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Notifications Concerning Treaties Administered by WIPO in the Field of Copyright

WIPO Convention

Declaration

UZBEKISTAN

The Government of Uzbekistan deposited, on May 5, 1993, the following declaration:

“The Government of the Republic of Uzbekistan hereby declares that the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967, and amended on September 28, 1979, continues to be applicable in the Republic of Uzbekistan.

“The Government of the Republic of Uzbekistan declares that, for the purpose of establishing its contribution towards the budget of the WIPO Conference, the Republic of Uzbekistan wishes to belong to Class C.”

WIPO Notification No. 165, of May 10, 1993.

Accession

SAINT LUCIA

The Government of Saint Lucia deposited, on May 21, 1993, its instrument of accession to the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967.

The said Convention will enter into force, with respect to Saint Lucia, on August 21, 1993.

WIPO Notification No. 166, of May 24, 1993.

Berne Convention

New Member of the Berne Union

SAINT LUCIA

The Government of Saint Lucia deposited, on May 21, 1993, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works.

The said instrument of accession contains the following declaration:

“Pursuant to Article 33(2) of the said Convention, the Government of Saint Lucia declares that it does not consider itself bound by the provisions of paragraph (1) of Article 33 of the said Convention.”

Saint Lucia has not heretofore been a member of the International Union for the Protection of Liter-

ary and Artistic Works (“Berne Union”), founded by the Berne Convention.

The Berne Convention, as revised at Paris on July 24, 1971, and amended on September 28, 1979, will enter into force, with respect to Saint Lucia, on August 24, 1993. On that date, Saint Lucia will become a member of the Berne Union.

Saint Lucia will belong to Class IX for the purpose of establishing its contribution towards the budget of the Berne Union.

Berne Notification No. 146, of May 24, 1993.

Normative Activities of WIPO in the Field of Copyright

Committee of Experts on a Possible Protocol to the Berne Convention for the Protection of Literary and Artistic Works

Third Session

(Geneva, June 21 to 25, 1993)

QUESTIONS CONCERNING A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

PART III. NEW ITEMS

*Memorandum prepared by
the International Bureau*

PRELIMINARY REMARKS

1. This part (Part III) of the memorandum deals with three of the 10 items on the program of the June 1993 (that is, the third) session of the Committee of Experts, namely with those mentioned in subparagraphs (vii) and (ix) of the decision of the Assembly of the Berne Union quoted in paragraph 5 of Part I* of this memorandum (document BCP/CE/III/2-1, page 4) as “new items”: “distribution right, including importation right,” “enforcement of rights” and “national treatment.” They constitute Chapters VIII, IX and X.

2. As discussed in paragraphs 6 and 9 of Part II of this memorandum (document BCP/CE/III/2-II, page 2), one of the “new items”—“distribution right, including importation right”—is not completely new. Several aspects of the right of distribution (rental right, public lending right, importation right) were discussed in the memorandum prepared for the second session of the Committee of Experts. The subchapter on rental right and public lending right and the relevant passages of the report are reproduced in Part II. For the preparation of the relevant chapter of this document concerning the “new item,” the results of the above-mentioned discussions have been taken into account.

3. Still another of the three “new items”—national treatment—is not completely new either. Although national treatment as a general question was not discussed as a separate subject in the memoranda prepared for the first two sessions of the Committee of Experts, the obligation to apply this basic principle of the Berne Convention was referred to in respect of the various categories of subject matter to be protected and of the various rights discussed (see paragraphs 31(v) and (vi), 68 to 70 of document BCP/CE/I/2 and paragraphs 93, 103, 117, 130 and 135 of document BCP/CE/I/3). The obligation to grant national treatment was emphasized particularly in the chapter on collective administration of rights (see paragraphs 167 and 168 of document BCP/CE/I/3); however, that chapter was not discussed by the Committee of Experts. The results of the discussions by the Committee of Experts on the application of the principle of national treatment have also been taken into account for the preparation of the relevant chapter of this document.

VIII.

DISTRIBUTION RIGHT, INCLUDING IMPORTATION RIGHT

Definitions

4. In the present document, the notions mentioned in the following eight paragraphs are used according to the definitions set forth in the same paragraphs.

5. The “*right of distribution*” and its synonym, the “*right of circulation*,” is the right to authorize any act where ownership or possession of one or more copies of the work changes or change hands: in the case of sale, gift, etc., it is ownership, whereas, in the case of rental and lending, it is pos-

* See *Copyright*, 1993, pp. 72 to 74.

session that goes from one person to another. Naturally, ownership and possession may change hands simultaneously. As it will be seen, this right rarely exists in an absolute manner.

6. The “*exhaustion of the right of distribution*” is the termination of the right of distribution in respect of any copy of the work where ownership has been transferred for the first time by means of an implicit or explicit authorization of the author or, or other original owner of the copyright in, the work. The “*first sale doctrine*” is the doctrine on which such exhaustion of the right is based.

7. The “*right of first distribution*” (*droit de mise en circulation*) and its synonym, the “*right of putting into circulation*,” is the right of distribution concerning any copy of the work in respect of which the right of distribution has not been exhausted through first sale.

8. The “*right of rental*” is a special variant of the right of distribution, namely the right to authorize the rental of a copy of the work. “Rental” is the transfer of the possession of a copy of the work, for a limited period of time, for *profit-making purposes*. Where the right is not exclusive but merely gives a right to remuneration—that is, is subject to a non-voluntary license—this document so states.

9. The “*right of lending*” is also a special variant of the right of distribution, namely the right to authorize the lending of a copy of the work. “Lending” is the transfer of the possession of a copy of the work, for a limited period of time, for *non-profit-making purposes*. Few countries recognize this right either as an exclusive right or a mere right of remuneration. Several countries recognize a limited form of this right, defined in the following paragraph and called “public lending right.”

10. The “*public lending right*” is a special form of the right of lending. In most countries that recognize this right, the lending must be by non-profit libraries open to the public. This right is usually a mere right to remuneration (not an exclusive right of authorization).

11. The “*droit de suite*” is an inalienable right of the author, or, after his death, the persons or institutions authorized by national legislation, with respect to the original or “original copies” of a work of art or original manuscript, to an interest in any sale of the work subsequent to the first transfer by the author of the work.

12. The “*right of importation*” is the right to authorize that copies of the work, irrespective of

whether or not they have been made with the consent of the author or other owner of copyright, be brought into the territory of the country. It is not a right of distribution proper since importation does not necessarily involve a change in ownership or possession (however, as discussed in paragraphs 22 and 23, below, the right of importation is an indispensable corollary to the right of first distribution in the country concerned). Consequently, the title of this chapter, which implies that importation is a kind of distribution, is perhaps not quite precise.

Situation under the Berne Convention

13. It is only concerning works adapted for cinematographic works and cinematographic works themselves that the Berne Convention provides for a *right of distribution* (Articles 14(1) and 14^{bis}(1)). There is, however, a difference between the English and French texts of the Convention. In the English text, the word “distribution” is used, while, in the French text, the expression “*mise en circulation*” is used. The English word “distribution” could be interpreted in two ways: either to mean the *first* distribution only, or to also mean *all subsequent* acts of distribution. The expression “*mise en circulation*” (“putting into circulation”) indicates, however, that only the first distribution is meant. In this context, it should be noted that, under Article 37(1)(c) of the Convention, “[i]n case of differences of opinion on the interpretation of the various texts, the French text prevails.”

14. No other provision of the Berne Convention refers to either a right of distribution or a right of first distribution (putting copies into circulation). From this silence, the conclusion is frequently drawn in legal literature that, with the exception of the cases covered by Articles 14(1) and 14^{bis}(1), neither a right of distribution nor a right of first distribution exists under the Berne Convention.

15. To support such a view, reference is generally made to what is considered the rejection of the introduction of a “general” right of distribution at the 1967 Stockholm Diplomatic Conference for the revision of the Berne Convention. The proposal (conference document S/72), submitted by the delegations of Austria, Italy and Morocco, suggested recognition of such a right through simply modifying the draft provision which became later the present Article 9(1) of the Berne Convention. Those delegations proposed that, after the word “reproduction,” the words “and circulation” be added, as a result of which the exclusive right to authorize

reproduction would have been transformed into an exclusive right to authorize reproduction *and* any (first and subsequent) distribution ("circulation") of copies. At the sixth meeting of Main Committee I, the proposal was rejected by 17 votes to seven, with eight abstentions (see Summary Minutes of Main Committee I, paragraph 709).

16. It seems that, while the view that under the Berne Convention no ("general") right of distribution ("right of circulation") exists is justified, this is not the case as regards the view that no right of *first* distribution ("right of putting into circulation") exists in respect of categories of works other than the ones covered by Articles 14(1) and 14^{bis}(1) of the Convention.

17. It should be noted that the provision of Article 14(1) of the Berne Convention was originally inserted in the text of the Convention at the 1948 Brussels Diplomatic Conference for revision of the Convention (while Article 14^{bis}(1) adopted at the 1967 Diplomatic Conference simply extended the scope of application of the rights provided for in Article 14(1)). Article 14(1), *inter alia*, recognized the exclusive right to authorize the cinematographic adaptation and reproduction of works, and for the distribution of the works thus adapted or reproduced. This provision was redundant: it should be assumed that it has been adopted merely for the sake of security, to eliminate any possible doubts. In respect of the right of adaptation, the redundancy was obvious, since Article 12 of the Convention provided for an exclusive right of authorizing *any* adaptation, and, thus, that provision also covered cinematographic adaptation. The redundancy existed also in respect of reproduction: at that time, the Convention did not explicitly provide for a right of reproduction (it was only the 1967 Stockholm Diplomatic Conference which adopted a provision (the new Article 9) explicitly recognizing that right). However, nobody was of the view that, because the right of reproduction was explicitly recognized in respect of works adapted for cinematographic works and was not recognized in respect of other works, it did not exist in the case of other works. Hence the special redundant nature of the provision of Article 14(1) as regards the right of reproduction: it was redundant because it stated, in respect of certain works, the existence of a right which had been recognized—albeit not so stated in the Convention—as existing in respect of all works. There is good reason to believe that the provision of Article 14(1) on the right of (first) distribution (*mise en circulation*) was (and still is) of the same nature, that is, it was (and still is) a special redundant provision explicitly stating, in respect of cer-

tain works, what had always been recognized implicitly in respect of all works.

18. There is good reason to believe so if the nature of reproduction as a qualified act and as a basic form of exploitation of works is considered. The *raison d'être* and ultimate aim of the right of reproduction is to provide for control by the author or other owner of copyright over the making available of copies of the work to the public; this is the essence of the normal exploitation of the work on the basis of the right of reproduction. An authorization given to a publisher to reproduce a work without the corollary authorization of the first distribution of the copies to the public would be meaningless (and such corollary authorization is always given to the publisher either implicitly or explicitly, determining, in general, at the same time the conditions of such distribution (particularly the territory where distribution can take place)). It would be impossible to exploit the right of reproduction in a normal way if that right were so restrictively interpreted as to only grant the author or other owner of copyright control over the making of copies but no control over the first distribution of the copies reproduced. In that way, although the author or other owner of this right would have the exclusive right to authorize the making of copies of his work, he would be unable to exploit his work on the basis of this right, if, e.g., the owner of the right of reproduction in another country were able to inundate the market by importing copies authorized by him (that is, by the owner of copyright in that other country) and distribute them; or, in other words, if the authorization of the first distribution of copies in the territory concerned were not an inseparable corollary to the right of reproduction granted for that territory.

19. What the 1967 Stockholm Diplomatic Conference rejected, as mentioned in paragraph 15 above, was the right of *general* distribution, that is, a right that would have gone beyond the *first* distribution. But the Conference did not entertain what could have been a more modest proposal, namely that the right of distribution must only be recognized in respect of the *first* distribution and not also in respect of any subsequent distribution.

