"NEIGHBORING RIGHTS"

GUIDE

to the

ROME CONVENTION

and

to the

PHONOGRAMS CONVENTION

Note communicated by the ILO

"For its part, the International Labour Office has communicated to WIPO a certain number of comments, the essentials of which have been accepted by WIPO, on the section of the Guide that concerns the Rome Convention. ILO considers that the Guide will assist in the promotion of that instrument. It is not associated with the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms."

Note communicated by Unesco

"This Guide is published on the sole responsibility of WIPO. Unesco exercises jointly with the ILO and WIPO the functions of secretariat provided for in Article 32 of the Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, and it cooperates with WIPO, for matters within its competence, in the functions of secretariat entrusted to the International Bureau of WIPO by Article 8 of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms. It did not feel able, in either of those two capacities, to share in the drafting of this Guide: in the opinion of Unesco, the Guide represents an interpretation of the provisions of the Convention, which that Organization does not consider itself called upon to undertake."

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GUIDE
to the
ROME CONVENTION
and
to the
PHONOGRAMS CONVENTION

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PREFACE

It is generally accepted that the concept of intellectual property covers two areas: on the one hand industrial property, with its different facets (patents, industrial designs, etc.), and on the other hand literary and artistic property, in other words copyright, and the related field of "neighboring rights." The World Intellectual Property Organization (WIPO) is the only one among the specialized agencies of the United Nations whose entire efforts and activities are directed towards promoting the recognition and safeguarding of this set of rights introduced by national and international legislation for the benefit of intellectual creators.

As we know, WIPO is the successor to the United International Bureaux for the Protection of Intellectual Property (BIRPI), whose task was to provide for the administration of the two major Conventions concluded at the end of the last century: the Paris Convention for the Protection of Industrial Property of 1883 and the Berne Convention for the Protection of Literary and Artistic Works of 1886. It was on the occasion of one of the revisions of the latter Convention, in Rome in 1928, that the problem of the protection of "neighboring rights" came into the international limelight, and that the search for solutions to it was considered desirable. BIRPI harnessed itself to this task in cooperation with the International Labour Organisation and the United Nations Educational, Scientific and Cultural Organization, and the result was the Diplomatic Conference convened in Rome in 1961, at which the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations came into being. When it took over from BIRPI, WIPO continued to devote part of its activities to the promotion of that protection throughout the world. Indeed it was at the end of a Diplomatic Conference held in Geneva in 1971 that another treaty was concluded in this field, namely, the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, the administration of which is entrusted to WIPO.

The important part thus played by WIPO in this area of intellectual property led the member States of the Intergovernmental Committee of the Rome Convention to ask for a Guide to the Rome Convention to be written and published by WIPO on the lines of the one written on the Berne Convention and published in 1978. The Governing Bodies of WIPO therefore included in the program and budget for the 1980–1981 period measures whereby such a

Guide, which would cover both the 1961 Rome Convention and the 1971 Phonograms Convention, might be published.

It should be made clear that this Guide is not to be regarded as an authentic interpretation of the provisions of these two international treaties, since such an interpretation is not within the competence of the International Bureau of WIPO. The conception of this work is similar to that of the Guide to the Berne Convention, and its sole aim is to present, as simply and clearly as possible, an account of the origins, aims, nature and scope of the provisions concerned. It is for the authorities concerned, and interested circles, to form their own opinions.

The purpose of the publication of this Guide is to make the legislators and administrations of countries aware of the question of the protection of "neighboring rights," to help them understand better the way in which international relations in this area are handled and to facilitate the implementation of the Rome and Phonograms Conventions and broaden their scope, in order thereby to assure performers, producers of phonograms and broadcasting organizations that their rights will be safeguarded and their interests defended.

Like the Guide to the Berne Convention, this Guide to the Rome Convention and the Phonograms Convention has been written by Mr. Claude Masouyé, Director of the Public Information and Copyright Department of the International Bureau of WIPO. The English version has been established, on the basis of the original French text, by Mr. William Wallace, formerly Assistant Comptroller in the Industrial Property and Copyright Department at the Department of Trade of the United Kingdom.

Geneva, March 1981

ARPAD BOGSCH
Director General
World Intellectual Property Organization
(WIPO)

PART ONE

GUIDE
to the
ROME CONVENTION (1961)

**International Convention
for the Protection of Performers,
Producers of Phonograms and
Broadcasting Organizations**

INTRODUCTION

I. The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereafter called the Rome Convention, or, since there can be no ambiguity simply "the Convention") was finalized on October 26, 1961, at the end of a Diplomatic Conference held in Rome. It came into force on May 18, 1964, and, at the moment, boasts some twenty Contracting States. It has not yet been the object of any revision, and the States in question are bound by a single text which is reproduced in the present work.

II. To follow the history of the preparatory work which led to the drawing up of this international agreement goes beyond the purpose of this present Guide and would run to great length, because these preparations stretched over many years and followed many ups and downs. Nevertheless, it seems worthwhile briefly to set out the circumstances and the reasons which led to the international recognition of a number of rights usually called "neighboring." In other words, to give, in this Introduction, replies to the questions "when and how? and then why?."

III. For ease of reference, the expression "neighboring rights" will be used here to cover the rights granted by the Rome Convention to performers, producers of phonograms and broadcasting organizations (without prejudging the question whether or not these are in truth neighbors to the copyright of authors). The question of whether they should enjoy protection has been long debated and has been one of the prime preoccupations of the many bodies representing the interested parties. No single event stands above the others. There were many studies and suggestions made and positions taken up, right from the beginning of this century; one example among the many is that the International Literary and Artistic Association (ALAI) at its Congress in Weimar in 1903 looked sympathetically at the plight of solo performers. In fact, the need for a protection for these rights was bound up with the growth of new technical methods of disseminating creations of the mind — gramophone records, cinema and radio — inventions which performers gladly accepted, since they offered great opportunities to reach a wide public but which tended, as they later found, to upset the pattern of their professional life. Coupled with the unemployment which followed the first world war, this had serious consequences for performers. Their claims grew ever more pressing and the organizations which represented them, notably the International Musicians Union, turned naturally, since it was a question of employment opportunities, to the International Labor Office (ILO).

IV. The work of this body from 1926 to the conclusion of the treaty in 1961 was of prime importance. In the matter of safeguarding opportunities for employment and preserving the standard of living of a distinguished category of workers, the ILO could not ignore the serious economic problems which had arisen and which called for an international solution. Its 1940 Conference had on its agenda the question of rights for performers in relation to broadcasting and recording; but the second world war put a temporary end to this.

V. In the meantime, the question of the protection to be given to the artistic performances of artistes was being tackled in a different context. In 1928, in Rome, the Berne Convention Revision Conference felt that an international convention on the subject was premature, but called on governments to consider measures to protect performers. Still under the Berne Convention umbrella, a meeting of experts was convened in 1939 in Samaden (Switzerland) by the Secretariat of the Berne Union and the International Institute for the Unification of Private Law. The participants produced two draft treaties – one on performers and makers of phonograms, and the other on broadcasting organizations. These they thought of as "linked" to the Berne Convention.

VI. For their part the international non-governmental organizations, particularly those representing performers and authors were not inactive in the search for solutions. The reports of their meetings are full of resolutions and recommendations on the matter. Bargains were struck (e.g., in 1934 at Stresa the International Confederation of Authors and Composers Societies (CISAC) signed an agreement with the International Federation of the Phonographic Industry). But again the war of 1939–45 interrupted such efforts.

VII. After the war, it was again in connection with the Berne Convention that the matter was taken up afresh. The Diplomatic Conference in Brussels in 1948 for the further revision of that Convention, though it ruled out protection under copyright, nevertheless adopted three resolutions giving future action a significant twist. These again exhorted governments to continue their efforts to find means of protecting makers of instruments for the mechanical reproduction of musical works and broadcasting organizations; but they laid down that these must in no way affect authors' rights. As to performers, their resolution was based on the artistic quality of the performances and used the expression "rights neighboring on copyright."

VIII. From 1949 on, there came an impressive series of international meetings into whose details it is impossible to go here. Suffice it to mention only main landmarks on the road to Rome in 1961. The ILO, through its Committee on Employees and Intellectual Workers, again took up the question of performers' protection and from 1950 onwards sought to coordinate its efforts with those of the Berne Union Secretariat. It convened a meeting in 1951 in Rome which produced a draft convention to give protection simultaneously to performers, producers of phonograms and broadcasting organizations. This

idea of simultaneous protection was finally accepted by the parties concerned. Governments, when consulted, offered many and diverse views, and discussions continued, including those on the procedure to be followed in convoking meetings of experts.

IX. Meanwhile, in 1952 in Geneva, the Universal Copyright Convention came into being, with Unesco as its Secretariat. In view of the close connection with copyright which was involved, Unesco could not be a mere observer but had a valid claim to be a third partner in the exercise of preparing a convention.

X. In 1956, the Secretariat of the ILO convened, in Geneva, a meeting of the interested parties which drew up detailed rules for the protection of performers, producers of phonograms and broadcasting organizations with an explanatory report. For their part, after a meeting in Paris of a study group in 1956, Unesco and the Berne Secretariat convened a meeting of governmental experts in Monaco (1957) to prepare a draft convention for the protection of "certain rights called neighboring on copyright."

XI. The drafts emanating from Rome (1961), Geneva (1956) and Monaco (1957) contained profound differences which needed ironing out; and the activities of the three intergovernmental organizations needed coordinating. This was done by the convocation, under their auspices, at The Hague in 1960, of a committee of governmental experts with the task of preparing for a diplomatic conference on the protection of neighboring rights, and drawing up a general report of the views expressed at the meeting, on the basis of documentation submitted jointly by the three convening organizations. From this a single draft emerged. This was The Hague draft on which the Rome Convention was based.

XII. After this account of the main events which led to the Rome Convention, it remains to give the reasons why the neighboring rights came to be protected. It is common ground that they owe their existence to technical changes. Up to the end of the last century, the artistes' offerings (actors in a play, operatic and concert singers, musicians playing pieces of music, circus and variety artistes doing their turns, etc.) had an ephemeral character. They disappeared at the moment they were seen or heard. After the play or the concert was over, nothing was left except the impression created in the memory of the audience. In a very few cases someone made a sketch of a scene, a soloist, an orchestra or an acrobat, or perhaps a photograph of an event to jog the public's memory. But people had to be present where the event took place in order to appreciate it. The invention of the gramophone, cinematography and radio, and their spread to an ever-wider public at the beginning of the 20th century, revolutionized the ways in which authors were able to publicize their work. But since these means of communication, ever-improving, bore mainly on the offerings of performers, it was the latter who were most affected and became prior claimants to a grant of neighboring rights.

XIII. It was particularly the coming of gramophone recordings that had the most serious effect. Performing a work, which for centuries had been a transitory exercise, became durable and created something not only capable of being stored, but also of being multiplied and sold and used indefinitely. This striking invention permitted sounds to be fixed and hence preserved and the production of a myriad of copies for every conceivable use. The spoken word, the instrumentalist's music and the singer's song could be recorded and used again and again. It led to the growth of an industry of the first rank. There is no need to stress the importance of the part played today by the phonographic industry in the social and cultural life of mankind, with its discs, cassettes and other recordings.

XIV. As for the cinema, its influence on performers took a different aspect when sound films succeeded the silent. It offered great employment opportunities to all categories of performers. But when, as has been said "the piano came to the screen", the many musicians who accompanied silent films found their livelihood disappear at a stroke and bewailed their lack of jobs.

XV. Finally, the other invention, broadcasting, too, created a marked change in the methods of exploiting works. The theater or concert hall audience for any given performance of a work was suddenly enlarged to allow the public in their homes to see and hear every kind of literary and artistic production. These inventions had an even greater effect when, as happened, they were rapidly combined. Records were played on the radio and radio was itself widely recorded. Today is the era of universal phonograms and the permanent broadcast.

XVI. These modern products of man's inventive genius produced a profound upset of the legal and social order. At law the performer, by his mere presence before the microphone, permitted the fixation of his presentation; his performance is usually governed by conditions fixed by contract, the performer receiving a fee or royalties on sales. At first the permission was for fixation on a cylinder and, since he had to repeat the performance for each cylinder, he was paid per copy. Later the fixation could be repeated on many copies and the performer had to authorize both fixation and reproduction. These were covered in most contracts. But from the moment the recording, to whose making and sale the performer had consented, was used by third parties (in ways he had never allowed for and over which he had no control), no legal link existed between him and his labor which others were exploiting. In this he differed from the writer or composer who retains a measure of control over his work when it is let loose upon the world. In other words, once his "live" performance was engraved in the wax of a matrix, a microgroove or the soundtrack of a film, albeit with his permission, others could exploit it in ways unforeseen in the contract and beyond the control either of the performer or the person making the recording. The law of contract showed itself impotent to cover these

practices, which, with the continuous growth of the phonographic industry and of broadcasting, over the years reached enormous proportions.

XVII. In the social field, recordings and their wide diffusion led to a loss of employment opportunities: thanks to records, it became no longer necessary to obtain the consent, on each occasion, of performers; instead of live performers, on the radio or television, in dance halls and restaurants, and even for incidental music in the theater, recourse was had merely to recordings. The result was (and still is) grave technological unemployment affecting individuals often unfitted by their special training and their temperament for other jobs, diminishing the attractions of a musical career, and blighting the whole profession. By a kind of boomerang, the disc became the enemy of the performer, taking away his chance of work; in this, by increasing the consumption of recordings, broadcasting also helped. True there are a number of performers for whom life is not bad — the record, radio and TV stars; but the danger of technological unemployment remains a preoccupation of the profession as a whole and common interest calls for solidarity among its members. Performers therefore demand the right to exercise some control over the many uses to which their performances can be put.

XVIII. For their part, the producers of phonograms have not been inactive, since modern techniques involve for them, too, a need for protection. From the beginning, records enjoyed a huge success even though the old 78's lacked the "high-fidelity" later offered by 45's and 33's. The arrival of tapes, and their wide popularity, is witness to the perseverance of this success. Phonograms are part of the way of life, offering the public an almost inexhaustible source of entertainment and culture. This source has been tapped by others than those for whom the records were originally sold. Radio and television stations have made great use of records to fill their programs. Even if the plugging of records on the air advertises them (and one must not forget that they also add to the reputation of the main performer), it is a fact that discs, tapes and other fixations have become essential aids to broadcasting. Besides, the increasing availability to the public of cheap and easy to use recording machines has increased the dangers of copying and the growth of parasitic industries operating on the verges of legality. All this had led the producers of phonograms to demand the right to say yes or no to the copying of their phonograms and to receive payment if these are used for broadcasting or for communication to the public. It is worth noting how well their claims match those of the performers.

XIX. As technology advanced, the broadcasting organizations also felt the need to protect themselves. They spent considerable time, skill, effort and money on the preparation of their programs and felt it unfair that others, perhaps competitors, should help themselves to these by rebroadcasting them, recording them or showing them in places to which the public had access.

Protection of this sort was of interest also to the performers whose efforts contributed to the programs. Without power to control the use to which their broadcasts were put, the organizations could not guarantee to the performers or the authors that the programs would not reach a wider audience than was envisaged when permission to broadcast was given. Again, since their programs could form the basis of phonograms or videograms, their interests were in this respect identical with those of the phonographic industry. For all these reasons the broadcasters became a third claimant for neighboring rights.

XX. There is no point in going into the legal basis for these rights which rejoice in a different name according to the theories of the namer (they are sometimes called "related" or "connected" or "intermediary"), and whose links with copyright stem from the fact that, since authors depend on the recipients of such rights to make their works known to the public, the latter are the former's auxiliaries. It is important too to remember the extent to which the three parties depend on each other and how their rights intermingle. True, the purist may complain that, notwithstanding the skill and talent of a recording engineer or a broadcast producer, the making of a record or of a broadcast is, after all, an essentially industrial act, whereas the performances of artistes are of their nature acts of spiritual creation; and to mix them up together in one convention creates a hotch-potch. Nevertheless the Rome Convention has done so, always with the guideline of stopping the unfair appropriation of the labor of others.

XXI. The Rome Convention, as will be seen, allows a lot of latitude to member States in the way they apply it. As well as the basic *table d'hôte* menu — the conventional minima — there exist *à la carte* provisions which allow each country a choice of the obligations which it must undertake. Besides, this Convention of 1961 was a landmark in the evolution, during the last few decades, in the nature and role of conventions regulating international intellectual property relationships. The conventions concluded at the end of the 19th century were the result of a common denominator between national legislations and attempt to make clear the reciprocal obligations of member States; whereas those drawn up more recently tend to set out the rights and obligations which each State should incorporate into its domestic law. True, the Rome Convention reflects the state of the art in 1961 and there have been considerable developments since then. But no draftsman of a law to protect neighboring rights can fail to be influenced by it.

XXII. The influence of the Rome Convention in this field was reinforced by the drawing up, in 1974, under the auspices of the Intergovernmental Committee established by Article 32 of a "model law concerning the protection of performers, producers of phonograms and broadcasting organizations." Reference will be made to this from time to time as "the model law on neighboring rights."

XXIII. Finally, it is worth noting that the Intergovernmental Committee already mentioned set up, in 1979, a sub-committee to examine the results of a study made by the Secretariats on the bringing into operation and practical application of the Rome Convention. This sub-committee has drafted a number of recommendations on the subject which can complement the model law in helping competent authorities to decide on legislative matters and administrative practice in order to assure to performers, to producers of phonograms and to broadcasting organizations effective protection for their respective rights and interests.

* * *

Preamble

The Contracting States, moved by the desire to protect the rights of performers, producers of phonograms, and broadcasting organisations,
Have agreed as follows:

0.1. As is normal in international treaties, the Rome Convention contains the usual Preamble to set out its purpose. Here the text is very brief, the participants, prudently no doubt, merely expressing their desire to protect the rights of performers, producers of phonograms and broadcasting organizations. The formula is the same as that which forms the opening of the Berne Convention for the Protection of Literary and Artistic Works.

0.2. In its mention of the three categories, the Preamble follows the Convention's title, usually shortened to "the Rome Convention" or "the Neighboring Rights Convention," to the extent that the latter expression is acceptable. The meaning of the expressions "performers" and "producers of phonograms" appear in the definitions (Article 3). The term "broadcasting organizations" does not, although the definition of "broadcasting" and "rebroadcasting" clarify the idea. In any case, the term "broadcasting" obviously covers both radio and television.

0.3. The mention of the expression "rights" in the Preamble ensures complete parallelism with the Berne Convention: there "the rights of authors" — here "the rights of performers, producers of phonograms and broadcasting organizations."

ARTICLE 1

Safeguard of Copyright Proper

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.

1.1. This preliminary provision deals with the relationship of the Rome Convention to copyright. It was already in earlier drafts (Geneva 1956, Monaco 1957 and The Hague 1960) since the problems arising from this relationship largely affected the birth-pangs of the new Convention and the search for solutions was a constant preoccupation of those concerned.

1.2. There are two cases in which no problems arise: first, when the performances, recordings or broadcasts are of works not protected by copyright, having fallen into the public domain; secondly, when no work in the copyright sense is involved, as for example in the circus or the sports arena. Clearly there is no conflict here.

1.3. But the great majority of cases do involve copyright works and here the question arises whether the rights given by this Convention conflict with those of the authors, and if so do they risk prejudicing the latter's copyright?

