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ROME CONVENTION

for the Protection of Performers, Producers of
Phonograms and Broadcasting Organisations



GENEVA

UNITED INTERNATIONAL BUREAUX FOR THE PROTECTION
OF INTELLECTUAL PROPERTY

BIBLIOTHÈQUE INTERNATIONALE RÉUNIE
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of Abraham L. KAMINSTEIN, Rapporteur-General

SECTION A 1

ROME CONVENTION, 1961

**INTERNATIONAL CONVENTION FOR THE PROTECTION
OF PERFORMERS, PRODUCERS OF PHONOGRAMS
AND BROADCASTING ORGANISATIONS ***

The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organisations,

Have agreed as follows:

ARTICLE 1

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

ARTICLE 2

1. For the purposes of this Convention, national treatment shall mean the treatment accorded by the domestic law of the Contracting State in which protection is claimed:

(a) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory;

* This Convention has been signed by the following twenty-five countries: Argentina, Austria, Belgium, Brazil, Cambodia, Chile, Denmark, Ecuador, Finland, France, Germany (Fed. Rep.), Holy See, Iceland, India, Ireland, Israel, Italy, Lebanon, Mexico, Monaco, Paraguay, Spain, Sweden, United Kingdom and Yugoslavia.

(b) to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory;

(c) to broadcasting organisations which have their headquarters on its territory, as regards broadcasts transmitted from transmitters situated on its territory.

2. National treatment shall be subject to the protection specifically guaranteed, and the limitations specifically provided for, in this Convention.

ARTICLE 3

For the purposes of this Convention:

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

(b) "phonogram" means any exclusively aural fixation of sounds of a performance or of other sounds;

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

(d) "publication" means the offering of copies of a phonogram to the public in reasonable quantity;

(e) "reproduction" means the making of a copy or copies of a fixation;

(f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds;

(g) "rebroadcasting" means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.

ARTICLE 4

Each Contracting State shall grant national treatment to performers if any of the following conditions is met:

(a) the performance takes place in another Contracting State;

(b) the performance is incorporated in a phonogram which is protected under Article 5 of this Convention;

(c) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by Article 6 of this Convention.

ARTICLE 5

1. Each Contracting State shall grant national treatment to producers of phonograms if any of the following conditions is met:

(a) the producer of the phonogram is a national of another Contracting State (criterion of nationality);

(b) the first fixation of the sound was made in another Contracting State (criterion of fixation);

(c) the phonogram was first published in another Contracting State (criterion of publication).

2. If a phonogram was first published in a non-contracting State but if it was also published, within thirty days of its first publication, in a Contracting State (simultaneous publication), it shall be considered as first published in the Contracting State.

3. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

ARTICLE 6

1. Each Contracting State shall grant national treatment to broadcasting organisations if either of the following conditions is met:

(a) the headquarters of the broadcasting organisation is situated in another Contracting State;

(b) the broadcast was transmitted from a transmitter situated in another Contracting State.

2. By means of a notification deposited with the Secretary-General of the United Nations, any Contracting State may declare

that it will protect broadcasts only if the headquarters of the broadcasting organisation is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting State. Such notification may be deposited at the time of ratification, acceptance or accession, or at any time thereafter; in the last case, it shall become effective six months after it has been deposited.

ARTICLE 7

1. The protection provided for performers by this Convention shall include the possibility of preventing:

(a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

(b) the fixation, without their consent, of their unfixed performance;

(c) the reproduction, without their consent, of a fixation of their performance:

- (i) if the original fixation itself was made without their consent;
- (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;
- (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes, and the reproduction of such fixation for broadcasting purposes.

(2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

(3) However, the domestic law referred to in sub-paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

ARTICLE 8

Any Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connexion with the exercise of their rights if several of them participate in the same performance.

ARTICLE 9

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 or artistic works.

ARTICLE 10

Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms.

ARTICLE 11

If, as a condition of protecting the rights of producers of phonograms, or of performers, or both, in relation to phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the copies in commerce of the published phonogram of their containers bear a notice consisting of the symbol ©, accompanied by the year date of the first publication, placed in such a manner as to give reasonable notice of claim of protection; and if the copies or their containers do not identify the producer or the licensee of the producer (by carrying his name, trade mark or other appropriate designation), the notice shall also include the name of the owner of the rights of the producer; and, furthermore, if the copies or their containers do not identify the principal performers, the notice shall also include the name of the person who, in the

country in which the fixation was effected, owns the rights of such performers.

ARTICLE 12

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

ARTICLE 13

Broadcasting organisations shall enjoy the right to authorise or prohibit:

- (a) the rebroadcasting of their broadcasts;
- (b) the fixation of their broadcasts;
- (c) the reproduction:
 - (i) of fixations, made without their consent, of their broadcasts;
 - (ii) of fixations, made in accordance with the provisions of Article 15, of their broadcasts, if the reproduction is made for purposes different from those referred to in those provisions;
- (d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

ARTICLE 14

The term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which:

- (a) the fixation was made — for phonograms and for performances incorporated therein;

(b) the performance took place — for performances not incorporated in phonograms;

(c) the broadcast took place — for broadcasts.

ARTICLE 15

1. Any Contracting State may, in its domestic laws and regulations, provide for exceptions to the protection guaranteed by this Convention as regards:

(a) private use;

(b) use of short excerpts in connexion with the reporting of current events;

(c) ephemeral fixation by a broadcasting organisation by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1 of this Article, any Contracting State may, in its domestic laws and regulations, provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms and broadcasting organisations, as it provides for, in its domestic laws and regulations, in connexion with the protection of copyright in literary and artistic works. However, compulsory licences may be provided for only to the extent to which they are compatible with this Convention.

ARTICLE 16

1. Any State, upon becoming party to this Convention, shall be bound by all the obligations and shall enjoy all the benefits thereof. However, a State may at any time, in a notification deposited with the Secretary-General of the United Nations, declare that:

(a) as regards Article 12:

(i) it will not apply the provisions of that Article;

(ii) it will not apply the provisions of that Article in respect of certain uses;

- (iii) as regards phonograms the producer of which is not a national of another Contracting State, it will not apply that Article;
- (iv) as regards phonograms the producer of which is a national of another Contracting State, it will limit the protection provided for by that Article to the extent to which, and to the term for which, the latter State grants protection to phonograms first fixed by a national of the State making the declaration; however, the fact that the Contracting State of which the producer is a national does not grant the protection to the same beneficiary or beneficiaries as the State making the declaration shall not be considered as a difference in the extent of the protection;

(b) as regards Article 13, it will not apply item (d) of that Article; if a Contracting State makes such a declaration, the other Contracting States shall not be obliged to grant the right referred to in Article 13, item (d), to broadcasting organisations whose headquarters are in that State.

2. If the notification referred to in paragraph 1 of this Article is made after the date of the deposit of the instrument of ratification, acceptance or accession, the declaration will become effective six months after it has been deposited.

ARTICLE 17

Any State which, on October 26, 1961, grants protection to producers of phonograms solely on the basis of the criterion of fixation may, by a notification deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of Article 5, the criterion of fixation alone and, for the purposes of paragraph 1 (a) (iii) and (iv) of Article 16, the criterion of fixation instead of the criterion of nationality.

ARTICLE 18

Any State which has deposited a notification under paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16

or Article 17, may, by a further notification deposited with the Secretary-General of the United Nations, reduce its scope or withdraw it.

ARTICLE 19

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 shall have no further application.

ARTICLE 20

1. This Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of this Convention for that State.

2. No Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

ARTICLE 21

The protection provided for in this Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms and broadcasting organisations.

ARTICLE 22

Contracting States reserve the right to enter into special agreements among themselves in so far as such agreements grant to performers, producers of phonograms or broadcasting organisations more extensive rights than those granted by this Convention or contain other provisions not contrary to this Convention.

ARTICLE 23

This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until June 30, 1962, for signature by any State invited to the Diplomatic Conference on

the International Protection of Performers, Producers of Phonograms and Broadcasting Organisations which is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

ARTICLE 24

1. This Convention shall be subject to ratification or acceptance by the signatory States.

2. This Convention shall be open for accession by any State invited to the Conference referred to in Article 23, and by any State Member of the United Nations, provided that in either case such State is a party to the Universal Copyright Convention or a member of the International Union for the Protection of Literary and Artistic Works.

3. Ratification, acceptance or accession shall be effected by the deposit of an instrument to that effect with the Secretary-General of the United Nations.

ARTICLE 25

1. This Convention shall come into force three months after the date of deposit of the sixth instrument of ratification, acceptance or accession.

2. Subsequently, this Convention shall come into force in respect of each State three months after the date of deposit of its instrument of ratification, acceptance or accession.

ARTICLE 26

1. Each Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention.

2. At the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.

ARTICLE 27

1. Any State may, at the time of ratification, acceptance or accession, or at any time thereafter, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall extend to all or any of the territories for whose international relations it is responsible, provided that the Universal Copyright Convention or the International Convention for the Protection of Literary and Artistic Works applies to the territory or territories concerned. This notification shall take effect three months after the date of its receipt.

2. The notifications referred to in paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Articles 17 and 18, may be extended to cover all or any of the territories referred to in paragraph 1 of this Article.

ARTICLE 28

1. Any Contracting State may denounce this Convention, on its own behalf, or on behalf of all or any of the territories referred to in Article 27.

2. The denunciation shall be effected by a notification addressed to the Secretary-General of the United Nations and shall take effect twelve months after the date of receipt of the notification.

3. The right of denunciation shall not be exercised by a Contracting State before the expiry of a period of five years from the date on which the Convention came into force with respect to that State.

4. A Contracting State shall cease to be a party to this Convention from that time when it is neither a party to the Universal Copyright Convention nor a member of the International Union for the Protection of Literary and Artistic Works.

5. This Convention shall cease to apply to any territory referred to in Article 27 from that time when neither the Universal Copyright Convention nor the International Convention for the Protection of Literary and Artistic Works applies to that territory.

ARTICLE 29

1. After this Convention has been in force for five years, any Contracting State may, by notification addressed to the Secretary-General of the United Nations, request that a conference be convened for the purpose of revising the Convention. The Secretary-General shall notify all Contracting States of this request. If, within a period of six months following the date of notification by the Secretary-General of the United Nations, not less than one half of the Contracting States notify him of their concurrence with the request, the Secretary-General shall inform the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, who shall convene a revision conference in co-operation with the Intergovernmental Committee provided for in Article 32.

2. The adoption of any revision of this Convention shall require an affirmative vote by two-thirds of the States attending the revision conference, provided that this majority includes two-thirds of the States which, at the time of the revision conference, are parties to the Convention.