20. Although, on the basis of the considerations above, it may be concluded that, under the Berne Convention, a right of first distribution exists as an inseparable corollary to the right of reproduction, it should be added that such a right is not of significant practical importance as long as both the reproduction and the first distribution take place in one and the same country. The owner of the right of reproduction may control the conditions of the first

distribution by means of contractual stipulations. Until the first sale (or other first transfer of ownership), the copies remain in the ownership of the person or legal entity who or which may be bound by such stipulations. As discussed below, explicit recognition of the right of first distribution as an inseparable corollary to the right of reproduction is also an important legal basis for the explicit recognition of the right of importation.

21. While the existence of a *right of first distribution* may be deduced from the present text of the Berne Convention, this is not the case as far as a (general) *right of distribution* ("right of circulation") is concerned. There is no obligation under the Berne Convention to recognize any right of distribution concerning a copy that has been sold (or whose ownership has been otherwise transferred) by or pursuant to an implicit or explicit authorization of the author or other owner of rights. The only exception is the *droit de suite* under Article 14^{ter} of the Convention which is applicable in the case of resale of the original or "original copies" of the work or the manuscript of the work. The recognition of the *droit de suite* is not, however, a minimum obligation but a mere option under the Convention.

22. The Berne Convention does not contain any direct provision on the *right of importation*. However, the history and various provisions of the Berne Convention—particularly its provisions concerning national treatment—indicate that the rights granted under the Berne Convention have always been construed as territorial rights. It is evident, therefore, that the mere fact that a certain act (e.g., reproduction) which requires the author's authorization according to the law of one country has been authorized by the author in that country, does not make that (or any other) act lawful in another country. This is evidenced (i) by Article 16 concerning seizure of infringing copies which are not necessarily infringing copies in the country from which they are imported, (ii) by Article 13(3) on seizure of sound recordings imported without permission from another country where they have been produced on the basis of a non-voluntary license (which, thus, indirectly refers to the existence of a right of importation), and (iii) by Article IV(4)(a) of the Appendix which forbids the exportation of copies made on the basis of compulsory translation or reproduction licenses (exportation which, of course, would qualify inevitably as importation in any other country). However, what is discussed in paragraphs 13 to 20, above, is at least as important: the right of first distribution is an inseparable corollary to the right of reproduction. The author or other

owner of the right of reproduction in a certain country would not be able to exploit this right in a normal way without the possibility to authorize or prohibit the importation of copies (particularly for distribution) into that country, even if the copies have been made with the authorization of the owner of copyright in another country. The situation is not different if the owner of copyright is the same in the two countries concerned because, flowing from the territorial nature of copyright, two separate rights are involved which he should be able to exercise separately (also taking into account the differing economic, social, cultural and legal conditions of the two countries concerned). Unless he has extended his authorization also to country B, he should be in the position to oppose the importation into country B of copies made in country A even where those copies were made with his authorization.

23. Thus, there is good reason to believe that, in addition to the existence of a right of first distribution, also the existence of a right of importation may be deduced from the present text of the Berne Convention as an inseparable corollary to the right of reproduction.

New developments

24. For a long while, the situation at the national level was in harmony with the minimum standards of the Berne Convention. A *right of first distribution* was recognized either in the text of the national laws themselves (frequently in the form of the recognition of a (general) right of distribution with the exhaustion of this right after the first sale of the copy concerned) or on the basis of case law deriving such a right from the right of reproduction. Nor was existence of a *right of importation* generally questioned. Furthermore, the *droit de suite* was granted in a number of countries. A (general) *right of distribution* (right of circulation) "surviving" the first sale of copies was not, in general, recognized. There was only one significant exception in this respect in certain countries: the recognition of the public lending right.

25. The *public lending right* has been established in the copyright law only in one country (Germany). In the other countries where it exists, it is provided for in laws other than copyright laws and is considered as being outside the field of copyright proper (although, as discussed below, it may be questioned whether to do so is really appropriate). At the second session of the Committee of Experts, it was felt that any provision on the public

lending right in a possible protocol to the Berne Convention would be premature.

26. The situation outlined above has changed recently as a result of the growing importance of *rental* as a basic form of exploitation of certain categories of works.

27. Rental of copies is not a new phenomenon; rental of printed copies of musical works (in particular the scores of works intended for public performance, such as operas and choral and orchestral works) has been common practice for many decades. The original form of a right of distribution in the laws of some countries was to provide composers and music publishers the right to distribute their works through rental (not merely through sale) of copies; this assured them income from rental of scores each time their works were performed.

28. Non-commercial lending of sound recordings had been in existence for some time in countries with well-functioning public library systems. But due to the natural deterioration of analog recordings caused by frequent playing and normal wear-and-tear, commercial markets for rental of analog sound recordings never developed to a great extent. The advent of digital technology—and in particular the laser-read compact disc (CD)—caused a fundamental change. The extreme durability of the new recording medium, and the fact that repeated use had no discernible effect on sound quality, made it possible to rent out the same copy a great number of times (and those copies were regularly used also for “home taping”).

29. At first, CD recordings could only be copied using conventional analog recording equipment, but the development of digital recording equipment for consumer use in recent years meant that digital recordings could be copied in digital format. The copies thus produced were in all respects identical to—and a perfect substitute for—the original recordings. As is often the case when new technologies are first commercialized, CDs were quite expensive when they came onto the market. Record rental businesses began to spring up in certain countries, catering to customers who rented CDs at prices lower than sales prices.

30. The effect of this new commercial practice on the rights of authors and other copyright owners of musical works included in sound recordings was potentially disastrous. These “downstream” rental businesses made substantial sums by an activity that undermined the market for the distribution of copies under the control of the copyright owners,

and—because the distribution right was exhausted when the recordings were sold—such businesses paid nothing to the copyright owners.

31. The legislatures of several countries responded by amending their copyright laws to provide for a right of rental concerning sound recordings, either as an exception to the principle of exhaustion of the distribution right after the first sale of copies, or as a specific new right.

32. Some countries also provide a rental right in respect of audiovisual works, particularly in the form of videocassettes. While home copying of rented videocassettes is an important factor, the situation is different from the case of sound recordings, where the primary market was traditionally sales of copies. Until quite recently, the primary market for videocassettes has been rental. Absent a right to control rental, unlicensed rental enterprises are able to divert legitimate business from licensed distributors, and, moreover, they may serve as outlets for pirate copies. Thus, legislators have granted authors and other owners of copyright the power to control the chain of distribution through authorizing or prohibiting rental.

33. Recent developments indicate that a right to control rental is also important for other categories of works, particularly for computer programs and works—including collections of works and/or data—stored in electronic (ever more frequently, digital) format.

34. There are many different types of computer programs and data bases, designed for multiple uses in business, government and private settings. These works may be made available to the public in various ways (e.g., by sale or licensing, including subscription agreements) and may be copied quite easily, by, e.g., downloading into a computer memory or—in the near future—by transfer from a CD-ROM directly onto another digital carrier. Unauthorized rental could virtually supersede organized distribution in certain cases, and the opportunities thus created for unauthorized copying could seriously prejudice the legitimate interests of authors and other owners of copyright.

35. These considerations have led in certain countries to the enactment of a rental right for owners of rights in computer programs, and to proposals for such a right for owners of rights in data bases.

36. The above-mentioned developments at the national level have created a new balance of interests between the rights of authors and other owners

of copyright in certain works, on the one hand, and the proprietary rights of the lawful owners of copies, on the other. Lawful owners of copies continue to be free to resell the copies or lend them in private circles; denying this freedom would be in conflict with proprietary rights. At the same time, this freedom should not go so far as to also extend to rental which has become an important means of making copies available to the public, since this would go beyond what is justified for the respect of proprietary rights and would conflict with the basic objectives of copyright. The scope of application of the principle of exhaustion of the right of distribution after the first sale of copies has been and should be restricted accordingly.

37. These developments have resulted in a significant extension of the application of the right of distribution. At the same time, as regards the *right of importation*, the possibility of exactly the opposite trend has emerged recently. Certain countries have excluded or at least restricted the application of this right in respect of copies the making of which has been authorized in other countries, and, in this connection, a new theory, the theory of "international exhaustion," has emerged. Under that theory, once copies are lawfully put on the market in one country, they may be lawfully imported into any other country without the authorization of the author or other owner of copyright.

38. It should be pointed out that "international exhaustion" is not the same as the exhaustion that may apply within a group of countries which have formed a single economic territory or customs union for purposes which include the free circulation of goods. In such a case, the relevant legislation of the countries concerned may provide that the first sale or other first transfer of ownership of copies with the consent of the author or other owner of copyright in one country of the territory exhausts the distribution right in the other countries *within* that territory. However, consistent with the principle of territoriality of copyright, such first sale or other first transfer of ownership will *not* exhaust the distribution right in countries *outside* the single economic territory or customs union.

39. The theory of international exhaustion seems to be based on a perception that territorial distribution rights may create barriers to international trade because they permit the exclusion of copies of works produced under a license in one country from importation into other countries where copies of the same works may not yet be on the market, or where copies of the works may be on the market but for a higher price. International exhaustion is seen as a means of reducing "trade barriers" by

"opening" markets to imports from suppliers of lawfully made copies in other countries.

40. This new theory does not take into account a well-established principle of competition law for the revision of which no reason has emerged, namely the principle that the "vertical" exercise of exclusive intellectual property rights—such as the licensing of distribution rights by the author or other owner of copyright to different persons in different countries—does not constitute anti-competitive activity. Application of this theory might stimulate imports and promote international competition as a matter of trade law or policy, but it seems doubtful that a change in one of the fundamental rules of the international copyright system is the right way to achieve this result. The principle of territoriality provides security for the chain of authorizations that permit orderly supply of copies for international distribution. A possible alternative to this system could be unorganized and sporadic local supply of copies, or, rather, supply from a single source, possibly a great distance away, with less sensitivity to the needs of each market, on the one hand, and loss of the possibility of copyright owners to control one of the main forms of exploitation of their works, on the other, with the double result of increasing piracy and undermining the resources for important creative segments of the cultural and information industries and, as an inevitable consequence, a decrease in the supply of new works (that is, just the opposite of what is intended).

Proposals

41. Of the two inseparable corollary rights—the right of first distribution and the right of importation—to the right of reproduction, the recognition of which may be deduced from the Berne Convention, it would seem desirable to recognize the *right of importation*, in the form of an interpretative provision included in a possible protocol to the Berne Convention.

42. The explicit recognition of the *right of first distribution* in itself would not seem an urgent need, since the absence of such recognition has not created significant problems in the application of the Berne Convention. There are, however, two contexts in which such recognition may still be found desirable.

43. The first context is the relationship of the right of first distribution with the right of importation: explicit recognition of the right of first distribution would provide an appropriate foundation

for explicit recognition of the right of importation as an indispensable corollary to the right of first distribution.

44. The second context is the relationship of the right of first distribution with those elements of the right of distribution which "survive" the first sale of copies. In this respect, the same solution may be applied as that followed in various national laws, namely (i) providing a (general) right of distribution in respect of all categories of works; (ii) providing, in general, for the possibility to apply the principle of exhaustion of the right (first sale doctrine); (iii) clarifying that such exhaustion does not extend to the *droit de suite*; and (iv) excluding the exhaustion of the right of distribution in some specific cases (in particular, in the case of rental, in general, or rental of certain categories of works).

45. The other possible option would be to follow the solution of the memorandum discussed by the second session of the Committee of Experts, that is, in addition to the explicit recognition of the right of importation, to provide only for those specific rights that survive the first sale of copies.

46. Whichever of the two solutions is applied, the most substantive question is the scope of those elements of the right of distribution which survive the first sale (or other first transfer of ownership) of a copy. It is obvious that the right to resell the copy (except for the case of the *droit de suite*) should not survive. It is clear now that there would be no support for any provision on traditional public lending rights (granted in case of "public lending" of books and similar printed publications). It is difficult to gauge the general feeling about the need for the survival of a possible general right of lending in cases not covered by the above-mentioned traditional public lending rights. Taking into account the recent developments at the national level and the results of the discussions at the second session of the Committee of Experts, it seems that it is only the recognition of a rental right surviving the first sale which may receive fairly general support.