1.4. The authors' societies, though accepting the need for protection of certain performances, looked with some fear and suspicion on the proposals to protect the neighboring rights. They claimed that a convention on this subject was useless or at least superfluous; most problems could be dealt with by contract; and in any case it was premature since the function of international treaties was to follow, and not to precede, national legislation, and, on this subject, few countries had passed laws. This being so, these bodies were determined to maintain the integrity of copyright, fearing the impact the creation of these new rights would have on the rights authors already enjoyed. To allay these fears, those negotiating in Rome retained this provision from earlier drafts and wrote into this Article a safeguard clause.

1.5. According to its terms, the protection granted leaves intact and in no way affects the protection of copyright in literary and artistic works and no provision of the Convention may be interpreted as prejudicing such protection. This makes it quite clear that the legal situation of the copyright owner is unaffected. His economic interests are a different matter.

1.6. Some consider that these two sentences are merely an affirmation of principle without practical effect. One must distinguish, they say, between the right and its exercise since it is only in the exercise of the right that conflicts of interest can arise.

1.7. One can point to two cases, albeit marginal and not insoluble, which can pose difficulties. The classic example is when the use of a copyright work demands more than one authorization. A soloist gives a recital of a number of pieces; the composer of one of them agrees to a record-maker recording the work in the concert hall, but the performer refuses. The copyright remains unaffected but its exercise is prevented. Again, the reverse situation may arise, the soloist's interests demand that the performance be recorded, but, because of contracts he has previously made with another record company, the composer refuses.

1.8. Another example is that of the numerous music users who are accustomed to paying a given sum for copyright dues. Faced with other demands, if they do not cease their use altogether or cut it down, they will tend to offer less for the copyright. This is known as the "cake" theory, which assumes the amount payable for the use of music is a fixed sum. If the cake has to be divided up, the authors will be given a smaller slice. Though this argument is used in relation to secondary uses (Article 12) it can apply generally without being a sufficient reason to deny the rights the Convention grants. This illustrates the difficulty of reconciling the various interests involved.

1.9. It has been said that, to take the line that only the composer's permission is needed to authorize the making of a copy of a phonogram (on the grounds that to require also its producers' permission would affect the exercise of the composer's copyright) would deprive the Convention of all meaning. The real meaning is that his protection must not be prejudiced, leaving it to the courts to settle any disputes.

1.10. This Article 1 is limited to safeguarding copyright. It does not proclaim its superiority by laying down that neighboring rights may never be stronger in content or scope than those enjoyed by authors. Indeed there are a number of examples showing that neighboring rights are not necessarily inferior. The Rome Convention gives record makers and broadcasting organizations the right to forbid the reproduction of phonograms and the rebroadcasting of their broadcasts respectively. The Berne Convention is less firm: copyright in the cases in point may be the subject of compulsory licenses. Here one might digress to differentiate between compulsory and legal licenses. In the case of a compulsory license, the copyright owner must allow the use required of his work, though he retains the right to negotiate the conditions for such use; if the parties cannot agree these are settled by an administrator or a judge. In the case of a legal license, the work can be used as of right and the copyright owner gets nothing but a compensation laid down in rules made by a competent

authority. These two sorts of license, to which resort may only be made if all else fails and agreement is impossible between the parties, are contrasted with contractual licenses which depend on there being agreement. The Rome Convention does not allow for any compulsory licenses to override refusals by producers of phonograms or broadcasting organizations.

1.11. Again, the Rome Convention contains no special provisions for relaxing the strictness of copyright in favor of developing countries, unlike the multilateral copyright conventions revised in 1971. True, this was largely a matter of timing. But the fact remains that in those countries the level of neighboring rights (as they affect audiovisual reproduction in the use of educational films and videograms for educational purposes) is higher than that of copyright proper. However, there are other provisions in the Convention which redress the balance, bearing in mind that without the author's works, neighboring rights do not come into operation.

1.12. The General Report of the Conference makes the meaning of this Article clear. 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.

1.13. This basic Article is, in a way a guide to Contracting States when they legislate to cover national neighboring rights situations. They are not allowed to do so in ways which affect the protection of copyright: for example, competition between two exclusive rights over the same Article; the Rome Convention envisages a right to remuneration for performers, phonogram producers or both when a recording is performed in public; to transform this into an exclusive right leads to a conflict with the author's exclusive right and prejudices it; to do so might bring the legislator into conflict with the safeguard for copyright in Article 1, according to one school of thought.

ARTICLE 2

Protection given by the Convention
Definition of National Treatment

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;

(*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.

2.1. The protection given by the Convention consists mainly of national treatment. The General Report of the Rome Conference and the first paragraph of Article 2 have the aim of defining this national treatment as it applies to the three categories of beneficiaries. National treatment is that accorded by the Contracting State in which protection is claimed (i) to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory; (ii) to producers of phonograms who are its nationals, as regards phonograms first fixed or published on its territory; (iii) to broadcasting organizations which have their headquarters on its territory as regards broadcasts transmitted from that territory. In short it is the treatment which a state accords to its national performers, phonograms and broadcasts. To demonstrate who are the beneficiaries of this treatment, the Convention, in Articles 4, 5 and 6 sets out the respective points of attachment.

2.2. The treatment to be accorded is further defined in paragraph 2 of this Article which brings in the minimum protection specifically guaranteed by the Convention. The national treatment is subject to the protection set out particularly in Article 7 (for performers), 10 (for producers of phonograms) and 13 (for broadcasting organizations). Even if a Contracting State does not grant these minima to its own nationals, it must do so to nationals of other Contracting States. The same paragraph makes it clear that the minimum rights which must be given are themselves subject to the limitations on these rights which the Convention allows. The General Report makes this clear giving an example: under Article 16 a Contracting State could deny or limit rights of secondary use with respect to phonograms (Article 12), regardless of whether its domestic law granted this protection.

2.3. National laws on the protection of neighboring rights differ widely and indeed in some countries there are none. This fact made it impossible for the Convention to fix an obligatory high standard of protection, whereas if it had been based on a common denominator of those countries with the lowest standard, it would have lost its purpose.

2.4. The formula in this Article has the advantage that it brings the level of treatment granted nationally at least as high as the conventional minima, as regards domestic performers, record-makers and broadcasting organizations, since no country will wish to grant foreigners greater rights than its own nationals. But the discussions in Rome made it clear that the protection which States are bound by the Convention to give may not always coincide exactly with national treatment since the former could be greater or less than the latter.

2.5. This provision, whereby foreigners are assimilated to nationals in all States party to the Convention is to be found in the multilateral copyright conventions, though in the Rome Convention its impact is less because the approach is different. Although it refers to performances, phonograms and broadcasts to define national treatment and the various points of attachment, the object of protection is not the thing, but specified beneficiaries. The copyright conventions on the other hand protect the work itself. Again, many national laws are not, at least up to now, familiar with the concept of a "neighboring" right. The result is, for these, a rather different pattern of international protection.

2.6. In the end this system of national treatment provided for in this Article amounts to unrestricted assimilation. The absence, in the laws of a given country, of any specific protection for neighboring rights does not mean that there is no equivalent to the rights the Convention gives in the national, general, criminal or civil law. In any case, at least in countries where conventions are self-applying, even if the national law is silent, the protection of international situations is guaranteed by the conventional minima which it has undertaken to honor. In other words, convention nationals can count on the minimum of protection in all Contracting States.

ARTICLE 3

Definitions
Article 3, paragraph (a): Performers

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;

3.1. This provision defines what is included, for Convention purposes, in the expression "performer" and does so broadly. Note, first, that it is immaterial whether the work performed is or is not protected by copyright. The text says simply "literary or artistic works." It is made clear in the General Report of the 1961 Conference that this expression, which is used elsewhere in the Convention, has the same meaning as in the Berne and Universal Copyright Conventions where it includes, in particular, musical, dramatic and dramatico-musical works.

3.2. Secondly, the reference to "works" means that the Convention does not protect a number of people who, although undoubtedly performers in the accepted sense, do not perform works as this is meant in copyright. Examples are variety and circus artists (jugglers, acrobats and clowns). In case there should be any doubt, it also excludes sports personalities. True, the Convention later (Article 9) allows countries to protect artists who do not perform works. It is up to national laws to decide which. Note that performers of this sort are not deprived of protection if the sketches or mimes they perform are indeed works in the sense of Article 2 of the Berne Convention. Again, many performers are themselves composers of the songs they sing and are therefore protected as authors.

3.3. The French text uses, for the single word "performer," "artiste interprète ou exécutant." The words "artiste interprète" are usually used of soloists and actors, whereas members of an orchestra, including the conductor are usually "artistes exécutants." In order that there should be no doubt that conductors of instrumental and vocal groups were protected, both were considered included in the expression "artiste interprète ou exécutant."

3.4. Finally, if the Convention includes in a single group a wide category of persons who communicate works to the public, this does not mean that in practice their situations are identical. Some artists put the stamp of their personality on their performance of a work: the conductor of an orchestra completes the score by his personal annotations; the soloist plays his instrument in an individual way; the actor gives his own interpretation to a part. They are

in a sense creators who are tied, in their performances, to the work itself but who, in practice, are with difficulty distinguished since one cannot determine with precision who, by virtue of his inventiveness, must be judged artist. But it is clear that he must "perform" and the words used in French in the Convention might tend to exclude more extras of theater or cinema and those who assume a merely mechanical role (stagehands for example) since their part in the show bears no personal stamp and is marginal or secondary. It is a matter for the courts to interpret these terms. The words "act, sing, deliver, declaim, play in or otherwise perform" give them wide latitude.

3.5. In view of the above, it was felt unnecessary in Rome to define "performance." However, as the General Report points out it was decided that obviously performance means the activities of a performer as such, and it was agreed that whenever the Convention uses the expression "performance" or in the French text "exécution" it must be understood as a generic term which also includes recitation and presentation ("récitation" and "représentation").

Article 3, paragraph (b): Phonogram

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

3.6. The importance of this paragraph and those which follow which define what is meant by phonograms are clear since these definitions govern the scope of the protection of the Convention. A phonogram is defined as a fixation, that is to say from the moment when it is fixed it is protected. Whether or not it is multiplied into a number of copies and these are put at the disposition of the public is of no importance: from its making the original fixation is protected. However, the exceptions allowed by the Convention (see below Article 15) such as private use or ephemeral fixations restrict to some extent the scope of this protection.

3.7. The fixation must be exclusively aural. A fixation of images (e.g., cinema) or of images and sounds (e.g., television) are therefore excluded (see below Article 19 in so far as this concerns performers).

3.8. Finally, the fixation may be of sounds of a performance or of other sounds. During the Rome Conference bird-song and natural noises were given as examples of the latter. In other words, whatever the origin of the sound, the phonogram as such is protected by the Convention.

Article 3, paragraph (c): Producers of Phonograms

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

3.9. This definition is clear and needs no explanation. Note that it is the first fixation and the accent is on an industrial and not a personal activity. On the latter point, it was noted in the Report 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.

3.10. It should be noted that broadcasting organizations may, as regards their own recordings, qualify as producers of phonograms within the Convention, although certain rights are reserved to producers of those phonograms which are published for commercial purposes (see Article 12).

Article 3, paragraph (d): Publication

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

3.11. It is worth pointing out, apropos of this definition, that the idea of "reasonable quantity" gives rise to disputes as to the number of copies required. However the sense of this paragraph is clear and the courts are there to sort out disputes.

3.12. This notion appeared already in the Berne Convention; it was changed in a revision of the Convention in 1967 in the sense that the offering of copies to the public must be such as to satisfy their reasonable demands, having regard to the nature of the work. It is not impossible that as regards the publication of phonograms judges will adopt the same approach.

3.13. Note that the text does not say that the offering of copies to the public must take place on the territory of a Contracting State. The result is that a record company in a country not yet party to the Convention may enjoy protection under it, if it first (or simultaneously) "publishes" the phonogram in a Contracting State (always assuming that the criterion of publication as a point of attachment is not ruled out) (see below Article 5).

Article 3, paragraph (e): Reproduction

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

3.14. The insertion of this definition in the Convention was to make it clear that by reproduction is meant the making of copies. The performance of a work, its public recitation or broadcasting or its exhibition to the public do not give rise to the making of new copies and are excluded. During the discussions in 1961 it was made clear that the expressions "phonogram" and "fixation" were not synonymous.

3.15. "Phonogram" is an exclusively aural fixation of sounds, whereas a "fixation" may be either visual or audiovisual and the Rome Convention only protects phonograms which are exclusively sounds.

Article 3, paragraph (f): Broadcasting

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

3.16. The opening words of the definition make it clear that broadcasting may be sound radio or television.

3.17. Secondly, the reference to "wireless means" narrows the field. As the General Report points out, the Conference was of the opinion that only transmission by Hertzian waves or other wireless means should constitute broadcasting. The result is that wire diffusion (sound relay, cable television) is excluded: it is well known that the Rome Convention does not cover cable. But this does not stop member countries from giving some protection nationally. It is only the Convention's protection that is lacking.

3.18. Finally, the words "for public reception" make it clear that transmissions to a single person or a defined group (ships at sea, aircraft, a fleet of taxis) are not broadcasts for the purpose of the Convention.

Article 3, paragraph (g): Rebroadcasting

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

3.19. It is said expressly that the two broadcasts must be simultaneous. This excludes deferred rebroadcasts since these are based on a fixation of the original broadcast. Note that if a Contracting State makes use of the optional exception in Article 15 to allow ephemeral recordings, these do not thereby lose the character of "simultaneous" with the broadcast into which they are to be included.

3.20. As regards the second part of the sentence referring to "broadcasting organizations," the General Report of the Conference makes it clear that, 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 Radiodiffusion Télévision Française or the British Broadcasting Corporation, the latter, and not the postal administration, is to be considered the broadcasting organization.

3.21. Furthermore, if a given program is sponsored by an advertiser or is prerecorded 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 within the meaning of the Convention.

ARTICLE 4

Performances Protected
Points of Attachment for Performers

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.

4.1. This provision sets out the conditions under which performers enjoy protection. It is the first of three Articles dealing with points of attachment.

4.2. A question common to all three Articles was debated at the Rome Conference: namely, whether the Convention applies only to international situations or also to national ones, i.e., whether a Contracting State must give the protection the Convention demands to its national performances, phonograms and broadcasts as well as to foreign ones. It was agreed that, like the multilateral copyright conventions, the Rome Convention touched only on international situations.

4.3. As a result, the beneficiaries of the Convention have the right to claim, in Contracting States other than that in which they satisfy their respective points of attachment, the minimum protection accorded by the Convention (e.g., for a performer, to forbid the fixation without his consent of his "live" performance; for a record company, to prohibit the reproduction of its phonograms; for a broadcasting organization the rebroadcasting of its broadcasts). But they cannot do so in the latter Contracting State since then it is only a national situation which arises, and it is only the national law of that State which applies.

4.4. The point is of little practical significance as the General Report points out. It is almost inconceivable that a country would not give to its national performances, phonograms and broadcasts at least the same protection as it gives to foreign ones. It is normal to look after one's own people. In any case the conventional minima are not very high, and this is true also for performers. The national legislator would be unlikely to provide for less.

4.5. When considering these points of attachment one can see that they differ from the copyright conventions. The Rome Convention does not speak of "the country of origin." It sets out directly who is protected and in which cases

(Articles 4, 5 and 6). Note however that the points of attachment vary between the different categories of beneficiaries, and furthermore the Convention gives Contracting States the right not to apply this or that criterion. As a result the system is highly complex and is likely to provide a good deal of work for the courts.

4.6. Article 4 thus sets out the cases in which performers may claim protection: namely, if (a) the performance takes place in another Contracting State or (b) the performance is incoporated in a phonogram which is protected under Article 5 of the Convention, or (c) the performance, not being fixed in a phonogram, is carried by a broadcast protected by Article 6 of the Convention. It is worth bearing in mind the meaning of "performance" (see comments on Article 3 (a) above).

4.7. As the General Report points out, it was stated during the Conference 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. As to item (a), the fact that in this Convention, unlike the copyright conventions, the criterion of nationality is not included in the points of attachment, makes it necessary for the right to national treatment to depend on the State in which the performance takes place. It was thought best to reject the criterion of nationality because of the almost insurmountable difficulties arising particularly over such things as collective performances (choirs and orchestras, etc.), and to adopt instead merely a criterion of territoriality.

4.8. There are three conditions, and if any one of these is met, a performer is entitled to the minimum protection established by the Convention.

4.9. First, the performance must have taken place in another Contracting State: a soloist gives a piano recital in Stockholm and the concert is broadcast by Danish radio; this performer may demand the application of the Convention by Denmark. But it will be remembered that in Sweden, where the concert took place, it is the Swedish national law which applies.

4.10. Secondly, the performance is recorded in a phonogram protected by Article 5: a Brazilian actor agrees to his recital of poems being recorded in Brazil on disc; he can demand that Mexico prohibits his performance being used for purposes other than those for which he gave his consent e.g., advertising.

4.11. Thirdly, a "live" performance is included in a broadcast protected under Article 6: a quartet plays a number of musical pieces before the

microphone in a studio of an Italian broadcasting organization which has the quartet's consent to broadcast in Italy. If it is rebroadcast in the Federal Republic of Germany without the consent of the quartet, the latter may pray the Convention in aid. But note Article 7.2 whereby such consent must be required under the national law.

ARTICLE 5

Protected Phonograms
Article 5, paragraph (1): Points of Attachment for Producers of Phonograms

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).

5.1. This Article lists the conditions for the grant of national treatment to producers of phonograms; these are the nationality of the producer, the place of fixation of the sound, and that of first publication of the phonogram. Its effect is that each Contracting State is bound to grant national treatment in each of the following three cases: (a) when the producer is a national of a Contracting State (criterion of nationality); (b) when the first fixation is made in a Contracting State (criterion of fixation); (c) when it is published for the first time in a Contracting State (criterion of publication). As with performers, it is sufficient if one of these conditions is satisfied.

5.2. The criterion of nationality, as in the Berne Convention, is the basic one. It may not be excluded. (See however Article 17 below with the reasons for that Article.) It ensures protection for phonogram producers who are Convention nationals whether their products are sold inside or outside Convention territory, as often happens in the case of the phonographic industry.

5.3. The criterion of fixation is based on facts easily ascertained: one generally knows the place a recording was made and therefore whether it is protected under this heading. The first fixation of sounds must take place at the same time and usually in the same place as any performance thereby recorded. This Convention allows a record company from a non-contracting State to enjoy protection for recordings made within the Convention territory. A number of national laws do not recognize the criterion of fixation.

5.4. Finally, the third point of attachment — that of first publication. This in practice gives the phonographic industry the most protection. It allows record companies to have recordings made in non-convention countries by nationals of those countries. In these cases, neither the criterion of nationality nor that of fixation apply; but the criterion of publication operates to allow the widest protection.

Article 5, paragraph 2: Simultaneous 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.

5.5. This provision tends to increase further the number of phonograms enjoying convention protection. The idea of simultaneous publication is taken from the multilateral copyright conventions, e.g., Article 3 (4) of the Berne Convention. It allows an American record company (the United States of America not yet being a Contracting State), having sold a number of records there, to put the recording on the British, and thus the European, market. If it does so within thirty days of the first U.S. sales, the phonogram enjoys Convention protection. The publication must not, of course, be merely colorable. It must conform to the definition in Article 3 (d). It is for the courts to decide, in any dispute, whether the number of records offered for sale was "reasonable" in the circumstances. But one would not expect that the record industry would find the requirement of "reasonable quantity" difficult to meet.

