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# Copyright

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World Intellectual Property Organization (WIPO)

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## Notifications Concerning Treaties Administered by WIPO in the Field of Copyright

### WIPO Convention

#### Declaration

#### REPUBLIC OF MOLDOVA

The Government of the Republic of Moldova deposited, on June 3, 1993, a declaration 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 respect of the Republic of Moldova.

*WIPO Notification No. 167, of June 7, 1993.*

### Berne Convention

#### New Member of the Berne Union

#### NIGERIA

The Government of Nigeria deposited, on June 10, 1993, its instrument of accession to the Berne Convention for the Protection of Literary and Artistic Works.

July 24, 1971, and amended on September 28, 1979, will enter into force, with respect to Nigeria, on September 14, 1993. On that date, Nigeria will become a member of the Berne Union.

Nigeria has not heretofore been a member of the International Union for the Protection of Literary and Artistic Works ("Berne Union"), founded by the Berne Convention.

Nigeria will belong to Class VII for the purpose of establishing its contribution towards the budget of the Berne Union.

The Berne Convention, as revised at Paris on

*Berne Notification No. 147, of June 14, 1993.*

#### Ratification of the Paris Act (1971)

#### SWITZERLAND

The Government of Switzerland deposited, on June 25, 1993, its instrument of ratification of the Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as revised at Paris on July 24, 1971.

ber 28, 1979, of the said Convention will enter into force, with respect to Switzerland, on September 25, 1993.

The Paris Act (1971), as amended on Septem-

*Berne Notification No. 148, of June 25, 1993.*

## Phonograms Convention

### Succession

#### SLOVAKIA

The Government of Slovakia deposited, on May 28, 1993, its instrument of succession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971. The said succession takes effect from January 1, 1993, the

date on which Slovakia assumed responsibility for its international relations.

*Phonograms Notification No. 51, of June 21, 1993.*

### Ratification

#### SWITZERLAND

The Government of Switzerland deposited, on June 24, 1993, its instrument of ratification of the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971. The said

Convention will enter into force, with respect to Switzerland, on September 30, 1993.

*Phonograms Notification No. 52, of June 30, 1993.*

### Accessions

#### CYPRUS

The Government of Cyprus deposited, on June 25, 1993, its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971. The said

Convention will enter into force, with respect to Cyprus, on September 30, 1993.

*Phonograms Notification No. 53, of June 30, 1993.*

#### NETHERLANDS

The Government of the Netherlands deposited, on July 7, 1993, its instrument of accession to the Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms of October 29, 1971. The said

Convention will enter into force, with respect to the Netherlands, on October 12, 1993.

*Phonograms Notification No. 54, of July 12, 1993.*

## Normative Activities of WIPO in the Field of Copyright

### Committee of Experts on the Settlement of Intellectual Property Disputes Between States

Fifth Session

(Geneva, May 10 to 21, 1993)

The Committee of Experts on the Settlement of Intellectual Property Disputes between States held its fifth session in Geneva from May 10 to 21, 1993.\* The following 70 States and one intergovernmental organization were represented as members: Algeria, Argentina, Armenia, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Cameroon, Chile, China, Colombia, Côte d'Ivoire, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Guinea, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kenya, Latvia, Lesotho, Libya, Malawi, Malaysia, Mexico, Morocco, Namibia, Netherlands, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Slovenia, Spain, Sudan, Swaziland, Sweden, Switzerland, Syria, Thailand, Togo, Turkey, United Kingdom, United States of America, Uruguay, Viet Nam, Yugoslavia, Zambia, Commission of the European Communities (CEC). Representatives of four intergovernmental organizations (United Nations (UN), United Nations Educational, Scientific and Cultural Organization (UNESCO), General Agreement on Tariffs and Trade (GATT), European Patent Organisation (EPO)) and of two non-governmental organizations (International Association for the Protection of Industrial Property (AIPPI), International Literary and Artistic Association (ALAI)) participated in the session in an observer capacity.

The Committee examined all the provisions set forth in the draft Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property (document SD/CE/V/2) and in the draft Regulations under the Treaty (document SD/CE/V/3), which are reproduced hereafter. The draft Treaty provides for a dispute settlement system which involves recourse to consultations and submission of

disputes to a panel procedure. Good offices, conciliation and mediation as well as arbitration are also provided for on an optional basis. The Committee also discussed a proposal submitted by the European Communities concerning the status of regional economic integration organizations and intergovernmental organizations under the Treaty, and another submitted by the Government of the Netherlands concerning the compulsory submission of disputes either to arbitration or to the International Court of Justice. In view of those proposals and the fact that a number of other issues required further consideration, the Committee concluded that an additional (sixth) session of the Committee of Experts should be convened.

#### DRAFT TREATY ON THE SETTLEMENT OF DISPUTES BETWEEN STATES IN THE FIELD OF INTELLECTUAL PROPERTY

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##### Preamble

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\* For the Note on the fourth session, see *Copyright*, 1992, pp. 217 and 218.

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## Preamble

### *The Contracting Parties*

*Desiring* to promote the protection of intellectual property by furthering the enforcement of international obligations and securing the uniform interpretation and application of international rules in the field of intellectual property,

*Bearing in mind* that disputes between States or between States and intergovernmental organizations may arise out of the enforcement of such international obligations and the interpretation or application of such international rules,

*Recognizing* the need for such disputes to be resolved through appropriate multilateral institutional arrangements,

*Convinced* that a treaty, administered by the World Intellectual Property Organization, establishing procedures for the amicable settlement of such disputes would promote the protection of intellectual property,

*Have agreed* as follows:

## Article 1

### Establishment of a Union

The Contracting Parties to this Treaty constitute a Union for the purposes of this Treaty.

