited with the Director General of the World Intellectual Property Organization at the time of ratification, acceptance or*

accession or at any time thereafter, any Contracting Party may declare that it will not apply the provisions of sub-articles (1) and (2) of this Article.

Amending previous proposal CRNR/DC/20

The Delegation of Israel proposes the following:

To delete paragraph (2) of Article 7, and to add the following new paragraph (3) to Article 12:

(3) Subject to the provisions of Article 9(2) of the Berne Convention, Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct or indirect in any manner or form, has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature ~~provided that such reproduction is effected by the end user in the course of use of the work that is authorized by the author or permitted by law.~~

[End of document]

CRNR/DC/69

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLES 7, 13, 14 AND 20 OF DRAFT TREATY N° 2

proposed by the Delegation of Israel

Amending previous proposal CRNR/DC/21

The Delegation of Israel proposes the following:

To delete paragraph (2) of Article 7, and to add the following new paragraph (3) to Article 13:

(3) Subject to the provisions of Article 13(2) Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct or indirect in any manner or form, has the sole purpose of making the fixed performance perceptible or where the reproduction is of a transient or incidental nature ~~provided that such reproduction is effected by the end user in the course of use of the work that is authorized by the author or permitted by law.~~

Amending previous proposal CRNR/DC/23

The Delegation of Israel proposes the following:

To delete paragraph (2) of Article 14, and to add the following new paragraph (3) to Article 20:

(3) Subject to the provisions of Article 20(2) Contracting Parties shall limit the right of reproduction in cases where a temporary reproduction, direct or indirect in any manner or form, has the sole purpose of making the phonogram audible or where the reproduction is of a transient or incidental nature ~~provided that such reproduction is effected by the end user in the course of use of the work that is authorized by the author or permitted by law.~~

[End of document]

CRNR/DC/70

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLE 1 OF DRAFT TREATY N° 2

proposed by the Delegation of Brazil

The Delegation of Brazil proposes that the following paragraph be introduced after paragraph 1(1) as a new paragraph 1(2):

This Treaty shall have no connection, either explicit or implicate, with other treaties or conventions that are, directly or indirectly, concerned with the same subject matter.

[End of document]

CRNR/DC/71

December 13, 1996 (Original: Chinese)

**AMENDMENT TO PARTLY CONSOLIDATED TEXT OF DRAFT TREATY N^o. 2
(CRNR/DC/58)***proposed by the Delegation of the People's Republic of China***1. The Delegation accepts the following provisions of the consolidated text:****Preamble****Article 1. Relation to other Conventions.****Article 2. Definitions, in which Alternative A is selected in respect of "fixation" in subparagraph (c), and Alternative A is selected in respect of "communication to the public" in subparagraph (h).****Article 3. Beneficiaries of protection under this Treaty.****Article 4. National treatment.****Article 5. Moral rights of performers: Alternative B is selected.****Article 6. Economic rights of performers in their unfixed performances: Alternative B is selected.****Article 9. Right of distribution: Alternative F is selected; it is proposed that Alternative A and Alternative B be merged into "performances fixed in phonograms."****Article 10. Right of rental: It is proposed that Alternative A and Alternative B be merged into "performances fixed in phonograms."****Article 16. Right of distribution: Alternative B is selected.****Article 17. Right of rental.****Article 20a. Right of remuneration for broadcasting and communication to the public.****Article 20b. Limitations and exceptions.****Article 21. Term of protection: it is proposed that Alternative A and Alternative B be merged into "performances fixed in phonograms."****Article 23. Obligations concerning rights management information.****Article 24. Formalities and independence of protection.**

Article 25. Reservations: Alternative C is selected.

Article 26. Application in time: Alternative B is selected.

Article 27. Special provisions on enforcement of rights: Alternative C is selected.

2. **It is proposed that the following provisions be deleted:**

Article 8. Right of modification

Article 15. Right of modification.

Article 22. Obligations concerning technological measures.

3. **It is proposed that Article 7 be replaced by:** “Performers shall enjoy the exclusive right of authorizing the direct or indirect permanent reproduction of their performances fixed in phonograms in any manner or form.”

4. **It is proposed that Article 14 be replaced by:** “Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect permanent reproduction of their phonograms in any manner or form.”

5. The Delegation has reservations concerning Article 11 on the right of making available of fixed performances and Article 18 on the right of making available of phonograms.

[End of document]

CRNR/DC/72

December 13, 1996 (Original: Chinese)

AMENDMENT TO ARTICLE 14 OF DRAFT TREATY N° 1

proposed by the European Community and its Member States

Article 14

Obligations concerning Rights Management Information

“(1) Contracting Parties shall make it unlawful for any person ~~knowingly~~ to perform any of the following acts:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority,

knowing that by so doing they are enabling or facilitating

- (i) an infringement of any of the rights provided for under this Treaty, or
- (ii) the avoidance of any legal obligation to pay any remuneration in respect of any right covered by this Treaty.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.”

[End of document]

CRNR/DC/73

December 13, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 7 OF DRAFT TREATY NO. 1

proposed by the Delegation of Colombia on behalf of itself and Argentina, Bolivia, Brazil, Chile, Costa Rica, Cuba, Ecuador, El Salvador, Guatemala, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela

It is proposed that the text of the Basic Proposal shown below in square brackets be deleted and that the passages in underlined italics be added.

Article 7

Scope of the Right of Reproduction

- (1) No change.
- (2) Subject to the provisions of Article 9(2) of the Berne Convention, [it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction] *the scope of the right of reproduction shall not extend to the temporary reproduction of a work where such reproduction* has the sole purpose of making the work

perceptible or where the reproduction is of a transient nature *as part of a technical process*, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by Law, *as provided in Article 10 of this Treaty*.

Explanatory Note

Article 9(1) of the Berne Convention establishes the right of reproduction "... in any manner or form." In view of the fact that new technology has broadened traditional "forms" and "manners," it has become necessary to redefine the scope of the right of reproduction and exclude from it those reproductions that are technically necessary for making the work perceptible or form part of a technical process and do not in themselves constitute the production of originals or copies of the work.

If the foregoing is not expressly stated, it could give rise to one-sided, excessively broad interpretations of the scope of Article 9(1) of the Berne Convention.