5.6. If first publication takes place outside Convention territory, and no publication takes place within it for more than thirty days, the criterion of publication does not of course apply; and unless there is protection for some other reason, e.g., because the producer is a national of a Contracting State, the Convention cannot be prayed in aid.

Article 5, paragraph 3: Power to Exclude Certain Criteria

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.

5.7. This final paragraph was a compromise solution written into the Convention to take account of the divergent positions taken during the 1961 debates. Some States refused to apply the criterion of fixation (which allows non-convention nationals to acquire protection by having their phonograms first fixed on convention territory). Others refused to recognize the criterion of publication (which allows the record industry to protect its whole category of records by merely first or simultaneously publishing them in a Contracting State). Still others wanted only the criterion of fixation, and to exclude that of nationality.

5.8. By virtue of this solution, each State may reserve the right not to apply either the criterion of fixation or that of publication. No country may exclude

both at the same time; it is a case of one or the other. And no country may exclude the criterion of nationality; all must protect phonogram producers who are nationals of other Contracting States. Nevertheless, there is an exception to this basic rule, in Article 17, for countries whose laws, at the date of the Convention, gave protection only on the basis of place of fixation.

5.9. This notification of intention not to apply one of these criteria (fixation or publication) must be made to the depository power (the Secretary-General of the United Nations). It may be made at the time of ratification, acceptance or accession or at any time thereafter.

5.10. There is thus a range of situations governing the protection of phonograms. This is dealt with in the General Report of the Conference.

5.11. With respect to phonograms first or simultaneously published in Convention territory, there may be three categories of Contracting States: (i) 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. (ii) 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. (iii) 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 two remaining criteria (nationality, publication) is present.

5.12. 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: (i) 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. (ii) Those that, by a declaration under paragraph 3 exclude the application of the criterion of fixation. They will have to protect unpublished phonograms if, and only if, the criterion of nationality is present.

5.13. Of course, the opportunity given to countries to rule out this or that criterion was intended to allow as many countries as possible to join the Convention. But it cannot be denied that the system is a complex one, and care is needed in deciding whether or not a given phonogram is protected.

ARTICLE 6

Protected Broadcasts
Article 6, paragraph 1: Points of Attachment for Broadcasting Organizations

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.

6.1. This provision lays down conditions for the grant of national treatment to broadcasting organizations. There are two.

6.2. First, that the headquarters is in another Contracting State. This criterion of nationality is clear and calls for no comment except that it was agreed during the discussion in Rome that by the State where the headquarters of the broadcasting organization is situated should be understood 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 German as "offene Handelsgesellschaft" or "Kommandit-gesellschaft."

6.3. Secondly, that the broadcast is made from a transmitter situated in another Contracting State. Thus, the broadcasts of an organization of a non-member country are protected if their transmitter is on convention territory.

Article 6, paragraph 2: Power to Reserve

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.

6.4. As with phonograms, the Convention allows a reservation here. It is not a choice between two, but a right to demand that both criteria be met; in other words, that it will protect broadcasts only if the headquarters of the broadcasting organization is situated in another Contracting State and the broadcast was transmitted from a transmitter situated in the same Contracting

State. Protection might thus be ruled out in the case of some peripheral stations where the headquarters is on one side of a frontier and the transmitter on the other.

6.5. This notification of a reserve is done in the same way as in Article 5.

ARTICLE 7

Minimum Protection for Performers
Article 7, paragraph 1: Particular Rights

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.

7.1. This Article 7 is the pillar of the Convention for performers in that it determines the conventional rights which they enjoy.

7.2. The opening phrase uses the words "shall include the possibility of preventing" the doing of certain acts without the consent of the performer. The acts are listed later. This rules out any possibility of compulsory licenses since, in their case, the performer would not have the possibility of preventing the acts in question.

7.3. Note that the words "possibility of preventing" differ from those in the articles dealing with protection for producers of phonograms and broadcasting organizations. The latter have the right "to authorize or prohibit." Some think this paradoxical, regrettable and unfair. But it is of course only a minimum and national laws can go further.

7.4. The reason for the wording in this paragraph is to leave complete freedom of choice as to the means used to implement the Convention, and to choose those which member countries think most appropriate and best. They may be based on any one or more of a number of legal theories: law of employment, of personality, of unfair competition or unjust enrichment, etc. — and of course, if they wish, an exclusive right. The important thing is that those means achieve the purpose of this Article, namely that the performer has the possibility of preventing the acts enumerated.

7.5. The wording used also allows countries like the United Kingdom to retain their method of protection which is by criminal law, punishing those who make and/or use performances without consent. These countries think this solution best and refuse the grant of a property right in the nature of a copyright.

7.6. One reason is said to be that property rights are by their nature assignable. If musicians, for example, were able to assign their right to authorize to some central body, for example their trade unions, they could, in times of dispute, deprive themselves of the right to perform in record and broadcasting studios whether or not they wished to do so. The weapon in the hand of the union would be, it is felt, disproportionately large. In the resulting lack of records and/or a broadcasting blackout, both the performers and the public would suffer.

7.7. By the simple decision to appear or not on the state or in the studio, the performer carries in himself the exclusive right to authorize his performance. But from the moment modern technology intervenes (phonograms, broadcasting) their performance, once fixed, may be used in ways never envisaged. It is then that one asks whether they should not have a right, like that of the author in his work, which allows him to follow its fortune, and retain a control over their performances.

7.8. The grant of such an exclusive right raises the fears of authors who see in it the possibility of hindering, if not paralysing, the exercise of their own rights over their works. In fact, the performer would be unlikely to use it to forbid the use of his performance as it is not in his interests to do so — but merely to claim further remuneration. Phonogram producers too have their fears that such a right might be used to refuse recording altogether. They feel that the performers usually owe their worldwide reputations to recordings, and it is the record companies that are best able to defend their interests. But one must remember that, without the performer, and indeed the author of the work performed, there would be no disc or cassette. Again the broadcasting organizations fear that the exercise of an exclusive right would be a pretext for creating difficulties over both original broadcasts and rebroadcasts, and might, in the end, have a harmful effect on the contractual relations which exist between the parties. Almost every broadcast is preceded by a contract fixing the conditions governing it and the remuneration to be paid. Some say that the wage-earning nature of the activity is incompatible with an exclusive right; according to others, this is nonsense; because of the personal character of his performance, he should have a right to say yes or no in every case.

7.9. The Rome Convention's refusal to include, in the conventional minima, an exclusive right for performers, is said to make them appear poor relations, second-class citizens and the like. However that may be, in order to effect a compromise between the negotiating countries, it merely stipulates that the

performer shall have the possibility of preventing a certain number of acts which become unlawful if done without his consent.

7.10. Before considering what these acts are, it is worth noting a problem of wording which is mentioned in the General Report. The question arose as to whether the Convention should use the expression "live" performance (in the French "exécution directe"). This expression is ambiguous for several reasons: first, because "live" in English has a different connotation from "directe" in French; second, 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 Convention. In fact, broadcasting programs, these days, contain few live performances. Almost all broadcast matter is prerecorded.

7.11. Article 7.1 (a) gives, with some exceptions, performers the possibility of preventing the broadcasting (sound or television) or communication to the public of their performances without their consent.

7.12. The question of communication to the public was debated in Rome in 1961, as the General Report points out. What is meant is a performance (e.g., a recital in a concert hall) which is transmitted to another public, not present in the hall, by loudspeakers or by wire. It was argued that the communication to the public of a live performance did not ordinarily involve the crossing of national frontiers; it was therefore unnecessary to provide for it 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, and therefore refused to eliminate the reference. Later developments in the realm of cable television, whereby TV programs are sent ever-greater distances over frontiers, makes one think this was a wise decision.

7.13. Having set out the principle, Article 7.1 (a) provides four exceptions in the words "except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation": the first is when the performance has itself already been broadcast; it is then a rebroadcast and a matter for national law (see Article 7.2). The second case is when the broadcast is made from a fixation: it might be an ephemeral recording (Article 15 (c)), a commercial disc (Article 12), or a recording made for broadcasting purposes (Article 7.2). The third exception is when the performance communicated to the public is itself a broadcast performance (radio and television sets in such public places as cafes, restaurants, hotels, shops, aircraft, etc.). The final exception is when the communication to the public is made from a fixation (the classic case of performance by jukebox — which, unless reserved, brings Article 12 into play).

7.14. To summarize, consent is required for broadcasting and communication to the public of a "live" performance, provided no broadcasting or recording of this performance has intervened. The model law on neighboring rights contains provisions in this sense: performers' rights are limited to the protection of performances which have not already been fixed or broadcast.

7.15. Article 7.1 (b) allows performers to prevent the fixation of their live performance without their permission. An example is that of an orchestra whose weekly concert is broadcast by Irish Radio; from the broadcast, which also takes place in the United Kingdom, a recording is made without the orchestra's knowledge; since an international situation involving two Contracting States exists, the orchestra can pray the Convention in aid. It was understood in Rome that consent is needed for recording any live performance, whether broadcast or communicated to the public by wire or by any other means. The model law follows this, covering all unfixed performances.

7.16. Article 7.1 (c) sets out three cases in which consent to the *reproduction* of a fixation is required.

7.17. The first case (paragraph 1 (c) (i)) is where the original fixation is made without consent. For example, a violin solo or a song forms part of a radio program; without the consent of the soloist or singer, someone makes a recording and sends it to a record company which launches records of it on the market. As the General Report relates, there was some discussion as to whether to call these records "unlawful." In the event it was decided to say "without their (i.e., the performer's) 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 because, for example, it was made for private use. Paragraph 1 (c) (iii) alone would apply.

7.18. In the second case (paragraph 1 (c) (ii)), the performer's consent is required for the reproduction of a phonogram if it is made for purposes different from those to which the performer consented. A good example is that of a disc which is incorporated, without the performer's consent in the soundtrack of a motion picture. When he agreed to be recorded, it was on the understanding that his recording would be used in commerce, albeit in large quantities, but not that it would be used in a film. Such use demands a further consent from him.

7.19. Finally, the third case (paragraph 1 (c) (iii)) is when a recording is made by virtue of one of the exceptions allowed by Article 15, but is later reproduced for other purposes. That Article (see below) allows the Convention protection to be abrogated in four cases. If the national law so provides, prior consent is not needed for private use, short excerpts for current events, ephemeral fixations

and teaching or scientific research. But any subsequent use for other purposes called for the performer's agreement. An example often given is that of a professor who records a radio program of an author declaiming one of the classic tragedies; the professor makes a few copies to allow his pupils to comment. So far so good. A recording made for private use is reproduced for teaching. It would be different if a less scrupulous professor joined with a record company to make and sell records of the speech to the public. This would be a "different purpose" from those in Article 15.

7.20. Note that the first fixation may be of sound or of vision. One should not deduce from the examples given to illustrate the Convention that it is limited to sound alone; everything that counts for sound radio counts also for television. Unlike the Convention, the model law on neighboring rights contains a definition of the term "fixation": "the embodiment of sounds, images or both in a material form, sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated during a period of more than transitory duration."

7.21. During the discussions in Rome, it was suggested that there might be a fourth case, i.e., when the fixation of a performance was reproduced by a person other than the one authorized by the performer: thus requiring a double consent in such a case — that of the performer as well as the phonogram producer. In the end however it was thought unnecessary. As the General Report shows, 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 copies. It was felt that cases in which, for some reason or other, the producer would or could not take action, were probably so rare that they did not require coverage in the provisions on minimum protection for performers.

Article 7, paragraph 2: Relations Between Performers and Broadcasting Organizations

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.

7.22. This second paragraph of Article 7 decreases the minimum protection enjoyed by performers so far as their relations with broadcasting organizations are concerned.

7.23. Sub-paragraphs (1) and (2) allow a Contracting State to regulate certain questions in favor of broadcasting organizations once the performer has consented to have his performance broadcast. These cover rebroadcasting, fixation for broadcasting purposes and reproduction of such a fixation for broadcasting purposes. This does not however rule out the matters in question being dealt with in contracts between the interested parties (sub-paragraph (3)).

7.24. The first two subparagraphs allow the authorities in each Contracting State to decide if and to what extent performers who have given their consent to the inclusion of their performances in broadcast programs may claim protection against rebroadcasting, recording for broadcasting purposes and making copies of such a recording for such purposes; in other words, whether the original agreement carries with it, automatically, agreement to the other acts. The broadcasting corporations point out that direct or deferred relays are the normal pattern nowadays; exchange of both sound and television programs is essential in the communication between nations; major news events are carried by the global televisions chains (e.g., Eurovision which largely covers Western Europe and is relayed to other continents and Intervision which links broadcasters of Eastern Europe). To give performers the chance to stop relays of their contributions risks depriving the public of such tit-bits. For their part, the performers say there is no question of their forbidding nor even hindering such interchanges. But they feel that a measure of protection would enable them to demand reasonable supplementary fees in suitable cases, for this extension of the audience enjoying their performances. On this point it is worth remembering that when Eurovision relays started, the broadcasting organizations claimed to have the right to relay the performances given in each of their studios to the other members, without the consent of, or extra payments to, the performers. However after some years of negotiations it was agreed that artists would get a supplementary fee when national broadcasts were relayed on Eurovision. To obtain this concession the performers' representative bodies had to threaten to withdraw their members from taking part in programs intended for relay on Eurovision. The Convention does not take sides on this but leaves it to national law. Some feel however that by merely doing so, the Convention takes the side of the broadcasting organizations.

7.25. Of course the relations between the two parties are normally the subject matter of contracts. This fact was well known to the negotiators in Rome in 1961. Having left national legislation free to regulate the matters in sub-paragraphs 1 and 2, they provided, in sub-paragraph 3, that the domestic laws in question should not operate to deprive performers of their ability to control, by contract, their relationship with broadcasting organizations.

7.26. Although the Convention left these matters to domestic legislation, the model law on neighboring rights obviously could not do the same. In the first place it gives performers the power to stop the operation of "radio pirates" — those who broadcast their performances without permission simultaneously with the authorized broadcasts. Secondly, it lays down specifically that "in the absence of any contractual agreement to the contrary or of circumstances of employment from which the contrary would normally be inferred, the authorization to broadcast does not imply an authorization to license other broadcasting organizations to broadcast the performance." The reference to "circumstances of employment" envisages the case of artistes on the permanent staff of the broadcasting organization in question, but in practice many of the latter enjoy the same advantages as to extra remuneration as do the free-lance performers.

7.27. It is to Article 7 of the Convention that performers look for their protection. To summarize, it gives them the opportunity of preventing the doing of certain acts without their consent, namely broadcasting, communicating to the public or making a fixation of their live performances; and the reproduction of any such fixation if the original was not consented to, or for purposes other than those to which they consented or are permitted by the law. The right is always subject to the limits and exceptions laid down in the Convention.

7.28. It is worth noting that the Convention is silent, as regards all three categories protected, on the question of moral rights. Clearly, it is the performers who would have the strongest case for such a right, particularly to claim to be identified by name with their performances and that these should not be mutilated in ways likely to spoil them. It is important for the performer to build up his reputation as a recording artist or a radio or TV star. His name must be known to the public, and the performance with which he is identified must not be used in such ways, or subjected to such changes as are likely to damage that reputation. In many countries, the moral rights enjoyed by authors have set the pattern for such protection, while in others the law of defamation can be prayed in aid. National ideas, like national laws, vary on this subject; and the Rome Convention does not deal with it.

7.29. The Convention protects all who perform works whatever their eminence, merits or talent. These are matters of subjective judgment — of personal opinion — and have no importance so far as the Convention is concerned.

ARTICLE 8

Performers Acting Jointly

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.

8.1. Once again, the Convention, in this Article, brings in national legislation. It concerns the manner in which artists who perform jointly should be represented in the assertion of their rights. There are many cases in which two or more performers are concerned.

8.2. Member countries are not however given a completely free hand. The General Report sums it up neatly: the provision makes it clear that national laws cannot deal with any of the *conditions* under which these rights are exercised; they must be limited to the question of how members of a group are *represented* when they exercise 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 licensing.

8.3. Note that the text does not oblige countries to legislate (any Contracting State "may" . . .); they simply have the power to do so. The model law on neighboring rights takes the opportunity; it contains provisions, identical for single or group performances. The person giving consent must be authorized in writing to do so; but users are excused of all criminal or civil responsibility, if they rely, in good faith, on a consent given by a person who purports to be authorized to give it on behalf of a group of performers. But any person who purports to give consent without being authorized, or who acts on a consent which he knows to be unauthorized, commits a criminal offence.

8.4. Performers' representatives are of many kinds: trade unions, professional groupings, agents. It has been said that domestic laws on neighboring rights would have been facilitated had there been, in the countries concerned, organizations truly representative of performers and accustomed to look after their interests in the case of group, or even individual, performances.

ARTICLE 9

Variety and Circus Artists

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.

9.1. This Article gives member countries the opportunity to enlarge the category of performers protected (or, more accurately, reminds them to do so if they wish). The definition of performers in Article 3 speaks of persons who perform "literary or artistic works." The question arises whether protection may not be extended to those whose performances are not necessarily of such works. The Convention does not do so, but in a sense suggests to member countries that they might. The obvious case is that of the variety or circus artist (clown, acrobat, juggler) who can see the value of his whole act diminished if not destroyed, by its unauthorized filming or broadcasting. Its showing on television will keep viewers away from the circus or music hall. Of course, if that act contains one of their own works (e.g., a sketch or a mime) they will enjoy protection both under the Convention and by copyright proper.

9.3. The great difficulty about extending protection to those who do not perform works is to decide how far to go without making too many difficulties for the broadcasting organizations, i.e., to keep protection within defined limits. Some countries wish to include footballers; others only those who play in official competitions; most refuse altogether. As to variety and circus artists, the model law on neighboring rights omits them from the definition, but the commentary draws attention to the power to go further.

9.4. The General Report deals with the usefulness or otherwise of this Article. Some delegations felt 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.

ARTICLE 10

Right of Reproduction for Phonogram Producers

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

10.1. This Article is the first of three dealing with protection for phonograms.

10.2. As a minimum, the Rome Convention gives producers of phonograms the right to authorize or prohibit the reproduction of their phonograms, whether this is done by direct or indirect means. It was understood in Rome that this means a reproduction by use of the matrix (direct), or by use of a record pressed therefrom, or by recording a radio or TV program which contains a phonogram (indirect).

10.3. The fact that the Convention speaks merely of "phonograms" does not mean that parts of phonograms can be copied with impunity. As the General Report states 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.

10.4. This Article should be read with the definition of "producer of phonograms" in Article 3 (c). This makes it clear that the person enjoying protection is the individual or legal entity which first fixes the sounds. Thus, in, for example, the normal case of a recording company, it is that company and not the various technicians and operators which it employs which is meant.

10.5. Unlike the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, drawn up in Geneva in 1971 (the Phonograms Convention), the Rome Convention contains no express provisions against importation or the unauthorized distribution of phonograms, and it does not cover these acts if done separately from the act of unauthorized reproduction. In other words, it gives phonogram producers no right to control the distribution of their phonograms (see, in contrast, Article 14 of the Berne Convention as regards films); nor does it forbid importation into a Contracting State of copies which would have been infringements had they been made in that State (compare Article 16 of the Berne Convention on the seizure of infringing copies). It was agreed in 1961 that these matters were left to member countries to decide.