## Article 2

### Use of Terms and Abbreviated Expressions

For the purposes of this Treaty, unless expressly stated otherwise:

- (i) "Contracting Party" means a State or an intergovernmental organization that is party to this Treaty;
- (ii) "Union" means the Union referred to in Article 1;

(iii) "Assembly" means the Assembly referred to in Article 9;

(iv) "Organization" means the World Intellectual Property Organization;

(v) "International Bureau" means the International Bureau of the Organization;

(vi) "Director General" means the Director General of the Organization;

(vii) "Regulations" means the Regulations under this Treaty that are referred to in Article 11;

(viii) "prescribed" means prescribed in the Regulations;

(ix) "dispute" means a disagreement between parties concerning the existence or breach of an obligation referred to in Article 3(1) or (2);

(x) "party" in the expression "party to a dispute" means a State or an intergovernmental organization;

(xi) the expression "a party to a dispute" shall be construed as including also cases where there are several parties;

(xii) "source treaty" means the treaty containing the provision or provisions concerning the protection of intellectual property, the interpretation or application of which provision or provisions is an issue to be decided in the course of the settlement of the dispute.

## Article 3

### Sphere of Application

(1) [*Disputes Between Contracting Parties Under Multilateral Treaties*] This Treaty applies to any dispute between Contracting Parties only to the extent that at least one or more of the issues to be decided upon in settling the dispute relates to a matter or to matters of intellectual property and requires the interpretation or application of one or more provisions, forming the basis of the obligation the alleged breach of which is in dispute and binding those Parties, contained in a multilateral treaty

*Alternative A:* [no further words] [in the field of intellectual property].

*Alternative B:* that is administered by the Organization alone or that is administered by the Organization in association with one or more intergovernmental organizations.

*Alternative C:* that is administered by the Organization alone.

(2) [*Other Disputes*] Where a dispute does not fall within the scope of paragraph (1), the provisions of this Treaty shall nevertheless be applicable to the dispute but only to the extent that at least

one or more of the issues to be decided upon in settling the dispute relates or relate to a matter or to matters of intellectual property, if the dispute

(i) arises under a source treaty that requires the parties to the dispute to submit their dispute to one or more of the procedures for the settlement of disputes established by this Treaty or that permits the parties to the dispute to agree to so submit their dispute and they so agree, or

(ii) concerns an obligation the source of which is other than a treaty and the parties to the dispute agree to submit their dispute to one or more of the procedures for the settlement of disputes established by this Treaty [, provided that, in the case provided for in item (i) or item (ii), above,

*Alternative A:* all the parties to the dispute that so agree are Contracting Parties.

*Alternative B:* at least one of the parties to the dispute that so agree is a Contracting Party].

(3) [*Non-Applicability of the Treaty to Certain Disputes*] Notwithstanding paragraphs (1) and (2), this Treaty, or any procedure established therein, shall not apply

(i) where the parties to a dispute agree that, for the purposes of that dispute, this Treaty, or a specified procedure established therein, shall not apply; or

(ii) where the dispute arises under a source treaty that does not permit the parties to the dispute to resort to dispute settlement procedures other than those provided for in that treaty.

[(4) [*Exhaustion of Local Remedies*] (a) A party to a dispute may not invoke any procedure for the settlement of a dispute established by this Treaty where the dispute concerns the alleged breach by the other party to the dispute of an obligation concerning the treatment to be accorded by that other party to a national or to the nationals of the party invoking the procedure unless that national has or those nationals have exhausted [the effective remedies available within the territory of the other party to that national or those nationals without having obtained the treatment called for by the said obligation, or where that is not possible, an equivalent treatment] [local remedies in accordance with [generally recognized principles of] [customary] rules of international law].

(b) The rule stated in paragraph (a) shall not be applicable where the obligation requires the other party to the dispute to enact a law on a matter affecting the status or rights of a national or the nationals of the party invoking the procedure and the other party to the dispute has not enacted that law.]

## Article 4

### Consultations

(1) [*Invitation to Enter into Consultations*] Before making a request for a procedure before a panel pursuant to Article 6, a party to a dispute shall, subject to Articles 3(3)(i), 5(1) and 6(1)(ii), invite the other party to the dispute to enter into consultations with it in respect of that dispute. The invitation shall indicate that the invitation is made with a view to initiating consultations pursuant to this Treaty, set forth the obligation or obligations the alleged breach of which has given rise to the dispute and state the facts and the legal grounds on which the allegation against the other party to the dispute is based.

(2) [*Reply to the Invitation*] Unless the parties to the dispute otherwise agree, the party to the dispute to which the invitation to enter into consultations is addressed shall reply to the invitation within two months from the date of the receipt of the invitation and shall, subject to Article 5(1), for a date within three months from the date of the receipt of the invitation, offer to the other party an adequate opportunity for the consultations.

(3) [*Consultations*] The parties to the dispute shall proceed in good faith in their consultations with a view to settling the dispute through agreement.

[(4) [*Notification of the Invitation*] The party to the dispute that extends the invitation to enter into consultations shall [, if the other party to the dispute so agrees,] send a copy of the invitation to the Director General. The Director General shall [, if the parties to the dispute so agree,] notify the members of the Assembly and the parties to the source treaty, if any, of the fact that an invitation to enter into consultations has been made and [,if the parties to the dispute so agree,] of the names of the parties to the dispute. The Director General shall [, if the parties to the dispute so agree,] transmit, on request, to any member of the Assembly or party to the source treaty, a copy of the said invitation.]

[(5) [*Notification of the Results of the Consultations*] Each of the parties to the dispute shall [, if the parties so agree,] inform the Director General whether the result of their consultations is the settlement of their dispute or not, and, if they have settled their dispute, what the outcome is. The Director General shall [, if the parties to the dispute so agree,] notify the members of the Assembly and the parties to the source treaty, if any, the information received from the parties to the dispute concerning the results of their consultations.]

[(4)][(6)] [*Privileged Nature of the Conduct and Contents of Consultations*] [Subject to paragraphs (4) and (5), and] unless the parties to the dispute otherwise agree, no party to the dispute shall divulge the way in which the consultations are or have been conducted, or any admission or any offer of settlement, or any other statement made, or any information furnished, in the course of the consultations, by any party to the dispute, except such information that, prior to the consultations, has been disclosed by a party to the dispute or that is generally known or that is in the public domain. In addition, in any procedure other than the said consultations, including the procedures provided for in Articles 5, 6 and 8 of this Treaty,

*Alternative A:* any such divulgence shall be without prejudice to the rights of any party to the dispute.

*Alternative B:* no party to the dispute may invoke or rely on any admission or any offer of settlement or any other statement made, or any information provided, in the course of the consultations where such statement or information could prejudice the position or rights of any other party to the dispute.