47. For the sake of sufficiently uniform regulation of the most basic rights in respect of the various categories of works, and because, if rental really becomes an important means of exploitation of a category of work, the considerations in favor of the recognition of a right of rental hardly differ significantly among categories of works, the recognition of a general right of rental would be desirable. The outcome of the discussions at the second session of the Committee of Experts indicates, however, that such a proposal would not receive sufficient support. What may receive such support is the

recognition of the right of rental in respect of certain categories of works. The categories of works to which the right of rental (surviving the first sale of copies) might be accepted are the following: musical works in the form of graphic notation, audiovisual works, works the performances of which are embodied in sound recordings (and, of course, in the neighboring rights context, also sound recordings themselves), computer programs, as well as any other kinds of works (including collections of works and/or of data (such as data bases)) stored in electronic (including digital) format. In these cases, public lending may, and in general does, have the same effect as rental on the possibility of normal exploitation of the works concerned. Therefore, in addition to the recognition of the right of rental surviving first sale, it seems justified to consider, as a possible alternative, the recognition of a right of lending, too, in a similar manner.

48. In order to fulfill their functions, the bundle of rights forming copyright should normally be exclusive rights of authorization. The restriction of exclusive rights to a mere right to remuneration should only be allowed in exceptional cases where there are specific reasons for such restriction. In the case of the right of rental, in general, there seem to be no such reasons. Where some exception might still be considered is where there are already existing systems in a country which are not easy to change and, thus, some transitional solution is inevitable to make possible the accession to the protocol of the countries concerned. If the alternative to also recognize a public lending right in respect of the same categories of works were adopted, specific exceptions might be justified to the exclusive nature and even to the very obligatory application of such a right. It seems that the same conditions may be set here as the ones provided for in Article 9(2) of the Berne Convention.

49. *It is proposed that the protocol*

(a) should state that, under the present text of the Berne Convention, it is obligatory to protect the exclusive rights of the author or other owner of copyright to authorize the first distribution and the importation (for distribution) of copies of works, as these rights, although not mentioned in the Convention, are inseparable corollaries to the right of reproduction expressly mentioned in the Convention; and

(b) should provide the following:

(i) the author of, or other owner of copyright in, a work has the exclusive right to authorize the distribution of the original or

copies of the work, through sale or other transfer of ownership, or through rental, public lending or other transfer of possession;

(ii) subject to Article 14^{ter} of the Berne Convention (*droit de suite*), any national legislation may provide that the right mentioned in item (i) is not applicable in respect of the original or a copy of the work which has been sold, or the ownership of which has been otherwise transferred, by or pursuant to an (implicit or explicit) authorization of the author or other owner of copyright;

(iii) the faculty provided for national legislation under item (ii) does not apply in case of rental [or public lending] of the original or copies of

- musical works in the form of graphic notation,
- audiovisual works,
- works the performances of which are recorded in phonograms (sound recordings),
- computer programs, and
- any other kinds of works stored in electronic (including digital) format;

[(iv) notwithstanding item (iii), any country that, on the date of the adoption of the protocol, has in force provisions under which only a right to remuneration exists for the rental of copies of works the performances of which are recorded in phonograms, may make a reservation declaring that it will not recognize the exclusive right to authorize the rental of such copies after the copies concerned have been sold or their ownership has been otherwise transferred by or pursuant to an (implicit or explicit) authorization of the author or other owner of copyright, but will maintain, at least temporarily, such a right to remuneration;]

[(v) any national legislation may provide, in certain specific cases, for exceptions to the exclusive right of the author or other owner of copyright to authorize public lending provided for in items (i) and (iii), provided that such exceptions do not conflict with the normal exploitation of the works and do not unreasonably prejudice the legitimate interests of authors or other owners of copyright;]

(vi) the author of, or other owner of copyright in, a work has, even following the sale or other transfer of ownership of the copies of the work by or pursuant to his or its (implicit or explicit) authorization, the exclusive right to authorize the importation of

copies of his work, whether or not such copies were made with his or its authorization, into the country, or where two or more countries have formed a single economic territory for purposes including the free circulation of goods, and the national legislation of the countries concerned so provides, into any of the countries concerned;

(vii) the right provided for according to item (vi) is not applicable where the importation is effected by a person for his personal and non-commercial use as part of his personal luggage.

IX.

ENFORCEMENT OF RIGHTS

Situation under the Berne Convention

50. The Berne Convention only contains two provisions relating directly to the enforcement of rights. First, it provides that infringing copies of a work are subject to seizure in any country of the Berne Union where the work enjoys protection and that this is so even when the copies come from a country where the work is not or no longer protected (Article 16(1) and (2)). Second, it provides that, if copies of recordings of musical works made in a country under a compulsory license are imported, without permission of the author or other owner of copyright, into a country where they are considered as infringing copies, they are subject to seizure (Article 13(3)).

51. Furthermore, as provisions indirectly requiring appropriate enforcement measures in any country party to the Berne Convention, the provisions of Article 36 should also be taken into account. Paragraph (1) of the Article provides that "[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention," and, under paragraph (2) of the Article, that "[i]t is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention." It is obvious that these provisions cannot be respected without appropriate enforcement measures.

Consideration of standards for the enforcement of rights at recent WIPO meetings and in other international fora

52. At the beginning of the 1980s, WIPO started an intensive anti-piracy program. That program

included, *inter alia*, the organization of two WIPO Worldwide Forums on Piracy (1981 and 1983), an anti-piracy resolution by the Conference of WIPO (1985), the elaboration of detailed principles on anti-piracy measures concerning the piracy of audiovisual works, phonograms and the printed word in the series of meetings on various categories of works (1986 to 1988), and the discussions of the application of anti-piracy measures in the framework of a number of development cooperation programs.

53. In parallel, WIPO also dealt with the questions of the fight against counterfeiting in the field of industrial property. A committee of experts on the protection against counterfeiting held two sessions (1986 and 1987).

54. At the above-mentioned meetings, advice on draft model provisions (in the case of counterfeiting) and on draft "principles" (in the case of piracy) was discussed, both intended to achieve the following two main goals: (i) to make legislators, governments and the general public aware of the need to combat counterfeiting and piracy; and (ii) to create material that would be useful both to those who prepare national laws and to those who adopt them, when they consider which provisions national laws should contain as measures for effectively and efficiently combating counterfeiting and piracy. Naturally, the model provisions and the principles, even where endorsed by the committees of experts, did not create in any way an obligation of any government or legislative body to follow them.

55. As a result of the various WIPO meetings discussing measures against counterfeiting and piracy, it was found that it would be appropriate to discuss the questions of counterfeiting and piracy together since both their legal nature and the measures for combating them were similar. It was also taken into account that one and the same illegal act frequently violated both industrial property rights ("counterfeiting") and copyright and/or neighboring rights ("piracy"). (For example, when illegally manufactured copies of a phonogram containing the performance of a musical work protected by copyright (pirate copies) are offered for sale under a label that is the imitation of a protected trademark (counterfeit trademark).) Therefore, in 1988, WIPO convened a Committee of Experts on Measures Against Counterfeiting and Piracy.

56. The said Committee of Experts discussed draft model provisions for national laws prepared by the International Bureau of WIPO (document C&P/CE/2) in the preparation of which all the results of the above-mentioned WIPO meetings

had been utilized. The draft model provisions contained provisions on conservatory measures, on civil remedies and on criminal sanctions. The following conservatory measures were proposed: seizure of pirate copies; sealing of the premises where acts of piracy took place; seizure of implements used for the manufacturing or packaging of pirate copies and of papers referring to such copies; ordering the termination of the acts of piracy; ordering disclosure of the source of pirate copies. The following civil remedies were proposed: payment of damages; payment of legal costs (including lawyer's fees); destruction of pirate copies and of implements susceptible to be used to continue acts of piracy; ordering the cessation of acts of piracy. As regards criminal sanctions, it was proposed that any act of piracy should be qualified as an offense: under one alternative, the sanction was, where the act of piracy was committed with criminal intent, the same punishment as that provided for theft, otherwise a fine; under another alternative, the sanction was imprisonment or a fine or both.

57. At the April 1988 session of the Committee of Experts, a number of comments were made by the various delegations and the representatives of invited organizations, and significant progress was made to set international standards for the fight against piracy (and counterfeiting).

58. Since 1988, however, no new session of the said Committee of Experts has been convened because measures for the enforcement of intellectual property rights, and particularly measures against counterfeiting and piracy, were expressly mentioned in the agenda of the negotiations concerning trade-related aspects of intellectual property in the framework of the Uruguay Round of GATT, which began in 1986, and it was felt desirable to wait for the outcome of those negotiations.

59. In the draft WIPO Model Law on Copyright prepared by the International Bureau of WIPO (documents CE/MPC/I/2, CE/MPC/II/2 and CE/MPC/III/2) and discussed by a Committee of Experts at three sessions in 1989 and 1990, the chapter on enforcement of rights still took the form of a mere reference to the draft WIPO Model Provisions on Measures Against Counterfeiting and Piracy, since it was hoped that, with the completion of the Uruguay Round negotiations originally scheduled for the end of 1990 (but not yet completed when the present document was written (March 1993)), those Model Provisions would be finalized and published.

60. When, however, in keeping with the program of WIPO for the 1992-93 biennium, the Commit-

tee of Experts on a WIPO Model Law on the Protection of Producers of Sound Recordings was convened for June 1992, and the Uruguay Round negotiations were still not completed, it was decided that the draft of that Model Law should include a chapter on enforcement of rights (document MLSR/CE/1/2). The said chapter contained detailed provisions on conservatory measures, civil remedies, criminal sanctions and on measures, remedies and sanctions against abuses in respect of technical means applied for the protection of copyright. At the June 1992 session of that Committee of Experts, the proposed model provisions—which otherwise could be considered as also applicable *mutatis mutandis* for the enforcement of copyright in literary and artistic works—were, in general, supported, and comments were only made on some details of the draft provisions.

61. The proposals, below, are based on the results of the above-mentioned various WIPO meetings dealing with the questions of international standards applicable for the enforcement of copyright and neighboring rights. They also reflect some further ideas that have emerged from the discussions of the same questions in other international fora, e.g., from the Uruguay Round negotiations of GATT.

62. On March 3, 5 and 8, 1993, respectively, the International Bureau of WIPO received letters from Sweden (signed by Mr. Henry Olsson, Legal Counsel, Ministry of Justice), Australia (signed by Mr. C.C. Creswell, Acting First Assistant Secretary, Attorney-General's Department, Business Law Division) and the United States of America (signed by Mr. Ralph Oman, Register of Copyrights), respectively, in which it is proposed, in essence, that the discussions of enforcement of rights, in the present WIPO Committee of Experts, be based on a text developed during the said GATT negotiations. That proposal was made without knowing what the present memorandum would contain.

63. The above-mentioned three letters indicate that certain technical amendments are necessary to adapt the said GATT text to the purposes of the possible protocol to the Berne Convention. However, the letters do not specify the said amendments to be made.

64. The three letters and the said GATT text are reproduced in the Annex.

65. The proposals of the International Bureau contained in paragraphs 66 to 79 concern:

- (i) the definition of infringement (paragraphs 66 and 67);
- (ii) provisional (conservatory) measures (paragraphs 68 and 69);
- (iii) civil remedies (paragraphs 70 and 71);
- (iv) criminal sanctions (paragraphs 72 and 73);
- (v) measures against abuses in respect of technical devices (paragraphs 74 and 75);
- (vi) "border" measures (paragraphs 76 and 77);
- (vii) general procedural safeguards (paragraphs 78 and 79).

[i] *Definition of infringement*

66. It would seem to be useful to define "infringement," a notion that is frequently used in connection with the enforcement of rights.

67. *It is proposed that the protocol define "infringement" as follows: "Infringement" is a violation of any right protected under the protocol, whether the right is a moral right, an exclusive right of authorization or a right to remuneration.*

[ii] *Proposals concerning provisional (conservatory) measures*

68. The availability of appropriate provisional (conservatory) measures is an indispensable element of any efficient mechanism for the enforcement of copyright. The most important objectives of such measures are the prevention of acts of infringement and the seizure of infringing copies, reproducing equipment and other implements that could be used for (further) infringements and that constitute essential evidence and could disappear if not brought under the control of the court. These measures must be available on an *ex parte* (*inaudita altera parte*) basis where giving the defendant prior notice would be counterproductive.