10.6. The model law referred to above follows the Convention in this respect, but its commentary points out the power to cover unauthorized importation or distribution, and indeed the need to do so if the country in question intends to join the Phonograms Convention.

ARTICLE 11

Formalities for Phonograms

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 or their containers bear a notice consisting of the symbol (P), 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.

11.1. This Article is based on Article III of the Universal Copyright Convention regarding the use of the symbol © as notice of a claim to copyright protection. It scarcely calls for comment. It affirms the principle that phonograms are protected abroad without the need to comply with any formality. But if Rome Convention countries' laws do, in fact, demand formalities as a condition of protection, these are considered fully satisfied if the steps set out in this Article 11 are followed.

11.2. This notice affects both the rights of performers and of phonogram producers. Since commercial discs and tapes are these days normally sold in sleeves, jackets or boxes, which in any case bear advertising designs and photographs, the notice can be placed on these containers rather than on the records themselves.

11.3. Besides, it is only when the copies or their containers do not mention the producer and the principal performers that the notice must give the name of the owners of rights. In practice, in view of the information given on the containers, the records themselves usually bear only the symbol (P) and the year of first publication. Ownership of the rights is decided by the legislation and practices of the country where fixation took place.

11.4. Following the normal pattern, Article 11 applies only to phonograms from convention countries other than the one is which protection is claimed. Those considered as national phonograms are subject to such formalities, if any, as are demanded by national law.

11.5. The Convention imposes no obligation to demand formalities of any kind. As the General Report makes clear, it was understood by all in Rome that this Article does not require Contracting States to enact domestic legislation requiring formalities for the protection of performers or recorders in connection 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.

11.6. The model law on neighboring rights contains a provision, the optional nature of which is made clear in the commentary, on the lines of Article 11. It seems sensible that phonograms fixed or published in Rome Convention countries should bear this notice prescribed by Article 11 even if their national law does not demand it. This is in order to ensure that they are not pirated in other member countries that do. Although few countries in fact insist on formalities to protect phonograms, this Article standardizes the form of notice, and almost all containers these days carry the symbol Ⓟ which has become as familiar as the symbol © in the case of copyright.

ARTICLE 12

Secondary Uses of Phonograms

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.

12.1. This is undoubtedly the most important provision in the Convention — its focal point, although performers attach even greater importance to Article 7. It deals with "secondary uses" of phonograms. This expression is not to be found in the Convention but it is generally used to cover the use of records for communication to the public and for broadcasting. The subject gave rise to prolonged discussions in the period of run-up to Rome (Geneva 1956, Monaco 1957, The Hague 1960). The General Report of the 1961 meeting recites that it was undoubtedly the most difficult of questions before the Conference; since then discussion has continued unabated as to both the effect and the practical application of Article 12.

12.2. When a phonogram which has been published for commercial purposes is used directly for broadcasting or communication to the public, Contracting States have three possibilities. These are to assure the payment by the user of an equitable remuneration (i) to the performers or (ii) to the producer of the phonogram or (iii) to both. In any case, the payment is a single one to be shared if necessary. Further, the provision is optional in the sense that member countries may exclude it in whole or in part (see below Article 16). Each country must therefore make its own choice of the path to follow between the various claims, decide to accept or reject the Article, and, if the former, provide for its practical application.

12.3. The Article is the result of a compromise between the many interests involved and the national legal systems. The participants in the Rome Conference chose this system of setting out the principle and allowing for reserve, rather than that of leaving it all to national laws. In the result, secondary uses may be excluded in toto by virtue of Article 16; if not, Contracting States are offered a bundle of possibilities as to the grant of remuneration and its application in practice.

12.4. Note that the Convention does not offer, as an alternative to remuneration, the grant of an exclusive right. It speaks only of a single equitable remuneration, payable by the user to the beneficiaries named in the

national law (within the limits set out in the Convention). Note too that, because of Article 19, performers may enjoy rights only in "exclusively aural" fixations of sound which find their way to the commercial market. As a result, one school of thought considers that to grant an exclusive right or otherwise enlarge the scope of protection for secondary uses would be to modify profoundly the shape and purpose of the Convention and risk destroying the balance attained between the various interests (i.e., not only the three categories which benefit from the Convention, but also the authors) on which a harmonious development of conventional protection depends. Nevertheless one must look at the legislation of member countries on this point. There are those which go beyond a simple right to remuneration and these would no doubt hotly deny that they were in any way in breach of the letter or spirit of the Convention in doing so. Some give the phonogram producer a copyright in his sound recording which allows him to control not only the amount of remuneration but the extent to which his records are used for broadcasting or communication to the public ("needle time"). Others give performers a right to remuneration for any use, direct or indirect, of the phonogram or give them the right to authorize its use for all purposes to which they have not already consented. It seems therefore, in the light of this, that it is in order for national laws to go further in this while respecting in international relations the minima provided for in the Convention.

12.5. The principle of Article 12 is that equitable remuneration must be paid by the user for secondary uses. But there are three conditions, as regards the kind of phonogram, the character of the use and its purpose.

12.6. As is clear not only from the General Report but from the text itself, not all phonograms are included. The Article applies only to published phonograms and then only if publication was for commercial purposes (one must look to Article 3 (d) for the definition of publication). It does not cover, for example, recordings made by broadcasting organizations for their own broadcasts. Only commercial discs and cassettes, magnetic tapes, etc., are covered, the question of the commercial purpose, if disputed, being a matter for the courts.

12.7. The second condition is that the use must be "direct." This means that the person who takes the decision to make use of the phonogram is the one called upon to pay. As the General Report points out, use by way of rebroadcasting would not be a direct use. The rebroadcaster is not called upon to make a second payment. However, as the report makes clear, 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.

12.8. The third and last condition is that the phonogram in question must be used for broadcasting, or for "any communication to the public." Other uses are not covered.

12.9. So far as broadcasting is concerned, payment of the remuneration is very often a matter of contract; in default of agreement, laws usually provide for the tariff being fixed by a competent authority or a tribunal. The amount may be a lump sum indexed to the cost of living or revised periodically. This is usually the case with state radio. With commercial radio, it may be based on other factors such as the revenue (gross or net) from advertising or the times at which the advertising spots are broadcast. In either case other factors play their part in determining the amount: number of times a broadcast takes place and for how long, comparative costs of live broadcasts and by utilizing records, profits made by the organization, probable number of listeners, population of the area covered, etc. All these factors may affect the final decision as to the sum to be paid.

12.10. As to communication to the public, there may be difficulties, particularly in collecting the sums due from the users of the commercial discs. Here again there are a number of different factors determining the remuneration: type of use, duration of the license, etc. The payments made to authors and composers for licenses to perform their works in public provide a pattern often followed; indeed sometimes the sums payable for neighboring rights are a percentage of those paid for copyright. In the absence of contractual agreement these are fixed by competent authorities or by the law itself.

12.11. A certain amount of case law has already grown up as regards secondary uses of records for both broadcasting and public performance. There are court decisions on the amounts payable and on the interpretation of the laws in force on this subject.

12.12. Having laid down the principle of payment, and the conditions for it, Article 12 lists the beneficiaries, i.e., performers and/or record-makers. As has already been said, Contracting States have a choice between three solutions: payment to one or to the other or to both. Whatever the decision, it is a single amount that is payable. The purpose is to save the broadcasting organizations and other users from having to deal with a number of different beneficiaries. However many are entitled to claim a share, the user has only a single sum to pay.

12.13. Not all member countries adopt the same solution to the problems posed. But the usual practice, it seems, is to adopt what is probably the simplest, namely to place the onus on the phonographic industry of collecting the sums payable both on its own account and on that of the performers. This solution has practical merits. It is easier for the user to deal with the producers with their huge international catalogues, and relatively simple for them to distribute fairly since they are well informed of the identity of those whom they recorded. This is the solution adopted by the model law on neighboring rights.

The remuneration is payable to the producer of the phonogram; but, unless otherwise agreed, he is obliged to pay half that amount to the performers.

12.14. Article 12 gives domestic law the task of deciding on the conditions for sharing remuneration, but only if there is no agreement on this point. The accent is on agreement and, in many countries, this has in fact been achieved both as to collection and distribution of the sums due for secondary uses of phonograms. As to sharing, bodies representing performers and the record industry respectively on both national and international level have reached an accord. Briefly this is that, in countries where both are entitled by law to a share, the net proceeds for both broadcasting and public performance are divided equally. Where the law gives the right to only one of the two parties it must hand on to the other one-third of the net proceeds from broadcasting. But it has been agreed between the internationally represented bodies that, if the broadcast took place in a Rome Convention country, this one-third is increased to one half. Of course, where the principle of equal division receives general approval, there is nothing to stop governments providing a greater share for the performers. So far as receipts from communication to the public are concerned, division of these is left to the interested parties on the national level. Finally, sums due to performers who cannot be identified or traced remain in the country where they were collected, and may be used for the general good of the profession.

12.15. The Convention leaves open the proportion into which any shares should be divided. But the usual share is half to each party and, as has been seen, this, in the absence of agreement, is what the model law provides.

12.16. To recapitulate, a single equitable remuneration is payable when commercial records are used for broadcasting or for any other communication to the public. The right to this remuneration is a matter for the law of the Contracting State where it is due; the beneficiaries may be performers, record-makers, or both; usually collection is a matter for the record industry; distribution takes place according to principles agreed between the two parties or fixed by law. In practice it is desirable to provide the machinery necessary for putting Article 12 into operation (creation of collecting societies specifically charged with collection and distribution of the sums payable, or even entrusting to the already existing authors' collecting societies, the task of acting as agents so charged). International relations will be facilitated by a reciprocal agreement made between societies of this sort.

12.17. There is one more burning question which the Convention leaves open: must the remuneration due to performers be distributed to each individually, or may it go to a collectivity of performers to be used for common or social purposes for the benefit of the profession as a whole? Article 12, which merely says "to the performers" is vague: the word "to" permits a

number of interpretations. It would certainly seem, from a logical point of view, that the remuneration should be payable only to those who have contributed their performances to the records used for broadcasting or public performance. However, some performers' representative bodies take the line that, because of the harm caused by secondary uses of phonograms, the money should be paid to those who suffer therefrom, because of their loss of employment opportunities. The Convention does not, in terms, forbid member countries to ignore individual rights and set up collecting systems on the grounds that, because secondary uses damage the profession as a whole, it is the proper subject for compensation. If this view is taken, a mutual assistance fund can be created; such a solution could, in developing countries, be of help to local artistes. The model law on neighboring rights discusses, in its commentary, this possibility.

12.18. Thus Article 12, coupled with the power given by Article 16 to reserve it in whole or in part, is a compromise between a number of interests. It seems worthwhile to review briefly the merits of the case for each.

12.19. The actors, musicians and other artistes put forward a number of reasons to justify their claim to remuneration for, if not a right to say yes or no to, the broadcasting and public communication of their recorded performances. A few examples are enough to set the scene. The use of discs in the make-up of broadcasting programs almost certainly diminishes, to the same extent, the opportunity to give live performances. If the broadcasting organizations were unable to rely on commercial discs, they would have to employ more orchestras, vocal groups and soloists. And even if, in the beginning, the broadcasting of his recording provides useful publicity for the performer, its plugging over a period of weeks or months makes it boring and distasteful to the public. Again if a disc intended to give pleasure to individual ears is broadcast, the auditorium becomes much greater than that envisaged when the recording was made.

12.20. Communication to the public too is not without effect. A virtuoso receives the plaudits of the crowd for his live performance; he then goes on tour. If his "act" has been the subject of a widely-diffused recording, his potential audience may decide that they have no need to hear it again in the concerts he gives. However this can work the other way: publicity acquired creates a demand to see the artist in the flesh and participate in person in his performance. This is particularly true of the classics, ballet, and even the great stars of light music. But there is another more serious effect: records take the place of bands at private dances, in dance halls and in cabarets. These merely become discotheques. The bar pianist and the string quartet in the Palm Court tend to disappear, although there are those who would like to see them back in their accustomed places.

12.21. Thus the results of this use of records are less opportunities for artists. Jobs are lost and harder to come by and they suffer from technological unemployment, while, moreover, they get no share of the profits made by those who use their recordings. They are faced in the entertainment market with competition from records to which, paradoxically, they have themselves contributed.

12.22. The phonogram producers plead a different case. The use of discs on radio means they are playing to a vast public. This can have an effect on sales: either fewer people buy, because they have already heard the recording on the air or because, although they liked it at first, they are now fed up with its constant plugging. These factors can mar the prospects of a disc. The record companies would therefore like to exercise control over the use to which their goods are put. They point out that their commercial discs form a large part of radio programs. Indeed, some broadcasting stations rely on them so heavily that they could not function at all without them. They have put the records to a purpose other than that for which they were originally intended and this calls, at the very least, for the makers' participation in the resulting profits.

12.23. Public performances too (in shops, supermarkets, offices, aircraft and "music while you work" in factories, etc.) are an extension of the original purpose. This in turn merits a further payment, especially since the users, by replacing men by machines, have saved a lot of money.

12.24. Other considerations move the broadcasting organizations. This Article 12 is of no value to them. Quite the reverse: the Article may force them to pay for the use they make of commercial records. Their case is that their broadcasts provide an excellent springboard from which novelties can take off and therefore the best possible advertising medium for the sale of discs. The fact that the record companies send them free samples of their wares proves this without doubt. Indeed in some countries the record-makers go so far as to send "sweeteners" to the broadcasting organizations in order to ensure that specified records are included in their broadcast programs. This is true also of the use of discs in jukeboxes. In fact, they say, the remuneration should pass in a direction opposite to that laid down in the Convention. The free publicity they give should offset any payments due for secondary uses, or at least be taken into account in calculating them.

12.25. The broadcasting bodies stress the important role played by their programs in cultural, educational and social life, particularly in developing countries. There are many among these which have no recording industry and would therefore have to make payments without receiving anything in return. The remuneration Article 12 could force them to make to foreign record companies would create balance of payment problems (which the reserve allowed by Article 16 would permit them to escape or mitigate). The purse the

broadcasters use to pay for their programs is not bottomless; a multiplicity of rights, even if only to remuneration, could land them in lawsuits, prove mutually stultifying and generally hamper their activities.

12.26. Finally the authors; they too have their fears. Music users, they say, set aside certain resources to pay for royalties (no matter whether these are for copyright or neighboring rights — they know no difference). If performers and record-makers are allowed a finger in the pie as well as composers, the latter will get a smaller piece. Their revenues will therefore decrease, either because more people share the available cake or because, if the size of the total payments demanded is too great, the music user in question will cut down or cease altogether his activities. If, in the same material object — the record — a number of rights subsist (those of authors, performers and record-makers) there will be less for authors; they will have to share with the others or find that the records are not performed in public at all. In either case they lose.

12.27. It is impossible to give a categoric answer to the questions whether copyright revenues are decreased by the sums paid to performers and record-makers, or whether these would be greater were it not for the participation of the latter. One cannot say whether the one has an influence on the other since they depend upon the attitude of the user; and to ask whether, in given circumstances, a sum might be greater or less is to pose a hypothetical question which can be neither proved nor refuted. Secondly all secondary uses are not the same. Compare broadcasting organizations and discotheques. Some must make use of commercial discs by the very nature of their businesses. To others they are merely useful adjuncts. By and large, it appears that payments to performers and record-makers are justified when those who use the records do so primarily for gain.

12.28. This review of the main arguments advanced in support of each case shows a delicate balance achieved in international relations by Article 12. As has already been said, each State must review the arguments, weigh the importance of each and eventually choose, from the bundle of solutions the Convention offers, that which seems fairest and best suited to its own economic situation.

ARTICLE 13

Minimum Rights for Broadcasting Organizations

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.

13.1. This Article lays down the minimum rights to be enjoyed by broadcasting organizations, the third category of beneficiaries under the Convention. It ensures them the exclusive right to authorize or prohibit a number of activities in the realm of broadcasting.

13.2. Paragraph (a) allows them to control rebroadcasting (see Article 3 (f) and (g) for the meaning). Rebroadcasting must be simultaneous, although there is nothing to prevent member countries' laws prohibiting also deferred rebroadcasting, in which case (b) applies.

13.3. Secondly, under (b), they can also authorize or forbid the fixation of their broadcasts. It was agreed in 1961 that this included a part of the broadcast, although no position was taken on whether a single still photograph taken from the screen constituted such a part. This is left to national laws to decide (see the General Report). Omission of the right to control the taking of still photographs can be damaging to the broadcasters, particularly in the news field. Leaving the press, who are in a sense competitors, free to take and publish photographs of news events or the winning goal in the World Cup competition from the TV screen does not make for good relations between them.

13.4. Thirdly, they can stop the reproduction of fixations made without consent or made under the exceptions provided in Article 15 if the reproduction is for a different purpose. This provision has its parallel, as regards performers, in Article 7. As there, it was agreed that 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.

13.5. Finally, paragraph (d) accords the right to permit or forbid the communication to the public of television broadcasts if this is done in places accessible to the public on payment of an entry fee. The reasoning behind this is as follows: some cafes, hotels and cinemas, in order to attract clients, offer the showing of television programs, charging something for the privilege of watching. In doing so, they are using the broadcast for their own gain. State occasions (e.g., a coronation) are sometimes shown in this way, but it is more often sporting events. As regards the latter, this public showing has the effect of reducing the "gate" and hence the takings for the sports promoters who are inclined therefore to refuse their permission to televise the event unless the broadcasting organization can control where it is publicly shown, e.g., within a certain radius of the place where the event is taken place. Once there is a television set in most homes, the problem becomes, of course, less acute.

13.6. Note the two conditions: it covers only "places accessible to the public"; and there must be a fee payable for entry to the place where the showing takes place. The fact that there is a charge for meals, drinks, etc., is not enough.

13.7. In any case, the conditions are left to domestic law to lay down. The model law on neighboring rights does not include this right at all (since Article 16 allows it to be reserved), but the commentary draws attention to the fact that it is included in the, albeit optional, conventional minima for broadcasting organizations.

13.8. An important omission from Article 13 is the right to control retransmission of the broadcast program by wire (the definition of broadcasting in Article 3 (f) speaks of "wireless means"). The question whether the transmission of a program by means of a space satellite with a view to it being seen by the public constitutes "broadcasting" within that definition is a matter of controversy.

ARTICLE 14

Minimum Duration of Protection

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.

14.1. This Article describes the term of protection for the three categories of beneficiaries. The duration, twenty years, is the same for each, but the starting points differ. It is clear from the text — "at least" — that this is only a minimum.

14.2. As the General Report points out, 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 Rome Conference decided that the latter two provisions were superfluous and omitted them from the Convention.

14.3. 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 (see Article 2). It is also clear that each member country can give a longer term than that prescribed. But suppose it grants a shorter term for its own nationals. Does the national treatment provision allow it to do the same thing for other Convention nationals? The answer is no. This Article is intended to guarantee, to the three categories protected, the minimum term set out.

14.4. 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.

14.5. National laws in force in 1961 differed as to duration and a term between the extremes was therefore adopted, namely twenty years. As to the

starting point, for phonograms and the performances recorded in them, it is twenty years from the end of the year in which the fixation was made. Performers and phonogram producers thus enjoy the same term and the record falls into the public domain on the same date for both. For unfixed performances and for broadcasts it is twenty years from the end of the calendar year the performance, or the broadcast, as the case may be, took place, in accordance with Article 6.

14.6. The model law on neighboring rights does not fix any term of protection but makes it clear that the period chosen must not be less than twenty years. On starting points it follows this Article.