## Article 5

### Good Offices, Conciliation, Mediation

(1) [*Recourse to Good Offices, Conciliation or Mediation*] (a) The parties to a dispute may, by common agreement, made at any time, that is, before, during or after the consultations provided for in Article 4, and even during the panel procedure established under Article 6, submit their dispute to the procedure of good offices, conciliation or mediation of an intermediary jointly designated by them.

(b) Where a party to a dispute is a Contracting State that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, it may request the good offices, conciliation or mediation of the Director General

*Alternative A:* prior to the making by either party to the dispute of a request for a procedure before a panel:

(i) if within the time limit specified in, or otherwise agreed to by virtue of, Article 4(2), an invitation to enter into consultations made by the said Contracting State to the other party is not replied to by the other party, or the opportunity for consultations is not offered by the other party, or the parties to the dispute are

unable to agree that their consultations shall commence; or

(ii) if all parties to the dispute agree that the consultations provided for under Article 4 shall be dispensed with; or

(iii) if the consultations under Article 4 do not result in the settlement of the dispute within six months from the date of the receipt of the invitation referred to in Article 4(1) or within any other shorter or longer period agreed upon by the parties.

*Alternative B:* at any time [, that is, before,] [during or] after the consultations provided for in Article 4 [or during the] [but not after the making by either party to the dispute of a request for a] [procedure before a panel under Article 6].

(c) The Director General shall transmit a copy of the request referred to in paragraph (b) to the other party to the dispute and shall transmit a copy of the response of that party to that request to the party making the request.

(2) [*Cooperation with the Intermediary*] The parties to the dispute shall cooperate in good faith with the intermediary in order to enable the latter to carry out the functions necessary to bring about the settlement of the dispute through agreement.

[(3) [*Notification of Submission to Good Offices, Conciliation or Mediation*] Each of the parties to a dispute that agree to submit their dispute to the procedure of good offices, conciliation or mediation under paragraph (1)(a) shall [, if the said parties so agree,] inform the Director General of that submission. The Director General shall [, if the parties to the dispute so agree,] notify the members of the Assembly and the parties to the source treaty, if any, of the fact that a submission has been made under paragraph (1)(a) or that a request has been made under paragraph (1)(b) and [, if the parties to the dispute so agree,] of the names of the parties to the dispute and the name of the intermediary.]

[(4) [*Notification of the Results of Good Offices, Conciliation or Mediation*] Each of the parties to a dispute that has been submitted to good offices, conciliation or mediation under paragraph (1)(a) shall [, if the parties so agree,] inform the Director General whether the result of those means is the settlement of their dispute or not, and, if they have settled their dispute, what the outcome is. The Director General shall [, if the parties to the dispute so agree,] notify the members of the Assembly and the parties to the source treaty, if any, the information received from the parties to the dispute concerning the results of the good offices, conciliation or mediation carried out under paragraph (1)(b).]



~~[(3)]~~[(5)] [*Privileged Nature of the Conduct and Contents of the Procedure*] [Subject to paragraphs (3) and (4).] Article 4(4) shall apply, *mutatis mutandis*, to both the parties to the dispute and the intermediary also in respect of the procedure of good offices, conciliation or mediation.

## Article 6

### Panel Procedure

(1) [*Recourse to a Panel*] Any party to a dispute may request a procedure before a panel:

(i) if, within the time limit specified in, or otherwise agreed to by virtue of, Article 4(2), an invitation to enter into consultations made by that party to the other party is not replied to by the other party, or the opportunity for consultations is not offered by the other party, or the parties to the dispute are unable to agree that their consultations shall commence; or

(ii) if all parties to the dispute agree that the consultations provided for under Article 4 shall be dispensed with; or

(iii) if the consultations under Article 4, or the good offices, conciliation or mediation, if any, referred to in Article 5, do not result in the settlement of the dispute within six months from the date of the receipt of the invitation referred to in Article 4(1) or [from the date of the conclusion of the common agreement referred to in Article 5(1)(a) or from the date of the request for good offices, conciliation or mediation referred to in Article 5(1)(b), respectively.] [from the date, if any, on which any party to the dispute informs the Director General, in accordance with Article 5(4), that they have not settled their dispute.] or within any other shorter or longer period agreed upon by the parties.

(2) [*The Request*] (a) The request for a procedure before a panel shall be addressed to the Director General.

(b) The said request shall

(i) set forth the terms of the invitation to enter into consultations made under Article 4(1), unless the parties to the dispute have agreed to dispense with the said consultations,

(ii) set forth the obligation the alleged breach of which has given rise to the dispute and state the facts and the legal grounds on which that allegation is based,

(iii) state the relevant facts concerning the attempted settlement of the dispute through the consultations, if any, provided for under Article 4 or through any procedure provided for under Article 5,

(iv) be accompanied by a summary of the dispute, drawn up in the prescribed manner and with the prescribed content.

(c) The Director General shall, within seven days of its receipt, send a copy of the said request and of the summary of the dispute to the other party to the dispute. He shall also send to all parties to the dispute a copy of the roster of potential members of panels that is established in the prescribed manner and shall offer to the said parties the possibility of his drawing up from the said roster a list of persons with particular expertise appropriate to the subject matter of the dispute.

(2)*bis* [*The Answer*] (a) Within two months of the sending by the Director General of the copy of the request for a procedure before a panel referred to in paragraph (2)(a), the other party to the dispute shall send to the Director General an answer stating which of the facts and legal grounds in the request the said party admits or denies, on what basis, and on what other facts and legal grounds it relies.

(b) Within seven days of the receipt of the answer, the Director General shall send a copy of that answer to the party to the dispute that made the request.

(2)*ter* [*Transmission of Summary of Dispute, the Request and the Answer to the Members of the Assembly and Parties to the Source Treaty*] The Director General shall transmit to the members of the Assembly as well as to the parties to the source treaty a copy of the summary of the dispute and shall, on request, transmit to any member of the Assembly and to any party to the source treaty a copy of the request for a procedure before a panel and of the answer thereto.