[End of document]

CRNR/DC/74

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLE 12(1) OF DRAFT TREATY N° 1

proposed by the Delegation of Israel

The Delegation of Israel proposes the following changes to Article 12(1):

To replace the word *only* with the phrase *to an extent with exceptions or limitations provided for in the Berne Convention and..* Accordingly, Article 12(1) would read as follows:

- (1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty *to an extent consistent with exceptions or limitations provided for in the Berne Convention and* in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

[End of document]

CRNR/DC/75

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLES 10 AND 17 OF DRAFT TREATY N° 2

proposed by the Delegation of Japan

The Delegation of Japan proposes the following, which is to revise its former proposal (CRNR/DC/15):

1. First proposal:

To delete the following phrase from paragraph (2) of Article 10 and paragraph (2) of Article 17:

“for a period of 3 years from the entry into force of this Treaty”

2. Alternative proposal:

To replace paragraph (2) of Article 10 by the following:

(2) A Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms may, in a notification deposited with the Director General of WIPO, declare that it will not apply the provision of paragraph (1) and it will maintain that system.

To replace paragraph (2) of Article 17 by the following:

(2) A Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms may, in a notification deposited with the Director General of WIPO, declare that it will not apply the provision of paragraph (1) and it will maintain that system.

[End of document]

CRNR/DC/76

December 13, 1996 (Original: English)

AMENDMENT TO ARTICLE 8 OF DRAFT TREATY N° 1 AND
ARTICLES 9 AND 16 OF DRAFT TREATY N° 2

proposed by the Delegations of Australia, Canada and New Zealand

Article 8 of Draft Treaty N° 1

It is proposed that this Article be deleted from the Treaty.

Article 9 and 16 of Draft Treaty N° 2

It is proposed that these Articles be deleted from the Treaty.

[End of document]

CRNR/DC/77

December 13, 1996 (Original: Spanish)

AMENDMENT TO ARTICLE 2 OF DRAFT TREATY NO. 2

proposed by the Delegation of Peru

Article 2
Definitions

For the purposes of this Treaty:

(a) a “performer” is a person who performs, sings, reads, recites, interprets or otherwise executes a literary or artistic work or an expression of folklore, or a variety or circus performer;

(b) a “phonogram” is the sounds of a performance or other sounds, or digital representations thereof, fixed for the first time in an exclusively sound medium. Phonographic, magnetic tape and digital recordings are copies of phonograms;

(c) a “fixation” is the embodiment of signs, sounds, images or digital representations thereof in a physical medium that allows them to be read, perceived, reproduced, communicated or used;

(d) a “producer of phonograms” is a natural person or legal entity on whose initiative and responsibility and under whose coordination the sounds of a performance or other sounds, or digital representations thereof, are fixed for the first time.

[End of document]

CRNR/DC/78

December 13, 1996 (Original: French)

AMENDMENT TO ARTICLE 9 OF DRAFT TREATY NO. 1

proposed by the Delegations of Cameroon, Mali, Morocco, Niger, Senegal and Tunisia

The Delegations of the above-mentioned African States propose the deletion of paragraphs (2) and (3) of Article 9 of Draft Treaty No. 1 on the grounds that the exclusive right of an author to authorize or prohibit the renting of his work should be afforded to him since rental constitutes a form of exploitation of a work.

[End of document]

CRNR/DC/79

December 14, 1996 (Original: English)

AMENDMENT TO THE PARTLY CONSOLIDATED TEXT OF DRAFT TREATY N° 1

proposed by the European Community and its Member States

Delete Article 3 (Notion and Place of Publication).

[End of document]

CRNR/DC/80

December 17, 1996 (Original: English)

SECOND REPORT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. The Credentials Committee (hereinafter referred to as “the Committee”), established on December 5, 1996, by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, met for the second time on December 17, 1996.

2. The Delegations of the following States, elected members of the Committee by the Diplomatic Conference, attended the meeting: Azerbaijan, China, Croatia, Italy, Jordan, Senegal and Trinidad and Tobago.

3. The Chairman of the Committee, elected by the Diplomatic Conference, was Mrs. Ndèye Abibatou Youm Diabe Siby (Senegal). The Vice-Chairmen, elected by the Diplomatic Conference, were Mr. Nikola KopΦιΔ (Croatia), Mr. Corrado Milesi Ferretti (Italy) and Ms. Mary Ann Richards (Trinidad and Tobago).

4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on December 3, 1996, and amended on December 5, 1996 (document CRNR/DC/9 Rev.; hereinafter referred to as “the Rules of Procedure”), the Committee examined the credentials and full powers received since its first meeting on December 9, 1996.

5. The Committee found in order the following further communications:

(a) as far as *Member Delegations* are concerned,

(i) the *credentials* and *full powers* (that is, credentials for participating in the Conference and full powers to sign one or several of the treaties to be adopted by the Diplomatic Conference) of the delegations of the following eight States:

Algeria	Kenya
Austria	Mexico
Chile	Trinidad and Tobago
Germany	Yemen

(ii) the *credentials* (without full powers) of the delegations of the following four States:

Armenia	Lesotho
Cameroon	Russian Federation

(b) as far as the *Special Delegation* is concerned, the *credentials* and *full powers* of the Delegation of the European Communities (1).

6. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph 5(a)(i) and (b), above, and the credentials of the delegations mentioned in paragraph 5(a)(ii), above.
7. The Committee re-expressed the wish that the Secretariat should bring Rule 6 (“Credentials and Full Powers”), 7 (“Letters of Appointment”) and 10 (“Provisional Participation”) of the Rules of Procedure to the attention of Member Delegations or Observer Delegations not having presented credentials or full powers and of the representatives of Observer Organizations not having presented letters or other documents of appointment.
8. The Committee decided that a report on its meeting should be prepared by the Secretariat and issued as its report, to be presented by the Chairman of the Committee to the Conference, meeting in Plenary.
9. The Committee authorized its Chairman to examine any further communications concerning Member Delegations, Observer Delegations, Special Delegation or Observer Organizations which might be received by the Secretariat after the close of its second meeting and to report thereon to the Conference, meeting in Plenary, unless the Chairman deemed it necessary to convene the Committee to examine and report on those communications.