ARTICLE 15

Permitted Exceptions
Article 15, paragraph 1: Specific Limitations

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.

15.1. The Rome Convention, like that of Berne, allows member countries to impose limitations on the conventional minimum rights. The exceptions are applicable to all three categories of beneficiaries.

15.2. The first, in sub-paragraph (a) covers private use. It follows the copyright pattern meaning use other than public use or use for profit. So far as performers are concerned, it really only arises if their performances are recorded. A singer performs to a group of friends; he might even, at a pinch, receive a fee. But there is no risk to him unless his songs are recorded and used in a way he does not like. As to phonogram producers, the ease with which recordings of high quality can be made these days places the idea of private use in a new dimension. Intergovernmental bodies have gone into the question in depth and outlined suggestions as to how national laws should deal with it. This exception, like those that follow, is after all a matter for domestic law.

15.3. The second exception, in sub-paragraph (b), allows the use of short extracts for reporting current events. The model is in Article 10*bis* of the Berne Convention which many countries have followed. News reporting should not be hampered because of performances of works picked up more or less incidentally during the coverage. The classic example is that of a military band playing at a reception for a Head of State or at a sporting event. The television cameras inevitably take parts of the band's performance. It would be foolish to allow the bandsmen to forbid the recording or broadcasting of such extracts. On this point, the Berne Convention adds "to the extent justified by the informatory purpose" leaving the courts with some latitude of decision. The same is true of "short excepts." To take an example often quoted, it is for the courts to decide whether the broadcasting in toto of the overture to an opera in order to give the flavor of the work as a whole is or is not the use of a short excerpt, and whether the repetition, as a sort of leit-motiv, of a well-known record during news broadcasts may be considered a valid exception to this protection.

15.4. The third exception (sub-paragraph (c)) covers ephemeral recordings made by broadcasting organizations by means of their own facilities and for their own broadcasts. This, like the others, follows the Berne Convention (paragraph 3 of Article 11*bis*) and the same considerations apply as in copyright proper: ephemeral in character, recording made by the broadcasting organization and not for it, use only for its own broadcasts and not for those of others. The purpose is to meet a technical difficulty: to allow sound and television channels to make their own recordings of matter which they have already been authorized to broadcast, in order to defer programs, allow for time delays and generally make the best use of their transmitting apparatus. The model law on neighboring rights applies this exception to the rights of both performers and phonogram producers. To make things simpler for the broadcasting organizations, it suggests the time for destroying such recordings should be the same as applies to "ephemeral" recordings of copyright works.

15.5. Finally, sub-paragraph (d) allows Contracting States to refuse protection against use solely for the purpose of teaching or scientific research. Again the multilateral copyright conventions provide the model. The Berne Convention for example, in its Article 10 (2) allows member countries to "permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in the publications, broadcasts, or sound or visual recordings for teaching, provided such utilization is compatible with fair practice." Furthermore, both the Berne and Universal Conventions contain special exceptions applying only to developing countries, allowing a system of compulsory licenses to reproduce or translate works for the purpose of teaching, scholarship or research. It seems likely that, if called upon to decide on the scope of this exception, the courts would be guided by the spirit of the rules applicable to copyright.

15.6. These are not the only exceptions allowed by the Convention. The second paragraph of Article 15 starts with the words "irrespective of paragraph 1 of this Article," which confirms its unlimited character.

Article 15, paragraph 2: Equivalents with Copyright

> **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.**

15.7. This paragraph permits provisions in national laws allowing exceptions other than those set out in paragraph 1 above if those laws provide for such exceptions to copyright. The four specific exceptions in paragraph 1 are those

mainly used to limit authors' rights, but there may be other minor ones, and this paragraph avoids neighboring rights owners being treated better than authors in the matter of exceptions.

15.8. The General Report of the 1961 Conference recites that if, for example, the copyright statutes of a Contracting State allow free quotation for the purposes of criticism, or free use for charitable purposes, that State could allow the same exceptions with regard to the protection of performers, producers of phonograms, or broadcasting organizations.

15.9. This is merely an option given to members countries: they are under no obligation to create an exact equivalent. They might for example feel that there was no need to allow the copying of phonograms simply for the purposes of criticism. But the paragraph was intended to act as a hint to the member States that they should in principle consider treating both copyright and neighboring rights equally in this respect. The model law on neighboring rights, after setting out specific exceptions, has a general provision based on the thinking behind this paragraph. But it suggests in its commentary that States might preferably consider instead listing each exception separately.

15.10. The paragraph however in its final phrase makes it clear that this power to provide equivalent exceptions is itself limited: the only compulsory licenses allowed are those permitted by the Convention itself.

15.11. As the General Report points out, the acts enumerated in paragraph 1 of Article 7 require consent by the performer. The institution of a compulsory license 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. On the other hand, such a system would, it seems, be possible as regards the acts mentioned in paragraph 2 of that Article if such a system operated as a limitation on copyright.

15.12. As regards phonograms, the commentary on the model law points out that, if a country wishes to be bound by the Phonograms Convention, Article 6 of that Convention imposes three conditions on the power to grant compulsory licenses, and these would have to be taken into account.

ARTICLE 16

Reservations

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.

16.1. In the comments on earlier articles, mention has several times been made of Article 16 which shows the importance it has in the structure of the Convention. This is for two reasons. By allowing certain reservations, it lessens the compulsory obligations of member countries and this makes accession to the Convention possible for the largest possible number of States.

16.2. The first paragraph starts with a general proposition: each State, on becoming a party to the Convention, is deemed to accept all its obligations and, of course, enjoy all its benefits. This is the normal rule and there is strictly no need to say it; but it serves to introduce the reservations which are in fact permitted.

16.3. The only reservations allowed are in relation to Articles 12 and 13. On these member countries are offered a choice.

16.4. Sub-paragraph (a) deals with Article 12 — remuneration for secondary uses of phonograms. Each Contracting State is given four options listed below.

16.5. The first (a) (i) is to rule out altogether the application of that Article — no payment whatever for secondary uses. If, in such a State, commercial recordings are used for broadcasting or communication to the public, nothing is payable to performers or to record-makers.

16.6. The second (a) (ii), is to refuse remuneration for "certain uses." The General Report makes it clear 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. Domestic laws may provide for payment only in the case of communication to the public or only for broadcasting. In developing countries for example, the tendency is to confine the grant of remuneration for the use of commercial phonograms to cases where the broadcasting or other public communication is done for commercial ends, thus providing what is felt to be a reasonable compromise between the various interests. Of course, each country is free to make its own choice having regard to its own situation.

16.7. Under the third option, set out in sub-paragraph (a) (iii), any State may declare that it will not apply Article 12 as regards phonograms the producer of which is not a national of another Contracting State. It will be remembered that Article 5 contains three points of attachment for phonograms: those of nationality, place of fixation and place of first publication. This allows, for the purposes of Article 12, the application of only one of these — nationality. Note that in a State which makes such a declaration, nothing is payable either to the producer or to the performers, notwithstanding that the State in question grants such remuneration, unless, of course, the producer is a convention national.

16.8. Finally, by the fourth option (a) (iv), a State which grants payment for secondary uses for phonograms the producers of which are nationals of another Contracting State, may limit protection to the extent to which the latter State protects nationals of the former. This is usually called material reciprocity. No Contracting State must give more than it receives. Note that the term of protection is specifically mentioned as well as its extent.

16.9. Without this opportunity to apply material reciprocity, a State which accepts Article 12 in toto would be at a disadvantage compared with one which does not apply it at all ((a) (i)) or limits its application ((a) (ii) and (iii)). Nationals of such States can expect no more than their own countries give. To take two examples: State A makes this declaration in (a) (iv); State B applies Article 12 without reservation; State C rules Article 12 out altogether. A commercial phonogram made by a national of State B is broadcast in State A; there is material reciprocity and payment may be claimed. The same is not true of a phonogram made by a national of State C, since his own country gives no remuneration and there is no reciprocity. Second example: State A limits remuneration to cases of use in broadcasting; State B makes no reservation; the

performers and/or producer of a State B recording can only claim, in State A, for broadcasting use; whereas those of State A can claim payment, in State B, for both broadcasting and public communication.

16.10. However, the second phrase in sub-paragraph (a) (iv) places a limit on material reciprocity. As the General Report points out, it may not be applied with respect to the beneficiaries. A State that grants protection to both performers and producers may not refuse protection to a State that protects only the performer or producer. 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.

16.11. Thus, if State A provides for payment only to performers, State B only to phonogram producers, and State C to both, there is no difference between the three States as to the "extent" of protection, and material reciprocity cannot be applied in relations between them.

16.12. The second category of reservations permitted by Article 16 relate to item (d) of Article 13 which gives broadcasting organizations protection against the performance in public of their television broadcasts: Article 16 (i) (b) allows any Contracting State to declare that it will not apply that item. As has been seen, Article 13 (b) is of importance mainly in the case of the televising of sporting events where there is a case for giving a control to the broadcasting organizations. Given the great difficulty in drawing demarcation lines between cases in which the right can and cannot be exercised, the Convention adopts an all or nothing solution. Contracting States either apply Article 13 (d) as it stands or reject it altogether.

16.13. The other Contracting States are not obliged to grant that protection to television programs coming from a broadcasting organization whose headquarters is in the State rejecting Article 13 (d). Thus, as with secondary uses of phonograms, reciprocity is provided for.

16.14. Note that these reservations may be made "at any time" and not just at the time the instruments of ratification, acceptance, or accession are deposited. As the General Report points out this is intended to allow countries to introduce a reservation after they had adhered to the Convention, if changes in their domestic law make this desirable.

16.15. In this case, the declaration deposited with the United Nations becomes effective, according to paragraph 2, six months after its deposit. This is longer than the period in Article 25; it was chosen to allow other States to know of pending reservations and take the necessary steps. The period is the same as that in Article 5 (3).

ARTICLE 17

Certain Countries Applying Only the "Fixation" Criterion

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.

17.1. This provision refers back to Article 5 regarding the points of attachment for producers of phonograms. It does two things: allows certain countries to apply the single criterion of fixation instead of the two criteria demanded by Article 5; and to permit the same countries to substitute the criterion of fixation for that of nationality in Article 16 (i) (a) (iii), (iv).

17.2. It will be remembered that all Contracting States are bound to protect phonograms of which the producer is a national of another Contracting State. Of the three criteria this one is obligatory. However, as an exceptional matter, States whose laws at the date of the Convention provided protection only on the basis of the place of fixation of the phonogram are allowed to become parties to the Convention without changing their law on this point.

17.3. This power of reservation is circumscribed in two ways. The operative date is October 26, 1961, the date the Convention was signed in Rome, and not that of joining the Convention. (It was in fact inserted to accommodate the Scandinavian countries which had recently passed new laws on neighboring rights.) Provisions of this sort are to be found in other Conventions, notably in Article 7 (7) of the (much earlier) Berne Convention, where the subject is duration of copyright, and Article 7 (4) of the (later) Phonograms Convention (1971).

17.4. Secondly, this reservation may only be made at the date of joining the Convention. It must be deposited with the Secretary-General of the United Nations at the time of ratification, acceptance or accession and not later. In this it differs from other declarations provided for in the Convention, e.g., in Article 5 (3). But this is an exceptional case intended to deal with the state of affairs in existence when the Convention was drawn up. Of course, if the national law is changed, e.g., by adopting additionally the criterion of nationality, the reservation can be withdrawn (see Article 18).

ARTICLE 18

Withdrawal of Reservations

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.

18.1. This Article allows States which have made reservations to withdraw them or lessen their impact. The reservations in question are: choice between the criteria of fixation or publication for the purpose of protecting phonogram producers (Article 5 (3)); combining the two conditions for protection of broadcasting organizations (headquarters *and* place of transmission both in the same Contracting State) (Article 6 (2)); refusal of, or limitations on, payment for secondary uses of phonograms under Article 12; and refusal of the right of broadcasting organizations to control the communication to the public of their television broadcasts (Article 16 (1)); application of the sole criterion of fixation (Article 17). No other reservations are possible (see Article 31).

18.2. Article 18 allows member countries time to reconsider. They can withdraw or reduce the effect of reservations at any time. One may be permitted to hope that if Contracting States do, on reflection, make changes, these will be in the direction of giving a more ample protection to the beneficiaries of the Rome Convention.

ARTICLE 19

Performers' Rights in Films

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.

19.1. This Article is important for the performers whose rights it affects. It is also important in that it makes clear the relationship between the conventional rights and cinematographic works and all other visual and audiovisual fixations. (A number of countries make no distinction, treating all these as cinematograph films or motion pictures.) Taken with Article 1 (safeguard of copyright) and Article 12 (secondary uses of phonograms), Article 19 has been the subject of prolonged discussion during the preliminary work and in Rome in 1961. It deals with the part played by filmed performances in the Convention.

19.2. From the moment the performer consents to the inclusion of his performance in a film (in the widest sense of that word), Article 7, which ensures him his minimum protection, ceases to apply. He cannot prevent any use which is made of his fixed performance whether the fixation was intended for cinema showing or on television. For example, an actor plays a role in a film or television studio. His mere presence before the cameras means that he agrees to its being filmed for showing in cinemas or on the television screen as the case may be. The same is true of a musician who agrees to his playing being recorded for use on the film soundtrack. Once released these performances can be put to uses the performers did not contemplate (e.g., by the insertion in other films or broadcasts; or the making of videograms to be sold in commerce); neither actor nor musician can invoke the Convention to ensure payment for such uses. Their only remedy lies against the maker of the original film, and then only if their contracts so provide. Another example: an actor who regularly plays the same character tends to become "typed" and often finds difficulty in gaining employment in other roles. This happens when there is a long-running television series using the same actor in the star part (detective, sheriff, super-crook, etc.). If these performances are also included in videograms the problem is exacerbated and employment opportunities in other parts become the more difficult to come by.

19.3. The Monaco Draft (1957) excluded films altogether: no provision was to be interpreted as applying to a reproduction or to any use made of a film. In The Hague in 1960 the need to protect performers against clandestine filming either live or off the air and to protect television broadcasts even if they included films was recognized. But it was not intended to impose any

obligations on States, to affect any rights of film makers or any other rights in visual or aural-and-visual fixations.

19.4. The Hague Draft (1960) sought to compromise between the interests represented there. It gave performers protection against the reproduction of fixations of their performances for purposes different from those for which their consent was given; but this did not extend to films. Thus, no protection was apparently accorded either to the performers or to the broadcasting organizations against reproduction or other uses of fixations of images or of images and sounds.

19.5. These two drafts illustrate the path which led to Article 19, with its aim of keeping the film industry out of the Rome Convention. The difficulties were constantly stressed. New techniques made it impossible to draw a clear line between the cinema and televisual fixations. True, most feature films were made in film studios and distributed to, and shown in, cinemas in the accustomed way. But they were also made by broadcasting organizations for showing on "the box" as part of their own programs, or produced by freelance firms on their account; again, many feature films made for the cinema ended up by being shown on television and thus acquiring a new lease of life. This tangled skein was hard to unravel. Besides, one must remember that the Rome discussions took place at a time when changes in copyright protection enjoyed by cinematographic works was also under active debate. (A few years later (1967) the Revision in Stockholm of the Berne Convention produced new Article 14 and 14*bis*.) Film producers feared damage to their interests if performers and broadcasting organizations were to enjoy rights in their films. It was on copyright rather than on neighboring rights that they had set their sights, and it was to the Berne Revision in Stockholm rather than to Rome that they looked. Their preoccupation in Rome was simply to steer clear of the Convention.

19.6. As the General Report of the Rome meeting points out, the exclusion of the minimum guarantees provided in Article 7 for performers, in the case of visual or audiovisual fixations, is more extensive there than it was in The Hague draft. Whereas protection is enjoyed by broadcasting organizations for all their television broadcasts, whether or not these contain films, the result of Article 19 is that performers lose all protection in films except against fixations made clandestinely or otherwise without their consent.

19.7. On the other hand, Article 19 has no effect upon performers' freedom of contract in connection with the making of visual or audiovisual fixations, nor does it affect their right to benefit by national treatment, even in connection with such fixations.

19.8. Article 19 leaves untouched the rights which broadcasting organizations enjoy under Article 13 for their television broadcasts. And, since Article 3 (f) defines broadcasting simply as "the transmission . . . of sounds or of images and sounds," these enjoy protection whether made live or from fixations.

19.9. There is a general feeling that Article 19 places the performers in a position inferior to the other categories of beneficiaries, and this in an area where it hurts most. Cinema and television play a leading role in the professional life of a performing artist. His whole career may depend on the showing he makes in these media. True, a singer may be launched by a record, or an actor by his performance in a theater. But his reputation is usually confirmed on the screen. There is no need to stress the importance of television for a celebrity. It is here that he has the chance to express his personality, show his talents and offer the public a close-up of his art. But once he has consented to the sounds and images in his screen appearance being recorded, he is deprived of all means to control (and hence receive payment for) any of the uses to which that fixation may be put. Nor is the relevant technology at a standstill. The negotiators in Rome no doubt thought only of the cinema as it had existed during the previous sixty years. Since then new means of exploitation have evolved, for example videograms sold for showing in the home.

19.10. In the light of this, it is doubtful whether a strict application of Article 19 is within the spirit of the Convention having regard to modern developments. International bodies have drawn attention to the need, for financial and professional reasons, to allow performers some control over the use to which videograms, recorded TV programs, and other films are put. They have recommended that national laws should offer, particularly to performers, a better protection in this respect than does the Convention, which fails, having regard to technical progress, to meet the real needs on the international level.

ARTICLE 20

Non-Retroactivity

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.

20.1 The problems dealt with in this paragraph arise whenever new laws are passed or conventions concluded. They cover acquired rights and retroactivity. There are plenty of intellectual property precedents: e.g., Article 18 of the Berne Convention. With international labor agreements the same thing is true: respect for acquired rights is the usual pattern (see Article 19.8 of the Constitution of the International Labour Organisation).

20.2. Paragraph 1 provides that the Convention shall not prejudice rights acquired in any Contracting State before that State was a party to the Convention. This is normal. A new legal measure does not apply, in principle, to rights which, have already been acquired by virtue of the earlier legislation, and whose effects have, so to speak, become the property of the person enjoying them. However, rights which might have been acquired (but were not) and mere expectations based on the earlier legal situation, are not considered "acquired rights" for this purpose.

20.3. The second paragraph makes it clear that no State need protect rights arising from events which took place before the Convention entered into force for that State. In other words, a performance or a broadcast taking place or a phonogram fixed before that date need not be given any rights internationally in the State in question.

20.4. The model law contains two alternatives on this point. As in the Convention, each State is given a choice: either to exclude entirely from protection performances or broadcasts that took place and phonograms that were fixed before the Convention's operative date for them; or to give them protection on condition that no one need destroy fixations acquired in good faith before the entry into force of the law in question. Thus the principle is non-retroactivity; but national laws may temper the severity of this principle, provided acquired rights are not prejudiced.

ARTICLE 21

Protection by Other Means

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

21.1. This Article foresees the possibility of other sources of protection for these three categories of beneficiaries and confirms that the Convention provides merely a minimum.

21.2. Such sources might be found in national laws: for performers in personal or moral law including that of defamation; for record-makers there is unfair competition and passing off. But there are also international treaties. Ten years after the Rome Conference, a meeting in Geneva drew up a Convention directly concerning one of the categories of beneficiaries — the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971. (See the second section of this Commentary.)