69. *It is proposed that any country party to the protocol be obliged to provide for the following measures to be applied, as a rule, by judicial authorities, in the following manner:*

(a) *granting temporary preliminary injunctions to prohibit the committing, or the continuation of the committing, of infringements;*

(b) *ordering the search, temporary seizure and temporary impounding*

(i) of copies of works which can be reasonably suspected to have been made or imported without the authorization of the author or other owner of copyright where the making or importation of copies is subject to such authorization; and

(ii) of the packaging of, and the implements the predominant use of which can be reasonably suspected to be the making of, such copies, as well as of documents, accounts or business papers relating to such copies;

(c) requiring the party who or which has requested that the measures mentioned in items (a) and (b) be taken (hereinafter referred to as "the applicant") to provide a security, or other assurance, sufficient to protect the party against whom or which the measures are requested and to prevent abuse;

(d) granting the measures mentioned in items (a) and (b) *ex parte*, where appropriate, in particular where any delay is likely to cause irreparable harm to the author or other owner of copyright or where there is a demonstrable risk of evidence being destroyed;

(e) revoking the provisional measures mentioned in items (a) and (b), above, where the applicant does not initiate within a reasonably short time a proceeding as a result of which a decision may be taken on the merits of the case.

[iii] *Proposals concerning civil remedies*

70. The purposes of civil remedies are (i) to provide compensation for the prejudice caused by infringements, (ii) to dispose appropriately of the infringing copies, (iii) to dispose appropriately of implements used for infringing activities and (iv) to grant injunctions to prohibit further infringements. Such remedies must always be available irrespective of whether the infringement has been committed willfully and/or for profit-making purposes.

71. *It is proposed that any country party to the protocol be obliged to provide for the following remedies to be applied by judicial authorities in the following manner:*

(a) ordering that the infringer who knew or had reasonable grounds to know that he was engaged in infringing activities pay to the author or other owner of copyright whose right has been infringed damages ad-

equate to compensate for the prejudice suffered by him or by it as a consequence of the act of infringement, as well as to pay the legal expenses of the author or other owner of copyright, including attorney's fees, and fixing the amount of damages taking into account the importance of the prejudice suffered by the author or other owner of copyright, as well as the importance of the infringer's profits attributable to the infringement;

(b) where infringing copies exist, ordering the destruction, forfeiture or other reasonable disposition, including surrender to the author or other owner of copyright, of such copies and their packaging, except such copies and their packaging whose owner is a third party who or which acquired ownership in good faith;

(c) ordering the destruction, forfeiture or other reasonable disposition, including surrender to the author or other owner of copyright, of implements used by the infringer predominantly for infringing activities, where there is a danger that such implements may be used to commit further acts of infringement;

(d) granting injunctions to prohibit acts of infringement, in cases where there is a danger that any such act may be continued.

[iv] *Proposals concerning criminal sanctions*

72. Civil remedies are not always sufficient deterrents. Where infringement becomes a business and where closing down one plant with the assistance of courts and law enforcement authorities may only mean that the plant will re-open somewhere else, civil remedies are not sufficient. Infringements committed willfully and with profit-making purposes should be punished by criminal sanctions, and the level of such sanctions must make it clear that such infringements of copyright are serious offenses. It may be considered that criminal sanctions be also applicable in case of infringements committed through gross negligence, for profit-making purposes. Furthermore, a provision on recidivism may also be justified. The proposal concerning the latter appears hereafter in square brackets because it might be considered such a detail of the regulation of criminal sanctions which should rather be a matter for national legislation.

73. *It is proposed that any country party to the protocol be obliged to provide for the*

following penal sanctions to be applied by judicial authorities in the following manner:

(a) fixing a fine and/or a term of imprisonment at least in cases where infringement is committed willfully [, or through gross negligence,] and for profit-making purposes;

[(b) increasing the upper limit of the penalties mentioned in item (a) where the defendant has been convicted for a new act of infringement within five years, or, if there is a period prescribed by the general provisions of the criminal law of the country for the increase of penalties in case of recidivism, within that period, from his conviction for a previous infringement;]

(c) applying civil remedies provided for according to paragraph 71, above, in a criminal proceeding, in cases where no decision has been taken or is about to be taken on such remedies in a civil proceeding.

[v] *Proposals concerning measures against abuses in respect of technical devices*

74. In certain cases, the only practical means of preventing copying is through so-called "copy-protection" or "copy-management systems," that is, systems containing technical devices that either entirely prevent the making of copies or make the quality of the copies made so poor that they are unusable. Technical devices are also used to prevent the reception of encrypted commercial television programs except with the help of decoders (and the would-be viewers have to buy or rent such decoders). However, it is technically possible to make devices by means of which copy-protection and copy-management systems as well as encryption systems may—although illegally—be circumvented. Where such devices are manufactured or imported and distributed illicitly, the normal exploitation of the works is undermined and may cause serious prejudice to the authors of, or other owners of copyright in, those works. Such activities are violations of the protected rights and should be sanctioned in a way similar to that of other kinds of infringements.

75. *It is proposed that any country party to the protocol be obliged*

(a) to provide for the same sanctions, to be applied by judicial authorities, as the ones provided for according to paragraph 73, above, in case of manufacture or impor-

tation for sale or rental, or the distribution by sale or rental, of

(i) any device specifically or predominantly designed or adapted to circumvent any device intended to prevent or restrict the making of copies of works or to impair the quality of copies made (the latter device hereinafter referred to as "copy-protection or copy-management device");

(ii) any device that is capable of enabling or assisting the reception of an encrypted program, broadcast or otherwise communicated to the public, by those who are not entitled to receive the program;

(b) to provide that, in the application of provisional (conservatory) measures, civil remedies, criminal sanctions and border measures provided for according to paragraphs 69, 71 and 73, above, and 77, below, any illicit device mentioned in item (a)(i) and (ii), above, is assimilated to infringing copies of works;

(c) to provide that the author of, or other owner of copyright in, a work shall be entitled to damages provided for according to paragraph 71, above, in the same way as in a case where his or its copyright is infringed, where

(i) copies of the work have been made by him or it, or with his or its authorization, and offered for sale or rental in an electronic form combined with a copy-protection or copy-management device, and a device specifically or predominantly designed or adapted to circumvent the said device is made or imported for sale or rental or is distributed through sale or rental;

(ii) the work in which he or it has a right is included in an encrypted program broadcast or otherwise communicated to the public by him or it, or with his or its authorization, and a device enabling or assisting the reception of the program by those who are not entitled to receive the program is made or imported for sale or rental or is distributed through sale or rental.

[vi] *Proposals concerning "border" measures*

76. Border measures are intended to prevent infringing copies—or lawful copies in violation of the right of importation—from being brought into the country concerned. They constitute an effective way to counter acts of infringement, because it is frequently easier to prevent the distribution of in-

fringing copies at the border than after the copies have already been brought into the country and put into circulation. Border measures are usually carried out by administrative authorities (customs authorities) and not by judicial authorities. Safeguards and appropriate procedural rules are necessary to ensure the fairness and effectiveness of measures applied by such authorities.

77. *It is proposed that any country party to the protocol be obliged to provide the author or other owner of copyright with the possibility to apply for temporary seizure by the customs authorities of copies of works in connection with which he or it has valid grounds for suspecting that their bringing into the country would infringe his or its copyright, and to ensure an appropriate procedure concerning such provisional seizure, providing that*

(a) the author or other owner of copyright give a detailed description of the copies so as to enable the customs authorities and, where appropriate, the intended recipient, to recognize the copies concerned;

(b) the applicant, unless exceptional circumstances warrant otherwise, provide a security, or other assurance, sufficient to protect the intended recipient against any possible prejudice caused by unjustified measures; however, such a security or other assurance must not unreasonably deter recourse to submit applications for temporary seizure;

(c) the applicant give sufficient evidence that he or it is the author or other owner of copyright or a duly authorized representative thereof having standing under domestic law, and that he has valid grounds for the suspicion on the basis of which he has submitted his application;

(d) the intended recipient be promptly notified of the seizure;

(e) the seizure be revoked where the applicant does not initiate a proceeding as a result of which decision may be taken on the prolongation of the seizure as a provisional (conservatory) measure (according to paragraph 69(b), above) or on the final disposition of the seized copies or implements (according to paragraphs 71(b) and (c) and 73(c), above);

(f) the competent authority order inspection of the copies or implements concerned and allow, where appropriate, the author or

other owner of copyright, the intended recipient, the owner of the copies or implements, or his or its representative, to inspect them;

(g) the competent authority order that the applicant indemnify the intended recipient and the owner of the copies or implements concerned for any prejudice caused by an unjustified seizure.

[vii] *Proposals concerning general procedural safeguards*

78. *Providing for the availability of various enforcement measures may not be entirely sufficient. It seems desirable that the possible protocol also provide general safeguards to ensure due procedures for the application of those measures in keeping with the principles of justice and fairness and with the need for efficiency.*

79. *It is proposed that the protocol provide that any country party to it must include provisions in its national law necessary to ensure that*

(a) procedures for the enforcement of copyright be fair, equitable, transparent, expeditious, not unnecessarily complicated, costly or burdensome, and do not impose unreasonable time limits;

(b) parties against whom or which measures for the enforcement of copyright are to be taken, except for ex parte proceedings mentioned in paragraph 69, above, be given the right to written notice, before any such measures are taken, containing sufficient details, in particular the full indication of the facts that are claimed to justify the measures;

(c) except for ex parte proceedings mentioned in paragraph 69, above, parties be allowed to be represented and accompanied by a legal counsel of their choice;

(d) procedures do not impose overly burdensome or otherwise unreasonable requirements concerning personal appearances;

(e) parties be given a fair opportunity to substantiate their claim and to present, to this end, all relevant evidence and to seek disclosure, with the court's permission, of relevant information from other parties to the dispute and, where appropriate, from third parties;

(f) the competent authority allow, unless exceptional circumstances warrant otherwise, evidence given by experts appointed by the parties to the dispute or with their consent;

(g) procedures provide adequate means to protect confidential information provided by any of the parties to the dispute or by third parties required to give evidence;

(h) decisions be, as a general rule, in writing, reasoned, and promptly made available to the parties to the dispute;

(i) decisions be based solely on the facts in respect of which the parties were offered an opportunity to present their views;

(j) initial judicial decisions and final administrative decisions be appealable before a distinct judicial body; and

(k) the competent authority have the authority to order a party at whose request enforcement measures were ordered to pay to any other party wrongfully enjoined or restrained adequate compensation for the prejudice caused by the unjustified measures.

X.

NATIONAL TREATMENT

Situation under the Berne Convention

80. The principle or rule of national treatment is stated in the first sentence of Article 5(1) of the Berne Convention which reads as follows: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals"

81. This rule of national treatment in the Berne Convention is of a universal nature in the sense that—apart from the very few exceptions mentioned below—it is not limited to any particular categories of works or particular rights.

82. The Berne Convention allows *reciprocity*, rather than national treatment, in the following four cases:

(i) *works of applied art*: if in the country of origin they are protected solely as industrial designs, a country which grants protection both under the copyright law (for "works of applied art") and its

industrial design law (for "industrial designs") may deny protection under its copyright law (but has to grant protection under its industrial design law (Article 2(7));

(ii) works that qualify for protection by virtue of the "back door" provision: their protection may be limited to the protection that is given to works of nationals of the countries party to the Convention by the country whose nationals the authors of such countries are (Article 6(1));

(iii) *comparison of terms*: if a country grants protection longer than the minimum provided in the Berne Convention and the country of origin of the work grants protection that is shorter than in the first-mentioned country, the first-mentioned country may apply the said shorter term in the case of a work the country of origin of which grants the shorter term (Article 7(8)) (there is a specific exception in Article 30(2) concerning the term of protection of the right of translation, but, for all practical purposes, it is not significant);

(iv) *droit de suite*: a country that recognizes the *droit de suite* may only apply it to works whose authors are nationals of another country which also recognizes the *droit de suite* (Article 14^{ter}(2)).