3. In the event of adoption of a Convention revising this Convention in whole or in part, and unless the revising Convention provides otherwise:

(a) this Convention shall cease to be open to ratification, acceptance or accession as from the date of entry into force of the revising Convention;

(b) this Convention shall remain in force as regards relations between or with Contracting States which have not become parties to the revising Convention.

ARTICLE 30

Any dispute which may arise between two or more Contracting States concerning the interpretation or application of this Convention and which is not settled by negotiation shall, at the request

of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

ARTICLE 31

Without prejudice to the provisions of paragraph 3 of Article 5, paragraph 2 of Article 6, paragraph 1 of Article 16 and Article 17, no reservation may be made to this Convention.

ARTICLE 32

1. An Intergovernmental Committee is hereby established with the following duties:

(a) to study questions concerning the application and operation of this Convention; and

(b) to collect proposals and to prepare documentation for possible revision of this Convention.

2. The Committee shall consist of representatives of the Contracting States, chosen with due regard to equitable geographical distribution. The number of members shall be six if there are twelve Contracting States or less, nine if there are thirteen to eighteen Contracting States and twelve if there are more than eighteen Contracting States.

3. The Committee shall be constituted twelve months after the Convention comes into force by an election organised among the Contracting States, each of which shall have one vote, by the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works, in accordance with rules previously approved by a majority of all Contracting States.

4. The Committee shall elect its Chairman and officers. It shall establish its own rules of procedure. These rules shall in particular provide for the future operation of the Committee and

for a method of selecting its members for the future in such a way as to ensure rotation among the various Contracting States.

5. Officials of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works, designated by the Directors-General and the Director thereof, shall constitute the Secretariat of the Committee.

6. Meetings of the Committee, which shall be convened whenever a majority of its members deems it necessary, shall be held successively at the headquarters of the International Labour Office, the United Nations Educational, Scientific and Cultural Organization and the Bureau of the International Union for the Protection of Literary and Artistic Works.

7. Expenses of members of the Committee shall be borne by their respective Governments.

ARTICLE 33

1. The present Convention is drawn up in English, French and Spanish, the three texts being equally authentic.

2. In addition, official texts of the present Convention shall be drawn up in German, Italian and Portuguese.

ARTICLE 34

1. The Secretary-General of the United Nations shall notify the States invited to the Conference referred to in Article 23 and every State Member of the United Nations, as well as the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works:

(a) of the deposit of each instrument of ratification, acceptance or accession;

(b) of the date of entry into force of the Convention;

(c) of all notifications, declarations or communications provided for in this Convention;

(d) if any of the situations referred to in paragraphs 4 and 5 of Article 28 arise.

2. The Secretary-General of the United Nations shall also notify the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works of the requests communicated to him in accordance with Article 29, as well as of any communication received from the Contracting States concerning the revision of the Convention.

IN FAITH WHEREOF, the undersigned, being duly authorised thereto, have signed this Convention.

DONE at Rome, this twenty-sixth day of October 1961, in a single copy in the English, French and Spanish languages. Certified true copies shall be delivered by the Secretary-General of the United Nations to all the States invited to the Conference referred to in Article 23 and to every State Member of the United Nations, as well as to the Director-General of the International Labour Office, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works.

SECTION A 2

**FINAL ACT OF THE DIPLOMATIC
CONFERENCE**

FINAL ACT *

The Conference convened jointly by the International Labour Organisation, the United Nations Educational, Scientific and Cultural Organization and the International Union for the Protection of Literary and Artistic Works,

With a view to adopting an international Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations,

Was held at Rome on the invitation of the Government of Italy from 10 to 26 October 1961 under the Chairmanship of H. E. Mr. Giuseppe Talamo Atenolfi (Italy),

And held discussions on the basis of the Records of the Committee of Experts on the International Protection of Performers, Producers of Phonograms and Broadcasting Organisation, which met at The Hague from 9 to 20 May 1960, and of Draft Final Clauses submitted jointly by the Secretariats of the three Organisations convening the Conference.

* This Final Act has been signed by the following thirty-six countries: Argentina, Australia, Austria, Belgium, Brazil, Cambodia, Chile, Congo [Leopoldville], Cuba, Czechoslovakia, Denmark, Finland, France, Germany (Fed. Rep.), Holy See, Iceland, India, Ireland, Israel, Italy, Japan, Luxembourg, Mauritania, Mexico, Netherlands, Norway, Peru, Portugal, South Africa, Spain, Sweden, Switzerland, Tunisia, United Kingdom, United States of America and Yugoslavia.

The Conference drew up the text of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations.

IN FAITH WHEREOF the undersigned, delegates of the States invited to the Conference, have signed this Final Act.

DONE at Rome, this twenty-sixth day of October 1961, in the French, English and Spanish languages, the original to be deposited in the archives of the United Nations.

GENERAL REPORT

Diplomatic Conference on the International Protection of Performers, Producers of Phonograms and Broadcasting Organizations

(Rome, 10-26 October 1961)

REPORT

of ABRAHAM L. KAMINSTEIN, Rapporteur-General

Introduction

The Diplomatic Conference on the International Protection of Performers, Producers of Phonograms, and Broadcasting Organizations, met in Rome, at the *Palazzo dei Congressi* of the *Esposizione Universale di Roma* from October 10 to 26, 1961, on the generous invitation of the Italian Government.

CONVOCATION OF THE DIPLOMATIC CONFERENCE

The Diplomatic Conference was convened jointly by the Directors-General of the International Labour Office (ILO) and the United Nations Educational, Scientific, and Cultural Organization (UNESCO) and the Director of the Bureau of the International Union for the Protection of Literary and Artistic Works (Berne Union).

PREPARATORY WORK

The preparations for this meeting took a long time to complete. The rights involved were discussed by the International Union

for the Protection of Literary and Artistic Works at its Diplomatic Conference in Rome in 1928. The International Labour Organisation began studies in 1926 dealing with the protection of performers, and has maintained a continuing interest in the subject. The problem was considered at a meeting in Samaden, Switzerland (1939), and *vœux* were expressed by the Brussels Revision Conference of the Berne Copyright Union (1948).

In 1951 a committee of experts meeting in Rome produced a preliminary draft convention regarding the protection of performers, manufacturers of phonographic records, and broadcasting organizations, the so-called Rome Draft. In 1956 another draft was produced under the sponsorship of the International Labour Office, and in 1957 the Monaco Draft was prepared by a committee of experts convened by UNESCO and the Berne Union. The matter was under constant study in the Intergovernmental Copyright Committee and the Permanent Committee of the Berne Union. Finally, in 1960, a committee of experts convened jointly by the three intergovernmental organizations met at The Hague, under the able chairmanship of Prof. G. H. C. Bodenhausen, drew up and unanimously approved the draft convention (hereafter referred to as the Hague Draft) which served as the basis for the deliberations in Rome. The text of the Hague Draft and the report on it adopted by the experts were transmitted to governments and through them to interested organizations.

DOCUMENTATION

The Diplomatic Conference had before it the "Records" of the Hague Committee of Experts, including the Hague Draft. It also had before it a draft of the final or formal clauses (hereafter referred to as the Secretariat Draft) and draft rules of procedure for the Conference. The last two drafts were prepared by the Secretariats of the three sponsoring Organizations. Finally, the Conference had before it the observations and suggestions of governments concerning the Hague and Secretariat Drafts, and an analysis of these observations and suggestions prepared by the Secretariats.

TERMS OF REFERENCE OF THE CONFERENCE

The Conference was invited to draw up and adopt an international convention for the protection of the rights of performers, producers of phonograms, and broadcasting organizations (sometimes referred to as "neighboring rights").

PARTICIPATION

Delegations from 44 countries attended the Conference. At a later point the Credentials Committee reported that credentials in good order had been presented on behalf of the Delegations from the following 39 countries which participated in the Conference: Argentina, Australia, Austria, Belgium, Brazil, Cambodia, Chile, Congo (capital: Leopoldville), Cuba, Czechoslovakia, Denmark, Finland, France, Germany (Federal Republic of), Holy See, Iceland, India, Ireland, Israel, Italy, Japan, Luxembourg, Mauritania, Mexico, Monaco, Morocco, Netherlands, Norway, Peru, Poland, Portugal, South Africa (Republic of), Spain, Sweden, Switzerland, Tunisia, United Kingdom of Great Britain and Northern Ireland, United States of America, Yugoslavia.

Representatives of the following 5 countries registered as participants: Dominican Republic, Ghana, Nicaragua, Rumania, and Venezuela. Rumania and Venezuela announced that they were present as observers.

The Delegation of Morocco objected to the seating of the Delegation of Mauritania. The President of the Conference ruled that since an invitation had been issued to Mauritania, that country could participate. Morocco recorded its protest against this ruling.

The United Nations, the Council of Europe, and the International Institute for the Unification of Private Law were represented by observers. In addition, there were observers from 15 international nongovernmental organizations who presented their views to the Conference during the debates.

Organization of the Conference

The opening session heard introductory addresses by Mr. H. Saba, representing the Director-General of UNESCO, Mr. J. Secretan, Director of the United International Bureaux for the Protection of Intellectual Property, Mr. Abbas Ammar, Assistant Director-General of ILO, and Mr. G. Giraud, Under-Secretary of State, representing the Italian Government.

OFFICERS OF THE CONFERENCE

The opening plenary session of the Diplomatic Conference elected by acclamation Ambassador Giuseppe Talamo Atenolfi Brancaccio di Castelnuovo, Head of the Italian Delegation, as its President.

The following heads of their respective delegations were designated Vice-Presidents of the Conference: Messrs. Ricardo Tiscornia (Argentina), Samreth Soth (Cambodia), Vojtech Strnad (Czechoslovakia), Henry Puget (France), Eugen Ulmer (Federal Republic of Germany), Dua-Sakyi (Ghana), G. H. C. Bodenhuis (Netherlands), Sture Petré (Sweden), Mustapha Fersi (Tunisia), and Gordon Grant (United Kingdom).

Mr. Abraham L. Kaminstein (United States of America) was designated Rapporteur-General of the Conference.

Ambassador Michithoshi Takahashi (Japan) was appointed Chairman of the Credentials Committee and Conseiller d'Etat Henry Puget (France) Chairman of the Drafting Committee.

The President of the Conference, the ten Vice-Presidents, the Rapporteur-General, and the Chairman of the Credentials Committee constituted the "Bureau" or Steering Committee of the Conference.

PROCEDURE

The draft rules of procedure were approved by the Conference with slight modifications, including in particular a change in Rule 10 to provide for nine members of the Drafting Committee (later changed to 12) and an amendment in Rule 16 to limit to

representatives of States the right to submit draft resolutions and amendments.