21.3. There is yet another category — the broadcasting organizations — who may drink at such an international source: the Brussels Convention of 1974 Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite.

21.4. Unlike the Rome Convention, accession to these two treaties mentioned above is open to almost all countries of the world. They are now both in force.

ARTICLE 22

Special Agreements

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.

22.1. This Article follows directly on earlier articles which can be found at Article 20 of the Berne Copyright Convention, and Article 19 of the Paris Industrial Property Convention. Member States may conclude agreements between themselves; but these must either give performers, producers of phonograms or broadcasting organizations greater rights than does the Rome Convention, or contain other provisions not contrary to it. The same pattern is to be found in the Berne and Paris Conventions.

22.2. The inclusion of such a provision in the Berne and Paris Conventions at the end of the last century is explained by the fact that many States had already concluded bilateral treaties among themselves, and these often looked after the interests of those benefitting from the multinational Conventions better than did the latter. For this reason they contained a supplementary sentence preserving the applicability of existing Conventions which conformed with the conditions in the Article in question. Although a number of special agreements were drawn up in the field of industrial property, little recourse was made to Article 20 of the Berne Convention (a few bilateral agreements on duration of protection and European agreements on television matters).

22.3. On the other hand, views can differ on the merits and the effects of Article 22 of the Rome Convention. Complaint has been made that to give groups of member countries the power to conclude bilateral or regional treaties among themselves risks creating an international legal mosaic complicating the operation of the Convention itself. Again, it has been pointed out that if, under a special agreement, one or two of the three categories is given a higher level of protection than the other(s), the delicate balance the Convention sought to attain will be upset.

22.4. Again, one may well ask whether, on the analogy of the Berne Convention, the purpose of any such agreement must be to give more extensive rights to the beneficiaries *as a whole*. But, unlike Berne, which contains only one category, namely authors, the Rome Convention, in a single treaty, establishes a balance between, and gives protection to, no less than three. However, the use of the word "or" between "producers of phonograms" and "broadcasting organizations" seems to make it clear that Article 22 does in fact

allow an agreement which enlarges the protection enjoyed by any one or more of the three categories.

22.5. In speaking of "conventions among themselves," Article 22 deals only with special arrangements limited to countries party to the Rome Convention. The Conventions of 1971 and 1974 are of a universal nature, and do not therefore find their justification in Article 22, but rely rather on Article 21.

ARTICLE 23

Signature and Deposit

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.

23.1. This is the first of the final clauses which appear in all international treaties. It deals first with deposit of the Convention. The original text (see Article 33 below) is to be in the custody of the Secretary-General of the United Nations. The same is true of the Phonograms (1971) and Satellites (1974) Conventions, the three Conventions in the field of neighboring rights thus being kept together. The reason is that they were drawn up under the auspices of three intergovernmental organizations which were (or were to become) specialized agencies of the United Nations. In fact, as regards Rome, one of the three bodies under whose guidance the preliminary work was done and which provided the Secretariat of the Conference was BIRPI which had for a long time provided the Secretariat of the Berne Convention on Copyright, and BIRPI was not yet one of the UN family. It was not until 1974 that, under the name of WIPO (World Intellectual Property Organization), the body became a specialized agency. In the result, the United Nations is the depository power and the three specialized agencies fulfil certain tasks (Articles 29 and 32).

23.2. Secondly, Article 23 lays down the time during which the Convention may be signed. It is usual to allow a period during which countries which did not sign the Convention at the closing ceremony may do so later. The period, intended to allow consultation at home once the test is known, varies, but is usually about six months. Here the date chosen was June 30, 1962. Signature means no more than approval of the treaty. No obligations are undertaken till subsequent ratification or acceptance. Countries which have not signed within the time limit may, if they satisfy the conditions in Article 24, accede. The practical effects are the same in both cases.

23.3. Finally, Article 23 says who may sign. It imposes two conditions: (i) the State must have been invited to the Rome Conference (whether or not it in fact attended), *and* (ii) it must be a party to the Universal Copyright Convention or a member of the Berne Copyright Union (i.e., a party to the Berne Convention).

23.4. As to the first condition, invitations were sent to States members of the International Labour Organisation (ILO), Unesco, the Berne Union and those that were parties to the Universal Copyright Convention. Membership of these bodies was of course taken as of the date the invitations were sent out. The matter is in any case academic since the last date for signature was in June 1962.

23.5. The second condition, however, calls for more comment since it emphasizes the link between the Rome Convention and copyright proper.

23.6. There was a difference of view on this subject. One school of thought felt that since member countries ought to be united by a copyright treaty, there was no point in allowing others to sign. The other school felt that there was no need for such a link.

23.7. The "copyright" school 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 since the rights were "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.

23.8. The "open" school on the other hand 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.

23.9 The majority favored a copyright link and this Article, together with Article 24, so provides.

23.10. The same condition was therefore attached to signature.

ARTICLE 24

Becoming Party to the Convention

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.

24.1. The various ways of becoming a Contracting State are here enumerated. The first paragraph allows ratification (or acceptance) by States which have signed. As the General Report points out, whether a signatory State calls its adherence "ratification" or "acceptance" is a matter of internal law.

24.2. Accession is dealt with in paragraph 2. It is open to invited States which have not signed and all members of the United Nations, but only on condition that they are party to at least one of the two multilateral Copyright Conventions (Berne and UCC). The link with copyright is therefore again confirmed. Taken with Article 23 no country may be a party to Rome without it.

24.3. Articles 23 and 24 therefore form a sort of corollary to Article 1. The three Articles govern the relationship between copyright and neighboring rights. They recall the need to safeguard copyright and to leave the author's legal rights unaffected. And they demand that these neighboring rights cannot be detached from copyright: acceptance of the rights and obligations drawn up in 1961 depends upon acceptance equally of copyright rights and obligations. Some feel that this does no more than recognize the very proper hierarchy which exists de facto in most cases. Others feel that performers' rights are *sui generis*. They stand by themselves and have nothing to do with copyright.

24.4. It is worth noting that there is nothing "closed" about the other two treaties in the neighboring rights field (Phonograms and Satellites). Their opening to the world at large was effected in a rather different context however.

24.5. Finally, by the third paragraph, all notifications are made to the depository power (Secretary-General of the United Nations).

ARTICLE 25

Entry into Force

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.

25.1. Under this Article, the Convention enters into force three months after the sixth instrument of ratification, acceptance or accession is deposited. As the Geneva Report points out, the number of six was a compromise, some wanting more States and some less, the latter with a view to its being in force earlier.

25.2. In fact the sixth instrument was deposited on May 18, 1964, and the Convention came into operation three months later.

25.3. Paragraph 2 deals with States which become party later than the original six; for each the operative date is three months after the date of deposit of its instrument. This three months' notice of a new country joining allows existing member States time to take an administrative action that may be necessary to meet their new obligations.

25.4. Note that the three months run from the date of deposit and not from the date the depository power notifies existing members. Unless the time between the two events is short there may be difficulty in completing the necessary administrative action in time. This may be why the Stockholm text of the Berne Convention (1967) and the Phonograms Convention (1971) — see Part 2 of this Commentary — make the three months run from the later date (though the same is not true of the Satellites Convention 1974).

ARTICLE 26

Implementation of the Convention by the Provision of Domestic Law

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.

26.1. This Article owes its inspiration to Article X of the Universal Copyright Convention (1952). It seeks to avoid cases in which not all the countries which have become party to an international treaty honor their obligations under it. The provisions were incorporated in the Berne Convention when it was revised in Stockholm in 1967 (see Article 36). It is perhaps worth noting that there is no sanction to enforce this obligation which Contracting States assume under the Conventions in question; nor are the intergovernmental organizations which are charged to look after the Conventions given any power to check whether the obligations are honored.

26.2. However that may be, the first paragraph obliges each Contracting State to take the steps necessary to ensure that conventional obligations are met. What these are depends on the constitution of the State concerned: in some, Conventions are self-applying — once adhered to they become part of the law of the land overriding inconsistent domestic laws; in others, they are treated simply as agreements between States and form no part of the domestic law unless and until parliament so legislates, or, more usually, enacts their substance in laws which provide for nationals as well as foreigners. The "measures necessary" may therefore be administrative, legislative or both according to the country's constitution. But the General Report points out that some countries felt this paragraph unnecessary since no country would be likely to adopt unconstitutional measures.

26.3. Under paragraph 2, each State must be in a position to meet its obligations at the moment of depositing its instrument of ratification or accession. This means that any necessary domestic measures have to precede deposit and cannot be left to the period between deposit and coming into effect. In this respect the Rome Convention differs from that of Berne (Article 36 (2)) and the Phonograms Convention (Article 9 (4)). These latter demand that obligations can be met only on the date of the State becoming bound, but Rome demands that this state of affairs be achieved three months earlier.

26.4. 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. However on other points which do call for some sort of legislative or administrative decision (for example, giving force to some of the provisions of Article 7), these countries were in the same position as countries in which conventions are not self-applying, and action was therefore necessary.

26.5. Some at Rome thought this Article unnecessary since countries were obviously bound to meet their obligations under the Convention and take all steps necessary to do so. Nevertheless it was felt wise to say so explicitly even if this was stating the obvious, and even if, as has been seen above, there is neither check nor sanction to ensure compliance. The other Conventions concluded since Rome have contained equivalent provisions.

ARTICLE 27

Applicability of the Convention to Certain Territories

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.

27.1. This Article provides for application of the Convention to territories which are not themselves responsible for their international relations. Contracting States which are so responsible may declare the Convention applicable to them, always of course provided that the same is true of at least one of the multilateral Copyright Conventions.

27.2. Notification is made to the Secretary-General of the United Nations at the moment the Contracting State which is responsible itself joins the Convention or at any time thereafter. It takes effect after three months.

27.3. The second paragraph deals in the same way with reservations and their withdrawal.

27.4. Since the Convention was drawn up, considerable political change has taken place, and the practical effect of provisions of this sort grown less and less.

ARTICLE 28

Denunciation of the Convention

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.

28.1. This Article lays down the conditions under which the Convention ceases to apply to a State or a particular territory, i.e., either as the result of a declaration or automatically. Any State may denounce the Convention on behalf of itself or any or all of the territories which it has joined under Article 27. The second paragraph lays down the procedure: the denunciation is addressed to the United Nations and takes effect one year after it is made. However paragraph 3 imposes a time limit: no denunciation may validly be made until five years have elapsed since the denouncing State became bound by the Convention. It was felt that the decision to denounce should not be made lightly and without due reflection after a reasonable time in which to experience its working. The same thinking was responsible for the insertion of an equivalent provision in the Stockholm Revision (1967) of the Berne Convention (Article 35 (4)). As the General Report of the Rome Conference shows, after the five years have elapsed, denunciation may take place at any time.

28.2. The other case in which the Convention can cease to apply to a State or territory is when the latter ceases to be bound by either of the multilateral copyright conventions, i.e., when (if a State) it ceases to be a party to, or (if a dependent territory) it ceases to be bound by neither the Berne nor Universal Conventions. No declaration is required; the effect is automatic. The link between neighboring rights and copyright is thus maintained.

ARTICLE 29

Revision of the Convention

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.

29.1. This Article is of great importance for the future of the Convention. Every international treaty needs to be looked at from time to time to improve its content, widen its geographical coverage or simply bring it up to date. Experience with the copyright conventions has shown the need for revision, without in any way decrying the value of the earlier text. But no treaty is perfect and although this Article does not mention expressly that the aim of revision is improvement (as does Article 27 of the Berne Convention), this is implicit. If the revision mechanism of Article 29 is set in motion, it will probably be with the aim of filling gaps which exist in the protection given to its beneficiaries.

29.2. The first paragraph deals with the steps to be taken to convene a diplomatic revision conference. It first imposes a time limit: the present text must be in force for at least five years. This has already happened. Then, at least half the Contracting States must agree to the convening of a conference to this end. If such a majority exists the three Secretariats, in cooperation with the

Intergovernmental Committee established by Article 32 below, convene the conference. The depository, i.e., the Secretary-General of the United Nations, acts as coordinator: he receives the revision request, consults with Contracting States and requests the Directors General of the International Labour Organisation, Unesco and WIPO (the successor to BIRPI) to convene the revision conference.

29.3. The second paragraph sets out how changes may be made. The majority required is two-thirds of the States present, provided there is also a two-thirds majority of all Contracting States whether attending the conference or not. The Rome Conference did not follow the unanimity rule which governs revision of, e.g., the Berne Convention, so that there would be no opportunity for one Contracting State to block any revision proposal. It was however agreed that changes could bind only those Contracting States which accepted them.

29.4. Finally, Article 29 (3) deals with the relationship between the text of 1961 and any text embodying a total or partial revision. There are two stipulations: by the first it will no longer be possible to join the Convention in its 1961 form from the moment the new text enters into force. There are a number of precedents for this, e.g., Article 34 of the Berne Convention. The later text obviously reflects up to date thinking on the subject, and it would be foolish to allow more countries to be parties to a text which is, by definition, obsolescent. The international labour conventions also carry provisions of this sort.

29.5. The second provision follows a pattern which exists in treaties on copyright and in labor conventions, aimed at regulating the relationship between the States bound by different texts of the same treaty. The 1961 text remains applicable to relationships, not only between countries bound by it, but also between those which have and those which have not become parties to the later text.

ARTICLE 30

Settlement of Disputes

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.

30.1. This deals with disputes which may arise between two or more Contracting States as to the interpretation or application of the Convention. It follows the copyright treaties (see for example Article 33 of the Berne Convention).

30.2. It deals only with disputes between States and not to litigation between individuals and companies. In any case the constitution of the International Court of Justice itself lays down that only States may bring cases before it. It applies of course only if the parties cannot settle their difference amicably and it gives them the opportunity to choose some other mode of settlement, e.g., an international arbitration.

30.3. As the General Report makes clear there was disagreement in Rome on the question of whether this recourse to the International Court should be obligatory or optional. The Article makes it clear that it is sufficient if either party wishes it. In later conventions the tendency has been to make this optional, because certain States, for constitutional or political reasons, find it difficult to accept. To meet them, the provision is now often one to which a reservation may be made. As it is, Article 30 may create difficulties for such States although its practical effect should not be over-emphasized. In fact, in the intellectual property field, no case has ever been referred to the International Court. In any case, judgments of the Court never condemn either party; they simply pronounce on the law, leaving the States to make of the judgment what they will.

ARTICLE 31

Limits on Reservations

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.

31.1. This Article makes it quite clear that no reservations to the Convention are permitted, other than those specifically authorized by it. It follows Article 30 (1) of the Berne Convention.

31.2. The reservations are described in detail in Article 16 and enumerated by reference to the articles which allow them. Articles 18 and 27 allow for their withdrawal or modification.

31.3. Apart from reservations explicitly mentioned, the obligations of the Convention are sacrosanct.

ARTICLE 32

Intergovernmental Committee

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.

32.1. This Article is devoted to the creation, tasks and composition of an intergovernmental committee. This Committee's first duty is a permanent and continuous one: to study questions concerning the application and operation of the Convention; its second is less so: to prepare for revision conferences. Although the text does not say so expressly, the Committee has no power of decision binding on member countries. But its advisory role is not unimportant. As the General Report points out its jurisdiction is not to control the

application of the Convention, but to study questions concerning its application and operation. It makes studies and recommendations on, and suggests solutions to, all questions of that sort. Thus, in 1974, it adopted the model law on neighboring rights to which reference has several times been made, which, with its commentary, is intended to make things easier for all those engaged in drawing up national laws. Again, in 1979, it adopted detailed recommendations on the practical application of the Convention. It has not so far had occasion to undertake its other task of preparing a revision conference.

32.2. Paragraph 2 deals with the Committee's composition. It consists of representatives of member States chosen with regard to equitable geographical distribution, a phrase which appears also in the multilateral copyright conventions. In the Convention's early days the number of such representatives depended on the number of Contracting States; now, however, that number allows a full committee of twelve.

32.3. The third and fourth paragraphs of Article 32 provide for the original setting-up of the Committee and for rules of procedure which in particular provide for the Committee's operation and renewal in such a way as to ensure rotation among the Contracting States. These provisions were followed, and, twelve months after the coming into force of the Convention (in May 1964) the Committee was formally constituted. It has since adopted its internal rules and held many sessions both ordinary and extraordinary.

32.4. The three final paragraphs speak for themselves. As has already been pointed out, the reference to the Bureau of the International Union for the Protection of Literary and Artistic Works must, since the reform in Stockholm of that Organization's structure, be read as a reference to the World Intellectual Property Organization, its Director General and its headquarters (in Geneva).

ARTICLE 33

Languages

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.

33.1. This Article, like those which follow, is one of the final clauses usually found in international treaties, particularly those in the intellectual property field.

33.2 Under the first paragraph, the Convention is drawn up in three languages. In the case of disputes as to the meaning of a provision, all three texts are considered equally authentic. In this it differs from the, much older, Berne Convention, originally drawn up in French alone but in which now the French text prevails in case of dispute (Article 37).

33.3. The second paragraph provides for official texts to be established in other languages. As the Report of the Conference points out, it was understood that these non-authentic but official texts would be established by the governments concerned and would be published by the three Secretariats. This has been done. In more recent conventions, other languages have been added to the list of official texts and any revision of this Convention would probably follow suit. But in any case, there is nothing to stop the publication of versions in other languages, to make accessions to the Convention more likely.

ARTICLE 34

Notifications

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 request 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.

34.1. This Article lays down the part played by the depository of the Convention (the Secretary-General of the United Nations) in the dissemination of information about it.

34.2. He is charged to inform all potentially interested States and the three Secretariats of the facts they need to know: countries becoming party to the Convention; entry into force; reservations and other declarations; denunciations and other cases of the Convention ceasing to apply; matters affecting the convening of revision conferences. Finally, in the classical final recital, he is charged to send certified true copies of the text to those concerned.

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PART TWO

GUIDE
to the
PHONOGRAMS CONVENTION (1971)

**Convention for the Protection
of Producers of Phonograms
Against Unauthorized Duplication
of Their Phonograms**

INTRODUCTION

I. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, hereinafter called the "Phonograms Convention" was finalized on October 29, 1971, at the end of a Diplomatic Conference in Geneva. It came into force on April 18, 1973, and boasts, at the moment, some thirty member States. It provides for no revisions since its object is permanent, and the general concensus on the need for urgency in attaining its goal does not lend itself to making modifications. The member States are bound by the text contained in this Guide.

II. As with the Rome Convention, it seems worthwhile to set out briefly the reasons for the existence in the neighboring rights field, of this Convention. This review recalls the facts and the laws as they existed.

III. During the 1960's, the enormous success enjoyed by discs and cassettes in the social and cultural life of nations excited the ambitions of shady enterprises to feather their nests by copying, usually clandestinely, the recordings or others and selling these copies either directly or by distribution networks. This piracy spread like a cancer until it reached enormous proportions: the legitimate phonographic industry reckoned that some hundred million infringing discs were being sold each year. The resulting financial loss is hard to calculate with any accuracy since this depends on whether, if the pirate outlets were closed, their customers would turn to buying the genuine articles. The situation varied country by country but the damage, though fluctuating, was constantly there.