[End of document]

CRNR/DC/81

December 18, 1996 (Original: English)

AMENDMENTS TO ARTICLES 98 AND 100
AND PROPOSED NEW ARTICLES 100BIS AND 100TER

proposed by the European Community and its Member States

*(Basic proposal for the Administrative and Final Clauses
of the Treaty to be considered by the Diplomatic Conference
(document CRNR/DC/3))*

Proposed new Article 98(3)(b) (to specify the essential nature of the right of any intergovernmental organisation only to exercise any voting rights for all of its Member States Contracting Parties to the Treaty and in place of its Member States Contracting Parties and vice versa)

“Any intergovernmental organisation Contracting Party may participate in the vote, in place of its Member States, with a number of votes equal to the number of Member

States which are party to this Treaty. No intergovernmental organisation Contracting Party shall participate in the vote if its Member States exercise their rights to vote and vice versa. The rights to vote, as exercised between an intergovernmental organisation and its Member States Contracting Parties to this Treaty, shall not, in any one vote, be exercised in any combination of votes exercised by the Member States and votes exercised by the organisation.”

Proposed new Article 98(3)(c) (to state clearly that any intergovernmental organisation Contracting Party to the Treaty can never exercise more votes than the number of Member States of that organisation that are Contracting Parties to the Treaty)

“The number of votes exercised by any intergovernmental organisation and its Member States Contracting Parties to this Treaty shall in no case exceed the number of Member States of that organisation which are Contracting Parties to this Treaty.”

Proposed new Article 98(5) (to avoid the need to deal in the treaty provisions with the requirement for the presence of the Member States of the intergovernmental organisation when the organisation exercises their votes)

“The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions, except that consensus shall be required for the adoption and amendment of rules governing the exercise of voting rights in the Assembly.”

Proposed new Article 100(2) (to recognize the basis on which the European Community has authority to become a party to the Treaty)

“The European Community, being competent in respect of, and having its own legislation binding of all its Member States on matters covered by this Treaty and having the authority to enter into international relations with respect to such matters, may become a party to this Treaty.”

Proposed new Article 100bis (to substitute for any declaration of competence)

“Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and bear all of the responsibilities under this treaty.”

Proposed new Article 100ter (to substitute for a declaration of competence)

“Any Contracting Party may request any other Contracting Party to provide information concerning its implementation of any provision of this Treaty. The Contracting Party receiving such a request shall provide this information within a reasonable time.”

Proposed text of a statement to be made on behalf of the European Community and its Member States and recorded in the minutes of the Conference:

“The European Community and its Member States hereby indicate that their common practice is to deposit their instruments of ratification or accession simultaneously.”

[End of document]

CRNR/DC/82 Prov.
December 18, 1996 (Original: English)

DRAFT
SUBSTANTIVE PROVISIONS OF TREATY N° 1

proposed by Main Committee I

**Treaty
on Certain Questions Concerning
the Protection of Literary and Artistic Works**

Contents

Preamble

Article 1: Relation to the Berne Convention

Article *1bis*: Scope of Copyright Protection

Article 2: Application of Articles 2 to 6 of the Berne Convention

Article 3: deleted

Article 4: Computer Programs

Article 5: Compilations of Data (Databases)

Article 6: Abolition of Non-Voluntary Broadcasting Licenses

Article 7: Scope of the Right of Reproduction

Article 8: Right of Distribution

Article 9: Right of Rental

Article 10: Right of Communication to the Public

Article 11: Duration of the Protection of Photographic Works

Article 12: Limitations and Exceptions

Article 13: Obligations concerning Technological Measures

Article 14: Obligations concerning Rights Management Information

Article 15: Application in Time

Article 16: Special Provisions on Enforcement of Rights

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of the authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

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

Article 1bis

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operations or mathematical concepts as such.

Article 2

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

Article 3

[Article 3 deleted]

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expressions.

Article 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This

protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

Article 6

Abolition of Non-Voluntary Broadcasting Licenses

Within seven years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licenses under Article 11*bis*(2) of the Berne Convention in respect of the broadcasting of a work.

Article 7

Scope of the Right of Reproduction

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works, in any manner or form, includes direct and indirect reproduction of their works, whether permanent or temporary.

[(2) Subject to the conditions under, and without prejudice to the scope of applicability of, Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law in accordance with the Berne Convention and this Treaty.]

Article 8

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the work with the authorization of the author.

Article 9

Right of Rental

(1) Authors of:

- (i) computer programs;
- (ii) cinematographic works; and
- (iii) works embodied in phonograms as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or

copies of their works.

(2) Paragraph (1) shall not apply:

(i) in case of a computer program where the program itself is not the essential object of the rental; and

(ii) in case of a cinematographic work, unless such commercial rental has led to widespread copying of such work materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms, may maintain that system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of authors.

Article 10

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication, to the public of their works by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 11

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 12

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty to an extent consistent with exceptions or limitations provided for in the Berne Convention in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 13

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 14

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies, having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

Article 15**Application in Time**

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 16**Special Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of document]

CRNR/DC/82

December 20, 1996 (Original: English)

SUBSTANTIVE PROVISIONS OF TREATY N° 1

adopted by Main Committee I

**Treaty
on Certain Questions Concerning
the Protection of Literary and Artistic Works**

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Preamble

Article 1: Relation to the Berne Convention

- Article 2: Scope of Copyright Protection
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- Article 11: Obligations concerning Technological Measures
- Article 12: Obligations concerning Rights Management Information
- Article 13: Application in Time
- Article 14: Provisions on Enforcement of Rights

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation,

Recognizing the need to maintain a balance between the rights of authors and the larger public interest, particularly education, research and access to information, as reflected in the Berne Convention,

Have agreed as follows:

Article 1

Relation to the Berne Convention

- (1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention. This Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties.
- (2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.
- (3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.
- (4) Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Article 2

Scope of Copyright Protection

Copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3

Application of Articles 2 to 6 of the Berne Convention

Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 2 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to computer programs, whatever may be the mode or form of their expression.

Article 5

Compilations of Data (Databases)

Compilations of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

Article 6

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the work with the authorization of the author.