Different means of, and arguments and methods used for, creating exceptions to national treatment

83. Recently, certain arguments have emerged in copyright literature, and also, some attempts have been made at the level of national legislation to create exceptions to national treatment in cases other than the above-mentioned four exceptions allowed by the Berne Convention. The exception may consist of simply denying national treatment or replacing it by reciprocity. Denial means that a given provision in national law applies only to nationals, that is, it does not apply to foreigners. Reciprocity means that a given provision in the national law applies to foreigners only if, and to the extent to which, *their* country provides for the right and makes it available to foreigners. The existing four exceptions in the Berne Convention to national treatment are all of this latter kind, that is, they provide for reciprocity.

Arguments alleging that certain payments are not covered by the Berne Convention

84. The Berne Convention covers the "rights of authors in their literary and artistic works" (see the preamble of the Convention). National treatment must be granted "in respect of works for which ... [authors] are protected under [the] Convention, in

countries... other than the country of origin," and this treatment must extend to "the rights which their respective laws [that is, the respective laws of the said countries] do now [that is, at the time of the adoption of the Convention] or may hereafter [that is, any time after the adoption of the Convention] grant to their nationals" (Article 5(1)).

85. The "respective laws" of the countries that are obliged to grant national treatment under the Berne Convention are any laws that provide for "rights of authors in their literary and artistic works." The name or title of a law, and the fact that the law may also contain provisions the subject and nature of which concern other rights, do not affect the obligation to grant national treatment in respect of the "rights of authors in their literary and artistic works." The mere fact that such rights are, in the law, called something other than copyright or author's rights (e.g., rights alleged to be cultural endowments or tax law institutions), does not change their legal nature and does not remove the obligation to grant national treatment.

86. Naturally, one has to decide what rights are covered by the notion of "rights of authors in their literary and artistic works." Rights mentioned in the Convention, or being of the same nature as those rights, are obviously covered. Thus, if the right is, e.g., an exclusive right to authorize a certain use of literary and artistic works, there is no doubt that national treatment must be granted in respect of such a right. The same is true if the right is a mere right to remuneration where such a right is admitted, merely as an alternative to an exclusive right of authorization by the Berne Convention (cf. Articles 11 and 13). At the same time, if authors have a right to payment which does not relate to the use of their works (but, e.g., the payment is due to them as an endowment, taking into account their profession as authors, as a contribution to promote national creativity), it cannot be said that such a right is a right in their literary and artistic works. Consequently, such a right is not covered by the obligation to grant national treatment.

87. Sometimes it is argued that the fact that it is not the actual users of works who pay for the use of a work—but e.g. the government or the municipality that pays—the right to payment is not of the nature of rights covered by the Berne Convention. However, if a right in literary and artistic works takes the form of a right to remuneration for the use of such works, it is irrelevant—from the viewpoint of whether or not the right is covered by the Berne Convention and its principle of national treatment—who pays the remuneration. Usually, it

is the person or entity who or which carries out a qualified act (user) who pays; however, even if the law provides otherwise and obliges some other persons or entities to pay, or if the State itself undertakes to pay, as long as the remuneration is to be paid for the use of literary and artistic works, it cannot be seriously questioned that the right to such remuneration is a right in literary and artistic works covered by the obligation to grant national treatment.

88. The first significant right in respect of which the question emerged whether it is covered by the principle of national treatment was the so-called *public lending right* (for the definition of the right, see paragraph 10, above) which had been introduced in certain countries as a right to remuneration for the lending of books by not-for-profit libraries to the public.

89. In Germany, the public lending right is provided in the copyright law. In other countries, the public lending right is regulated outside the copyright law and is called by the government a kind of cultural or social endowment.

90. The basis for the collection of public lending right payments is either the number of books stocked in libraries, or the number of loans effected or both, which numbers are established mostly through sampling systems. A further method is—although it is only rarely applied—that there is no sampling, and the amount of payment is calculated as a percentage of the annual public subsidy paid to libraries for purchasing books.

91. Public lending right payments are covered by public funds (in general, by government or municipal budgets) and collected by special institutions—usually of semi-public nature—such as national authors' funds. In Germany, however, public lending right payments are collected and administered by private collecting societies (collective administration being a condition under the law itself).

92. In some countries, the amount collected is paid to individual authors, although a certain percentage is retained for general cultural and social purposes. In other countries, there is no payment to individual authors; the whole amount collected is used for collective purposes.

93. Under the Copyright Law of Germany, national treatment does apply to the public lending right. The other countries where this right exists do not grant national treatment in this respect on the basis of the argument that this right is not part of copyright but a right to endowment, a special pay-

ment for the promotion of national creativity. In those countries, only nationals enjoy this right (that is, even reciprocity is not applied). In some countries, however, the right is extended to foreigners if they reside in the country or, under certain conditions, to authors of works published in the national language of the country.

94. It is submitted that, although the above-mentioned laws (other than the law of Germany) provide for public lending rights in laws other than the copyright law, those rights, as discussed below (see the next paragraphs), are of the nature of copyright, that is, rights in literary and artistic works. Nevertheless, for the reasons also discussed below (see paragraphs 96 and 97), it is believed that the denial or restriction of national treatment in respect of the said rights is, as an exception, allowed in the countries party to the Berne Convention.

95. As is outlined above, public lending rights take different forms. These rights have, however, something in common; namely, that they relate to a specific use of the works concerned: lending copies by non-profit-making libraries to the public. Rights conferred upon authors not just because they pursue a profession, but because their works are used in a certain way, are of a nature of "rights in literary and artistic works." This nature of public lending rights is clearer where there is individual distribution, and particularly where the distribution is made on the basis of sampling of actual frequency of lending. However, the mere fact that sampling is not undertaken and distribution is made on some other basis (e.g., on the basis that the works concerned have been made available for lending to the public) does not change the fact that such rights are "rights in literary and artistic works." The question of providing for collective use of the payments rather than for individual distribution is discussed below.

96. Nevertheless, controversy concerning the denial of national treatment in respect of public lending rights has mainly emerged at the level of copyright theory; in the relationship of the member countries of the Berne Union, the fact that national treatment, with the exception of Germany, is denied in respect of these rights has not created any real conflicts; rather, it seems that there is general agreement among the member countries of the Union that the present situation at the national level is acceptable. This attitude of the member countries of the Berne Union may be considered a case described in Article 31(3)(a) of the Vienna Convention on the Law of Treaties. Under Article 31(1) of the said Vienna Convention, "[a] treaty

shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Article 31(3) of the Convention adds that "[t]here shall be taken into account together with the context: ... any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions." The Vienna Convention is not applicable in respect of the Berne Convention since it is only applicable to treaties concluded after its entry into force, and the Berne Convention (even its latest 1971 Act) is not such a treaty. However, the Vienna Convention is a codification of customary international law, and, on the basis of customary international law, by and large the same conclusions may be reached as on the basis of the Vienna Convention itself.

97. It is proposed that it should be accepted that, since the adoption of the latest text of the Berne Convention, a *de facto* agreement of the member countries of the Berne Union has emerged about a fifth exception to the obligation to grant national treatment (concerning public lending rights for lending books by non-profit-making libraries to the public). However, it does not seem to be sufficient just to state this fact; all the necessary consequences of the said *de facto* agreement should be drawn.

98. First of all, it should be kept in mind that exceptions to the obligations under the Convention must not be interpreted in an extensive manner; they should rather be interpreted in a restrictive manner. Consequently, it should be clarified that the fact that there is agreement that national treatment may be denied in respect of the right to remuneration for "*public lending*" of books is in no way an appropriate basis to deny national treatment in respect of any *other right* to remuneration for any other use of literary and artistic works other than books. Thus, *inter alia*, the admitted exception is not a basis to extend the scope of rights not covered by national treatment to the lending by non-profit-making public libraries of works other than books (such as audiovisual works, works embodied in sound recordings, computer programs, etc.). Actually, for the sake of a sufficiently solid basis to determine the limits of the application of this new, fifth, *de facto* exception to the principle of national treatment, it may be beneficial to include an explicit provision—like the one on the *droit de suite*—in the Berne Convention. The operation would be similar to the removal of a cancerous part of an organ; by sacrificing that part, there might be hope to stop the transmission and proliferation of the cancer.

99. The fact that the danger of transmission and proliferation of the cancer of denial of national treatment to other areas does exist has been spectacularly demonstrated in the field of the *right to remuneration for private reproduction for personal purposes* of audiovisual works and works embodied in sound recordings ("home taping"). While certain countries respect national treatment in this case, certain other countries are denying national treatment to a greater or lesser extent.

100. In this case, however, not only the principle of national treatment is involved, but also the question of the recognition of a right—the most traditional and most fundamental right—specially granted by the Berne Convention: the right of reproduction.

101. The Berne Convention contains the basic provision of the right of reproduction in its Article 9(1) which reads as follows: "Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form."

102. The general rule of possible limitations of this exclusive right is contained in Article 9(2) which reads as follows: "It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author."

103. For the interpretation of this provision, it is important to note that the Program for the 1967 Stockholm Diplomatic Conference for the revision of the Convention contained a proposal for more specific limitations. The proposal aimed basically at making it possible for the national legislator to permit the reproduction of protected works in certain cases, namely "(a) for *private use*; (b) for legal or administrative purposes; and (c) in certain particular cases, provided that (i) the reproduction was not contrary to the legitimate interests of the author, and (ii) that it did not conflict with a normal exploitation of the work" (emphasis added).

104. At the Diplomatic Conference, proposals were made in favor of both extending and restricting the scope of possible limitations. At the end, agreement was reached on a more general wording which constitutes the present contents of Article 9(2). The report of the Diplomatic Conference contains the following interpretative state-

ment in relation to Article 9(2): "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies are made, photocopying may be permitted without payment, particularly for individual or scientific use" (paragraph 85 of the report of Main Committee I). Although the examples given concerning photocopying cannot be considered fully valid any longer (since, e.g., photocopying made by entities on the basis of blanket licenses granted by collective administration organizations has become a way of normal exploitation of the works concerned), the basic interpretative statements of the Diplomatic Conference concerning the application of Article 9(2) are still valid (including the statement clarifying that, in the case of such "mass uses," a right to remuneration may replace the exclusive right).

105. From the viewpoint of reproduction for private purposes, it is important to note that the direct reference in the Program of the Diplomatic Conference to reproduction for private use does *not* appear in the final text of Article 9(2). During the Conference, the Delegation of the United Kingdom submitted a proposal with the aim of eliminating items (a) and (b) from the Program proposal and instituting a different wording for condition (i) mentioned in point (c) of the Program (see paragraph 103, above) (mainly replacing the expression "is not contrary to the legitimate interests of the author" by "does not unreasonably prejudice the legitimate interests of the author") which was finally adopted. Consequently, it is clear that the Diplomatic Conference did not wish to give national legislators specific instructions about specific cases (e.g., "private use"). Instead, general criteria were introduced in the proposed provisions. The result is that national legislators must apply those criteria also in respect of private reproduction for personal purposes. If such reproduction conflicts with a normal exploitation of the work, it cannot be

permitted, and, if such reproduction unreasonably prejudices the legitimate interests of the author or other owner of copyright, it can only be permitted against an equitable remuneration (which should, as a minimum, mitigate the prejudice to a "reasonable" level).

106. The right to remuneration for home taping has been introduced in a number of countries because it was recognized that widespread home reproduction of audiovisual works and works embodied in sound recordings does unreasonably prejudice the legitimate interests of authors and other owners of copyright. An appropriate remuneration paid on the basis of such a right is suitable to mitigate the prejudice thus suffered to a reasonable level.

107. It is submitted that if, in addition to the option to allow the continuation of a practice that unreasonably prejudices the legitimate interests of authors and other owners of copyright without taking any measures against such prejudice, there is another option available (and, in various countries, applied with success), namely, the option of introducing a right to remuneration to at least mitigate the prejudice to a reasonable level, it is an obligation for a party to the Berne Convention to introduce and apply such a right.