(3) [*Designation and Convocation of the Panel*] (a) Within two months from the date of the sending by the Director General of the copy of the request referred to in paragraph (2)(c), or within such other time limit as may be agreed to by the parties to the dispute, the parties to the dispute shall agree on the total number of members of the panel, which number shall be no less than three but no more than five, as well as on the number of members of the panel to be designated by each. Within the said time limit, the parties to the dispute shall also designate the member or members of the panel agreed upon between them as the member or members of the panel to be designated by each. Unless the parties to the dispute otherwise agree, the member or members so designated must be persons whose name or names appear on the roster, established by the Assembly, of potential members of panels. If the parties to the dispute fail to agree on the total number of the members of the panel, the number shall be three. If any party to the dis-

pute fails to designate as a member or members of the panel the member that was or the members that were agreed by the parties to the dispute to be designated by that party or, if the parties fail to designate the member that was or the members that were agreed by the parties to the dispute to be designated by them jointly, then, at the request of either party to the dispute, the Director General shall designate the said member or members of the panel.

(b) Where at least one of the parties to the dispute is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, the Director General shall, at the request of any such party to the dispute that is so regarded, designate one or more persons from one or more countries regarded as developing countries as member or members of the panel, the number of them being fixed in the Regulations.

(c) The members of the panel designated by the Director General pursuant to paragraph (a) or (b) shall be persons whose names appear on the roster, established by the Assembly, of potential members of panels. The member or members of the panel designated by the Director General shall be a national of a Contracting Party, whether it be a party or not to the source treaty, if any, but may not be a national of any party to the dispute. The member or members so designated shall have an expertise in the field of intellectual property.

(d) The Director General shall convene the panel not later than two months from its designation.

(4) [*Task of the Panel*] The panel shall

(i) examine the dispute;

(ii) express an opinion in a written report on the question whether an obligation relating to a matter or to matters of intellectual property exists and was breached and, if so, to what extent; the report shall contain a finding of the facts and a statement of the law on which the opinion is based, and a summary of the panel's proceedings and of the submissions of the parties to the dispute;

(iii) make recommendations, in the said report, as to the measures that one or more of the parties to the dispute should take in the light of the said opinion; however, the panel shall not make any recommendation as to how a party to the dispute should enact or amend its legislation, unless that party requests the panel to make such a recommendation;

(iv) conclude its proceedings, adopt its report and transmit its report to the Director General within six months from the date of its first meeting [, or from the date, if any, on which any party to the dispute informs the Director General, in accor-

dance with Article 5(4), that the parties have not settled their dispute, whichever date is later,] or within such longer period not to exceed twelve months from that [later] date, as the panel, after consultation with the parties to the dispute, may decide;

(v) whenever a party to the dispute is a Contracting Party that is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations, take into account, in making its findings of fact and statement of the law, in expressing its opinion and in making its recommendations, the relevant provisions in the source treaty, if any, that contain special measures for developing countries, and the special circumstances and needs of the developing country party to the dispute [, as well as the impact of the recommendations of the panel on the economy and trade of that developing country].

(5) [*Procedural Rights of the Parties to the Dispute*] (a) In the course of the examination of the dispute by the panel, each party to the dispute shall have the right

(i) to be heard by the panel and be present when the other party or any intervening party is being heard,

(ii) to submit to the panel arguments in writing, including any written rebuttals of such arguments,

(iii) to receive copies of the submissions of arguments and rebuttals of the other party to the dispute,

(iv) to receive copies of the submissions expressing the views of an intervening party on the matter in dispute,

(v) to comment in writing on the draft of the report that the panel intends to make.

(b) If the parties to the dispute so request, the panel shall stop its proceedings.

(6) [*Intervention by Parties to a Source Treaty*] (a) Any party to a source treaty that is not a party to the dispute under that treaty, provided it is a Contracting Party and has a substantial interest in the dispute, may intervene, in the prescribed manner, in the proceedings before the panel in order to express its views on the matter in dispute. Any such party wishing to intervene shall so notify the Director General within one month from the sending of the information referred to in paragraph (2)ter and shall state in its notification the nature of its interest in the dispute.

(b) The intervening party shall have the opportunity to present written submissions to, and be heard by, the panel. If the parties to the dispute so agree, the intervening party may be present when the parties to the dispute are heard by the panel and

may receive copies of the submission of arguments and rebuttals of the parties to the dispute.

(7) [*Communication and Consideration of the Report of the Panel*] (a) The Director General shall transmit copies of the report of the panel to the parties to the dispute.

(b) Each of the parties to the dispute shall inform the Director General within one month from the date of the transmittal referred to in paragraph (a), or within such other period, not exceeding three months, as may be agreed upon by the parties to the dispute, of any comments it may have on the report and what action, if any, it has taken or plans to take in respect of the recommendations in the said report.

(c) The Director General shall within one month from the expiration of the time limit referred to in paragraph (b), or within such other period, not exceeding three months, as may be agreed upon by the parties to the dispute, transmit copies of the said report and of their comments, if any, on the report, together with the information received from them on the action taken or to be taken in respect of the said recommendations, to the members of the Assembly and to the parties to the source treaty, if any.

(d) The Assembly may have an exchange of views on the report of the panel and on the information thereon received from the parties to the dispute. The Assembly shall not impose or authorize sanctions for non-compliance with the recommendations contained in the report of the panel.

## Article 7

### Reporting on the Compliance with the Recommendations of the Panel

Each party to a dispute shall submit reports to the Assembly, in the prescribed manner and within the prescribed period or periods, on the implementation of the recommendation or recommendations made by the panel. Such reports shall be submitted by a party to the dispute even in the case where it disagrees with the recommendation or recommendations made by the panel.

## Article 8

### Arbitration

(1) [*Arbitration Agreement*] The parties to a dispute may agree, at any time, that their dispute shall be settled by arbitration in accordance with the provisions of this Article. If they agree to so settle their dispute, no other procedure for the settle-

ment of that dispute under this Treaty may be invoked or pursued by any of the parties to the dispute.