Article 7

Right of Rental

(1) Authors of:

- (i) computer programs;
- (ii) cinematographic works; and
- (iii) works embodied in phonograms as determined in the national law of Contracting Parties,

shall enjoy the exclusive right of authorizing commercial rental to the public of the originals or copies of their works.

(2) Paragraph (1) shall not apply:

- (i) in the case of computer programs where the program itself is not the essential object of the rental; and
- (ii) in the case of cinematographic works, unless such commercial rental has led to widespread copying of such works materially impairing the exclusive right of reproduction.

(3) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of authors for the rental of copies of their works embodied in phonograms may maintain that

system provided that the commercial rental of works embodied in phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of authors.

Article 8

Right of Communication to the Public

Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication, to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 9

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall not apply the provisions of Article 7(4) of the Berne Convention.

Article 10

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 11

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict

acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

Article 12

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public.

Article 13

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of document]

CRNR/DC/83 Prov.

December 18, 1996 (Original: English)

DRAFT
ADMINISTRATIVE AND FINAL CLAUSES OF THE TREATY

proposed by Main Committee II

[The text of this document is identical to document CRNR/DC/83.]

[End of document]

CRNR/DC/83

December 19, 1996 (Original: English)

ADMINISTRATIVE AND FINAL CLAUSES OF THE TREATY

proposed by Main Committee II

ARTICLE 100

ASSEMBLY

(1)(a) The Contracting Parties shall have an Assembly.

(b) Each Contracting Party shall be represented by one delegate who may be assisted by alternate delegates, advisors and experts.

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask the World Intellectual Property Organization (hereinafter referred to as "WIPO") to grant financial assistance to facilitate the participation of

delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 102(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General.

(5) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

ARTICLE 101**INTERNATIONAL BUREAU**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

ARTICLE 102**ELIGIBILITY FOR BECOMING PARTY TO THE TREATY**

(1) Any Member State of WIPO may become party to this Treaty.

(2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

ARTICLE 103**RIGHTS AND OBLIGATIONS UNDER THE TREATY**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

ARTICLE 104**SIGNATURE OF THE TREATY**

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

ARTICLE 105**ENTRY INTO FORCE OF THE TREATY**

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

ARTICLE 106**EFFECTIVE DATE OF BECOMING PARTY TO THE TREATY**

This Treaty shall bind

(i) the 30 States referred to in Article 105, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 105, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

ARTICLE 107

NO RESERVATIONS TO THE TREATY

No reservation to this Treaty shall be admitted.

ARTICLE 108

DENUNCIATION OF THE TREATY

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

ARTICLE 109

LANGUAGES OF THE TREATY

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

ARTICLE 110**DEPOSITARY**

The Director General of WIPO is the depositary of this Treaty.

[End of document]

CRNR/DC/84 Prov.

December 18, 1996 (Original: English)

DRAFT
SUBSTANTIVE PROVISIONS OF TREATY N° 2

proposed by Main Committee I

Draft Treaty
for the Protection of the Rights
of Performers and Producers of Phonograms

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Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Recognizing the need to maintain a balance between the rights of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

CHAPTER I GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

Article 2

Definitions

For the purposes of this Treaty:

(a) “performers” are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

(b) “phonogram” means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;

(c) “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) “producer of a phonogram” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

(e) “publication” of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

[item (f) deleted]

(g) “broadcasting” means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also “broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(h) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article [20a], “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided

under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) or, for the purposes of Article 5, Article 17 of the Rome Convention shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the protection provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty.

[Except as otherwise provided in Article [20a(3)] each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the subject matter protected by this Treaty.]

[(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the rights provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the rights specifically provided for, and the limitations and exceptions specifically provided for, in this Treaty.

(3) The obligation provided for in paragraph (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Article[s] [5 and 20a] of this Treaty.

(4) A Contracting Party shall not be obliged to accord to nationals, as defined in Article 3(2), of another Contracting Party the treatment provided for in paragraph (1) in respect of rights which do not derive from express provisions of this Treaty or which might be recognized by national legislation in the context of limitations and exceptions under Article [20b] of this Treaty.]

**CHAPTER II
RIGHTS OF PERFORMERS**

[Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his [musical] performances, have the right to claim to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

[(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his [musical] performances, have the right to claim to be identified as the performer of his performances except where omission is dictated by the manner of the use of the performance and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.]

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

[(4) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will not apply the provisions of this Article.]]

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their [musical] performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 7

Right of Reproduction

(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their [musical] performances fixed in phonograms, in any manner or form.

[(2) Subject to the conditions under, and without prejudice to the scope of applicability of, Article 13(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the fixed performance perceptible or where a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the fixed performance that is authorized by the performer or permitted by law in accordance with this Treaty.]

[Article 8

Right of Modification

Performers shall enjoy the exclusive right of authorizing the modification of their [musical] performances fixed in phonograms.]

Article 9

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their [musical] performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

Article 10**Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of performers.

Article 11**Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available of their [musical] performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 12

[No Article 12, see Article 20a.]

Article 13

[No Article 13, see Article 20b.]

CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14

Right of Reproduction

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

[(2) Subject to the conditions under, and without prejudice to the scope of applicability of, Article 20(2), it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the phonogram audible or where a temporary reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law in accordance with this Treaty.]

[**Article 15**

Right of Modification

Producers of phonograms shall enjoy the exclusive right of authorizing the modification of their phonograms.]

Article 16

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of phonograms.

Article 17**Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

Article 18**Right of Making Available of Phonograms**

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 19

[No Article 19, see Article 20a.]

Article 20

[No Article 20, see Article 20b.]

**CHAPTER IV
COMMON PROVISIONS****Article 20a****Right to Remuneration for Broadcasting and Communication to the Public**

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms [published for commercial purposes] for broadcasting or for any communication to the public.

[(1) Performers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms or videograms (audiovisual fixations) published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.]

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

[(4) For the purposes of this Article, phonograms published for commercial purposes include phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them.]

[Article 20*abis*

Right to Digital Broadcasting and Communication to the Public

(1) Notwithstanding provisions of Article [20a], producers of phonograms shall enjoy the exclusive right of authorizing the broadcasting or communication to the public of their phonograms by digital means by subscription and against payment of a fee for the reception of the broadcast or communication.