108. The right to remuneration for "home taping" has been introduced, in general, in the following way: The remuneration is paid by the manufacturers and importers of recording equipment and/or recording material to a collective administration organization. (The manufacturers and importers may, and, in general, do include all or part of the amounts involved in the price of those products and, thus, the remuneration is paid to those persons who actually copy the works.) The collective administration organizations, in certain countries (with the exception of a more or less large percentage to be set aside for "collective purposes"), distribute the remuneration to authors and other owners of copyright whose works are reasonably presumed to have been reproduced privately for personal purposes. Distribution techniques differ from country to country, but it can be said that distribution is made by means of one of the most widespread techniques (used also by musical performing rights organizations), namely on the basis of sampling. This technique contains an element of "rough justice" but it still guarantees a fairly correct distribution to individual authors and other owners of copyright reflecting essentially the actual use of the works concerned. Various studies have proved that, in the case of audio home taping, the two main—almost exclusive—sources of reproduc-

tion are sound recordings and radio broadcasts. On the basis of broadcasting logs, record sales figures and other available data, the actual structure of home taping can be identified and the royalties can be distributed to individual authors and other owners of copyright with by and large the same precision as in the case of certain categories of traditional performing rights royalties, and all this at extremely low cost. In the case of video home taping, where copying is mainly from television programs but where also tape-to-tape copying exists, the identification of the works most frequently used is somewhat more difficult but, with an adequate sampling technique, still a fairly correct "rough justice" can be obtained.

109. The remuneration is due for the most basic form of use of literary and artistic works—for reproduction—and it is due to the authors of, or other owners of copyright in, those works. There is no reason to deny that the right to such remuneration is covered by the concept of "rights of authors in their literary and artistic works."

110. From the viewpoint of the application of national treatment in the case of home taping royalties, there are four categories of countries party to the Berne Convention for the time being: (i) those which grant national treatment; (ii) those which grant, in general, national treatment but where the law provides for the use of a certain percentage of the remuneration for (national) collective purposes; (iii) those which deny national treatment and apply reciprocity; and (iv) those which deny national treatment (thus restricting the enjoyment of the right to remuneration to nationals (usually combined with using the remuneration for collective purposes)).

111. On the basis of the analysis in paragraphs 99 to 109, above, it is submitted that the denial of national treatment in respect of home taping remuneration is in conflict with the principle of national treatment (not mentioning that it is also in conflict with the provisions of the Berne Convention—Article 9(1) and (2)—specially granting a right, the right of reproduction). The question of obligatory use of a certain percentage of the remuneration for "collective purposes" is discussed below.

112. The restriction or denial of national treatment in respect of such a basic use of works as reproduction undermines the very foundation of international copyright protection. It should also be taken into account that, with the advent of digital technology, private reproduction for personal purposes may become not only one of the most impor-

tant forms of reproduction—as it is already—but even *the* most important one. This indicates even more clearly the absurdity of any idea of trying to deny national treatment concerning remuneration rights for such reproduction by placing such rights outside the realm of copyright, negating the true legal nature of those rights.

Arguments based on the fact that a right is only recognized in few countries

113. It is understandable that it is not easily acceptable for countries that are more generous and quicker to recognize certain “new rights” than others, to undertake, on the basis of the application of the principle of national treatment, what may be seen as *de facto* unilateral obligations.

114. At the same time, it does not seem justifiable to deny national treatment on this basis, since it is quite general, practically inevitable, that a “new right” (except perhaps where there is first an international arrangement concerning its recognition) is introduced step by step and not by and large at the same time in all Union countries or in the majority of them. Article 5(1) of the Berne Convention is meant, *inter alia*, for such a situation. There is hardly any basis to deny its application in such a case.

115. The solution for the more generous countries that fall into a minority situation within the Berne Union, by recognizing certain “new rights,” may rather be a sufficiently rapid international harmonization in the relevant areas and the regular updating of the minimum obligations under the Berne Convention (something that is also the purpose of the adoption of the proposed protocol to the Berne Convention).

Arguments based on the idea that the denial of national treatment may be a form of retaliation

116. There is a provision of the Berne Convention on the basis of which national treatment can be denied in respect of works protected under the Convention as a consequence of the fact that the nationals of the country concerned do not receive appropriate protection in another country, namely the provision of Article 6 allowing such denial of national treatment in the case of “back door protection” (mentioned in paragraph 82(ii), above).

117. The possibility of non-application of treaty obligations as a “retortion” against those countries that fail to fulfill such obligations exists in international law. The use of this weapon in the case of the

Berne Convention would, however, not be appropriate or desirable. If such retaliation were generally allowed—even in cases where what is involved is nothing more than a difference of opinion based on two equally defensible interpretations of the Convention—the setting aside of the Convention might become a kind of reflex, and this might lead to the mutual non-application of the Convention and, as a final result, to the undermining of its operation.

118. It is more appropriate to try to resolve possible disputes between States party to the Convention concerning actual or alleged violations of obligations through appropriate dispute settlement mechanisms. The present text of the Berne Convention only offers one possible way of settling such disputes if they cannot be settled by negotiation, namely, bringing the disputes before the International Court of Justice (Article 33). This forum does not always fit the special aspects of intellectual property disputes and may not offer the possibility of a sufficiently rapid and efficient settlement which would correspond to the accelerating developments in the field of intellectual property. To solve this problem, a WIPO treaty under preparation would deal with the settlement of intellectual property disputes between States. (The Committee of Experts convened for the preparation of a possible diplomatic conference for the adoption of such a treaty will hold its meeting in May 1993, after the finalization of the present document). If adopted, that treaty may offer appropriate procedures for possible disputes concerning the violations of obligations under the Berne Convention.

Indirect denial of national treatment to certain works by transferring their protection from copyright to a *sui generis* system

119. The Berne Convention only protects literary and artistic works. If a production does not qualify as such a work, the obligations under the Berne Convention, including the obligation to grant national treatment, do not apply. Where certain productions are wrongly qualified as not being covered by the concept of literary and artistic works, the result is not only that the specific rights granted by the Berne Convention are not respected, but, if such productions are still protected in the framework of a *sui generis* system (which is sometimes the case), even national treatment is denied (since such *sui generis* systems, qualified as being outside the field of copyright, are not covered by the obligation to grant national treatment).

120. The above-described phenomenon is, in general, related to the application of overly strict

originality tests (e.g., where, for a work to be qualified as original, it is not sufficient that it be a creation in the literary and artistic domains, but it must fulfill further conditions, such as that it should reflect in a marked way the "personality of the author" or should contain the elements of "above-average" creative efforts). In such a system, the productions that do not pass the strict originality test may be—and fairly frequently are—still considered to deserve protection and, for this purpose, a specific—safety net—*sui generis* protection is made available. Experience shows, however, that such "safety nets" tend to attract works to a greater extent than what would follow from a strict application of the provisions relating to the delimitation of works and "non-works." In case of doubt, the productions land in the "safety net." But only the productions of nationals of the country. In the absence of national treatment, the productions of foreigners continue their route down towards the hard soil of free use; no safety for them (except, perhaps, some vague possibility for the application of the law of unfair competition).

121. Overly strict originality tests are not justified under the Berne Convention. The Berne Convention requires the protection of all creations in the literary and artistic domains, and does not differentiate according to the importance of the level of creativity; where there is room for creativity (that is, where what is produced is not the result of mere "sweat of the brow" or of an infringement of rights in preexisting creations) what is produced within that room in the literary and artistic domains is to be recognized as being covered by the concept of literary and artistic works.

122. The most important categories of works where overly strict originality tests have resulted recently in the effect of both denying copyright protection to productions that would have to have such protection under the Berne Convention and denying national treatment are computer programs, data bases and audiovisual works (the latter works, when thrown down towards the "safety net" *sui generis* protection level, are in general renamed as "video recordings" or "videograms"). The intrinsic conflict of such systems with the Berne Convention is recognized ever more clearly. Such recognition led, e.g., to the harmonization of originality tests, practically at the level determined by the Berne Convention, in the directive of the European Community on computer programs adopted in 1991.

123. In the possible protocol to the Berne Convention, there seems no need to include provisions that would restate what is already contained in the

Convention in this respect. What is desirable, however, is to apply originality tests that correspond to the Berne Convention. In such a case, the need for "safety net" systems may not even emerge.

Indirect denial or restriction of national treatment in the framework of collective administration of copyright

124. There are certain exclusive rights that may only be reasonably exercised on a collective basis. Needless to say, just because a right is not exercised individually but through a collective administration organization, there is no reason for the denial or restriction of national treatment.

125. In general, national treatment is not denied or restricted in a direct way in case of collective administration of rights. It is, however, fairly frequently denied or restricted, either on the basis of national legislation, or through the actual practice of collective administration organizations, in the form of using remuneration for (national) "collective purposes" without the authorization of the authors and other owners of copyright concerned.

126. It goes without saying that authors and other owners of copyright may authorize directly, or through bodies representing them, the use of a certain part of their remuneration for "collective purposes." It is, e.g., a general practice of the member societies of the International Confederation of Societies of Authors and Composers (CISAC) to provide in contracts between them—normally concluded with the approval of the governing bodies of the societies—for the possibility of using a certain percentage of the remuneration collected (for both national and foreign authors) for such purposes, a percentage which is normally limited to 10%.

127. If this practice is based on appropriate contractual arrangements and on appropriate internal statutory rules of the societies concerned (guaranteeing effective participation of the interested authors and other owners of copyright in making the relevant decisions), it is in harmony with the basic principles of copyright and with the provisions of the Berne Convention. The situation is, however, completely different if a national law provides that payments due to authors and other owners of copyright for the use of their works will not be paid to them but will be used (without their authorization) for (national) collective purposes (for the "promotion of national creativity" and/or for social purposes of (national) authors). If such a provision covers rights in works to be protected under the

Berne Convention, it is in indirect conflict with the principle of national treatment since the remunerations collected are thus nationalized (and their corresponding part is not made available for "collective purposes" for foreign authors). If the rights involved are rights specially granted by the Berne Convention, such provisions, of course, also conflict with the minimum standards of the Convention.

128. It is not sufficient, however, that a national law does not provide for obligatory collective use of remunerations due to foreign authors. The national law should contain appropriate provisions guaranteeing that collective administration organizations respect the rights to be protected under the Berne Convention and the principle of national treatment, and not use remuneration due to foreign authors without the authorization of the authors concerned, or the bodies representing them, for purposes other than distributing the remuneration among the authors or other owners of copyright concerned (after the deduction of the actual cost of administration).

Proposals

129. The analysis above indicates that there is no reason to restrict the scope of application of national treatment under the Berne Convention and to introduce new exceptions. It seems, however, that, in addition to the four possible exceptions provided for in the text of the Convention, there is now a fifth exception based on a *de facto* agreement among the member countries of the Berne Union: the application of public lending rights for lending books and similar printed publications by non-profit-making libraries to the public. The explicit recognition of this fifth exception, with a precise determination of its limits and conditions and with a clarification that national treatment may not be denied in any further cases, may be beneficial for the defense of the principle of national treatment (for the reasons discussed in paragraph 92, above). Furthermore, provisions seem necessary to ensure the full application of national treatment also in the context of collective administration of rights.

130. *It is proposed that the protocol not introduce any new exception to the obligation to grant national treatment in keeping with Article 5(1) of the Berne Convention. It is also proposed that the protocol provide*

explicitly for the faculty of countries party to it not to grant national treatment in respect of any right granted for the public lending of books and similar printed publications (faculty which so far only exists on the basis of a de facto agreement among the member countries of the Berne Union).