(2) [*Arbitration Procedure*] Unless the parties to an arbitration agreement agree otherwise, the arbitration procedure shall be as follows:

(i) any party to an agreement referred to in paragraph (1) may request, in the prescribed manner, the other party to the dispute to proceed with the establishment of an arbitration tribunal. A copy of the request shall be addressed to the Director General;

(ii) the arbitration tribunal shall be composed of three arbitrators: subject to item (iii), each party to the dispute shall appoint one arbitrator, and the third arbitrator shall be appointed by agreement of the parties to the dispute. No arbitrator shall be a national of any State party to the dispute or of any State member of an intergovernmental organization that is party to the dispute;

(iii) if, within two months from the date of receipt by the Director General of the copy of the request referred to in paragraph (2)(i), any member of the arbitration tribunal has not been appointed by the parties to the dispute as provided in (ii), above, then the Director General shall, at the request of any of the parties to the dispute, appoint, as prescribed and within one month of the request, such arbitrator or arbitrators;

(iv) the arbitration tribunal shall be the judge of its own competence;

(v) the arbitration proceedings shall be conducted in the prescribed manner and within the prescribed time limits;

(vi) the arbitration tribunal shall decide its award on the basis of the treaty or other source of international law establishing the obligation the alleged violation of which has given rise to the dispute;

(vii) the adoption of an arbitration award shall require that the majority of the arbitrators vote for it.

(3) An arbitration award shall be final.

[(4) *Notification of Submission to Arbitration*] Each of the parties to a dispute that agree to submit their dispute to arbitration under paragraph (1) shall [, if the said parties so agree.] inform the Director General of that submission. The Director General shall [, if the parties to the dispute so agree.] notify the members of the Assembly and the parties to the source treaty, if any, of the fact that a submission has been made under paragraph (1) and [, if the parties so agree,] of the names of the parties to the dispute and the names of the arbitrators.]

[(5) *Notification of the Results of Arbitration*] Each of the parties to the dispute that has

been submitted to arbitration under paragraph (1) shall [ , if the parties so agree,] inform the Director General what the outcome of the arbitration is. The Director General shall [ , if the parties to the dispute so agree,] notify the members of the Assembly and the parties to the source treaty, if any, the information received from the parties to the dispute concerning the outcome of the arbitration.]

[4] [6] [*Privileged Nature of the Conduct and Contents of the Arbitration*] [Subject to paragraphs (4) and (5),] Article 4(4) shall apply, *mutatis mutandis*, to both the parties to the dispute and the arbitrators also in respect of the arbitration procedure.

## Article 9 Assembly

(1) [*Composition*] (a) The Union shall have an Assembly consisting of the Contracting Parties.

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

(c) Subject to subparagraph (d), the Union shall not bear the expenses of the participation of any delegation in any session of the Assembly.

(d) The Assembly may ask the Organization to grant financial assistance

(i) to facilitate the participation in sessions of the Assembly of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or

(ii) to cover the cost of any qualified legal expert referred to in Article 10(1)(iv).

(2) [*Tasks*] (a) The Assembly shall:

(i) deal with all matters concerning the maintenance and development of the Union and the implementation of this Treaty;

(ii) amend the provisions of the Treaty in accordance with the provisions of Article 13;

(iii) adopt the Regulations and may amend the provisions thereof;

(iv) adopt, where it considers it desirable, guidelines for the implementation of provisions of this Treaty or the Regulations;

(v) establish the roster of potential panelists referred to in Article 6(3);

(vi) exercise such rights and perform such tasks as are specifically conferred upon it or assigned to it under this Treaty;

(vii) give directions to the Director General concerning the preparations for any conference of revision referred to in Article 12 and decide the convocation of any such conference;

(viii) review and approve the reports and activities of the Director General concerning the Union, and give him all necessary instructions concerning matters within the competence of the Union;

(ix) establish such committees and working groups as it deems appropriate to achieve the objectives of the Union;

(x) determine which States and intergovernmental organizations, other than Contracting Parties, and which non-governmental organizations shall be admitted to its meetings as observers;

(xi) take any other appropriate action designed to further the objectives of the Union and perform such other functions as are appropriate under this Treaty.

(b) With respect to matters which are of interest also to other Unions administered by the Organization, the Assembly shall make its decisions after having heard the advice of the Coordination Committee of the Organization.

(3) [*Representation*] A delegate may represent one Contracting Party only.

(4) [*Voting*] (a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Provided that all its member States that are Contracting Parties have notified the Director General that their right to vote may be exercised by it, any intergovernmental organization that is a Contracting Party may so exercise the right to vote of its member States that are Contracting Parties present at the time of voting. The intergovernmental organization may not, in a given vote, exercise the right to vote if any of its member States participates in the vote or expressly abstains.

(c) The right to vote of a State that is a Contracting Party may not, in a given vote, be exercised by more than one intergovernmental organization.

(5) [*Quorum*] (a) One-half of the Contracting Parties that have the right to vote shall constitute a quorum.

(b) In the absence of the quorum, the Assembly may make decisions but, with the exception of decisions concerning its own procedure, all such decisions shall take effect only if the quorum and the required majority are attained through voting by correspondence.

(6) [*Majorities*] (a) Subject to paragraph (9)(b) of this Article, to Article 11(2)(b) and (3) and to Article 13(3)(b), the decisions of the Assembly shall require a majority of the votes cast.

(b) Abstentions shall not be considered as votes.

(7) [*Sessions*] (a) The Assembly shall meet once in every second calendar year in ordinary ses-

sion upon convocation by the Director General and, in the absence of exceptional circumstances, during the same period and at the same place as the General Assembly of the Organization.

(b) The Assembly shall meet in extraordinary session upon convocation by the Director General, either at the request of one-fourth of the Contracting Parties or on the Director General's own initiative. The Assembly shall also meet in extraordinary session, upon the convocation of the Director General, for the purpose of having the exchange of views provided for in Article 6(7)(d), or for the purpose of considering the reports called for under Article 7, if requested to do so for that purpose by any Contracting Party that is party to the dispute which is to be the subject of that exchange of views or of the said reports.

(8) [*Rules of Procedure*] The Assembly shall adopt its own rules of procedure.

(9) [*Guidelines*] (a) In the case of conflict between the guidelines referred to in paragraph (2)(a)(iv) and the provisions of this Treaty or the Regulations, the latter shall prevail.

(b) The adoption by the Assembly of the said guidelines shall require three-fourths of the votes cast.