(2) Contracting Parties may limit the right established in paragraph (1) to a right of remuneration with respect to broadcasts and communications where the structure and sequence of programming ensures that such broadcasts and communications do not prejudice the producers' right of distribution under Article 16, or their right of making their phonograms available to the public under Article 18.

(3) Contracting Parties may in special cases adopt limited exceptions to the right established in paragraph (1), where such exceptions do not materially impair primary economic uses or the value of the phonograms.]

Article 20b

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms.

Article 21

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the [musical] performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 22

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Article 23

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies,

having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or a phonogram or appear in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 24

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Article 25

Reservations

Subject to the provisions of Article[s] [5(4) and 20a(3)], no reservations to this Treaty shall be permitted.

Article 26

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

[End of document]

CRNR/DC/84 Prov. Corr.

December 19, 1996 (Original: English)

CORRECTIONS TO DRAFT SUBSTANTIVE PROVISIONS OF TREATY N° 2*prepared by the Secretariat*

After Article 26 (Application in Time) the following Article is inserted:

Article 27**Special Provisions on Enforcement of Rights**

- (1) *Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.*
- (2) *Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.*

[End of document]

CRNR/DC/84

December 20, 1996 (Original: English)

SUBSTANTIVE PROVISIONS OF TREATY N° 2

adopted by Main Committee I

**Draft Treaty
for the Protection of the Rights
of Performers and Producers of Phonograms**

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Preamble**The Contracting Parties,**

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Recognizing the need to maintain a balance between the rights of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

Have agreed as follows:

**CHAPTER I
GENERAL PROVISIONS**

Article 1

Relation to Other Conventions

- (1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").
- (2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

Article 2

Definitions

For the purposes of this Treaty:

- (a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
- (d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;
- (e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;
- (f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also

“broadcasting”; transmission of encrypted signals is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, “communication to the public” includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

(3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) or, for the purposes of Article 5, Article 17 of the Rome Convention shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

CHAPTER II RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live oral performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances except where omission is dictated by the manner of the use of the performance and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

Article 7

Right of Reproduction

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Article 8

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

Article 9

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of performers.

Article 10

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

**CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS**

Article 11

Right of Reproduction

Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their phonograms, in any manner or form.

Article 12

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of phonograms.

Article 13

Right of Rental

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

Article 14

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

CHAPTER IV COMMON PROVISIONS

Article 15

Right to Remuneration for Broadcasting and Communication to the Public

(1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.

(3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

Article 16

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms.

Article 17

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

Article 18

Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Article 19

Obligations concerning Rights Management Information

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies, having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

Article 20

Formalities

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

Article 21

Reservations

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

Article 22

Application in Time

(1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

Article 23

Provisions on Enforcement of Rights

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of document]

CRNR/DC/85

December 19, 1996 (Original: English)

DRAFT ARTICLE 100(3)(B)

*Proposal of the European Community and its Member States
(for the replacement of the second sentence of Article 100(3)(b)
on page 3 of document CRNR/DC/83 Prov.)*

In the case of concurrent exercise of the votes of the Member States of an intergovernmental organization Contracting Party by that intergovernmental organization and by one or more of its Member States, any votes exercised by that organization and by its Member States shall be treated as abstentions from the vote.

[End of document]

CRNR/DC/86

December 19, 1996 (Original: English)

**REPORT OF THE CHAIRMAN
OF THE CREDENTIALS COMMITTEE***prepared by the Secretariat*

Since the meetings of the Credentials Committee on December 9 and 17, 1996 (see documents CRNR/DC/17 and 80), the full powers of the Delegations of Mongolia, Namibia, Niger and Togo and the credentials of the Delegations of Lithuania and Madagascar have been received.

[End of document]

CRNR/DC/87

December 19, 1996 (Original: English)

DRAFT RESOLUTION*proposed by the President of the Conference*

[The text of this document is identical to document CRNR/DC/99, the contents of which are reproduced on page 93.]

[End of document]

CRNR/DC/88

December 20, 1996 (Original: English)

DRAFT RECOMMENDATION*proposed by the President of the Conference*

[The text of this document is identical to document CRNR/DC/100, the contents of which are reproduced on page 97.]

[End of document]

CRNR/DC/89

December 20, 1996 (Original: English)

**DRAFT
WIPO COPYRIGHT TREATY***submitted by Main Committees I and II to the Conference,
meeting in Plenary*

[The text of this document is identical to document CRNR/DC/94, the contents of which are reproduced on odd-numbered pages 3 to 25.]

[End of document]

CRNR/DC/90

December 20, 1996 (Original: English)

DRAFT
WIPO PERFORMANCES AND PHONOGRAMS TREATY
*submitted by Main Committees I and II to the Conference,
meeting in Plenary*

[The text of this document is identical to document CRNR/DC/95, the contents of which are reproduced on odd-numbered pages 39 to 77.]

[End of document]

CRNR/DC/91

December 20, 1996 (Original: English)

DRAFT
FINAL ACT
*submitted by the Drafting Committee to the Conference,
meeting in Plenary*

[The text of this document is identical to document CRNR/DC/DC/2, the contents of which are reproduced on page 89.]

[End of document]

CRNR/DC/92 Corr.

December 20, 1996 (Original: English)

DRAFT AGREED STATEMENTS CONCERNING TREATY No. 1

*submitted by Main Committee I
to the Conference, meeting in Plenary*

Concerning Article 3

It is understood that in applying Article 3 of this Treaty, the expression “country of the Union” in Articles 2 to 6 of the Berne Convention will be read as if it were a reference to a Contracting Party to this Treaty, in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression “country outside the Union” in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that “this Convention” in Articles 2(8), *2bis*(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a “national of one of the countries of the Union” will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization.

Concerning Article 4

The scope of protection for computer programs under Article 4 of this Treaty, read with Article *1bis*, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Article 5

The scope of protection for compilations of data (databases) under Article 5 of this Treaty, read with Article 2, is consistent with Article 2 of the Berne Convention and on a par with the relevant provisions of the TRIPS Agreement.

Concerning Articles 6 and 7

As used in these Articles, the expressions “copies” and “original and copies,” being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects.