Each national delegation had one vote in the Conference and its subsidiary bodies. All decisions in plenary meetings of the Conference required the affirmative vote of at least two-thirds of the delegations present and voting.

Plenary meetings of the Conference and meetings of the Main Commission and Working Parties were open to the public.

The working languages of the Conference were English, French, and Spanish.

SECRETARIAT OF THE CONFERENCE

The three sponsoring Organizations were represented at the Conference by the following officials: the ILO by Messrs. A. Ammar, F. Wolf, W. Dobbernack, P. P. Fano, and K. St. Grunberg; the UNESCO by Messrs. H. Saba, J. O. Díaz Lewis, and T. Ilosvay; and the Bureau of the Berne Union by Messrs. J. Secretan, C. Masouyé, and G. R. Wipf.

The three sponsoring Organizations provided the necessary assistance for the work of the Conference, including translation of the debates and documents under the direction of Mr. J. P. Urlik, Conference Officer. The three Organizations furnished a joint Secretariat of the Conference directed by Mr. J. O. Díaz Lewis, Secretary-General, Messrs. K. St. Grunberg and C. Masouyé, Secretaries, and Messrs. T. Ilosvay and G. R. Wipf, Deputy Secretaries. The staff of the joint Secretariat was completed by personnel detailed to the Conference by the Italian Government, with Mr. R. Ferretti, Minister Plenipotentiary, as liaison officer.

MAIN COMMISSION AND WORKING PARTIES

In addition to its plenary sessions, the Conference sat as a Main Commission. The President of the Conference was also Chairman of this Commission.

After a general discussion in plenary sittings of the Conference and in the Main Commission, three working parties were set up.

Working Party No. I, under the chairmanship of Prof. G. H. C. Bodenhausen (Netherlands) was entrusted with the work on Articles 2 to 4, 7, and 10 of the Hague Draft and the study of the substance of Articles 1, 18 and 19.

Working Party No. II, under the chairmanship of Prof. Eugen Ulmer (Federal Republic of Germany) was to deal with Articles 5, 6, and 8, and 11 to 16 of the Hague Draft.

Working Party No. III, under the chairmanship of Ambassador Sture Petrén (Sweden) was responsible for the final clauses, namely Articles 20 to 29 of the Secretariat Draft and, in addition, for Articles 1, 18, and 19 of the Hague Draft after their substance had been studied by Working Party No. 1.

The three Working Parties, therefore, covered the entire Convention, with the exception of Articles 9 and 17 which were reserved for the Main Commission.

Reports were submitted to the Main Commission by the rapporteurs: Mr. William Wallace (United Kingdom) for Working Party No. I, Dr. Valerio de Sanctis (Italy) for Working Party No. II (Mr. Arpad Bogsch (United States of America) for a sub-group of that Party working on what eventually became Article 16 of the Convention) and Ambassador Sture Petrén (Sweden) for Working Party No. III. These reports were of great assistance in the work of the Conference.

At the opening of the Conference, the Delegation of France declared that it considered a convention on neighboring rights both superfluous and untimely: superfluous because most of the situations covered by it can be regulated by contracts, and untimely because international conventions follow rather than precede juridical developments.

Other delegations disagreed, believing the time propitious for international regulations. The Scandinavian countries pointed to the recent adoption of their own national legislation. Some saw an international convention as helpful in setting standards and a general pattern for domestic legislation.

Convention Provisions

SAFEGUARDING OF COPYRIGHTS

(Article 1)

The Hague Draft contained an article providing that the protection granted under the Convention "shall leave intact and shall in no way affect the protection of the rights of authors of literary and artistic works or of other copyright proprietors", and that consequently, "no provision of this Convention may be interpreted as prejudicing such protection". The meaning of this provision, as clearly expressed in the Hague Report, was that the Convention would have no effect upon the legal situation of copyright proprietors. Its possible effect on economic interests was another matter.

Some delegations expressed the view that the provision was superfluous since the Convention, which did not deal with the rights of the author, could not affect him. Others, and particularly the French, Italian, and Mexican Delegations, insisted on the importance of such a provision. The French and Italian Delegations proposed (Doc. 15) that the provision be amended to state, in addition, that the protection granted under the Convention shall not affect "the exercise of that right [i. e., the right of copyright] over the work performed, recorded or broadcast". The two Delegations stated that their proposal was meant to be applied only in extreme cases.

During the discussion, some delegations said that the proposed amendment was dangerous since the provisions requiring consent by the performer, producer of phonograms, or broadcasting organization might be interpreted as "affecting the exercise" of copyright. They argued that, if this interpretation were accepted, the provisions requiring consent by the performer, recorder, or broadcaster could be rendered ineffective by the proposed amendment. For example, it might be maintained that only the authorization of the composer of the recorded music was necessary for the reproduction of a phonogram, because an added requirement for the authorization of the record producer could be considered

as "affecting the exercise" of the copyright of the composer. Several delegations expressed the opinion that such a result would deprive the Convention of any significance.

The Franco-Italian proposal, when put to a vote, was rejected, and the Hague text, with some modifications based mainly on a Swiss proposal (Doc. 19), was adopted and became Article 1 of the Convention. Proposals by India (Doc. 30) and the United Kingdom (Doc. 20) were not pressed, since their purport was considered to be implied in the text as approved.

Under the text of Article 1, as adopted, it is clear that whenever, by virtue of the copyright law, the authorization of the author is necessary for the reproduction or other use of his work, the need for this authorization is not affected by the Convention. Conversely, when, by virtue of this Convention, the consent of the performer, recorder, or broadcaster is necessary, the need for his consent does not disappear because authorization by the author is also necessary.

PROTECTION GRANTED BY THE CONVENTION
(Article 2)

On the basis of a proposal of the United States of America (Doc. 43), the Conference decided to treat separately the questions of (a) the persons protected and the circumstances under which protection is granted to them, and (b) the nature and extent of this protection.

The Hague Draft dealt with these questions concurrently; in the case of the beneficiaries it also did so indirectly, that is, by first stating that a Contracting State must grant protection if the country of origin of a performance, phonogram, or broadcast was another Contracting State, and then defining what country of origin meant in each case. The Conference found the definition in the Hague Draft ambiguous and the method of treatment somewhat complicated. Consequently, it decided to state directly who was to be protected and in what cases (Art. 4, 5 and 6), and the Convention, as adopted, no longer employs the term "country of origin". The question of nature and extent of protection is dealt with in Article 2.

The basic protection accorded by the Convention consists of national treatment, and this is defined in paragraph 1 of Article 2. The definition is different in form from that in the Hague Draft, but its essence and intent are identical. Simply stated, national treatment is the treatment that a State grants under its domestic law to domestic performances, phonograms, and broadcasts.

In response to a proposal by Belgium (Doc. 13) and Switzerland (Doc. 14), the Convention also contains a provision making national treatment subject to the protection specifically guaranteed by the Convention. This refers to the so-called minimum protection provided particularly in Articles 7, 10, 12 and 13, which the Contracting States undertake to grant — subject to permitted reservations and exceptions — even if they do not grant it to domestic performances, phonograms, or broadcasts. This idea is expressed in paragraph 2 of Article 2, which also provides that national treatment shall be subject to the limitations specifically provided for in the Convention. For example, under Article 16 a Contracting State could deny or limit rights of secondary use with respect to phonograms (Art. 12), regardless of whether its domestic law granted this protection.

In this connexion, Czechoslovakia proposed (Doc. 31) that a State which granted rights other than the minima required by the Convention should not be bound to grant them to nationals of other States which did not grant such rights to nationals of the first State. This was not accepted by the Conference.

During the discussion several delegations expressed the view that Article 2, paragraph 2, was unnecessary as a matter of strict legal logic; they argued that the qualifications upon the principle of national treatment necessarily resulted from the various provisions of the Convention and needed no special mention. The majority believed, however, that a provision like paragraph 2 would facilitate the understanding of the Convention. They favoured a clear statement that what the Convention obligates the States to grant does not necessarily coincide exactly with national treatment, since Convention protection might, under the circumstances referred to above, be more or less than national treatment.

DEFINITIONS

(Article 3)

Performers. — Definitions of “performers” were proposed by Austria (Doc. 49) and the United States of America (Doc. 52), and the one incorporated in the Convention is based on the suggestion of the latter. It provides that “‘performers’ means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary and artistic works”. The Conference agreed that the expression “literary and artistic works”, used in the definition of “performers” and in other provisions of the Convention, has the meaning which those words have in the Berne and Universal Copyright Conventions, and in particular that they include musical, dramatic, and dramatico-musical works. Furthermore, it was agreed that conductors of musicians or singers are to be considered as included in the definition of “performers”.

The Hague Draft contained a definition of “performance” but not of “performers”. In view of the addition of a definition of “performers”, the Conference found it superfluous to define “performance” separately; obviously, performance means the activities of a performer *qua* performer. It was, however, agreed that whenever the Convention uses the expression “performance”, or, in the French text, “exécution”, and in the Spanish, “ejecución”, it must be understood as a generic term which also includes recitation (“récitation”, “recitación”) and presentation (“représentation”, “representación”).

Phonogram. — For the purposes of the Convention, “phonogram” means any exclusively aural fixation of sounds of a performance or other sounds. The definition is almost identical with that which was included in the Hague Draft. It has been suggested that bird songs and other nature sounds are examples of sounds not coming from a performance.

Producer of phonograms. — As in the Hague Draft, “producer of phonograms” is defined as the person or legal entity which first fixes the sounds of a performance or other sounds.

It was noted during the discussion that when an employee of a legal entity fixes the sounds in the course of his employment, the employer legal entity, rather than the employee, is to be considered the producer.

Publication. — On the basis of proposals by Austria (Doc. 27), the United Kingdom (Doc. 20), and the United States of America (Doc. 50), publication was defined as the “offering of copies of a phonogram to the public in reasonable quantity”. This definition will be discussed again in connexion with Article 5.

Reproduction. — This term is defined as “the making of a copy or copies of a fixation”. The definition is based on a proposal of the United Kingdom (Doc. 20), and was found desirable in order to make it clear that reproduction means copying. Performance, exhibition, showing, or any other activity which does not result in new permanent tangible copies are excluded. It was explained during the Conference that the expressions “phonogram” and “fixation”, as used in the Convention, differ from each other: while “phonograms” are exclusively aural fixations, “fixations” also include visual or audio-visual fixations.