## Article 10

### International Bureau

(1) [*Tasks*] The International Bureau shall

(i) perform the administrative tasks concerning the Union, as well as any tasks specifically assigned to it by the Assembly;

(ii) provide the secretariat of the conferences of revision referred to in Article 12, of the Assembly, of the committees and working groups established by the Assembly, and of any other meeting convened by the Director General under the aegis of the Union;

(iii) perform, in the prescribed manner, the administrative tasks that may be required by any of the procedures for dispute settlement established by this Treaty;

(iv) provide information in respect of dispute settlement to any Contracting Party, at its request;

(v) where a Contracting Party is regarded as a developing country in conformity with the established practice of the General Assembly of the United Nations and funds of the Organization have been authorized to be used for such a purpose, make available to that developing country, at its request, a qualified legal expert to assist the said country in respect of any procedure established by this Treaty for the settlement of any dispute to which it is a party, it being understood that the

International Bureau shall act in a manner ensuring its continued impartiality.

(2) [*Director General*] The Director General shall be the chief executive of the Union and shall represent the Union.

(3) [*Assembly and Other Meetings*] The Director General shall convene the Assembly and any committee and working group established by the Assembly and all other meetings organized dealing with matters of concern to the Union.

(4) [*Role of the International Bureau in Meetings*] (a) The Director General and any staff member designated by him shall participate, without the right to vote, in all the meetings of the Assembly, the committees and working groups established by the Assembly, and any other meetings convened by the Director General under the aegis of the Union.

(b) The Director General or a staff member designated by him shall be *ex officio* secretary in all the meetings of the Assembly, and of the committees, working groups and other meetings referred to in subparagraph (a).

(5) [*Conferences of Revision*] (a) The Director General shall, in accordance with the directions of the Assembly, make the preparations for conferences of revision referred to in Article 12 and convene such conferences.

(b) The Director General may consult with intergovernmental and international and national non-governmental organizations concerning the said preparations.

(c) The Director General and staff members designated by him shall take part, without the right to vote, in the discussions at any conference of revision referred to in subparagraph (a).

(d) The Director General or a staff member designated by him shall be *ex officio* secretary of any conference of revision referred to in subparagraph (a).

## Article 11

### Regulations

(1) [*Content*] The Regulations shall provide rules concerning

(i) matters which this Treaty expressly provides are to be "prescribed";

(ii) any details useful in the implementation of the provisions of this Treaty.

(2) [*Entry into Force and Majorities*] (a) The Assembly shall determine the conditions for the entry into force of the Regulations and each amendment thereto.

(b) Subject to the provisions of paragraph (3), the adoption of the Regulations or of any amendment thereto shall require three-fourths of the votes cast.

(3) [*Requirement of Unanimity*] (a) The Regulations may specify rules which may be amended only by unanimous consent.

(b) Exclusion, for the future, of any rules designated as requiring unanimous consent for amendment from such requirement shall require unanimous consent.

(c) Inclusion, for the future, of the requirement of unanimous consent for the amendment of any rule shall require unanimous consent.

(4) [*Conflict Between the Treaty and the Regulations*] In the case of conflict between the provisions of this Treaty and those of the Regulations, the former shall prevail.

## Article 12

### Revision of the Treaty by Conferences of Revision

(1) [*Revision Conferences*] This Treaty may be revised by the Contracting Parties in conferences of revision.

(2) [*Provisions that can be Amended Also by the Assembly*] The provisions referred to in Article 13(1) may be amended either by a conference of revision or according to Article 13.

## Article 13

### Amendment of Certain Provisions of the Treaty by the Assembly

(1) [*Amending of Certain Provisions by the Assembly*] The Assembly may amend the provisions in Articles 4(2), 6(1)(iii), 6(2)(c), 6(2)*bis*(a) and (b), 6(2)*ter*, 6(3)(a) and (b), 6(4)(iv), 6(6)(a) and 6(7)(b) and (c), as well as 8(2)(iii), as far as the time limits mentioned in them are concerned and the provisions in Articles 9(1)(c) and (d), 9(5) and 9(7).

(2) [*Initiation and Notice of Proposals for Amendment*] (a) Proposals for amendments under paragraph (1) may be made by any Contracting Party or by the Director General.

(b) Such proposals shall be communicated by the Director General to the Contracting Parties at least six months in advance of their consideration by the Assembly.

(3) [*Adoption and Required Majority*]

(a) Amendments under paragraph (1) shall be adopted by the Assembly.

(b) Adoption by the Assembly of any amendment under this Article shall require three-fourths of the votes cast, provided that any amendment to Article 9 shall require four-fifths of the votes cast.

(4) [*Entry Into Force*] (a) Any amendment adopted under paragraph (3) shall enter into force one month after written notification of acceptance has been received by the Director General from three-fourths of the Contracting Parties members of the Assembly at the time the Assembly adopted the amendment.

(b) Any amendment to the said provisions thus accepted shall bind all States and intergovernmental organizations that were Contracting Parties at the time the amendment was adopted by the Assembly or that become Contracting Parties thereafter, except Contracting Parties which have notified their denunciation to this Treaty in accordance with Article 16 before the entry into force of the amendment.

## Article 14

### Becoming Party to the Treaty

(1) [*Eligibility*] The following may become party to this Treaty:

(i) any State that is a member of the Organization and any other State member of the United Nations or of any other specialized agency brought into relationship with the United Nations;

(ii) any intergovernmental organization that is a party to a multilateral treaty in the field of intellectual property or that, without being party to it, has accepted an obligation or obligations under such a treaty.

(2) [*Signature; Deposit of Instrument*] To become party to this Treaty, the State or the intergovernmental organization referred to in paragraph (1) shall:

(i) sign this Treaty and deposit an instrument of ratification, or

(ii) deposit an instrument of accession.

## Article 15

### Entry Into Force of the Treaty

(1) [*Entry Into Force*] This Treaty shall enter into force three months after [two] [five] States or intergovernmental organizations have deposited their instruments of ratification or accession.

(2) [*Ratifications and Accessions Subsequent to the Entry Into Force of the Treaty*] Any State or intergovernmental organization not covered by paragraph (1) shall become bound by this Treaty

three months after the date on which it has deposited its instrument of ratification or accession, unless a later date has been indicated in the said instrument. In the latter case, the said State or intergovernmental organization shall become bound by this Treaty on the date thus indicated.

### Article 16

#### Denunciation of the Treaty

(1) [*Notification*] Any Contracting Party may denounce this Treaty by notification addressed to the Director General.