Concerning Article 7

It is understood that the obligation under Article 7(1) does not require a Contracting Party to provide an exclusive right of commercial rental to authors who, under that Contracting Party's law, are not granted rights in respect of phonograms. It is understood that this obligation is consistent with Article 14(4) of the TRIPS Agreement.

Concerning Article 8

It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2).

Concerning Article 10

It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment.

It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention.

Concerning Article 12

It is understood that the reference to "infringement of any right covered by this Treaty or the Berne Convention" includes both exclusive rights and rights of remuneration.

It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty.

[End of document]

CRNR/DC/93 Corr.

December 20, 1996 (Original: English)

DRAFT AGREED STATEMENTS CONCERNING TREATY No. 2

*submitted by Main Committee I
to the Conference, meeting in Plenary*

[The text of this document is identical to document CRNR/DC/97, the contents of which are reproduced on pages 79 to 81, with the exception of the agreed statements concerning Article 3(2), Articles 7, 11 and 16, and Article 16, which were not included in document CRNR/DC/93 Corr.]

[End of document]

CRNR/DC/94

December 23, 1996 (Original: English)

WIPO COPYRIGHT TREATY

adopted by the Diplomatic Conference on December 20, 1996

[The text of this document is reproduced on odd-numbered pages 3 to 25.]

[End of document]

CRNR/DC/95

December 23, 1996 (Original: English)

WIPO PERFORMANCES AND PHONOGRAMS TREATY

adopted by the Diplomatic Conference on December 20, 1996

[The text of this document is reproduced on odd-numbered pages 39 to 77.]

[End of document]

CRNR/DC/96

December 23, 1996 (Original: English)

AGREED STATEMENTS CONCERNING THE WIPO COPYRIGHT TREATY

adopted by the Diplomatic Conference on December 20, 1996

[The text of this document is reproduced on pages 27 to 29.]

[End of document]

CRNR/DC/97

December 23, 1996 (Original: English)

**AGREED STATEMENTS CONCERNING
THE WIPO PERFORMANCES AND PHONOGRAMS TREATY***adopted by the Diplomatic Conference on December 20, 1996*

[The text of this document is reproduced on pages 79 to 81.]

[End of document]

CRNR/DC/98

December 23, 1996 (Original: English)

FINAL ACT OF THE DIPLOMATIC CONFERENCE*adopted by the Diplomatic Conference on December 20, 1996*

[The text of this document is reproduced on page 89.]

[End of document]

CRNR/DC/99

December 23, 1996 (Original: English)

RESOLUTION CONCERNING AUDIOVISUAL PERFORMANCES

adopted by the Diplomatic Conference on December 20, 1996

[The text of this document is reproduced on page 93.]

[End of document]

CRNR/DC/100

December 23, 1996 (Original: English)

RECOMMENDATION CONCERNING DATABASES

adopted by the Diplomatic Conference on December 20, 1996

[The text of this document is reproduced on page 97.]

[End of document]

CRNR/DC/101

August 26, 1997 (Original: français/English/español)

SUMMARY MINUTES, PLENARY

prepared by the International Bureau

[The text of this document is reproduced on pages 565 to 635.]

[End of document]

CRNR/DC/102

August 26, 1997 (Original: français/English/español)

SUMMARY MINUTES, MAIN COMMITTEE I

prepared by the International Bureau

[The text of this document is reproduced on pages 637 to 798.]

[End of document]

CRNR/DC/103

August 26, 1997 (Original: français/English/español)

SUMMARY MINUTES, MAIN COMMITTEE II

prepared by the International Bureau

[The text of this document is reproduced on pages 799 to 815.]

[End of document]

CRNR/DC/INF.1

November 8, 1996 (Original: English)

GENERAL INFORMATION

Document prepared by the International Bureau

[This document contained practical information concerning the venue and conference facilities of the Diplomatic Conference.]

[End of document]

CRNR/DC/INF.2

December 20, 1996 (Original: français/English)

LIST OF PARTICIPANTS

prepared by the International Bureau

[The information contained in this document can be found on pages 819 to 886.]

[End of document]

CRNR/DC/INF.3

November 29, 1996 (Original: English)

VENUES OF MEETINGS AND LOCATION OF CERTAIN OFFICES

Document prepared by the International Bureau

[This document contained practical information concerning the venue and location of certain offices of the Diplomatic Conference.]

[End of document]

CRNR/DC/INF.4

December 2, 1996 (Original: English)

LIST OF STATES AND ORGANIZATIONS
INVITED TO THE DIPLOMATIC CONFERENCE*prepared by the International Bureau*LIST OF STATES INVITED AS MEMBER DELEGATIONS
(THAT IS, THE STATES MEMBERS OF WIPO)

(as of December 2, 1996)

Albania, Algeria, Andorra, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cambodia, Cameroon, Canada, Central African Republic, Chad, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, El Salvador, Estonia, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iraq, Ireland, Israel, Italy, Jamaica, Japan, Jordan, Kazakstan, Kenya, Kyrgyzstan, Laos, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Malta,

Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Somalia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, United Arab Emirates, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Yemen, Yugoslavia, Zaire, Zambia, Zimbabwe (157)

SPECIAL DELEGATION

European Community (1)

LIST OF STATES INVITED AS OBSERVER DELEGATIONS (THAT IS, THE STATES MEMBERS OF THE UNITED NATIONS WHICH ARE NOT MEMBERS OF WIPO)

(as of December 2, 1996)

Afghanistan, Antigua and Barbuda, Belize, Botswana, Cape Verde, Comoros, Djibouti, Dominica, Dominican Republic, Equatorial Guinea, Eritrea, Ethiopia, Grenada, Iran (Islamic Republic of), Kuwait, Maldives, Marshall Islands, Micronesia (Federated States of), Mozambique, Myanmar, Nepal, Oman, Palau, Papua New Guinea, Samoa, Sao Tome and Principe, Seychelles, Solomon Islands, Syria, Vanuatu (30)

LIST OF INTERGOVERNMENTAL ORGANIZATIONS INVITED AS OBSERVER ORGANIZATIONS

United Nations (UN)
International Labour Organization (ILO)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Health Organization (WHO)
International Telecommunications Union (ITU)¹
World Meteorological Organization (WMO)¹
International Maritime Organization (IMO)¹
World Trade Organization (WTO)
African Intellectual Property Organization (OAPI)

¹ Invitation will be proposed at the time of the adoption of the Rules of Procedure.