Broadcasting. — This term is defined as the transmission of sounds, or of images and sounds, by wireless means for public reception. An Austrian proposal (Doc. 49) would have included transmission by wires in the definition. The Conference was of the opinion that only transmission by hertzian waves or other wireless means should constitute broadcasting. The words “transmission for public reception” used in the definition should make it clear that broadcasts intended for reception by one person or by a well-defined group — such as ships at sea, planes in the air, taxis circulating in a city, etc. — are not to be considered as broadcasts.

Rebroadcasting. — In its adopted form the definition, which was based on an Austrian proposal (Doc. 98), provides that rebroadcasting means “the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization”. An earlier Austrian proposal (Doc. 49)

would also have considered a deferred broadcasting as rebroadcasting. However, an objection was raised against this proposal on the ground that a deferred broadcast is necessarily based on a fixation of the broadcast of the originating transmitter, and the proposal was withdrawn.

Other definitions proposed by India (Docs. 30 and 50), and a proposed definition of the expression "broadcasting organization" (United States of America, Doc. 52), were also withdrawn. The debate on the latter, however, clarified a few points. For example, if the technical equipment in a Contracting State is owned by the postal administration, but what is fed into the transmitter is prepared and presented by such organizations as the Radiodiffusion-Télévision Française or the British Broadcasting Corporation, the latter, and not the postal administration, is to be considered the broadcasting organization. Furthermore, if a given programme is sponsored by an advertiser, or is pre-recorded by an independent producer of television films, and is transmitted by such organizations as the Columbia Broadcasting System in the United States of America, the latter, rather than the sponsor or the independent producer, is to be considered the broadcasting organization.

PROTECTED PERFORMANCES

(Article 4)

As already suggested, Articles 4, 5 and 6 indicate who is protected and in what cases. A question applicable to all three Articles was whether the Convention should apply only to international situations, or also to national situations. Simply stated, the question was whether a Contracting State must apply the Convention only to foreign or also to domestic performances, phonograms, and broadcasts.

Proposals by Belgium (Doc. 13) and Cambodia (Doc. 18), orally supported by other countries, suggested that the Convention should apply to domestic as well as international situations. It was generally agreed that the question was probably of little practical significance, since it was unlikely that a State would not grant at least the same advantages to domestic performances,

etc., as to foreign ones. On the other hand, several delegations, and particularly that of the United States of America, emphasized that domestic situations should not be regulated by international treaty. The amendments were not pressed and, like the Hague Draft, the Convention covers only international situations.

Article 4 provides that a Contracting State must grant protection to a performer in each and all of the following three cases: (a) when the performance takes place in another Contracting State; (b) when the performance is incorporated in a phonogram protected under Article 5; (c) when the performance, which has not been fixed in a phonogram, is carried by a broadcast protected under Article 6. It was stated during the discussion that the purpose of items (b) and (c) was to establish a system under which performances recorded on phonograms are protected when the phonogram producer is protected, and under which broadcast performances (other than those fixed on phonograms) are protected when the broadcasting organizations transmitting them are protected.

The Federal Republic of Germany proposed that a performer who is a national of a Contracting State, and who performs in another Contracting State, should enjoy in the latter State the same rights as those enjoyed by performers who are nationals of this latter State (Doc. 29). Views were divided on the question of whether this was a truly international situation; the performer would be a foreigner in the State where he would claim protection but, on the other hand, the place of the performance and the place where protection would be claimed would be the same. In view of the doubts expressed by some delegations the proposal was withdrawn.

PROTECTED PHONOGRAMS

(Article 5)

With respect to the protection of phonogram producers, the Hague Draft differentiated between published and unpublished phonograms. Under that Draft, a Contracting State would have had to protect published phonograms if first publication took

place in another Contracting State and would have had to protect unpublished phonograms if their fixation took place in another Contracting State, provided the producer was a national of a Contracting State.

The cases in which phonograms must be protected are somewhat different under the Convention as adopted. Subject to certain exceptions, Article 5 provides that each Contracting State must grant national treatment in each and all of the following three cases: (a) when the producer is a national of another Contracting State; (b) when the first fixation was made in another Contracting State; (c) when the phonogram was first published in another Contracting State.

Several delegations expressed their unwillingness to grant protection on the basis of the criterion of fixation. At the same time, several others declared that their countries could not accept the criterion of first publication (cf. France, Doc. 51). As a result, a compromise solution was worked out. This compromise, as incorporated in Article 5, paragraph 3, allows each Contracting State to make a reservation to the effect that it will not apply the criterion of publication or, alternatively, the criterion of fixation. The application of both criteria cannot be excluded by the same State; and the application of the criterion of nationality cannot be excluded by any State. (See, however, Art. 17).

With respect to *published* phonograms, the provision means that there may be three categories of Contracting States:

1. Those that make no declaration under paragraph 3. They will have to protect published phonograms if any of the three criteria (nationality, publication, fixation) is present.
2. Those that, by a declaration under paragraph 3, exclude the application of the criterion of publication. They will have to protect published phonograms if either of the remaining two criteria (nationality, fixation) is present.
3. Those that, by a declaration under paragraph 3, exclude the application of the criterion of fixation. They will have to protect published phonograms if either of the remaining two criteria (nationality, publication) is present.

As for *unpublished* phonograms, the exclusion of the application of the criterion of publication, of course, has no relevance. Thus, in this situation, the provision means that there may be two categories of Contracting States:

1. Those that make no declaration under paragraph 3. They will have to protect unpublished phonograms if either of the two criteria (nationality, fixation) is present.
2. Those that, by a declaration under paragraph 3, exclude the application of the criteria of fixation. They will have to protect unpublished phonograms if, and only if, the criterion of nationality is present.

As to published phonograms, the compromise did not satisfy a number of countries which had recently adopted laws recognizing only the criterion of fixation. They presented an amendment, the effect of which would have been to allow any Contracting State to apply only the criterion of fixation (Denmark, Finland, Iceland, Norway, and Sweden, Doc. 59). The amendment was rejected, but another amendment to accomplish the same result was moved a few days later by the United Kingdom (Doc. 110). Under this amendment the opportunity to apply the criterion of fixation alone would be given, not to any Contracting State, but only to those whose laws already in force on 26 October 1961 were based on the sole criterion of fixation. This amendment was adopted, and the corresponding provision is included in Article 17.

Paragraph 2 of Article 5 deals with "simultaneous publication". It provides that, even if a phonogram was first published in a non-Contracting State, it will be considered as "first published" in a Contracting State if publication takes place in the Contracting State within 30 days of the first publication.

This rule of "simultaneous publication" was also contained in the Hague Draft. Argentina, France, Italy, and Yugoslavia protested against the rule since, in their view, the definition of "publication" was narrower in the Hague Draft than in the Convention. Whereas the former defined publication as the multiplication of copies of the phonogram and the offering of such copies to the public in reasonable quantity, the latter speaks only

of the offering, and not about multiplication. Others, however, considered that the intent of the Hague Draft was the same, multiplication having been mentioned only to emphasize the need for a certain quantity of copies.

PROTECTED BROADCASTS

(Article 6)

Article 6, paragraph 1, provides that each Contracting State must grant national treatment to broadcasting organizations in either and both the following cases: (a) when the headquarters of the broadcasting organization is situated in another Contracting State, and (b) when the broadcast was transmitted from a transmitter situated in another Contracting State. Paragraph 2 of the same Article provides, in effect, that a Contracting State may reserve the right to protect broadcasts only if both the condition of nationality and the condition of territoriality are met.

It was agreed during the discussion that the State where "the headquarters of the broadcasting organization is situated" should be understood to mean the State under the laws of which the broadcasting entity was organized. Thus, in the French text "siège social" should be understood as the equivalent of "siège statutaire", and it was also agreed that the legal entity in question may be what is known in some European countries as "offene Handelsgesellschaft", or "Kommanditgesellschaft".

MINIMUM PROTECTION OF PERFORMERS

(Article 7)

Paragraph 1 of this Article contains an enumeration of the minimum protection guaranteed to performers. The introductory sentence states that the protection provided by this Convention for the performer "shall include the possibility of preventing" certain acts done without his consent. The quoted expression was opposed by several delegations. Czechoslovakia proposed (Doc. 31) that it be replaced by the expression "shall have the right to

authorize or prohibit”, which is the expression used in the parallel provisions enumerating the minimum rights of producers of phonograms (Article 10) and broadcasting organizations (Article 13). However, the Conference decided to maintain the expression, which had been used in the Hague Draft. It was understood that this expression was used in order to allow countries like the United Kingdom to continue to protect performers by virtue of criminal statutes.

It was agreed that the acts enumerated in the paragraph require consent by the performer. The institution of a compulsory licence system would therefore be incompatible with the Convention since, under such a system, a performer could not prevent, but would have to tolerate, the acts in question.

The question arose as to whether the Convention should use the expression “live” performance (in the French, “exécution directe”; in the Spanish, “ejecución directa”). This expression is ambiguous for several reasons: first, because “live” in English has a different connotation from “directe” in French, or “directa” in Spanish; second, because something that is a *directe* performance for the performer may not be *directe* for the public; and, third, because these terms have different connotations in different countries. Several attempts to define the term were unsuccessful, and it was finally agreed not to use the expression in the text of the Convention.

In connexion with paragraph 1 (a), the United Kingdom proposed (Doc. 20) to eliminate any reference to communication to the public of live performances. During the discussion it was argued that neither the communication to the public nor the fixation of a live performance ordinarily involves the crossing of national frontiers; it would thus be unnecessary to provide for them in a Convention limited to international situations. While the Conference recognized that cases of this sort might be rare, it did not regard their occurrence as outside the realm of the possible. The Conference therefore refused to eliminate the reference.

In connexion with paragraph 1 (b), Austria proposed that consent of the performer be required, not only in the case of the

fixation of a live broadcast performance, but also in the case of the fixation of a live performance communicated to the public by any other means (Doc. 63). The proposal was accepted, and the text of Article 7, paragraph 1 (*b*), as redrafted, has the effect suggested by Austria.

A proposal by the Federal Republic of Germany (Doc. 74) would have required the consent of the performer in the case of the rebroadcast of his live performance. This proposal was withdrawn since the matter of rebroadcasting is, to a large extent, dealt with in paragraph 2.

Paragraph 1 (*c*), in the comparable version of the Hague Draft, provided that, in order to reproduce a fixation of his performance, the consent of the performer would be required in three specific cases. The United States of America proposed (Doc. 80) that this consent be required generally and not only in the three cases specifically mentioned. This proposal was rejected, whereupon the United States of America moved (Doc. 80) that a fourth case be added. This would have had the effect of requiring the consent of both the producer of the phonogram and the performer, if a phonogram incorporating the latter's performance was copied by a person other than one licensed by the authorized producer. This proposal was not accepted by the Conference. The majority believed that it was sufficient to give the right of reproduction to the producer of the phonogram in such cases, since he could be expected to enforce his right should anyone make unauthorized reproductions. It was felt that cases in which, for some reason or other, the producer would or could not enforce his rights were probably so rare that they did not require coverage in the provision on minimum protection of performers.