(2) [*Effective Date*] (a) Denunciation shall take effect one year from the date on which the Director General has received the notification of denunciation.

(b) The denunciation shall not affect the application of this Treaty to any dispute to which the Contracting Party making the denunciation is a party and which is pending at the time of the expiration of the one-year period referred to in subparagraph (a).

### Article 17

#### Languages of the Treaty; Signature

(1) [*Original Texts; Official Texts*] (a) This Treaty shall be signed in a single original in the English, Arabic, Chinese, French, Russian and Spanish languages, all texts being equally authentic.

(b) Official texts shall be established by the Director General, after consultation with the interested Governments, in such other languages as the Assembly may designate.

(2) [*Time Limit for Signature*] This Treaty shall remain open for signature at the headquarters of the Organization for one year after its adoption.

### Article 18

#### Depositary

The Director General shall be the depositary of this Treaty.

## DRAFT REGULATIONS UNDER THE TREATY

### LIST OF RULES

#### PART A: Introductory Rules

- Rule 1: Use of Terms and Abbreviated Expressions
- Rule 2: Interpretation of Certain Words

#### PART B: Rules Concerning Several Articles of the Treaty

- Rule 3: Languages of Communications
- Rule 4: Expressing Dates
- Rule 5: Calculation of Time Limits
- Rule 6: Irregularities in the Mail Service
- Rule 7: Amount of Expenses to be Paid by Party to a Dispute

#### PART C: Rule Concerning Article 3 of the Treaty

- Rule 8: Notification of Submission of Dispute under Article 3(2)(i) or (ii)

#### PART D: Rules Concerning Article 4 of the Treaty

- Rule 9: Content of the Invitation
- Rule 10: Content of the Reply
- Rule 11: Channel and Mode of Communication of the Invitation and of the Reply
- Rule 12: Place of the Consultations
- Rule 13: Languages of the Consultations

#### PART E: Rule Concerning Article 5 of the Treaty

- Rule 14: Good Offices, Conciliation or Mediation of the Director General

#### PART F: Rules Concerning Article 6 of the Treaty

- Rule 15: Roster of Potential Members of Panels
- Rule 16: Number of Persons from Developing Countries as Members of Panel
- Rule 17: Summary of the Dispute
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- Rule 20: Languages in Panel Proceedings
- Rule 21: Submission of Written Arguments, Rebuttals, Statements and Documents in Panel Proceedings
- Rule 22: Hearings Before the Panel
- Rule 23: Content of the Panel Report

#### PART G: Rule Concerning Article 7 of the Treaty

- Rule 24: Reports to the Assembly

#### PART H: Rules Concerning Article 8 of the Treaty

- Rule 25: Request for an Arbitration Tribunal
- Rule 26: Roster of Potential Arbitrators
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- Rule 28: Place of Arbitration Proceedings
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#### PART I: Rules Concerning Articles 9 to 18 of the Treaty

- Rule 32: Facilities and Assistance of the International Bureau
- Rule 33: Absence of Quorum in the Assembly
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- Rule 35: Amendment of Time Limits Fixed in the Treaty

## PART A

## Introductory Rules

## Rule 1

*Use of Terms and Abbreviated Expressions*

(1) ["Treaty"; "Article"; "Regulations"; "Rule"; "Paragraph"; "Guidelines"] In these Regulations, the word

(i) "Treaty" means the Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property;

(ii) "Article" refers to the specified Article of the Treaty;

(iii) "Regulations" means the Regulations under the Treaty;

(iv) "Rule" refers to the specified Rule of the Regulations;

(v) "paragraph" refers to the specified paragraph of the Rule in which the paragraph containing the reference is located unless another rule is specified in that paragraph;

(vi) "Guidelines" means the guidelines adopted by the Assembly.

(2) [*Use of Terms and Abbreviated Expressions Defined in the Treaty*] The terms and abbreviated expressions defined in Article 2 for the purposes of the Treaty shall have the same meaning for the purposes of the Regulations.

## Rule 2

*Interpretation of Certain Words*

(1) ["Sender"; "Addressee"] Whenever the word "sender" or "addressee" is used in these Regulations, it shall be construed as meaning a Contracting Party, a party to the dispute, an intervening party, the Director General or the International Bureau that sends a communication or to whom a communication is addressed, unless the contrary clearly follows from the wording or the nature of the provision, or the context in which the word is used.

(2) ["Communication"] Whenever the word "communication" is used in these Regulations, it shall be construed as meaning the notification of the submission of a dispute, referred to in Article 3(2)(i) or (ii), the invitation to enter into consultations, referred to in Article 4(1), the reply to that invitation, referred to in Article 4(2), [the notifications under Article 4(4) and (5), Article 5(3) and (4) and Article 8(4) and (5),] the request for the good offices, conciliation or mediation of the Director

General, referred to in Article 5(1)(b), the response to that request, referred to in Article 5(1)(c), the request for a procedure before a panel, referred to in Article 6(2), the summary accompanying that request, referred to in Article 6(2)(b)(iv), the answer to that request, referred to in Article 6(2)*bis*, [the comments on the report of the panel, referred to in Article 6(7)(b),] the request for the establishment of an arbitration tribunal, referred to in Article 8(2)(i), and the reply to that request, unless the contrary clearly follows from the wording or the nature of the provision, or the context in which the word is used.

(3) ["Interested Party"] Whenever the expression "interested party" is used in these Regulations, it shall be construed as meaning either a sender or an addressee of a communication or both, unless the contrary clearly follows from the wording or the nature of the provision, or the context in which the expression is used.

## PART B

## Rules Concerning Several Articles of the Treaty

## Rule 3

*Languages of Communications*

(1) [*Communications to a Party to a Dispute*]

(a) Any communication addressed by a party to a dispute to another party to that dispute may be in any language chosen by the sender, provided that, if that language is not a language that is an official language of the addressee, the communication shall be accompanied by a translation in an official language of the addressee, prepared by the sender.

(b) Any communication addressed by the Director General or the International Bureau to a party to a dispute or to an intervening party shall be, at the option of the Director General or the International Bureau, in English or French; however, where that communication is in response to a communication addressed by such party to the Director General or the International Bureau in English or in French, the former communication shall be in the language of the latter communication.