131. *The relevant provision of the protocol should follow the provisions proposed in paragraph 49, above, concerning the right of distribution, and should provide that, where a country does not avail itself of the faculty mentioned in paragraph 49(b)(ii), above, in respect of public lending of books and similar printed material, and grants either an exclusive right or authorization or a right to equitable remuneration for such lending, it is a matter for national legislation to limit the protection thus granted to authors or other owners of copyright who are nationals of, or have their headquarters in, another country party to the Berne Convention, to the extent to which, and to the term for which, the latter country grants protection, in this respect, to authors or other owners of copyright who are nationals of, or have their headquarters in, the first-mentioned country. This provision implies that, if a country does not avail itself of the said faculty in respect of public lending of any other category of works, or in respect of rental of any category of works, granting national treatment is an obligation in keeping with Article 5(1) of the Berne Convention. If, however, it is felt that any doubt might emerge in this respect, this obligation should also be stated explicitly.*

132. *Furthermore, it is proposed that the protocol oblige the countries party to it to provide that national treatment be fully respected also in cases where rights are exercised through collective administration of rights, and that no remuneration collected by collective administration organizations and due to foreign authors and other foreign owners of copyright, be used, without the authorization of such authors or other owners of copyright, given directly or through persons or bodies representing them, for any purposes other than the distribution of such remuneration among the authors or other owners of copyright concerned (after the deduction of the actual costs of administration).*

ANNEX

GATT TEXT CONCERNING ENFORCEMENT
OF RIGHTS

1. The letter of Sweden, signed by Mr. Henry Olsson (Legal Counsel, Ministry of Justice), dated March 2, 1993, and received by the International Bureau of WIPO on March 3, 1993, reads as follows:

"I am writing to you with reference to the forthcoming meetings of the Committees of Experts on the possible Protocol to the Berne Convention and the envisaged new instrument on the protection of producers of phonograms and of performing artists.

"I understand that the working documents for those sessions of the Committees of Experts are being prepared. With reference to those documents, I would, in my capacity as Head of the Delegation of Sweden to the sessions of the Committees, like to express the wish that the provisions on enforcement in the proposed GATT/TRIPS text in the December 1991 version ('Part III, Enforcement of Intellectual Property Rights' in the 'Agreement on Trade-Related Aspects of Intellectual Property Rights, including Trade in Counterfeit Goods (Annex III)' be included in the working documents as proposed Annexes to the possible Protocol and to the new instrument, respectively, with no additions in substance and with only such technical amendments which are absolutely necessary to make the text applicable in that context and for those categories which are to be covered by the two instruments. Each Annex should, in our view, form an integral part of the main instrument."

2. The letter of Australia, signed by Mr. C.C. Creswell (Acting First Assistant Secretary, Attorney General's Department, Business Law Division), dated March 5, 1993, and received by the International Bureau of WIPO on the same day, reads as follows:

"Possible protocol to the Berne Convention; proposed new instrument for protection of performers and sound recording producers:

"I am writing to you regarding the preparation that I understand is being undertaken by WIPO of background papers for the forthcoming meetings of the Committees of Experts on the above two proposed instruments, scheduled for 21 June to 2 July.

"I understand that Henry Olsson has recently been in touch with you regarding agreement reached at a meeting in Brussels of representatives of countries, including Australia, forming the 'Stockholm Group' that has been formed to exchange views on a possible approach to the preparation of the two proposed instruments. I understand that he has informed you that there was general agreement at the Brussels meeting that there should be an annex to the proposed instruments reproducing Part III of the December 1991 ('Dunkel') draft of the proposed GATT TRIPS text on enforcement, with such technical amendments as would be necessary to make that Part applicable to the categories of intellectual property to be covered by the two instruments.

"I wish to confirm that Mr. Olsson's proposal is consistent with the policy of the Australian Government, as reflected in its public statements affirming its acceptance of the GATT Dunkel text as a whole. I must also bring to your notice the fact that there will be a Federal election in Australia on 13 March, and that the continuation of the policy of the Australian Government on these and other matters will depend on the endorsement of the Government that is formed following the outcome of that election. Should there be a change in the Australian Government policy relevant to the work of the two WIPO Committees of Experts on the above instruments, I shall, of course, notify the Committees of Experts and WIPO at an opportune time."

3. The letter of the United States of America, signed by Mr. Ralph Oman (Register of Copyrights), dated March 5, 1993, and received by the International Bureau of WIPO on March 8, 1993, reads as follows:

"In anticipation of the receipt in March of the preparatory documents for the meetings of the Committee of Experts on a Possible Protocol to the Berne Convention (protocol) and the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (new instrument), the U.S. Government has engaged in detailed discussions of issues relevant to those meetings. One issue of common interest to all concerned is enforcement of rights under the protocol and new instrument.

"I want to take this opportunity to present the U.S. Government's views on the provisions regarding enforcement of rights that should be included in the possible protocol and new instrument. We believe that the provisions contained in Part III, Enforcement of Intellectual Property Rights, of the draft text of December 20, 1991, concerning Trade-Related Aspects of Intellectual Property, Including Trade in Counterfeit Goods (TRIPS), should be, with only technical changes necessary to conform the text to the subject matter of the protocol and new instrument, the enforcement provisions for those documents. Moreover, we firmly believe that the enforcement provisions should be an integral part of each agreement and be included as annexes to the respective agreements using the model of Article 21 and the appendix to the Paris 1971 text of the Berne Convention. If additional rights are envisioned, they should be considered in the context of articles granting rights in the respective agreements.

"The TRIPS text represents the work of several years and contains provisions that both common and civil law jurisdictions can accept and implement within their domestic legal systems. Furthermore, it is a text that both developed and developing countries have supported as an acceptable package in the Uruguay Round context. We firmly believe that adoption of the draft TRIPS text on enforcement will facilitate the work of the members of the Berne Union and permit us to focus on the other issues on which there currently is a lesser degree of consensus."

4. The GATT text referred to in the letters quoted under points 1 to 3, above (reproduced from GATT document No. UTN.TNC/W/FA made available to the International Bureau of WIPO by the Secretariat of GATT) reads as follows:

PART III: ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS

SECTION I: GENERAL OBLIGATIONS

Article 41

1. PARTIES shall ensure that enforcement procedures as specified in this Part are available under their national laws so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.

2. Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the dispute without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a dispute shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in national laws concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of laws in general, nor does it affect the capacity of PARTIES to enforce their laws in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of laws in general.

SECTION 2: CIVIL AND ADMINISTRATIVE
PROCEDURES AND REMEDIES

Article 42: Fair and Equitable Procedures

PARTIES shall make available to right holders¹ civil judicial procedures concerning the enforcement of any intellectual property right covered by this Agreement. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by

¹ For the purpose of this Part, the term "right holder" includes federations and associations having legal standing to assert such rights.

independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 43: Evidence of Proof

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.

2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a PARTY may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

Article 44: Injunctions

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

2. Notwithstanding the other provisions of this Part and provided that the provisions of Part II specifically addressing use by governments, or by third parties authorised by a government, without the authorisation of the right holder are complied with, PARTIES may limit the remedies available against such use to payment of remuneration in accordance with sub-paragraph (h) of Article 31 above. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with national law, declaratory judgments and adequate compensation shall be available.

Article 45: Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages ad-

quate to compensate for the injury the right holder has suffered because of an infringement of his intellectual property right by an infringer who knew or had reasonable grounds to know that he was engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, PARTIES may authorise the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not know or had no reasonable grounds to know that he was engaged in infringing activity.

Article 46: Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.

Article 47: Right of Information

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

Article 48: Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of intellectual property rights, PARTIES shall only exempt both public authorities and officials from liability to appropriate remedial

measures where actions are taken or intended in good faith in the course of the administration of such laws.

Article 49: Administrative Procedures

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

SECTION 3: PROVISIONAL MEASURES

Article 50

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

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

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

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

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

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

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

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

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

SECTION 4: SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES¹

Article 51: Suspension of Release by Customs Authorities

PARTIES shall, in conformity with the provisions set out below, adopt procedures² to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods³ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. PARTIES may enable such an application to be made in respect of goods which involve other infringements of intellectual property rights, provided that the requirements of this Section are met. PARTIES may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

¹ Where a PARTY has dismantled substantially all controls over movement of goods across its border with another PARTY with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

² It is understood that there shall be no obligation to apply such procedures to imports of goods put on the market in another country by or with the consent of the right holder, or to goods in transit.

³ For the purposes of this Agreement:

- counterfeit trademark goods shall mean any goods, including packaging, bearing without authorisation a trademark which is identical to the trademark validly registered in respect of such goods, or which cannot be distinguished in its essential aspects from such a trademark, and which thereby infringes the rights of the owner of the trademark in question under the law of the country of importation;
- pirated copyright goods shall mean any goods which are copies made without the consent of the right holder or person duly authorised by him in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

Article 52: Application

Any right holder initiating the procedures under Article 51 above shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of his intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognisable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53: Security or Equivalent Assurance

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

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, integrated circuits or undisclosed information into free circulation has been suspended by customs authorities on the basis of a decision other than by a judicial or other independent authority, and the period provided for in Article 55 has expired without the granting of provisional relief by the duly empowered authority, and provided that all other conditions for importation have been complied with, the owner, importer, or consignee of such goods shall be entitled to their release on the posting of a security in an amount sufficient to protect the right holder for any infringement. Payment of such security shall not prejudice any other remedy available to the right holder, it being understood that the security shall be released if the right holder fails to pursue his right of action within a reasonable period of time.

Article 54: Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 51 above.

Article 55: Duration of Suspension

If, within a period not exceeding ten working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another ten working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard,

shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of Article 50, paragraph 6 above shall apply.

Article 56: Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 55 above.

Article 57: Right of Inspection and Information

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

Article 58: *Ex Officio* Action

Where PARTIES require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired *prima facie* evidence that an intellectual property right is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the

importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, *mutatis mutandis*, set out at Article 55 above;

- (c) PARTIES shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 59: Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46 above. In regard to counterfeit goods, the authorities shall not allow the re-exportation of the infringing goods in an unaltered state or subject them to a different customs procedure, other than in exceptional circumstances.

Article 60: *De Minimis* Imports

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

SECTION 5: CRIMINAL PROCEDURES

Article 61

PARTIES shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. PARTIES may provide for criminal procedures and penalties to be applied in other cases of infringement of intellectual property rights, in particular where they are committed wilfully and on a commercial scale.

Activities of WIPO in the Field of Copyright Specially Designed for Developing Countries

Africa

Training Courses, Seminars and Meetings

WIPO National Workshop on Intellectual Property Law Teaching and Research (Ghana). From March 22 to 25, 1993, WIPO organized in Accra a WIPO National Workshop on Intellectual Property Law Teaching and Research in cooperation with the University of Ghana. The Workshop was attended by some 50 participants, mainly university lecturers and students, researchers from technical institutes, private legal practitioners and government officials. Presentations were made by five WIPO consultants from India, Ireland, Nigeria, the United States of America and Zimbabwe, three officials from Ghana and two WIPO officials.

Assistance With Training, Legislation and Modernization of Administration

Central African Republic. In March 1993, at the request of the national authorities, the Interna-

tional Bureau prepared and sent a draft decree on the collective administration of copyright and draft statutes for an authors' society.

Gambia. In March 1993, a WIPO official had discussions with government officials in Banjul on the possible training of Gambian officials in the collective administration of copyright and assistance to the government in the setting up of a collective administration system in the country.

Ghana. In March 1993, two WIPO officials had discussions with government and United Nations Development Programme (UNDP) officials, as well as with members of the University of Ghana, on further cooperation between Ghana and WIPO in the field of intellectual property.

Asia and the Pacific

Training Courses, Seminars and Meetings

People's University of China. On March 3, 1993, a WIPO official presented a paper at the Center for Teaching and Research of Intellectual Property of the People's University of China in Beijing on "Treaties Administered by WIPO, their Adoption and Revision" to some 150 persons, including judges undergoing special training at the University, law professors and law students.

Assistance With Training, Legislation and Modernization of Administration

China. In March 1993, a WIPO official had discussions in Beijing with officials of the National

Press and Publication Administration (NPPA) and the National Copyright Administration of China (NCAC) on mutual cooperation in the field of copyright.

Also in March 1993, the same WIPO official had discussions in Beijing with officials of Peking University and the People's University of China on matters of mutual interest.

Hong Kong. In March 1993, WIPO organized in Geneva an information session on the work of WIPO and general intellectual property questions for a group of 17 Hong Kong government officials.