In paragraph 1 (*c*) (i), the Hague Draft provided that reproduction of a fixation required the consent of the performer if the original fixation was "unlawful". On the basis of a proposal by Austria (Doc. 63), "unlawful" was changed to read "without their [i.e., the performers'] consent". However, it was understood that paragraph 1 (*c*) (i) of Article 7 would be inapplicable in cases where, under a national law that took advantage of

Article 15, consent for a fixation was not required, and paragraph 1 (c) (iii) alone would apply.

Paragraph 1 (c) (ii) remained, in essence, as in the Hague Draft. It provides that performers must be given the possibility of preventing the reproduction of a fixation, if the reproduction is made for purposes different from those for which they gave their consent. A United Kingdom proposal (Doc. 20) would have limited the application of the provision to cases where the original fixation was made for purposes other than the making of commercial phonograms, but the proposal was not adopted. An Austrian proposal (Doc. 63) was rejected, as was a proposal by Czechoslovakia (Doc. 128) presented to the Plenary Conference. The latter proposal would have required the consent of the performers only "when the reproduction made for broadcasting is used for wireless purposes other than those for which they gave their consent". Those objecting to the proposal said, among other things, that it would not enable the performer to prevent the reproduction of a fixation, consented to for the making of commercial discs, in a motion picture sound track. The possibility of preventing such an act was among the cases which the Convention, as adopted, guarantees.

A proposal by Austria (Doc. 63) intended to give the performers a right against the unauthorized putting into circulation of reproductions, and a proposal by Poland (Doc. 41) which would have allowed the requirement for the performer's consent to be replaced by compulsory licences, were rejected by the Conference.

Paragraph 2, sub-paragraphs (1) and (2) permit a Contracting State to regulate by domestic law certain matters for the benefit of broadcasters where the performer consented to the broadcast or where fixations made for broadcasting purposes are used by broadcasting organizations. The United States of America proposed (Doc. 81) to delete these provisions, which were also contained in the Hague Draft. In its view, matters of rebroadcasting, fixations for broadcasting purposes, and the use of such fixations, ought to be left to contractual arrangements freely negotiated between performers and broadcasting organizations. The proposal for deletion was not accepted, but the principle of the pre-

eminence of free contractual arrangements was embodied in a new provision, which now constitutes sub-paragraph (3) of paragraph 2.

This new sub-paragraph is based on a proposal of the United Kingdom (Doc. 77), and states that domestic laws shall not, in the cases contemplated by sub-paragraphs (1) and (2), operate to deprive performers of the ability to control, by contract, their relations with broadcasting organizations. It was agreed during the discussion that "contract" in this context includes collective contracts, and also the decisions of an arbitration board if arbitration was the mode of settlement ordinarily applying between the performers and broadcasters.

Austria proposed (Doc. 63) that the Article incorporate a provision dealing with cases in which a performer has transferred his rights to an individual or a corporate body. The proposal would have permitted the performer in this situation to continue to exercise the rights himself, if this were necessary to enable him to carry out a recording or broadcasting engagement accepted by him. Some delegates stated that this proposal was contrary to the principle of freedom of contract, since it meant either that performers had the right to repudiate their contracts, or that their freedom of contract was limited at the outset. The proposal was rejected.

GROUP PERFORMANCES

(Article 8)

The Hague Draft provided that any Contracting State might, by its national laws and regulations, specify the conditions under which performers exercise their rights in cases where several of them participate in the same performance. The discussions underlined the importance of this provision, since most performances involve two or more performers.

Several proposals were made to the effect that these rights be exercised "jointly" or "in common", and that Contracting States be required rather than permitted to legislate in this matter (Belgium, Doc. 66; Monaco, Doc. 32; orally supported by France

and Portugal). However, after debate, these proposals were withdrawn.

The United States of America proposed, first, that national laws should come into play only if the members of the group were unable to agree among themselves as to the joint exercise of their rights (Doc. 82). This proposal was opposed by several delegations on the ground that it would prevent States from regulating the question generally; they favoured permitting national regulation regardless of whether or not there was a conflict among the members of any given orchestra or other ensemble. When put to a vote, the proposal was defeated.

Thereupon the United States of America suggested (Doc. 101) that the scope of national laws and regulations be restricted in this matter. Under this proposal, the provision would make clear that national laws could not deal with any of the conditions under which these rights might be exercised, but that they must be limited to the question of how members of a group were *represented* when they exercised their rights. The discussion indicated that the use of the expression "conditions of exercise of rights" might be undesirable in view of its connotations, particularly as used in the Berne Convention, where it is a euphemism for compulsory licences.

The text of the Hague Draft, as amended by this second proposal, was adopted as Article 8 of the Convention.

VARIETY ARTISTS

(Article 9)

As stated in connexion with Article 3, "performers" are defined as persons who perform literary or artistic works. This definition prompted some discussion, since several delegates thought that all persons who "perform" should come within the scope of the Convention, whether or not they perform "works". Other delegations, whose view prevailed, believed that the Convention should not require protection in the case of "performances" other than performances of "works". They regarded this result as necessary in order to avoid practical difficulties, since the

expression "performance" in everyday language has many connotations.

The Conference decided to write into the Convention, as had been done in somewhat different terms in the Hague Draft, a provision permitting any Contracting State, by its domestic laws and regulations, to extend the protection provided in the Convention to "artists" who do not perform literary or artistic works. Some delegations stated that the provision was superfluous since, even without it, a State might protect such artists in its own domestic sphere if it desired to do so. Others were of the opinion that the provision had some merit as a reminder for countries that they were not obliged to limit protection to performers of literary or artistic works. It was generally agreed that variety artists not performing works were among those within the purview of Article 9.

REPRODUCTION RIGHT OF PRODUCERS OF PHONOGRAMS

(Article 10)

The Hague Draft provided that producers of phonograms had the right to authorize or prohibit the reproduction of their phonograms, whether the phonogram was reproduced "directly or when broadcast".

Pursuant to proposals submitted by Austria (Doc. 76), Belgium (Doc. 70), Denmark (Doc. 62), and Portugal (Doc. 88), the words "or when broadcast" were replaced by the word "indirectly". It was understood that direct or indirect reproduction includes, among other things, reproduction by means of: (a) moulding and casting; (b) recording the sounds produced by playing a pre-existent phonogram; and, (c) recording off the air a broadcast of the sounds produced by playing a phonogram.

Belgium proposed that the right of reproduction refer to reproduction of part of the phonogram, as well as to complete reproduction (Doc. 70). This amendment was considered superfluous since the right of reproduction is not qualified, and is to be understood as including rights against partial reproduction of a phonogram. The same interpretation, it was agreed, should

apply to the reproduction of other fixations, and should be regarded as covering performers and broadcasters as well as producers of phonograms.

Austria proposed that the Convention give producers the rights to prohibit placing copies of their phonograms in circulation when they had not given their consent to such action, or when the terms of their consent had been exceeded (Doc. 76). Denmark, Finland, Iceland, Norway and Sweden (Doc. 24), and India (Docs. 50 and 104) suggested that the Convention prohibits the importation into a Contracting State of copies which would have been unlawful had they been made in that Contracting State. Objections to these proposals were raised on the ground that similar rights were not even recognized under the copyright conventions for works such as books. It was felt that the matter was one which should be left to the discretion of each Contracting State, and the proposals were not accepted.

Portugal proposed that the Convention not recognize the right of reproduction in cases where reproductions were made "by broadcasting organizations for technical reasons" (Doc. 88). This proposal was criticized as too vague and general, and was considered unnecessary since most of what it was intended to accomplish could be satisfied by national legislation; under another provision of the Convention (Article 15), countries are free to allow reproduction without authorization in the case of ephemeral fixations made by a broadcasting organization with its own facilities and for its own broadcasts.

FORMALITIES

(Article 11)

In essence the Hague Draft provided that, if the domestic law of a Contracting State required compliance with formalities as a condition of the protection of phonograms, this requirement must be considered as satisfied if all the copies in commerce of the published phonogram bore a particular form of notice. This notice was to consist of the symbol \textcircled{P} , accompanied by an indication of the country and year of first publication.

Proposals by Austria (Doc. 58) and the United States of America (Doc. 86) suggested, among other things, that the notice might appear on the phonogram container rather than on the copies of the phonograms themselves. This change was accepted. See also a somewhat similar proposal by Czechoslovakia (Doc. 31).

The Austrian and United States of America proposals also suggested that the name of the Contracting State in which the first publication took place not be required in the notice. This too was accepted.

Also approved was a further proposal of the United States of America that the notice need contain the names of the owners of the rights of producer and performers only where the copies or containers do not indicate the producer and the principal performers. Since most copies or containers indicate both, as a practical matter the notice will usually need to include only the symbol © and the year date.

The proposal was also amended pursuant to a suggestion by the Federal Republic of Germany. This suggestion was intended to make clear that, in cases where the names of the owners of rights are required in the notice, the question of who is the owner will be decided on the basis of the law and factual situation existing in the country where the phonogram was fixed. The United States of America proposal, as thus amended, became Article 11 of the Convention.

It was understood by all that this Article does not require Contracting States to enact domestic legislation requiring formalities for the protection of performers or recorders in connexion with phonograms. It was also clearly understood that, in countries where no formalities are required as a condition of protection, Convention protection must be granted even if the phonogram does not bear the notice specified by the Convention.

SECONDARY USES OF PHONOGRAMS

(Article 12)

The question of what the Convention should provide in connexion with the so-called secondary uses was doubtless the most

difficult problem before the Conference. "Secondary uses", a generalized expression not found in the Convention, is employed here to designate the use of phonograms in broadcasting and communication to the public.

The Hague Draft provided in essence that, if a phonogram published for commercial purposes were used directly for broadcasting or any public communication, a single equitable remuneration must be paid by the user to the performers, to the producers of phonograms, or both. At the same time the Hague Draft allowed Contracting States to refuse to grant this right of payment, either *in toto* or in relation to any of the uses indicated.

On the other hand, the earlier (1957) Monaco Draft did not impose any obligation on Contracting States to grant secondary use rights.

It was explained several times during the Conference that, in practice, the effect of the two Drafts would have been exactly the same, since a Contracting State would not have been obliged to grant secondary use rights under either one. The difference between the two Drafts was one of emphasis and approach. Under the Hague Draft, the granting of secondary use rights was a rule which could be avoided only if a Contracting State made a reservation; under the Monaco Draft there was no need for any reservation.