IV. By infringing discs is meant discs placed on the market without the consent of those who made the original sound recordings which those discs contained and without the consent required by law of authors and composers of the works and the artists who performed them. The labels borne by these discs naturally said as little as possible about the original recording. But they carried the name of the work and its performer. The public were seriously deceived, the more so since the original sleeves and envelopes with photographs of the artistes were often copied as well. As time progressed infringement extended to cassettes and other fixations until the point was reached at which sales of pirate cassettes far exceeded that of discs. The pirates had no difficulty at selling at a price less than that charged by the legitimate industry since the cost of their equipment was much less. It was a flourishing, easy-money business based on low costs and quick profits.

V. Of course, it is mainly the successful recordings which are copied; but since infringement affects all national repertoires, its repercussions damage the

interests of record-makers in many countries including developing countries which have their own record industries operating legitimately in the pressing and sale of recordings.

VI. Another type of piracy which has grown up is known as "bootlegging": this consists of making recordings without permission and usually clandestinely of musical performances either off the air or at concerts where the works are performed, and the making and selling of copies of these recordings. Since no copy of a phonogram is here involved (unless the broadcast was itself made from a recording), no phonogram producer's rights are affected. But the latter's interests are damaged both by the competition this creates for their own, legitimate, wares and by the troubles that arise in their relations with their own performers with whom they have entered exclusive contracts.

VII. Finally, those who indulge in these forms of record piracy of course pay nothing at all to the owners of copyright in the works concerned or to the artists who perform them. The loss these latter sustain does not end there. Sales of pirate copies cut down, pro rata, the sales of legitimate records, with the result that authors and performers find themselves deprived of the royalties and other payments they would otherwise have had from phonogram producers.

VIII. Sometimes it is only a sort of petty piracy from which these three categories suffer: the small dealer who, when he receives a disc, rerecords it on cassette and sells a few copies to friends. But it is the industrial piracy practised on a grand scale for large sums of money which, by stealing their markets, causes the real damage to the legitimate record companies and imperils their very existence. New recording techniques and new materials have helped this piracy to spread in unforeseen ways. Flourishing enterprises geared to supply the private market have sprung up in countries which have no laws against infringement and are party to no intellectual property conventions. Here the copying of discs, cassettes and the like is fully within the law and can prove very lucrative both for the enterprise in question and the country in which it operates.

IX. The situation on the legal front was no less serious. The weapons used to fight this piracy were varied (and not always reliable) and it was far from easy to settle on a formula which could be used as the foundation for an international treaty. Since international situations are usually involved, attempts were made to make use of the existing multilateral conventions. In the copyright field, the only action which can be taken against pirates must be based on the right of reproduction enjoyed by authors in their works. Phonogram producers, as such, have no protection under the copyright conventions even though some national laws describe their rights as copyright. In others they can sue under copyright only as contractual assignees of the

author's rights; in any case they often find it difficult to stop importation and sale of infringing copies which is where the shoe pinches most acutely. As to the Rome Convention, although it gives the phonogram producers the exclusive right to authorize or prohibit the direct or indirect reproduction of their phonograms, there is no mention of importation or unauthorized distribution and the Convention does not apply to these acts unless linked with the act of reproduction itself. What was needed was a way to stop these additional ways of cashing-in on pirate copies. Again, membership of the Rome Convention is confined to States which are also party to one of the copyright conventions. Membership includes only a part of the world market for phonograms. The fight against record piracy required the collaboration of as many countries as possible on a worldwide scale.

X. These were the reasons which prompted the representatives of the phonographic industry to plead the need to find means on the international level of curbing, halting and punishing acts which, in equity, could not be justified. They fired their alarm signals at the meeting, in 1970, of experts gathered together to prepare for the Revision (which took place in the following year) of the Berne and Universal Copyright Conventions. What they asked for was a short, simple international treaty to be concluded as quickly as possible.

XI. With the approval of the competent bodies in WIPO and Unesco, a committee of governmental experts convened by these two intergovernmental Organizations met in March 1971 and produced a draft which served as the basis for a Diplomatic Conference in Geneva in October of that year. Thus, in less than eighteen months, a new international convention was drawn up and adopted. The speed with which it all happened — quite exceptional in the field of international agreements — shows the urgency of the need to combat this growing canker of record piracy by entering into an accord of which the details follow.

* * *

Preamble

The Contracting States,

concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers, and producers of phonograms;

convinced that the protection of producers of phonograms against such acts will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;

recognizing the value of the work undertaken in this field by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization;

anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms;

have agreed as follows:

0.1. Before commenting on the wording of this Preamble, it may be worth saying a few words about the Convention's title, since this summarizes its purpose. There are two questions: who is protected? and against what? The beneficiaries give rise to no difficulty. The facts and fairness itself both point to the producers of phonograms. When it came to deciding against what they are protected, the Conference chose the original, reprehensible act, namely the unauthorized duplication of phonograms. The committée of experts had thought it better to put the accent on the product (the copies) and their unauthorized character: the draft therefore spoke of protection of phonograms against unauthorized duplication. Some would have liked the Convention to speak explicitly of "piracy" and to use that word. But this would have given the flavor of crime to the activity and carried the suggestion that it was criminal rather than civil remedies that were called for. The word was not therefore used.

0.2. As with most treaties of this kind, the Convention starts with a Preamble. This is longer than that of the Rome Convention. It contains four ideas: first, concern at the growth of unauthorized copying, and the harm this does to those concerned; secondly, that by giving protection to phonogram producers, one is also protecting the performers and authors of the works recorded; thirdly, a pat on the back for the work done by Unesco and WIPO; and finally a preoccupation which is worth stressing.

0.3. There already exists one convention in which producers of phonograms are given a measure of protection, namely the Rome Convention which has already been discussed. Some would have preferred that it was in that treaty that solutions should be found. But it seemed essential to achieve a wider membership than seems likely to be found in the near future in the Rome

Convention, without in any way making greater acceptance of the latter less likely. The same is true, by implication, of the copyright conventions.

0.4. Though not said so in terms in the Preamble, the general feeling was that this Convention should be as simple as possible and should be open to all States so as to receive quickly a wide acceptance (see paragraph 25 of the General Report).

ARTICLE 1

Definitions

For the purposes of this Convention:

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

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

(*c*) "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

(*d*) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.

1.1. This Article contains the definitions which make the Convention's framework — the meaning of the rights it gives and their scope.

1.2. Paragraphs (a) and (b) define "phonogram" and "producer of phonograms" in terms identical to those used in the Rome Convention (Article 3 (b) and (c)).

1.3. The words "exclusively aural fixation" used in the definition of phonogram posed the question of whether it includes the soundtrack of a cinematograph film or other audiovisual creation. The point was discussed in Geneva as the General Report relates. Two theories have been advanced.

1.4. According to one school of thought, when a disc is made from the soundtrack of a film, the soundtrack constitutes the raw material for the recording, so that, when an exclusively aural fixation of the soundtrack is made, the resulting recording is a phonogram within the meaning of the Convention. In fact, the soundtrack is almost invariably edited or otherwise altered in the process of producing the recording so that a new exclusively aural version is created.

1.5. The other view is that a film contains two parts, one visual and one aural, and these are linked from the outset. True, with cinema films, the soundtrack can be recorded separately and joined later to the celluloid. But with television films, both are normally recorded together and there is never any exclusively aural fixation. In other words, if there is simultaneous fixation of sound and vision, both go to form a single entity and there never exists any exclusively aural fixation within the meaning of the Convention. In the result, records made from that soundtrack are not protected by it.

1.6. The point is not unimportant. If the Convention simply excludes all recordings which originate as soundtracks of films, and if these can claim protection from no other clause or treaties, pirate records can be made from them ad lib and sold on the market. However, if a soundtrack is an integral part of a film, the maker of the film can it seems, take action under *copyright* laws or treaties to prevent the copying of a substantial part of his film, namely the soundtrack. In any case, as the General Report points out the Convention provides only for minimum standards of protection so that it is within the competence of each Contracting State to protect recordings produced from soundtracks as phonograms under its national legislation if it wishes to do so.

1.7. But it is still important to know what the Convention protects. The General Report relates that the view of the Conference was that the person to be protected should be the person who first fixes the phonogram as such. This suggests that means the person who made the first exclusively aural fixation no matter what sounds he used to make it. Broadcasting organizations may, of course, qualify as producers of phonograms or films.

1.8. The "producer of phonograms" may of course be an individual or a corporation. The nationality of the latter is determined by the place of its registered office. Protection depends on nationality (see Article 2).

1.9. Paragraph (c) is a definition of "duplicate" (the word was preferred to "copy" because, in English, the latter could include new recordings imitating or simulating the sounds in the original which the Convention is not meant to cover). The expression "directly or indirectly" means that a copy of a copy is included (two successive pirates, one copying from the other). The definition also includes duplicates made "off the air" from broadcasts of phonograms. It was deliberately drawn widely to combat all forms of piracy.

1.10. It also covers the case where the duplicate does not contain all the sounds in the original phonogram but only a "substantial part" of them. It seemed both logical and fair to stop the piracy of phonograms in whole or in part. The methods used in the field of recording offer all sorts of possibilities to take, superimpose and combine extracts of phonograms and it was not felt right that an infringer should escape on the pretext that he had not taken the whole. Article 10 of the Rome Convention also speaks of "direct or indirect" reproduction of phonograms, but without saying expressly that this includes extracts as well as the whole. The general feeling, however, is that it does.

1.11. As to the meaning of "substantial" in relation to part of a phonogram, paragraph 41 of the General Report makes it clear that this expresses not only a quantitative, but also a qualitative, valuation; quite a small part may be substantial. In fact, the purpose of the Convention is to prohibit or punish acts of piracy in whatever form which damage the interests of the legitimate

phonographic industry. National laws and courts have the final decision when a sufficient part is taken from the phonogram to make this damage a reality.

1.12. Paragraph (d) of this Article defines "distribution to the public." Unlike the Rome Convention, this one protects against distribution to the public of infringing duplicates as well as making them. In order not to narrow the scope of protection or hamper the legitimate industry, there is no mention, in terms, of commercial activity. But the words "are offered to the general public" carry that implication. It is the intended destination of the duplicates that counts.

1.13. It does not appear necessary to prove that any infringing duplicate has actually changed hands. Duplicates can be offered to the public by means of advertisements. But in any case, the Convention merely provides a minimum of protection. Nothing stops a member State legislating against, for example, the recording for broadcasting of pirate discs, while at the same time perhaps allowing the exchange of a recorded program into which a pirate disc has inadvertently crept.

ARTICLE 2

Obligations of Contracting States
Whom They Must Protect and Against What

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

2.1. This Article prescribes the obligations which Contracting States must undertake by setting out the persons to be protected and what they must be protected against.

2.2. As to which phonograms must be protected there are at least three possible points of attachment: the nationality of the maker, the place of first fixation and the place of first publication. To keep the Convention as simple as possible, only the first of these was chosen: each Contracting State undertakes to protect producers of phonograms who are nationals of other Contracting States.

2.3. There is one exception (see below Article 7 (4)) corresponding to the same exception in Article 17 of the Rome Convention. Note that, like the latter, the Phonograms Convention only governs international situations. A State undertakes no obligations as to its own nationals, but, in practice, is most unlikely to treat them worse than foreigners.

2.4. According to the Article, protection must be given against three acts: the making of duplicates without consent, their distribution to the public and their importation for this purpose, i.e., the principal acts of piracy.

2.5. Note that the authorization must be given by the protected phonogram producer. Some would have preferred the Convention to allow Contracting States to treat as producer his successor in title. But to have done so might have created confusion. There is nothing in the Convention to this effect. But the General Report makes it clear that "consent" may, under the domestic law of a Contracting State, be given by the original producer or by his successor in title or by the exclusive licensee in the Contracting State concerned; nevertheless this would not affect the criterion of nationality for the purposes of protection.

2.6. The fact that there must be protection against importation does not imply any obligation to increase the numbers of customs officers employed in order to seize all infringing discs which arrive at the frontier. In any case it is

only importation for distribution to the public that is forbidden, i.e., commercial imports. There is no point in demanding the confiscation of the individual discs crossing frontiers, even if infringements, if there is no intention of marketing them. A commercial aim is essential. The acquisition as souvenirs by a foreign tourist of the odd disc or cassette does not make him a pirate. The importation of a large number to make a profit would be a different matter.

2.7. The third prohibited activity is distributing to the public copies made without consent. There may be no question of importation; they may have been illicitly made in the country concerned. Whether or not the person making the records can be traced, there must be power to act against the person selling. The Article says so expressly.

ARTICLE 3

Means of Implementation by Contracting States

The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

3.1. Having set out the obligations of Contracting States, the Convention now deals with the means by which these obligations are fulfilled. In fact, the Convention does not confer any homogeneous right, since this Article leaves member countries free to choose the legal means by which to meet their commitments to other member States. But they are not given a completely free choice since the Article goes on to provide the options open to them.

3.2. Four possible means are described. The first of these is to grant a copyright in the sound recording such as is enjoyed by authors of literary and artistic works. This treats the recording as not merely an industrial creation, but the product of skill and labor and hence its maker is entitled to the same, or virtually the same, rights as creators of works.

3.3. The second possibility is to give protection by means of an "other specific right." This calls for some explanation. It has nothing to do with such things as fixed amounts of duty payable to customs officers on imports in contrast to ad valorem duties. It simply means a right in the nature of a copyright but known by the different name of a "neighboring right." It is sufficient, in order to meet the obligations of the Rome Convention, if the maker enjoys no more than a power to prevent the making of infringing copies. To meet the obligations of this Convention he must be able to prevent their importation and distribution to the public as well. The point is made clear in the commentary on the model law on neighboring rights.

3.4. The third legal sanction described in Article 3 is protection by means of the law relating to unfair competition. This is defined in Article 10*bis* of the Paris Convention for the Protection of Industrial Property as "any act of competition contrary to honest practices in industrial or commercial matters." The acts which Article 2 of the Phonograms Convention forbids generally speaking fall within this definition: the pirate dishonestly damages the legitimate producer by making and selling exact copies of his wares, often (since the pirates' costs are considerably less) at prices lower than usual. There is unfair competition too when the pirate deceives the public as to the true origin of the records, by passing off his goods as those of the legitimate producer.

3.5. The final legal possibility in this paragraph is protection by means of penal sanctions. In a Contracting State which meets its obligations by these means, it must be a criminal offence to do any of the acts set out in Article 2, punishable by fines and/or imprisonment.

3.6. These means of course are neither cumulative nor mutually exclusive. One will suffice but national laws may provide for more. For example, a phonogram producer may sue for unfair competition if the law so allows, even although he is also the owner of an exclusive right; or again there may be criminal sanctions for acts which also infringe an exclusive right. To summarize, there must be an exclusive right (copyright or neighboring right) enabling the legitimate record producer to sue for damages and/or injunctions, or the latter must be able to restrain persons committing the acts set out in Article 2 by means of the unfair competition law, or such acts must be criminal offences.

3.7. In offering this choice of means to Contracting States, the Phonograms Convention, unlike that of Rome and the Copyright Conventions, does not provide for national treatment and lays down no conventional law which could, without more ado, be applied in the courts of countries where conventions are self-applying. It is simply the acceptance of mutual obligations between Contracting States. As with the Satellites Convention, it is simply a case of putting an end to reprehensible practices which damage legitimate interests which merit protection. Because of the need for swift action and wide acceptance, it was felt acceptable to intermingle the various systems of protection in the hope that the end would justify the means.

ARTICLE 4

Term of Protection

The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.

4.1. This Article leaves the duration of protection to the domestic laws of Contracting States. But it lays down a minimum term below which that law may not go. This is twenty years from the end of the year in which the sounds were first fixed in the phonogram, or from its first publication. Since this is a minimum and the second event must be later than the first, it is not easy to see why Contracting States were offered the choice.

4.2. The Rome Convention, more logically, provides only a minimum of twenty years from first fixation. Perhaps the thought in this Article was that the year of first publication is easier to ascertain than that of fixation and, for countries adopting this point of departure, twenty years was the minimum.

4.3. Note that the twenty-year minimum only operates if a specific term is prescribed by the domestic law. In a country which chooses to meet its obligations by means of the unfair competition law, there is often no duration laid down for the civil wrong committed by the defendant. It is a matter of general law. However, as the General Report points out, it was assumed that in this case the protection should not in principle end before twenty years from the first fixation or first publication as provided for in the Convention for the other means of protection, in order to ensure a balance between the different systems.

4.4. Finally, unlike the Rome Convention and the multilateral conventions on copyright, no reciprocity of term is provided for. This is logical, since there is equally no provision for national treatment. All that matters is that Contracting States honor the minimum in Article 4.

ARTICLE 5

Formalities

If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

5.1. This Article deals with formalities. During the preparation of the draft, three possibilities were canvassed: no formalities at all; each State free to prescribe its own formalities; or that the Convention should prescribe a single formality for all. The last of these was adopted.

5.2. It is important to understand that no State need prescribe any formalities at all. All this Article does is to provide that, if any State does demand formalities as a condition of protection, these are considered met if the formula in this Article is followed.

5.3. To avoid complications and the added expense for phonogram producers of complying with two different formalities, this Article follows the formula laid down in Article 11 of the Rome Convention on this point, with minor modifications to make it fit the scope and wording of the Phonograms Convention.

5.4. Thus, the symbol and the required information is the same, the latter being slightly more precise to meet the practices of the phonographic industry and the legislation of certain States. For these reasons, mention of the producer's successor in title or exclusive licensee is also permitted.

5.5. In following the Rome Convention formula, which was itself inspired by the Article on formalities in the Universal Copyright Convention, this Article increases the use of the symbol Ⓟ on phonograms or on their containers.

ARTICLE 6

Limitations on Protection

Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

(*a*) the duplication is for use solely for the purpose of teaching or scientific research;

(*b*) the license shall be valid for duplication only within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates;

(*c*) the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, inter alia, the number of duplicates which will be made.

6.1. As in the Rome Convention, the question arises of the limitations to protection that should be permitted and the question of compulsory licenses. The first point to make clear is that in those countries which honor the Phonograms Convention provisions by means of their unfair competition law, the question does not arise. Exceptions are only relevant when the phonogram producers enjoy a property right (copyright or neighboring right) or when there are penal sanctions.

6.2. When an action alleging unfair competition is brought, the only question is whether the conduct of the defendant amounted to competition, and if so whether or not it was unfair. Permissible exceptions are, so to speak, built in automatically to the system. But when the phonogram producer enjoys a specific right, it is a different matter.

6.3. Article 6 allows Contracting States to provide the same exceptions as they provide for authors. In this it follows Article 15 (2) of the Rome Convention (see the Commentary on that Article in the first part of this work).

6.4. But what if a country which joins this Convention has no copyright laws and is a member of neither of the multilateral copyright treaties? This question, more theoretical than real, is answered in the General Report: they may be guided by the principles contained in those copyright treaties.

6.5. In its second sentence, Article 6 provides that, with one exception, no compulsory licenses may be granted. To allow any general system of compulsory licensing would be a sort of encouragement to copy which it is the object of the Convention to prevent. In any case, nothing in this Convention

gives protection against secondary uses of phonograms — public performance or broadcasting — in contrast with Article 12 of the Rome Convention.

6.6. To summarize, a State may apply the same exceptions as it does for copyright under its domestic law (*not* the copyright conventions except where it has no domestic copyright law). No general system of compulsory licenses is allowed.

6.7. But there is one exception to the ban on compulsory licenses, provided three cumulative conditions are met. The copy must be for use solely for teaching or scientific research. This wording is analogous to a provision (which applies to developing countries) in the Universal Copyright Convention, but wider since the word "teaching" is unqualified; export of copies is prohibited; and fair remuneration must be paid to the original producer.