Latin America and the Caribbean

Training Courses, Seminars and Meetings

First WIPO National Seminar on Collective Administration of Copyright (Brazil). From March 30 to April 2, 1993, WIPO organized, in Rio de Janeiro, in cooperation with the Ministry of Culture of Brazil, the First WIPO National Seminar on Collective Administration of Copyright. The Seminar was attended by 30 participants from 11 collective administration societies of Brazil and the Central Bureau for Collection and Distribution of Rights (ECAD). Papers were presented by three WIPO consultants from Spain, Switzerland and Uruguay and a WIPO official. Another WIPO official also participated in the Seminar.

WIPO National Workshop on Practical Aspects of Collective Administration of Copyright and Neighboring Rights (Paraguay). From March 10 to 12, 1993, WIPO organized, in Asunción, a WIPO National Workshop on Practical Aspects of Collective Administration of Copyright and Neighboring Rights for the technical and administrative staff of the Paraguayan Authors' Society (APA). Some 40 persons from different provinces of Paraguay participated in the Workshop. Two WIPO consultants from Chile and Switzerland conducted the Workshop.

WIPO Regional Training Course on Copyright and Neighboring Rights for Latin America (Paraguay). From March 15 to 24, 1993, WIPO organized, in San Bernardino (Paraguay), the 11th Regional Training Course on Copyright and Neighboring Rights for Latin America in cooperation with the Ministry of Foreign Affairs of Paraguay and the Swiss Society for Authors' Rights in Musical Works (SUISA). Twenty-one participants from Argentina, Brazil, Chile, Colombia, Costa Rica, Cuba, Ecuador, Guatemala, Honduras, Mexico, Panama, Peru, Uruguay and Venezuela attended the Course. In addition, there were 23 participants from Paraguay and six observers from Brazil, Chile, Costa Rica, Cuba and Uruguay. Forty-two papers were presented by 12 WIPO consultants from Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico, Peru, Spain, Switzerland, Uruguay and Venezuela, as well as by a national of Paraguay and a WIPO official. Another WIPO official also attended the Course. The Course was opened by the

Vice-Minister for Foreign Affairs of Paraguay, Mr. Oscar Cabello Sarubbi, and the Dean of the Faculty of Law of Paraguay, Mr. Carlos Mersán. The participants in the Course also attended the VIIIth International Congress on the Protection of Intellectual Rights held in Asunción (see hereafter).

WIPO VIIIth International Congress on the Protection of Intellectual Rights (of the Author, the Artist and the Producer) (Paraguay). From March 25 to 27, 1993, the VIIIth International Congress on the Protection of Intellectual Rights (of the Author, the Artist and the Producer) was organized in Asunción by WIPO in cooperation with the Ministry of Foreign Affairs and the Supreme Court of Justice of Paraguay. The Congress was attended by more than 600 participants, including nine representatives from other Latin American countries, some 60 local judges and seven judges from Argentina. The Congress was attended by the Director General, who was accompanied by three other WIPO officials. Thirteen items were covered by 36 panclists, mostly from Latin America and also from Portugal, Spain, Switzerland and the United States of America and by two WIPO officials. Opening addresses were made, *inter alia*, by the Director General of WIPO, Mr. Alexis Frutos Vaesken, Minister for Foreign Affairs, and Mr. José Alberto Correq, President of the Supreme Court.

Assistance With Training, Legislation and Modernization of Administration

Chile. In March 1993, Mr. Jorge Marshall, Minister for Economic Affairs, had discussions with the Director General and other WIPO officials in Geneva on cooperation between Chile and WIPO in relation to intellectual property.

Paraguay. In March 1993, on the occasion of his presence in Asunción to attend the above-mentioned International Congress, the Director General held talks with Mr. Arturo Rodríguez, President of the Republic of Paraguay, the Minister for Foreign Affairs, the Vice-Minister for Industry and Commerce and other government officials on intellectual property matters of common interest and on cooperation between Paraguay and WIPO.

Activities of WIPO in the Field of Copyright Specially Designed for European Countries in Transition to Market Economy

National Activities

Bulgaria. In March 1993, at the request of the government authorities, the International Bureau prepared and sent a note containing comments and proposals concerning the draft copyright law of Bulgaria.

Hungary. In March 1993, five government officials had discussions with WIPO officials in Geneva on WIPO's activities in Central and Eastern European countries.

Contacts of the International Bureau of WIPO with Governments and International Organizations in the Field of Copyright

United Nations

United Nations Consultative Committee on Administrative Questions (Financial and Budgetary Questions (CCAQ(FB))). In March 1993, a WIPO official attended the 78th session of this Committee, held in Vienna.

United Nations Consultative Committee on Administrative Questions (Personnel and General Administrative Questions) (CCAQ(PER)). In March 1993, two WIPO officials attended the 77th session of this Committee, held in New York.

United Nations Consultative Committee on Substantive Questions (CCSQ). In March 1993, three WIPO officials attended the first regular session for 1993 of the new Consultative Committee on Substantive Questions (CCSQ), held in Geneva.

International Civil Service Commission (ICSC). In March 1993, two WIPO officials attended the 37th session of the ICSC, held in New York.

United Nations Conference on Trade and Development (UNCTAD). In March 1993, a WIPO official attended the second part of the 39th session of the UNCTAD's Trade and Development Board (TDB), held in Geneva.

United Nations Institute for Training and Research (UNITAR). In March 1993, two WIPO officials attended an Inter-Agency Seminar on the International Civil Service and the UN Common System organized by UNITAR in Geneva.

Intergovernmental Organizations

General Agreement on Tariffs and Trade (GATT). In March 1993, 24 government officials from developing countries attending a training program on commercial policy organized by GATT visited WIPO where WIPO officials spoke to them on WIPO, particularly its norm-setting activities and development cooperation programs.

International Labour Office (ILO). In March 1993, a WIPO official attended a Consultative Meeting organized in Geneva by the ILO International Training Centre (Turin) to discuss with representatives of various United Nations agencies the aim and program of the workshops held at the said Centre on coordination of technical assistance in the field.

Other Organizations

American Arbitration Association (AAA). In March 1993, a WIPO official had discussions in

New York with representatives of AAA on cooperation on extra-judicial dispute resolution and on a proposed worldwide forum on intellectual property and arbitration to be held in 1994.

Association of International Libraries (AIL). In March 1993, a WIPO official participated in the Executive Committee of AIL, held in Geneva.

Center for Public Resources, Inc. (CPR). In March 1993, a WIPO official had discussions in New York with CPR experts on CPR's and WIPO's activities in the field of extra-judicial settlement of disputes.

International Literary and Artistic Association (ALAI). In March 1993, Professor Georges Koumantos, President of ALAI, had discussions with WIPO officials in Geneva on the organization of ALAI Study Days in Tunis in 1994 with WIPO's organizational support.

Also in March 1993, a WIPO official presented a paper on WIPO's activities, in particular on a possible protocol to the Berne Convention and on a possible instrument on the protection of the rights of performers and producers of phonograms, at a meeting organized by the Danish Group of ALAI in Copenhagen.

University of Lund (Sweden). In March 1993, a group of 18 international lawyers enrolled in an advanced studies course at the University of Lund visited WIPO and were briefed at WIPO on intellectual property and WIPO's activities.

National Contacts

Italy. In March 1993, Mr. Tommaso Troise, Delegate for Intellectual Property Agreements, Ministry for Foreign Affairs, accompanied by another government official, visited WIPO to discuss with the Director General and other WIPO officials cooperation between Italy and WIPO in the field of intellectual property.

Japan. In March 1993, Mr. Hiroyasu Uchida, Commissioner, Cultural Affairs Agency, accompanied by an official of the same Agency, had discussions in Geneva with the Director General and other WIPO officials on cooperation between Japan and WIPO in the field of copyright, particularly the establishment of a fund-in-trust for WIPO's development cooperation activities in the said field.

Also in March 1993, WIPO officials gave presentations on WIPO and its activities to a group of Japanese government officials on a study tour organized by the United Nations Institute for Training and Research (UNITAR).

United States of America. In March 1993, a WIPO official attended, as an observer, a hearing before the House Judiciary Subcommittee on Intellectual Property and Judicial Administration of the United States House of Representatives, in Washington, D.C., on a possible performance right in sound recordings and the rights of performers, issues which are proposed for inclusion in WIPO's possible instrument on the protection of the rights of performers and producers of phonograms.

Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1993

- June 28 to July 2 (Geneva)** **Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (First Session)**
 The Committee will examine the question of the preparation of a possible new instrument (treaty) on the protection of the rights of performers and producers of phonograms.
Invitations: States members of WIPO, the Commission of the European Communities and, as observers, certain organizations.
- September 20 to 29 (Geneva)** **Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-Fourth Series of Meetings)**
 All the Governing Bodies of WIPO and the Unions administered by WIPO meet in ordinary sessions every two years in odd-numbered years.
 In the sessions in 1993, the Governing Bodies will, *inter alia*, review and evaluate WIPO's activities undertaken since July 1991, and adopt the program and budget of the International Bureau for the 1994-95 biennium.
Invitations: States members of WIPO or the Unions and, as observers, other States members of the United Nations and certain organizations.
- October 13 and 14 (Funchal, Madeira)** **Symposium on the International Protection of Geographical Indications (organized by WIPO in cooperation with the Government of Portugal)**
 The Symposium will deal with the protection of geographical indications (appellations of origin and other geographical indications) both on the national and multilateral level.
Invitations: Governments, selected non-governmental organizations and any member of the public (against payment of a registration fee).
- November 8 to 12 (Geneva)** **Committee of Experts on a Model Law on the Rights of Performers and Producers of Phonograms (Second Session)**
 The Committee of Experts will continue to consider a draft Model Law dealing with the protection of the rights of producers of phonograms, and it will consider (for the first time) provisions for the Model Law dealing with the rights of performing artists.
Invitations: States members of the Berne Union or WIPO, or party to the Rome Convention or the Phonograms Convention and, as observers, certain organizations.

UPOV Meetings

(Not all UPOV meetings are listed. Dates are subject to possible change.)

1993

- October 27 (Geneva)** **Administrative and Legal Committee**
Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental organizations.
- October 28 (Geneva)** **Consultative Committee (Forty-Seventh Session)**
Invitations: Member States of UPOV.
- October 29 (Geneva)** **Council (Twenty-Seventh Ordinary Session)**
Invitations: Member States of UPOV and, as observers, certain non-member States and intergovernmental and non-governmental organizations.

Other Meetings

1993

June 26 to July 1 (Berlin)	Licensing Executives Society International (LESI): Annual Meeting.
August 17 to 19 (Stockholm)	International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP): Annual Meeting.
September 12 to 16 (Colombo)	Law Association for Asia and the Pacific (LAWASIA): 13th LAWASIA Conference.
September 20 to 24 (Antwerp)	International Literary and Artistic Association (ALAI): Congress.
October 1 and 2 (Budapest)	International League of Competition Law (LIDC): Study Days.
October 6 to 8 (Cincinnati)	Pacific Industrial Property Association (PIPA): International Congress.
October 12 to 14 (Lugano)	International Federation of Reproduction Rights Organisations (IFRRO): Annual General Meeting.
November 10 to 13 (Rome)	International Federation of Industrial Property Attorneys (FICPI): 1st FICPI Forum.

1994

February 2 to 8 (Queenstown)	International Federation of Industrial Property Attorneys (FICPI): Executive Committee.
May 4 to 9 (Beijing)	Licensing Executives Society International (LESI): International Conference.
May 8 to 11 (Seattle)	International Trademark Association (INTA): 116th Annual Meeting.
May 25 to 28 (Luxembourg)	European Communities Trade Mark Association (ECTA): Annual General Meeting and Conference.
May 28 to June 5 (Ostend)	International Federation of the Seed Trade (FIS)/International Association of Plant Breeders for the Protection of Plant Varieties (ASSINSEL): World Congress.
June 12 to 18 (Copenhagen)	International Association for the Protection of Industrial Property (AIPPI): Executive Committee.
June 20 to 24 (Vienna)	International Federation of Industrial Property Attorneys (FICPI): Congress.