The two Drafts had an additional result in common. A Contracting State which granted secondary use rights under its domestic law would have been permitted, under both Drafts, to refuse such protection for phonograms originating in countries that failed to grant it reciprocal rights.

The arguments in this Conference were centred around the question of whether the Hague or Monaco system should be followed — that is, whether the Convention should establish the principle of the obligation of payments for secondary uses.

The Netherlands suggested (Doc. 38) that the system of the Monaco Draft be adopted. In its view, a general obligation to recognize secondary use rights was "not sufficiently justified either on the score of equity or by social or economic consideration". Proposals to the same effect were advanced by France (Doc. 71)

and Portugal (Doc. 73). In explaining its proposal, the French delegation stressed the diversity of economic situations and laws existing in the various countries. These proposals, when discussed in the Working Group, received support from Japan, Monaco, Tunisia, and Yugoslavia.

On the other hand, the solution of the Hague Draft received the endorsement of Austria, Czechoslovakia, the Federal Republic of Germany, India, and the United Kingdom.

When put to a vote in the Working Group, the solution envisaged by the Monaco Draft was rejected by a vote of 14 against, 12 for, and 10 abstentions. Thereupon a solution along the lines of the Hague Draft was put to a vote and was carried by a majority of 24 for, with 8 against, and 3 abstentions.

A few days later the question was reopened in the Main Commission on the basis of a joint proposal of France, the Netherlands, and Portugal (Doc. 108). The system of the Hague Draft was adopted in this body by a vote of 21 for, 11 against, with 4 abstentions.

When the same question came before the Plenary Conference, the system of the Hague Draft was adopted, 20 countries voting for it (Argentina, Australia, Austria, Brazil, Cambodia, Chile, Congo (Leopoldville), Cuba, Czechoslovakia, the Federal Republic of Germany, Iceland, India, Ireland, Israel, Italy, Mauritania, Mexico, Peru, Poland, and the United Kingdom), 8 voting against it (France, Japan, Luxembourg, Monaco, the Netherlands, Tunisia, the Republic of South Africa, and Yugoslavia), and 9 abstaining (Belgium, Denmark, Finland, Norway, Portugal, Spain, Sweden, Switzerland, and the United States of America). The two-thirds majority required for the passage of any provision in the Plenary Conference thus having been achieved, the matter was settled. The joint proposal of France, the Netherlands, and Portugal (Doc. 108) was therefore not put to a vote.

As to the beneficiaries of the secondary use rights, several amendments were proposed. Belgium suggested (Doc. 65) that payment should always be made to the producer of the phonogram, and that he in turn should be required to share the payment with the performers. This proposal was rejected.

Argentina proposed (Doc. 85) that in each State the rights should be granted either to the performers or, alternatively, to performers and producers. This proposal was seconded by Czechoslovakia and supported by Mexico. When several delegations stated that the proposal would prevent their countries from accepting the Convention, Argentina withdrew its proposal, which was then put forward by Cuba but rejected by the majority. A proposal by the United Kingdom (Doc. 20) to insert the word "or" between the words "to the performers" and "to the makers of phonograms" in the Hague Draft was accepted. Thus it is now clear that a Contracting State has a choice of any of the following three possibilities: (a) to grant the right of equitable remuneration to the performers only; (b) to grant it to the producer of the phonogram only; (c) to grant it to both performers and producers of phonograms.

Of course, Article 12 must be read in conjunction with Article 16, the provision dealing with reservations permitted under the Convention, which is discussed in its proper place. In the Main Commission, the Italian and Polish Delegations raised a point of order and requested that Articles 12 and 16 be voted jointly. Since this had not been possible, the Italian Delegation told the Main Commission that it could not vote on Article 12 without linking it to Article 16.

A point repeatedly emphasized during the discussions, which is also clear from the text itself, was that the provision does not apply to all phonograms. It applies only to published phonograms, and then only if their publication was for commercial purposes. It was also pointed out that, in order to come under the provision, the use of phonograms in broadcasting must be a direct use. Use through rebroadcasting would not be a direct use. On the other hand, the mere transfer by a broadcasting organization of a commercial disc to tape and the broadcast from the tape, would not make the use indirect.

MINIMUM PROTECTION OF BROADCASTS

(Article 13)

The Convention provides, as did the Hague Draft, that broadcasters shall enjoy the right to authorize or prohibit the rebroadcasting of their broadcasts. For the definition of rebroadcasting see Article 3.

The Convention also provides that broadcasters have a right to authorize the fixation of their broadcasts. In this connexion, Austria (Doc. 89) and Switzerland (Doc. 92) proposed that the prohibition against the fixation of television broadcasts include the right to prevent the making of still pictures of the telecast. The Conference agreed that the prohibition against fixing the broadcast extended to fixing parts of the broadcast. It refused, however, to take a stand on the question of whether a still picture of a telecast is part of a telecast, and decided to leave this question to be dealt with in the national laws of each Contracting State.

The Hague Draft prohibited the reproduction of a fixation of a broadcast if the fixation was "unlawful". On the basis of a proposal by Austria (Doc. 89), and in line with Article 7, "unlawful" was changed to "without consent". It was also agreed that, as in the case of Article 7, Article 13 (c) (ii), rather than Article 13 (c) (i), applies in cases where, under Article 15, the fixation was made without the consent of the broadcaster.

The Convention, as did the Hague Draft, grants broadcasting organizations a television exhibition right — that is, a right to prohibit the communication to the public of television broadcasts, if the communication is made in places accessible to the public, and if an entrance fee is charged. Suggestions were made to delete this minimum right, but these were not accepted by the Conference. (See, however, Article 16, which permits reservations on this provision.)

Switzerland proposed (Doc. 92) that this right be granted whenever the communication to the public was made "for pecuniary gain" rather than where there was "payment of an entrance fee". Austria suggested (Doc. 89) that the right should apply regardless of whether an entrance fee is charged, as long as the

place where the public communication occurs is accessible to the public. After discussion, however, these proposals were withdrawn.

Lastly, Austria proposed that broadcasters be granted the right to authorize the putting into circulation of copies of a fixation of their broadcasts. This suggestion was not adopted by the Conference, for reasons analogous to those given above in the discussion of Article 10.

MINIMUM TERM OF PROTECTION

(Article 14)

In addition to establishing minimum terms, the article on the duration of protection in the Hague Draft provided that duration was to be determined by the law of the country where protection was claimed. It also contained a provision for "comparison of terms", under which no country would be required to grant protection for a longer period than that fixed by the country of origin.

The Conference decided that the latter two provisions were superfluous, and omitted them from the Convention.

It goes without saying that duration is determined by the law of the country in which protection is claimed, since this result is implicit in the provision on national treatment.

As to the comparison of terms, the Conference concluded that it might be of real importance only in the case of secondary use rights. It noted, however, that this situation is adequately covered by Article 16, paragraph 1 (a) (iv), which expressly permits material reciprocity with respect to duration. Comparison of terms was not considered essential with respect to the right of reproduction of fixations, mainly because in most countries unauthorized reproduction is regarded as an act of unfair competition without any well-defined time limits.

As to the minimum term, two questions had to be decided: (a) how long the term should be, and (b) when the term should start.

With respect to length, the Hague Draft provided for a minimum term of 20 years. Poland suggested 10 years (Doc. 41), Austria, 30 years (Doc. 90), and the United States of America recommended 25 years with a possible renewal period of an additional 25 years (Doc. 102). Czechoslovakia proposed 20 years for performances and 10 years for phonograms and broadcasts (Doc. 107). None of the proposals was adopted, and the Convention provides, as the Hague Draft did, for a minimum term of 20 years.

As for the starting point, Denmark, Finland, Iceland, Norway, and Sweden proposed that, in the case of phonograms, the minimum term be computed from the moment of fixation, whether or not the phonogram was published (Doc. 24). The proposal was adopted in a somewhat modified form, and became item *(a)* of Article 14. This starting point applies to phonograms and to performances incorporated in them. For performances not incorporated in phonograms the starting point is the date on which the performance took place [Article 14 *(b)*]; for broadcasts, the term is counted from the date on which the broadcast took place [Article 14 *(c)*].

In the Plenary Conference, Czechoslovakia proposed (Doc. 128) that the Convention omit any minimum term provision *(a)* for performances not incorporated in phonograms and *(b)* for broadcasts. The proposal was rejected, however, after several delegations expressed the view that it would have left visual or audio-visual fixations of performances, and fixations of broadcasts, without any minimum term.

POSSIBLE EXCEPTIONS

(Article 15)

Paragraph 1 of this Article, like the Hague Draft, permits the domestic laws and regulations of any Contracting State to provide certain exceptions to the protection guaranteed by the Convention. These exceptions relate to: *(a)* private uses; *(b)* the use of short excerpts in connexion with the reporting of current events; *(c)* ephemeral fixation by a broadcasting organization by means of

its own facilities and for its own broadcasts; and (d) use solely for purposes of teaching. On the basis of a proposal made by India, the Conference enlarged the last possible exception to include use solely for purposes of scientific research.

As to private uses, Switzerland suggested an amendment (Doc. 75) which would have provided *ex jure conventionis* — rather than leaving the matter to the discretion of domestic laws — that the use of a performance, phonogram or a broadcast exclusively for the personal and private purposes of the person who has reproduced the phonogram, fixed the broadcast off the air, etc., was lawful, provided that the reproduction of the phonogram or the fixation was not used by, or made available to, a third party with a view to financial gain. Switzerland also suggested that any Contracting State should be allowed to exclude the application of such a provision by means of a reservation made at the time of its adhering to the Convention. However, after discussion, Switzerland withdrew its proposal, since its aim can be achieved also under item (a) of paragraph 1 of this Article, as adopted by the Conference.

A number of other additions were suggested (Austria, Doc. 95; Denmark, Finland, Iceland, Norway, and Sweden, Doc. 61; Poland, Doc. 41; India, Doc. 115). However, these were not pressed, probably because many of the situations they would have covered could fall under the general provision contained in paragraph 2.

This paragraph was adopted on the basis of a proposal of the Federal Republic of Germany (Doc. 100). It provides that, irrespective of paragraph 1, any Contracting State may establish the same kinds of limitations upon the protection of performers, producers of phonograms, and broadcasting organizations as it provides in connexion with copyright in literary and artistic works. Thus, for example, if the copyright statute of a Contracting State allows free quotation for purposes of criticism, or free use for charitable purposes, the State could allow the same exceptions with respect to the protection of performers, producers of phonograms, or broadcasting organizations. However, as stated in the last sentence of the paragraph, “compulsory licences may be

provided for only to the extent to which they are compatible with this Convention ”.