Agency for Cultural and Technical Cooperation (AGECOP)
 Arab States Broadcasting Union (ASBU)
 Arab League Educational, Cultural and Scientific Organization (ALECSO)
 Asociación Latinoamericana de Intergración (ALADI)
 Association of South East Asian Nations (ASEAN)
 (Board of the) Cartagena Agreement (JUNAC)
 Caribbean Community (CARICOM)
 Commonwealth Fund for Technical Cooperation (CFTC)
 Commonwealth of Independent States (CIS)
 Conference of Latin American Authorities on Informatics (CALAI)
 Council of Europe (CE)
 Economic Community of the Great Lakes Countries (CEPGL)
 European Free Trade Association (EFTA)
 International Institute for the Unification of Private Law (UNIDROIT)
 Islamic Educational, Scientific and Cultural Organization (ISESCO)
 League of Arab States (LAS)
 Organization of African Unity (OAU)
 Organization of American States (OAS)
 Organization of the Islamic Conference (OIC)
 Permanent Secretariat of the General Treaty on Central American
 Economic Integration (SIECA)
 Sistema de Integración Centroamericana (SICA)
 Sistema Económico Latinoamericano (SELA)
 Southern African Development Community (SADC)
 Southern Common Market (MERCOSUR)
 The Commonwealth of Learning (COL)

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LIST OF NON-GOVERNMENTAL ORGANIZATIONS INVITED
AS OBSERVER ORGANIZATIONS

Afro-Asian Book Council (AABC)
 Agence pour la protection des programmes (APP)
 American Bar Association (ABA)
 American Federation of Musicians of the United States and Canada (AFM)
 American Federation of Television and Radio Artists (AFTRA)
 American Film Marketing Association (AFMA)
 American Intellectual Property Law Association (AIPLA)
 Asia-Pacific Broadcasting Union (ABU)
 Asociación Argentina de Interpretes (AADI)
 Asociación Nacional de Intérpretes (ANDI)
 Associação Portuguesa de Actores (APA)
 Association for the International Collective Management of Audiovisual Works (AGICOA)
 Association of Commercial Television in Europe (ACT)
 Association of European Radios (AER)
 Association of European Performers' Organisations (AEPO)
 Australian Copyright Council (ACC)

Bundesverband Deutscher Unternehmensberater (BDU)
Business Software Alliance (BSA)
Canadian Bar Association
Caribbean Broadcasting Union (CBU)
Chartered Institute of Patent Agents (CIPA)
Commercial Internet Exchange Association (CIX)
Computer and Communications Industry Association (CCIA)
Computer Users of Europe (CUE)
Conseil francophone de la chanson (CFC)
Coordination of European Independent Producers (CEPI)
Copyright Research and Information Center (CRIC)
Educator's Ad Hoc Committee on Copyright Law (ECCL)
Electronic Industries Association (EIA)
Electronic Industries Association of Japan (EIAJ)
European Alliance of Press Agencies (EAPA)
European Association of Advertising Agencies (EAAA)
European Association of Manufacturers of Business Machines and Information
Technology Industry (EUROBIT)
European Broadcasting Union (EBU)
European Bureau of Library, Information and Documentation Associations (EBLIDA)
European Cable Communications Association (ECCA)
European Committee for Interoperable Systems (ECIS)
European Computer Manufacturers Association (ECMA)
European Council of American Chambers of Commerce (ECACC)
European Federation of Agents of Industry in Industrial Property (FEMIP)
European Project-Digital Video Broadcasting (DVB)
European Tape Industry Council (ETIC)
European Writers' Congress (EWC)
Federation of European Audiovisual Directors (FERA)
Groupement européen représentant les organismes de gestion collective des droits des artistes
interprètes ou exécutants (ARTIS GEIE)
Ibero-American Television Organization (OTI)
Ibero-Latin-American Federation of Performers (FILAIIE)
Independent Film Producers International Association (IFPIA)
Information Industry Association (IIA)
Information Technology Association of America (ITAA)
Information Technology Industry Council (ITI)
Institute of Intellectual Property (IIP)
Intellectual Property Institute (CLIP)
Intellectual Property Owners (IPO)
Interactive Services Association (ISA)
Interamerican Copyright Institute (IIDA)
International Advertising Association (IAA)
International Affiliation of Writers' Guilds (IAWG)
International Alliance of Orchestra Associations (IAOA)
International Anticounterfeiting Coalition, Inc. (IACC)
International Association for Mass Communication Research (IAMCR)
International Association for the Advancement of Teaching and Research
in Intellectual Property (ATRIP)

International Association for the Protection of Industrial Property (AIPPI)
International Association of Audio-Visual Writers and Directors (AIDAA)
International Association of Entertainment Lawyers (IAEL)
International Association of Art (IAA)
International Association of Authors of Comics and Cartoons (AIAC)
International Association of Broadcasting (IAB)
International Association of Conference Interpreters (AIIC)
International Bar Association (IBA)
International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM)
International Chamber of Commerce (ICC)
International Communications Round Table (ICRT)
International Confederation of Free Trade Unions (ICFTU)
International Confederation of Music Publishers (ICMP)
International Confederation of Professional and Intellectual Workers (CITI)
International Confederation of Societies of Authors and Composers (CISAC)
International Copyright Society (INTERGU)
International Council of Design Associations (ICOGRADA)
International Council of Scientific Unions (ICSU)
International Council of Societies of Industrial Design (ICSID)
International Council on Archives (ICA)
International Dance Council (IDC)
International Federation for Information and Documentation (FID)
International Federation of Reproduction Rights Organizations (IFRRO)
International Federation of Actors (FIA)
International Federation of Associations of Film Distributors (FIAD)
International Federation of Computer Law Associations (IFCLA)
International Federation of Film Producers Associations (FIAPF)
International Federation of Interior Architects/Interior Designers (IFI)
International Federation of Journalists (IFJ)
International Federation of Library Associations and Institutions (IFLA)
International Federation of Musicians (FIM)
International Federation of Newspaper Publishers (FIEJ)
International Federation of Press Clipping and Media Monitor Bureaus (FIBEP)
International Federation of the Phonographic Industry (IFPI)
International Federation of Translators (FIT)
International Franchise Association (IFA)
International Group of Scientific, Technical and Medical Publishers (STM)
International Hotel Association (IHA)
International Institute of Communications (IIC)
International Intellectual Property Alliance (IIPA)
International Law Association (ILA)
International League of Competition Law (LIDC)
International Literary and Artistic Association (ALAI)
International Music Council (IMC)
International Organization for Standardization (ISO)
International Organization of Hotel and Restaurant Associations (HoReCa)
International Organization of Journalists (IOJ)
International P.E.N.