6.8. It must be remembered that the Phonograms Convention only gives protection against making, importing, and marketing "for the purpose of distribution to the public." There must be few, if any, cases in which the aim of this exception "use solely for teaching or scientific research" falls within that prohibition.

6.9. Although the text does not say so, this limited power to issue compulsory licenses seems intended particularly for developing countries. But, on the face of it, it is of general application, and for that reason the commentary on the model law on neighboring rights mentions the possibility.

ARTICLE 7

Savings
Article 7, paragraph (1): Safeguard of Copyright and Neighboring Rights

> **(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.**

7.1. Article 7 deals with a number of miscellaneous and seemingly unconnected matters. Perhaps the connecting link is that they are all safeguards either for particular categories of individuals or for the freedom of action for member States.

7.2. The first paragraph is a combination of Articles 1 and 21 of the Rome Convention. The Phonograms Convention is not to limit or prejudice the protection otherwise enjoyed under domestic laws or international agreements by any of those categories which have an interest in the making or sale of phonograms, namely authors, performers and broadcasting organizations, not to mention the phonogram producers themselves (but not including the merchants through whose hands phonograms pass).

7.3. Though not specified the relevant international agreements are the Berne and Universal Conventions on Copyright, the Rome Convention on Neighboring Rights and the Paris Convention for the Protection of Industrial Property (particularly Article 10*bis* (2)), as concerns unfair competition.

7.4. In the preparatory draft it was said that the new treaty could not be interpreted as "superseding" (not merely limiting) protection under other laws and treaties. But this, it was felt, might lead to confusion between countries bound by the Rome and Phonograms Conventions respectively, having regard to the different levels of protection provided for in these two Conventions.

7.5. But another question arises: that of the relationship between two States each of which is a party to both Conventions (Rome and Phonograms). The effect of Article 22 of the Rome Convention was discussed in the earlier part of this Guide. The Phonograms Convention does not appear to give phonogram producers "more extensive rights" than that of Rome. True, it goes beyond mere making of pirate discs and covers also importation and sale. But, unlike Rome, it contains no provisions relating to secondary uses of phonograms. It certainly contains no provision which is "contrary" to the Rome Convention. Nevertheless it is to Article 21 rather than Article 22 of Rome that one looks to

find the link between the two Conventions. In any case, countries party to both must each accord the other the benefits of both cumulatively. There is no conflict between the two and in cases where texts overlap, the obligation is to apply the one which gives the greater protection.

Article 7, paragraph (2): Protection for Performers

(2) It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

7.6. By this second paragraph of Article 7 Contracting States are left to legislate as they will on protection for the performers recorded on the phonograms in question.

7.7. There appears, in any case, to be nothing to stop countries legislating on this point and the paragraph is really superfluous. But it was considered to be worth inserting to show that those assembled in 1971 in Geneva have not ignored the damage which record piracy may cause not only to the industry but to performers as well, and to remind the Contracting States of the latter's needs.

7.8. It was not however felt necessary to impose an obligation on States to allow performers to take action if the phonogram producer failed to do so. As the General Report points out, this was a matter which could be covered in the contract governing the making of the recording.

Article 7, paragraph (3): Non-Retroactivity

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

7.9. This provision on retroactivity follows Article 20 (2) of the Rome Convention. No country is required to protect phonograms first fixed before the Convention entered into force for that country. It is not of course obligatory. Any country may protect phonograms retroactively if it wishes.

7.10. If Contracting States follow the non-retroactive principle, the effect of the Convention is thereby weakened since pirate copies of a phonogram fixed earlier may continue to circulate. But some countries have constitutional objections to retroactive protection; and in any case it is usually the hit of the day out of which the big money is made. There is less demand for copies of older recordings.

Article 7, paragraph (4): Substitution of the Criterion of Fixation

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

7.11. This paragraph permits the continuation of an existing situation. It allows States which, on October 29, 1971, protected phonograms only on the basis of fixation, to continue to apply this criterion rather than that of the nationality of the maker. The date mentioned is that of the end of the Conference in Geneva which drew up the Convention.

7.12. This provision follows Article 17 of the Rome Convention, inserted to meet the needs of certain States which wished to join the treaty. See the Commentary on Article 17 in the earlier part of this work.

ARTICLE 8

Secretariat

(1) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(2) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and shall conduct studies and provide services designed to facilitate the protection provided for therein.

(3) The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in cooperation, for matters within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

8.1. This Article is the first of the final clauses dealing with administrative matters. The first two paragraphs follow Article 24, sub-paragraphs (2), (4) and (5) of the Berne Convention. They set out the functions normally performed by the Secretariat of an international treaty.

8.2. The duty of providing the Secretariat is conferred on the World Intellectual Property Organization, the only specialized agency of the United Nations which deals with all aspects of intellectual property. It performs the secretarial duties for the Berne Convention and the Paris Convention on Industrial Property, and is one of the three intergovernmental organizations entrusted with the administration of the Rome Convention on Neighboring Rights. WIPO is charged not only with the normal secretarial duties, but has also some of the functions of a depository power (see below).

8.3. Paragraph 3 provides that WIPO shall exercise its function in cooperation, for matters within their respective competence, with Unesco and the International Labour Organisation. Such collaboration already exists in practice by reason of working agreements between the agencies concerned and that has operated satisfactorily.

8.4. In fulfilling the tasks set it by this Article, the Bureau of WIPO has published synoptic tables showing the legal protection given to phonograms in a number of countries. The Model Law on Neighboring Rights, published under the auspices also of Unesco and ILO, takes account, in a number of instances, of the Phonograms Convention. Finally the three specialized agencies have combined forces to draw the attention of States to the desirability of becoming party to this Convention on Phonograms.

ARTICLE 9

Joining the Convention
Article 9, paragraph (1): Signature and Deposit

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until April 30, 1972, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

9.1. This first paragraph deals with three points. First, it provides that the depository of the original text (see below Article 13 (1)) shall be the Secretary-General of the United Nations. This is the same as in the Rome Convention (see Article 23) and the Satellites Convention (1974).

9.2. The Convention is open to signature until April 30, 1972, i.e., six months after the last day (October 29, 1971) of the Geneva Conference which drew up the Convention. What was said about Article 23 of the Rome Convention applies equally here.

9.3. Finally it determines the countries which may sign (and later ratify) and — read with paragraph (2) — those who may accede. The formula in the Stockholm Convention (1967) creating the World Intellectual Property Organization was followed and not that of Rome which is limited to States members of one or other of the multilateral copyright conventions (Article 24). The widest possible membership was therefore foreseen.

9.4. This formula seemed most likely to result in a large membership in the shortest time and hence the best way to stop record piracy. As has already been said, this was a prime reason for concluding the Convention in the first place.

Article 9, paragraphs (2) and (3): Ratification and Accession

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

9.5. These two paragraphs deal with the ways of becoming a party to the Convention. Those countries which have signed may ratify their signatures. Others may accede. So far as procedure (though not substance) is concerned, this paragraph follows the Rome Convention.

9.6. If a State, for reasons of internal law, prefers to "accept" rather than "ratify," this Article, like the Rome Convention, permits it. Accession is open to any State falling within paragraph (1).

9.7. Instruments of ratification, acceptance or accession are sent to the depository power.

Article 9, paragraph (4): States' Obligations as to Their Domestic Law

> **(4) It is understood that, at the time a State becomes bound by this Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.**

9.8. There are precedents for this provision in a number of treaties. It is the same as Article 36 of the Berne Convention and analogous with Article X of the Universal Copyright Convention, Article 25 (2) of the Paris Convention and Article 26.2 of Rome. (See the Commentary above on that Article.)

ARTICLE 10

Reservations

No reservations to this Convention are permitted.

10.1. This very short Article forbids all reservations by Contracting States. It is identical with Article 16 of the WIPO Convention, and like Article 31 of the Rome Convention except that the latter names certain permitted reservations.

10.2. Although it does not say so, it is clearly without prejudice to Article 7 (4) which does allow certain States to apply a criterion of protection for producers of phonograms other than the normal one.

ARTICLE 11

Entry into Force and Applicability
Article 11, paragraphs (1) and (2): Entry into Force of the Convention

> **(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.**
> **(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of ratification, acceptance or accession, the Convention shall enter into force three months after the date on which the Director General of the World Intellectual Property Organization informs the States, in accordance with Article 13, paragraph (4), of the deposit of its instrument.**

11.1. These first two paragraphs cover the coming into force of the Phonograms Convention. For its commencement, a very small number was chosen: five States sufficed. This was because of the urgency of the problem.

11.2. For the first five States it is in force three months after the deposit of the fifth instrument. This was in fact April 18, 1973.

11.3. The second paragraph deals with States joining after the fifth. For them it enters into force not three months after the date of deposit, but three months after the Director General of WIPO has notified other States of this deposit (see Article 13). This follows exactly the formula appearing in the Berne Convention.

Article 11, paragraphs (3) and (4): Applicability of the Convention to Certain Territories

> **(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.**
> **(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.**

11.4. This paragraph allows States to declare that the Convention applies to territories for whose international relations it is responsible. It does so by notification to the depository power, either on itself joining the Convention or later. Such a notification takes effect three months after its date of receipt.

11.5. However, paragraph (4) makes it clear that paragraph (3) in no way implies recognition or tacit acceptance by other Contracting States of the factual situation of such a territory. Many countries feel it is anachronistic to speak of another State being responsible for the international affairs of a territory which does not, strictly speaking, lie within its frontiers. This has appeared in a number of recent treaties (see for example Article 31 of the Berne Convention, Paris Act (1971)). It appeared for the first time in the Patent Cooperation Treaty (Washington 1970). For that reason it does not feature in the Rome Convention.

ARTICLE 12

Denunciation of the Convention

(1) Any Contracting State may denounce this Convention, on its own behalf or on behalf of any of the territories referred to in Article 11, paragrapb (3), by written notification addressed to the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the Secretary-General of the United Nations has received the notification.

12.1. This Article contains the usual provisions on denunciation of the Convention.

12.2. It is modelled on the first two paragraphs of Article 28 of the Rome Convention and the effects are the same (twelve months after receipt by the Secretary-General of the United Nations). The comments on Article 28 (see above) apply equally here.

ARTICLE 13

Languages and Notifications

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the Director General of the World Intellectual Property Organization, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

(*a*) signatures to this Convention;

(*b*) the deposit of instruments of ratification, acceptance or accession;

(*c*) the date of entry into force of this Convention;

(*d*) any declaration notified pursuant to Article 11, paragraph (3);

(*e*) the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall inform the States referred to in Article 9, paragraph (1), of the notifications received pursuant to the preceding paragraph and of any declarations made under Article 7, paragraph (4). He shall also notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of such declarations.

(5) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to the States referred to in Article 9, paragraph (1).

13.1. These are the usual final clauses. The first two paragraphs deal with the languages in which the Convention is drawn up, and the preparation of official texts in other languages. These texts are the responsibility of the Director General of WIPO in consultation with interested governments.

13.2. The original Convention is in four languages. To the three used in Rome, one — Russian — has been added. They are all equally authentic.

13.3. To the Rome list of languages in which there are official texts, two have been added. Arabic appeared in the Revision, earlier in the same year (1971), of the Copyright Conventions. The other is Dutch. This number of languages (nine in all) shows the desire to focus the attention of as many States as possible on the Convention with a view to wide early membership. WIPO has already published the texts.

13.4. Paragraphs (3) and (4) provide the machinery of notifications by the depository power and the Director General of WIPO. The latter, because of his administrative tasks exercises some functions usually carried out by the former.

13.5. The Secretary-General of the United Nations informs the Director General of WIPO and also the Directors-General of Unesco and the ILO (since these three form the joint Secretariat of the Rome Convention) of signatures, declarations, notifications, etc., which he receives.

13.6. The Director General of WIPO then tells the States of the information he has received. He also receives and passes on notifications under Article 7.4 of the choice of the criterion of fixation instead of that of nationality. Since the date on which the Convention takes effect as regards countries joining after the first five depends on when the Director General of WIPO sends out *his* notification, it behoves him to act with speed.

13.7. Finally, the Secretary-General of the United Nations circulates certified copies of the Convention to all the States mentioned in Article 9 (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;

(*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 or 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 Interna-

tional 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.

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

of October 29, 1971

The Contracting States,

concerned at the widespread and increasing unauthorized duplication of phonograms and the damage this is occasioning to the interests of authors, performers and producers of phonograms;

convinced that the protection of producers of phonograms against such acts will also benefit the performers whose performances, and the authors whose works, are recorded on the said phonograms;

recognizing the value of the work undertaken in this field by the United Nations Educational, Scientific and Cultural Organization and the World Intellectual Property Organization;

anxious not to impair in any way international agreements already in force and in particular in no way to prejudice wider acceptance of the Rome Convention of October 26, 1961, which affords protection to performers and to broadcasting organizations as well as to producers of phonograms;

have agreed as follows:

Article 1

For the purposes of this Convention:

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

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

(c) "duplicate" means an article which contains sounds taken directly or indirectly from a phonogram and which embodies all or a substantial part of the sounds fixed in that phonogram;

(d) "distribution to the public" means any act by which duplicates of a phonogram are offered, directly or indirectly, to the general public or any section thereof.

Article 2

Each Contracting State shall protect producers of phonograms who are nationals of other Contracting States against the making of duplicates without the consent of the producer and against the importation of such duplicates, provided that any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public.

Article 3

The means by which this Convention is implemented shall be a matter for the domestic law of each Contracting State and shall include one or more of the following: protection by means of the grant of a copyright or other specific right; protection by means of the law relating to unfair competition; protection by means of penal sanctions.

Article 4

The duration of the protection given shall be a matter for the domestic law of each Contracting State. However, if

the domestic law prescribes a specific duration for the protection, that duration shall not be less than twenty years from the end either of the year in which the sounds embodied in the phonogram were first fixed or of the year in which the phonogram was first published.

Article 5

If, as a condition of protecting the producers of phonograms, a Contracting State, under its domestic law, requires compliance with formalities, these shall be considered as fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol Ⓟ, accompanied by the year date of the first publication, placed in such manner as to give reasonable notice of claim of protection; and, if the duplicates or their containers do not identify the producer, his successor in title or the exclusive licensee (by carrying his name, trademark or other appropriate designation), the notice shall also include the name of the producer, his successor in title or the exclusive licensee.

Article 6

Any Contracting State which affords protection by means of copyright or other specific right, or protection by means of penal sanctions, may in its domestic law provide, with regard to the protection of producers of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. However, no compulsory licenses may be permitted unless all of the following conditions are met:

(a) the duplication is for use solely for the purpose of teaching or scientific research;

(b) the license shall be valid for duplication only within the territory of the Contracting State whose competent authority has granted the license and shall not extend to the export of duplicates;

(c) the duplication made under the license gives rise to an equitable remuneration fixed by the said authority taking into account, inter alia, the number of duplicates which will be made.

Article 7

(1) This Convention shall in no way be interpreted to limit or prejudice the protection otherwise secured to authors, to performers, to producers of phonograms or to broadcasting organizations under any domestic law or international agreement.

(2) It shall be a matter for the domestic law of each Contracting State to determine the extent, if any, to which performers whose performances are fixed in a phonogram are entitled to enjoy protection and the conditions for enjoying any such protection.

(3) No Contracting State shall be required to apply the provisions of this Convention to any phonogram fixed before this Convention entered into force with respect to that State.

(4) Any Contracting State which, on October 29, 1971, affords protection to producers of phonograms solely on the basis of the place of first fixation may, by a notification deposited with the Director General of the World Intellectual Property Organization, declare that it will apply this criterion instead of the criterion of the nationality of the producer.

Article 8

(1) The International Bureau of the World Intellectual Property Organization shall assemble and publish information concerning the protection of phonograms. Each Contracting State shall promptly communicate to the International Bureau all new laws and official texts on this subject.

(2) The International Bureau shall, on request, furnish information to any Contracting State on matters concerning this Convention, and shall conduct studies and provide ser-

vices designed to facilitate the protection provided for therein.

(3) The International Bureau shall exercise the functions enumerated in paragraphs (1) and (2) above in cooperation, for matters within their respective competence, with the United Nations Educational, Scientific and Cultural Organization and the International Labour Organisation.

Article 9

(1) This Convention shall be deposited with the Secretary-General of the United Nations. It shall be open until April 30, 1972, for signature by any State that is a member of the United Nations, any of the Specialized Agencies brought into relationship with the United Nations, or the International Atomic Energy Agency, or is a party to the Statute of the International Court of Justice.

(2) This Convention shall be subject to ratification or acceptance by the signatory States. It shall be open for accession by any State referred to in paragraph (1) of this Article.

(3) Instruments of ratification, acceptance or accession shall be deposited with the Secretary-General of the United Nations.

(4) It is understood that, at the time a State becomes bound by this Convention, it will be in a position in accordance with its domestic law to give effect to the provisions of the Convention.

Article 10

No reservations to this Convention are permitted.

Article 11

(1) This Convention shall enter into force three months after deposit of the fifth instrument of ratification, acceptance or accession.

(2) For each State ratifying, accepting or acceding to this Convention after the deposit of the fifth instrument of rati-

fication, acceptance or accession, the Convention shall enter into force three months after the date on which the Director General of the World Intellectual Property Organization informs the States, in accordance with Article 13, paragraph (4), of the deposit of its instrument.

(3) Any State may, at the time of ratification, acceptance or accession or at any later date, declare by notification addressed to the Secretary-General of the United Nations that this Convention shall apply to all or any one of the territories for whose international affairs it is responsible. This notification will take effect three months after the date on which it is received.

(4) However, the preceding paragraph may in no way be understood as implying the recognition or tacit acceptance by a Contracting State of the factual situation concerning a territory to which this Convention is made applicable by another Contracting State by virtue of the said paragraph.

Article 12

(1) Any Contracting State may denounce this Convention, on its own behalf or on behalf of any of the territories referred to in Article 11, paragraph (3), by written notification addressed to the Secretary-General of the United Nations.

(2) Denunciation shall take effect twelve months after the date on which the Secretary-General of the United Nations has received the notification.

Article 13

(1) This Convention shall be signed in a single copy in English, French, Russian and Spanish, the four texts being equally authentic.

(2) Official texts shall be established by the Director General of the World Intellectual Property Organization, after consultation with the interested Governments, in the Arabic, Dutch, German, Italian and Portuguese languages.

(3) The Secretary-General of the United Nations shall notify the Director General of the World Intellectual Property Organization, the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of:

(a) signatures to this Convention;

(b) the deposit of instruments of ratification, acceptance or accession;

(c) the date of entry into force of this Convention;

(d) any declaration notified pursuant to Article 11, paragraph (3);

(e) the receipt of notifications of denunciation.

(4) The Director General of the World Intellectual Property Organization shall inform the States referred to in Article 9, paragraph (1), of the notifications received pursuant to the preceding paragraph and of any declarations made under Article 7, paragraph (4). He shall also notify the Director-General of the United Nations Educational, Scientific and Cultural Organization and the Director-General of the International Labour Office of such declarations.

(5) The Secretary-General of the United Nations shall transmit two certified copies of this Convention to the States referred to in Article 9, paragraph (1).

TABLE OF CONTENTS

* Titles have been added to the Articles of the Convention in order to facilitate the identification. The titles do not appear in the original text. Some of the titles have been taken from the General Report of the 1961 Conference.

* As in the case of the Rome Convention, these titles do not appear in the original text.

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