RESERVATIONS

(Article 16)

As in the Hague Draft, reservations under the Convention are permitted only on specified provisions. Poland proposed (Doc. 41) that the Convention permit a Contracting State to make reservations on any provision whatsoever, but this proposal was not accepted.

One of the permitted reservations involves the provisions on secondary use rights in phonograms contained in Article 12. As regards this Article, any Contracting State has the power to make the following reservations:

- (i) It may declare that it will not apply the provisions of Article 12. This would be a total reservation.
- (ii) It may declare that it will not apply the provisions of Article 12 in respect to certain uses. This was understood by the Conference to mean that a country may decide not to grant payments in the case of uses in broadcasting, or in the case of public communication, or in the case of certain kinds of broadcasting or public communication.
- (iii) It may declare that it will not apply the provisions of Article 12 in cases where the phonogram producer is not a national of another Contracting State. This clause was adopted pursuant to a proposal by Ireland (Doc. 99). It means that the application of Article 12 may be refused even if the phonogram was fixed or first published in a Contracting State, as long as it was not first fixed by a producer who is a national of a Contracting State.

In addition, a State may limit the protection given to secondary use rights under its domestic law, even if the phonogram was fixed by a producer who is a national of another Contracting State, to the extent that similar protection is granted in the latter State. This clause, generally referred to as the clause of material

reciprocity, was adopted pursuant to a proposal of Denmark, Finland, and Sweden (Doc. 106). This enables the State making the reservation to cut back the protection it grants to the extent of the protection it receives. This possibility of comparison and cutting back also applies to the term of protection, and this is expressly stated in the Convention. The comparison, however, may not be applied with respect to the beneficiaries: a State that grants protection to both performer and producer cannot cut back rights with respect to a State that protects the performer or the producer only. Also, a State that grants protection only to the producer may not refuse protection to a State that grants protection only to the performer, and vice versa. This decision was taken by the Conference after a thorough discussion, based on a document prepared by an *ad hoc* working party (Doc. 119). This document clearly put before the Conference the necessity for deciding whether to extend the principle of material reciprocity to the question of beneficiaries.

The other reservation permitted under Article 16 relates to the television exhibition right of broadcasting organizations guaranteed under Article 13 (*d*) of the Convention. The Hague Draft permitted reservations on any of the minimum rights of broadcasting organizations. Pursuant to a proposal of France (Doc. 97), however, this possibility of reservation exists in the Convention only with regard to the said television exhibition right.

The Convention states that reservations on both Articles 12 and 13 (*d*) may be made at any time, and not just at the time instruments of ratification, acceptance, or accession are deposited. This is intended to allow countries to introduce a reservation after they have adhered to the Convention, if changes in their domestic law make this desirable.

COUNTRIES APPLYING THE SOLE CRITERION OF FIXATION (Article 17)

Article 17 allows certain countries to apply the sole criterion of fixation with regard to Article 5. This question was discussed above in connexion with that Article.

Article 17 also allows the same countries to substitute, for the purpose of Article 16, paragraph 1 (a) (iii) and (iv), the criterion of fixation for the criterion of nationality.

Both of the prerogatives given in Article 17 can be exercised by means of a declaration desposited with the Secretary-General of the United Nations. This declaration must be deposited at the time the Contracting State deposits its instrument of ratification, acceptance, or accession, and not later.

CHANGES IN RESERVATIONS

(Article 18)

Based on a proposal of the Netherlands (Doc. 54), this Article permits any State which has made reservations under other provisions of the Convention to reduce the scope of such reservations or to withdraw them altogether. Changes of this sort may be effected at any time, by notification deposited with the Secretary-General of the United Nations.

PROTECTION OF PERFORMERS AND BROADCASTING ORGANIZATIONS IN CONNEXION WITH VISUAL FIXATIONS

(Article 19)

Under the Hague Draft, performers were guaranteed convention protection against the reproduction without their consent of fixations containing their performances, if the reproductions were made for purposes other than those for which they had given their consent. However, this minimum guarantee did not extend to reproductions of visual and audio-visual fixations such as motion pictures. Furthermore, the Hague Draft did not appear to grant national treatment either to performers or to broadcasting organizations in connexion with the reproduction or other use of visual or audio-visual fixations.

Proposals by Austria (Doc. 103) and Czechoslovakia (Doc. 128) would have provided different solutions for cinematographic works on the one hand, and for visual or audio-visual fixations intended for television on the other. The majority of the delega-

tions, however, found such a distinction impractical. The Czechoslovakian amendment was presented in the last plenary session of the Conference and was rejected by a vote of 22 against and 7 for, with 8 abstentions.

Article 19 was adopted on the basis of a proposal of the United States of America (Doc. 105). It provides that, notwithstanding anything in the Convention, once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 has no further application. It was made clear during the debate that the exclusion of the minimum guarantees provided in Article 7 for performers, in the case of visual or audio-visual fixations, is more extensive in the Convention than it was in the Hague Draft. On the other hand Article 19 has no effect upon performers' freedom of contract in connexion with the making of visual and audio-visual fixations, nor does it affect their right to benefit by national treatment, even in connexion with such fixations. The Article is similar to the Hague Draft in that it does not limit the minimum rights guaranteed to broadcasting organizations with respect to broadcasts using visual or audio-visual fixations.

NON-RETROACTIVE EFFECT OF THE CONVENTION (Article 20)

Paragraph 1 of this Article is similar to a provision in the Hague Draft. It provides that the Convention shall not prejudice rights acquired in any Contracting State before the date of coming into force of the Convention for that State.

Paragraph 2 of this Article is based on a proposal of the United States of America (Doc. 117). It provides that no Contracting State shall be bound to apply the provisions of this Convention to performances or broadcasts which took place, or to phonograms which were fixed, before the date of coming into force of this Convention for that State.

OTHER SOURCES OF PROTECTION

(Article 21)

This Article provides that the protection granted by the Convention shall not prejudice any protection otherwise secured to performers, producers of phonograms, and broadcasting organizations. It is based on a joint proposal of Denmark, Finland, Iceland, Norway, and Sweden (Doc. 24).

SPECIAL AGREEMENTS

(Article 22)

On the basis of a proposal of Belgium (Doc. 96), Contracting States reserve, under this Article, the right to enter into special agreements among themselves, but only if such agreements grant more extensive rights than those granted by the Convention or contain no provisions contrary to the Convention.

SIGNATURE AND DEPOSIT OF THE CONVENTION

(Article 23)

The Hague Draft provided that the Convention would be "effective" only among those States that are parties to the Universal Copyright Convention or are members of the International (Berne) Union for the Protection of Literary and Artistic Works. This implied that it was possible to sign, ratify, accept, or accede to the Convention without being a party to either one of these Copyright Conventions. The Secretariat Draft provided that anyone invited to the Diplomatic Conference could sign the Convention, and that any country which had been so invited, or which was a member of the United Nations, could adhere. (For convenience, the expression "adhere" will be used to cover ratification, acceptance, or accession.) Invitations to this Diplomatic Conference were sent to members of the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organisation (ILO), and the International Union for the Protection of Literary and Artistic Works (Berne

Copyright Union), and to parties to the Universal Copyright Convention.

On this point there were two opposing schools of thought at the Conference. Some delegations considered it futile to permit countries which were not parties to either of the two Copyright Conventions to sign and adhere to the Convention, since such action would have no effect. They proposed that a country be required to be a party to at least one of the two Copyright Conventions before it be permitted to sign or adhere to the Convention. Proposals to this effect were embodied in amendments submitted by Austria (Doc. 14), India (Doc. 25 as orally corrected), the United Kingdom (Doc. 20), and the United States of America (Doc. 12) and was implied in a proposal by Japan (Doc. 37).

The contrary position was taken by Czechoslovakia (Docs. 31, 36, and 42) and Poland (Doc. 41) who wished, in addition, to open the Convention to States that were not parties to either of the Copyright Conventions. Czechoslovakia also suggested that the Convention be open to all countries, whether or not they had been invited to the Conference or were members of the United Nations. When the Conference rejected the proposals of Czechoslovakia and Poland, Czechoslovakia proposed (Doc. 42) that the Convention be open to any country whatsoever, but that Contracting States be allowed to declare, by way of reservation, that they would be bound only with respect to those countries which were parties to one of the Copyright Conventions. This, too, was defeated.

Proponents of the opposing point of view, particularly France and Italy, argued that the use of literary and artistic works was usually implied in the work of performers, recorders, and broadcasters. It was thus logical to establish a link between the Copyright Conventions and the present Convention, which was popularly known as a Convention on "neighboring" rights, i. e., rights neighboring on copyright. They believed it would be inequitable to have the performers, producers of phonograms, and broadcasting organizations of a country enjoy international protection, when the literary and artistic works they used might

be denied protection in that country because it was not a party to at least one of the Copyright Conventions. In reply, Czechoslovakia and other countries argued that there was no logical or equitable reason to establish such a link, particularly since the Convention would also protect the performances of literary or artistic works which had already fallen into the public domain, and phonograms or broadcasts which did not use literary or artistic works at all.

The majority of the Conference voted for the establishment of a link with copyright. The Convention therefore provides that, in order to sign the Convention, a State must fulfill both of the following conditions:

- (i) it must have been invited to attend the Conference, though it need not have attended; and
- (ii) it must be a party to the Universal Copyright Convention or the Berne Copyright Union.

Obviously, countries which are members of the Berne Copyright Union and are parties to the Universal Copyright Convention do meet these conditions.

Under Article 24 (2), a nonsignatory State may accede to the Convention whether or not it was invited to the Conference, if it is a member of the United Nations and a party to one of the Copyright Conventions. Congo (Leopoldville), Cuba, Czechoslovakia and Poland protested this decision of the Conference since they believed it would exclude a number of countries which, in their opinion, should be allowed to accede.

As proposed in the Secretariat Draft, the original signed copy of the Convention is deposited with the Secretary-General of the United Nations.

ADHERENCE

(Article 24)

States signing the Convention may thereafter ratify or accept it. Whether a signatory State calls its adherence "ratification" or "acceptance" is a matter of internal law. For States that do not sign, the Convention is open for "accession".

The conditions precedent for adherence established in Article 23 were discussed above in connection with that Article. The protests of some delegations with respect to this question were repeated during the discussions on Article 24.

Instruments of ratification, acceptance, or accession must be deposited with the Secretary-General of the United Nations.