International Publishers Association (IPA)
International Theatre Institute (ITI)
International Union of Architects (UIA)
International Union of Cinemas (UNIC)
International Video Federation (IVF)
International Writers Guild (IWG)
Japan Compact Disk Rental Commerce Trade Association (JCD)
Japan Electronic Industry Development Association (JEIDA)
Latin American Institute for Advanced Technology, Computer Science and Law (ILATID)
Law Association for Asia and the Pacific (LAWASIA)
Max-Planck Institute for Foreign and International Patent, Copyright and Competition
Law (MPI)
Media and Entertainment International (MEI)
National Association of Broadcasters (NAB)
National Music Publishers' Association (NMPA)
North American National Broadcasters Association (NANBA)
Patent and Trademark Institute of Canada
Performing Arts Employers Associations League Europe (PEARLE)
Sociedad de Autores y Compositores de Música (SACM)
Société civile pour l'administration des droits des artistes et musiciens
interprètes (ADAMI)
Software Information Center (SOFTIC)
Software Publishers Association (SPA)
The Chartered Institute of Arbitrators (CIArb)
Union of African Journalists (UAJ)
Union of European Practitioners in Industrial Property (UEPIP)
Union of Industrial and Employers' Confederations of Europe (UNICE)
Union of National Radio and Television Organizations of Africa (URTNA)
Video Software Dealers Association (VSDA)
World Association of Research Media (WARM)
World Blind Union (WBU)
World Federation of Advertisers (WFA)
World Federation of Music Schools (WFMS)
World Union of Professions (WUP)

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December 6, 1996 (Original: français/English)

**BUREAUX, COMMISSIONS ET COMITÉS
OFFICERS AND COMMITTEES**

[The information contained in this document can be found on pages 883 to 886.]

[End of document]

CRNR/DC/INF.6

December 20, 1996 (Original: English)

**SIGNATURE OF THE FINAL ACT
OF THE DIPLOMATIC CONFERENCE
ON CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS***Memorandum by the Secretariat*

The following Delegations signed, on December 20, 1996, the Final Act of the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions: Angola, Argentina, Australia, Austria, Azerbaijan, Belgium, Bolivia, Brazil, Burkina Faso, Canada, Chile, China, Colombia, Croatia, Cuba, Denmark, Ecuador, El Salvador, Finland, Germany, Honduras, Hungary, Indonesia, Ireland, Italy, Jamaica, Japan, Kazakstan, Kenya, Mexico, Mongolia, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Singapore, Slovakia, Slovenia, Spain, Sudan, Sweden, Switzerland, Togo, Trinidad and Tobago, United Kingdom, United States of America, Uzbekistan, Venezuela, Zimbabwe, European Communities (57).

[End of document]

CRNR/DC/INF.7

December 20, 1996 (Original: English)

SIGNATURE OF THE WIPO COPYRIGHT TREATY*Memorandum by the Secretariat*

[The information contained in this document can be found on pages 31 to 35.]

[End of document]

CRNR/DC/INF.8

December 20, 1996 (Original: English)

**SIGNATURE
OF THE WIPO PERFORMANCES AND PHONOGRAMS TREATY***Memorandum by the Secretariat*

[The information contained in this document can be found on pages 83 to 87.]

[End of document]

CRNR/DC/INF.9

December 23, 1996 (Original: English)

CLOSING SPEECH

*of Arpad Bogsch
Director General of WIPO*

Madam President,
Honorable Delegates,

The International Bureau of the World Intellectual Property Organization is proud that its member States chose WIPO for preparing and serving this diplomatic conference.

The two Treaties adopted by the Conference will have an immense impact on the future development of copyright and neighboring rights.

The success is due to you, Madam President. At all difficult moments, your advice and leadership were indispensable and successful.

The success is due also to the Chairmen of the Committees, Madam Youm, Mr. Lienes, Mr. Silva Soares and Mr. Ayyar. Mr. Lienes was also the sole author of the basic proposal of the substantive clauses and, therefore, his role was important on two accounts.

The International Bureau is grateful to these five officers and all the delegates and other participants for their patience and work through which they enriched in a most important way the treaty system of WIPO.

This Diplomatic Conference did not solve all the questions that await international norm making in the field of intellectual property. But the Conference itself adopted recommendations on the work to be undertaken by WIPO for the protection of audiovisual performances and of databases. WIPO is expected to deal in the near future also with the protection of expressions of folklore and of broadcasters' rights and with the specific copyright and trademark problems of global information systems, like the Internet.

The International Bureau of WIPO will do its best that those questions be studied and possible answers to them be found in the foreseeable future.

In the meetings that will deal with those questions, the non-governmental organizations will have their important role, as usual in WIPO committees of experts and other WIPO meetings.

Madam President, allow me please to end this statement by expressing my thanks first of all to Assistant-Director General Mihály Ficsor, Secretary of the Diplomatic Conference. His deep knowledge and his perfect diplomacy were once again and particularly brilliantly demonstrated.

My thanks go also to my colleague Francis Gurry, the Secretary of Main Committee II and of the Credentials Committee, for his outstanding work. And my appreciation goes also to my colleague Carlos Claa and all my other colleagues -- dozens of them -- who served this Conference with utmost efficiency in various capacities, all indispensable for the Conference.

They certainly deserve warm applause.

[End of document]

CRNR/DC/INF/10

December 23, 1996 (Original: English)

SIGNATURES

Memorandum by the Secretariat

[The information contained in this document can be found on pages 31 to 35 and pages 83 to 87.]

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