ENTRY INTO FORCE

(Article 25)

The Secretariat Draft proposed that the Convention become effective upon adherence by three States. The United Kingdom (Doc. 20) expressed the view that this might be too few; France, Italy and the United States of America proposed that the number be raised to twelve. When a compromise was sought, Italy suggested requiring nine adherents, whereas the Federal Republic of Germany and other delegations favoured six. The Conference adopted the latter proposal.

For the first six States adhering to it, the Convention will therefore come into force three months after the deposit of the sixth instrument of adherence. As to other States, it will become effective three months after the particular State has deposited its instrument of adherence.

APPLICATION OF THE CONVENTION

(Article 26)

The Secretariat Draft proposed a provision under which each Contracting State undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of the Convention. India proposed that "measures necessary" be replaced by "the necessary legislation" (Doc. 116). However, the Conference adopted the text as proposed in the Secretariat Draft. This is now paragraph 1 of Article 26.

Paragraph 2 of the Article also adopts the language proposed by the Secretariat Draft and provides that, at the time of adherence,

each State must be in a position, under its domestic law, to give effect to the terms of the Convention.

To some delegations, the Article seemed superfluous since each Contracting State must apply the Convention and, if necessary, adopt measures to conform to the Convention. Some delegations objected to the reference to the constitution of a State since no State was likely to adopt unconstitutional measures; they also felt that paragraph 2 was unnecessary since, if implementing measures were needed, they must perforce precede adherence. The majority of the Conference disagreed, considering it wise to make these points explicit and to emphasize the obligation of States to ensure the application of the Convention on their territory. It was also pointed out that, under paragraph 2, domestic measures would have to precede deposit and could not be left to the period between deposit and coming into effect.

Throughout the discussion it was understood that implementing legislation on points regulated by the terms of the Convention itself, would not be necessary in those countries in which international treaties were directly applicable and took precedence over inconsistent domestic laws.

TERRITORIES

(Article 27)

This Article deals with the method for making the Convention applicable to territories not responsible for their foreign relations. It provides, in effect, that this may be accomplished by filing a declaration with the Secretary-General of the United Nations. The declaration must be filed by the Contracting State responsible for the international relations of such territory, and can be filed only if one of the Copyright Conventions also applies to the territory.

Czechoslovakia (Doc. 33) and Poland (Doc. 41) proposed that there be no provision in the Convention relating to territories, and when the Conference adopted Article 27 and other provisions concerning territories, Congo (Leopoldville), Cuba, Czechoslovakia and Poland protested. Czechoslovakia expressed the

view any provision on territories would be an anachronism and would be contrary to the Declaration on the Granting of Independence to Colonial Countries and Peoples, adopted by the General Assembly of the United Nations in 1960 [resolution 1514 (XV)], which states “the necessity of bringing to a speedy and unconditional end colonialism in all its forms and manifestations”.

Other delegations took the position that the Declaration did not abolish the status of territories, that the continued existence of territories — some of them actually under the trusteeship of the United Nations — was a fact, and that the provisions in question were desirable because they enlarged the potential territorial scope of the Convention.

TERMINATING THE EFFECT OF THE CONVENTION

(Article 28)

Under Article 28, the Convention ceases to be effective in any given State or territory (i) when the Contracting State denounces the Convention, or (ii) when the Contracting State or territory is no longer a party to either of the Copyright Conventions. The latter provision — automatically terminating the effect of the Convention in States which no longer belong to either Copyright Convention — was adopted by the Conference pursuant to proposals made by Austria (Doc. 14) and Japan (Doc. 37).

Denunciation may be made by notification addressed to the Secretary-General of the United Nations, and takes effect twelve months after receipt by the Secretary-General. The right of denunciation may be exercised by a Contracting State only after it has been bound by the Convention for at least five years. Japan (Doc. 37) and the United States of America (see Doc. 60 rev.) proposed that the Convention require no waiting period for denunciation, and the Netherlands proposed that the waiting period last three rather than five years (see Doc. 60 rev.), but these proposals were not approved.

Once the five-year period has elapsed, the Convention may be denounced at any time. The Secretariat Draft would have

allowed denunciation only during the 6th, 11th, 16th, 21st, etc., year following adherence, but this proposal was not adopted.

REVISION
(Article 29)

The procedure to be used in calling revision conferences is laid down in paragraph 1 of this Article.

The Secretariat Draft provided that no revision conference could be convened before the expiration of at least five years from the time the Convention first came into force. Japan objected to this time limitation (Doc. 37), but it was approved by the Conference.

Although any Contracting State may request a revision conference, the request must be agreed to by at least one half of the Contracting States. A proposal by Japan (Doc. 37) that the three International Secretariats also be given the authority to decide the convocation of revision conferences whenever they deemed one necessary, was not adopted.

Revision conferences will be convened by the three Secretariats in co-operation with the Intergovernmental Committee established under Article 32. This is a compromise between the Secretariat Draft, which would have entrusted the convocation to the three Secretariats alone, and a proposal of the United States of America (Doc. 45), which would have assigned the task to the Intergovernmental Committee.

Paragraph 2 deals with the question of how revisions are to be adopted. Adoption of any revision would require a vote of a least two-thirds of the States attending the revision conference, provided that this majority included at least two-thirds of the States then members of the Convention, whether or not they are present at the conference. This provision is based on a proposal of Switzerland (Doc. 72). One purpose of the provision was to avoid the "rule of unanimity", which would permit one Contracting State to defeat any revision proposal. The Conference understood that decisions reached at a revision con-

ference could bind only such States as ratify the revising Convention.

Paragraph 3 provides, in effect, that unless the Convention adopted by the revision conference provides otherwise, the present Convention shall be closed to new adherences as soon as the newly-adopted Convention comes into force. The present Convention would, however, remain in force as between Contracting States in cases where neither have become parties to the newly-revised Convention, or where one has and the other has not.

DISPUTES

(Article 30)

Under the Secretariat Draft, the International Court of Justice would, in effect, have been given jurisdiction in any dispute between two or more Contracting States which concerned the interpretation or application of the Convention and which had not been settled by negotiation.

Proposals of Czechoslovakia (Doc. 34) and Poland (Doc. 41) would have given the Court jurisdiction only if all the parties in a concrete case or controversy agreed to submit it to the Court. The United States of America proposed that the Convention should, in unmistakably clear terms, make the jurisdiction of the Court mandatory by providing that it would be enough for one of the parties to ask for a decision (Doc. 46).

The Conference adopted the latter recommendation, and rejected the proposal which would have made the Court's jurisdiction optional. Argentina, Congo (Leopoldville), and India explained that they voted against Article 30 because of this factor.

RESERVATIONS

(Article 31)

This Article makes it clear that reservations to the Convention may be made only with respect to those provisions where the Convention itself expressly provides for possibility of reservation.

Reservations are permitted only under Articles 5 (3), 6 (2), 16 (1) and 17.

Czechoslovakia proposed the omission of any such Article (Doc. 35). Poland suggested that the Convention allow reservation on any provision of the Convention (Doc. 41). Both these proposals were rejected by the Conference.

INTERGOVERNMENTAL COMMITTEE
(Article 32)

The Secretariat Draft proposed the adoption of an article on the "control of the application of the Convention". Under it, each Contracting State would have been required to file periodic reports with the three Secretariats on "any measures taken, under preparation, or contemplated by its administration in fulfilment of the present Convention". The reports would have been examined by twelve experts, each of the three Secretariats designating four. The reports of the experts would, in turn, have been submitted to the competent bodies of UNESCO, ILO, and the Berne Copyright Union.

Several objections were raised to this proposal. It was said that the measures implementing the Convention were of public record and did not need reporting and that, since the question was whether a State fulfilled its obligations under the Convention, no control could be properly exercised in this respect by experts appointed by Secretariats.

The Conference rejected the proposal of the Secretariats. Instead, it set up an intergovernmental committee, whose members are designated by Governments rather than by the Secretariats, and whose jurisdiction is not to control the application of the Convention but to study questions concerning its application and operation. Furthermore, the Intergovernmental Committee is given the task of collecting proposals and preparing documentation for revision conferences.

As proposed by Japan (Doc. 47), the members of the Committee are to be designated with due regard to equitable geographical distribution. Officials of the three Secretariats constitute

the secretariat of the Committee. The Committee itself will consist of six to twelve members, depending on the number of the Contracting States, and will meet at the request of a majority of its members. Most of what is contained in Article 32 is based on a proposal of the United States of America (Doc. 44 rev.).

LANGUAGES OF THE CONVENTION

(Article 33)

As proposed in the Secretariat Draft, the Convention is drawn up in English, French and Spanish, the three texts being equally authentic. The Convention was signed in these three languages.

On a joint proposal of Austria, Brazil, the Federal Republic of Germany, Italy and Switzerland (Doc. 39), it was also provided that official texts should be drawn up in German, Italian and Portuguese. It was understood that these non-authentic but official texts would be established by the Governments concerned, and would be published by the Secretariats of UNESCO, ILO and the Berne Copyright Union.

NOTIFICATIONS

(Article 34)

This Article provides that the Secretary-General of the United Nations will advise all those States concerned of the various facts which the Governments or the Secretariats need to know in connection with the Convention. The provision is an adaptation of the Secretariat Draft.

Conclusion

When the Convention as a whole was put to vote, it was adopted with 33 votes for, none against, and three abstentions. Eighteen countries — Argentina, Austria, Belgium, Brazil, Cambodia, Chile, Denmark, France, Germany (Federal Republic of), Holy See, Iceland, India, Italy, Mexico, Spain, Sweden, United

Kingdom, Yugoslavia — signed the Convention at the conclusion of the Conference on 26th October, 1961.

The “ Final Act ”, a document stating, in essence, that there was a diplomatic conference in Rome which drafted the Convention, was signed by almost all of the countries at the Conference.

In the form in which it was put before the Conference, the present Report covered only the substantive clauses, that is, the first twenty-two Articles of the Convention. The Conference adopted it unanimously in that form. That part of the present Report which deals with the so-called final clauses, that is, the last twelve Articles of the Convention, was submitted to all delegations for suggestions after the Conference.

The Rapporteur-General also wishes to take this opportunity to express his particular thanks to Dr. Arpad Bogsch, one of the delegates of the United States of America, for his tireless assistance and co-operation in the writing of the present Report.

Conseiller d'Etat Henry Puget, Head of the Delegation of France, expressed, in the name of his own and all other delegations, the sincere appreciation and admiration of the whole Conference for the services of its Chairman, Ambassador Giuseppe Talamo Atenolfi Brancaccio di Castelnuovo. His wisdom, energy, and tact contributed greatly to the successful outcome of the Diplomatic Conference which, it is hoped, will benefit the public as well as the protected interests for generations to come.

(signed) Abraham L. KAMINSTEIN.