(2) [*Communications to the Director General or the International Bureau*] Any communication addressed to the Director General or the International Bureau by a party to a dispute or by an intervening party [shall be, at the option of such party, in English or French] [may be in such language as that party chooses, provided that the communication is



accompanied by a translation in English or French, prepared by that party].

(3) [*Communications to the Assembly or to Parties to a Source Treaty*] Any communication addressed by the Director General or the International Bureau to the members of the Assembly or to the parties to a source treaty, if any, transmitting to those members or to those parties [any information referred to in Article 4(4) and (5), in Article 5(3) and (4) and Article 8(4) and (5),] the request referred to in Article 6(2), the answer referred to in Article 6(2)*bis*, the report, comments and information referred to in Article 6(7)(a), (b) and (c), and the reports referred to in Article 7, shall be, at the option of the Director General, in English or French, whereas [the information referred to in Article 4(4) and (5), Article 5(3) and (4) and Article 8(4) and (5),] the comments and information referred to in Article 6(7)(c) and the reports referred to in Article 7, shall be in the language of [that information,] those comments and information or those reports, as received from a party to the dispute, but shall be accompanied by a translation thereof, in English or French, prepared by that party. The report of the panel referred to in Article 6(7)(a), and prepared in accordance with Rule 23, shall be transmitted by the Director General to the Assembly and to the parties to the source treaty, if any, in its original language, and, if that language is not English or French, it shall be accompanied by a translation in the English or French language, prepared by the International Bureau.

#### Rule 4

##### *Expressing Dates*

Interested parties shall, for the purposes of the Treaty and the Regulations, express any date in terms of the Christian era and the Gregorian calendar, or, if they use other eras and calendars, they shall also express any date in terms of the Christian era and the Gregorian calendar.

#### Rule 5

##### *Calculation of Time Limits*

(1) [*Periods Expressed in Months*] Any period expressed as one month or a certain number of months shall expire in the relevant subsequent month, on the day which has the same number as the day of the event from which the period starts to run, provided that if the relevant subsequent month has no day with the same number, the period shall expire on the last day of the month.

(2) [*Periods Expressed in Days*] The calculation of any period expressed in days shall start with the day following the day on which the relevant event occurred and shall expire on the day on which the last day of the count has been reached.

(3) [*Periods Expressed in Weeks*] Any period expressed as a week or a certain number of weeks shall start on the day following the day on which the relevant event occurred, and the period shall expire in the relevant subsequent week, on the day which is the seventh day counting from that following day.

(4) [*Local Dates*] (a) The date which is taken into consideration as the starting date of the computation of any period shall be the date which prevails in the locality at the time when the relevant event occurred.

(b) The date on which any period expires shall be the date which prevails in the locality at which the required communication must be received.

(5) [*Expiration on a Non-Working Day*] If a period expires on a day on which the addressee is not open for official business, the period shall expire on the first subsequent day on which the addressee is open for official business.

(6) [*End of Working Day*] (a) A period expiring on a given day shall expire at the moment the addressee closes for official business on that day.

(b) Any addressee may depart from the provisions of paragraph (a) up to midnight on the relevant day.

(7) [*Date of Communication*] (a) Where a period starts on the day of the date of a communication, any interested party may prove that the said communication was mailed on a day later than the date it bears, in which case the date of actual mailing shall, for the purposes of calculating the period, be considered to be the date on which the period starts.

(b) Irrespective of the date on which the said communication is mailed, if the sender offers evidence to the Director General which satisfies the Director General that the communication was received more than seven days after the date it bears, the Director General shall treat the period starting from the date of the communication as expiring later by an additional number of days which is equal to the number of days which the communication was received later than seven days after the date it bears.

(8) [*Receipt of Communication*] (a) Any communication is deemed to have been received if it is physically delivered to the addressee or if it is delivered at its mailing address or at the place it conducts official business.

(b) The communication shall be deemed to have been received on the day it is so delivered.

(9) [*Indication of the Date of Expiration*] The Director General or the International Bureau shall in all cases in which he or it communicates a time limit, indicate the date of the expiration, according to paragraphs (1) to (8), of the said time limit.

#### Rule 6

##### *Irregularities in the Mail Service*

(1) [*Delay or Loss in Mail*] Delay by an interested party in meeting a time limit for a communication to be addressed to another interested party shall be excused if the sender proves to the satisfaction of the addressee that

(i) at least five days preceding the day of expiration of the time limit, it mailed the communication which, because of delay in arrival, reached the addressee after the expiration of the time limit or, because of loss in the mail, was never received by the addressee,

(ii) the sender effected the mailing within five days after the mail service was resumed or, in the case of loss in the mail, a communication which is identical with the communication lost is submitted to the addressee within one month after the sender noticed—or with due diligence should have noticed—the delay or loss, and in no case later than six months after the expiration of the time limit applicable in the given case.

(2) [*Interruption in the Mail Service*] Delay by an interested party in meeting a time limit for a communication to be addressed to another interested party shall be excused if the sender proves to the satisfaction of the addressee that

(i) on any of the ten days preceding the day of expiration of the time limit the postal service was interrupted on account of war, revolution, civil disorder, strike, natural calamity, or other like reason,

(ii) the sender effected the mailing within five days after the mail service was resumed.

#### Rule 7

##### *Amount of Expenses to be Paid by Party to a Dispute*

The International Bureau shall, subject to Rule 31, fix the amount to be paid by each party to a dispute as its contribution to the expenses of the procedure or procedures to which the dispute is submitted.

## PART C

### Rule Concerning Article 3 of the Treaty

#### Rule 8

##### *Notification of Submission of Dispute under Article 3(2)(i) or (ii)*

Where, pursuant to Article 3(2)(i) or (ii), a dispute is to be submitted by the parties to the dispute to one or more of the procedures for the settlement of disputes established by the Treaty, each such party shall inform the Director General that the said dispute is being so submitted and shall specify the procedure or procedures concerned.

## PART D

### Rules Concerning Article 4 of the Treaty

#### Rule 9

##### *Content of the Invitation*

The invitation to enter into consultations, referred to in Article 4(1), shall

(i) state the name of the State or intergovernmental organization that is extending the invitation,

(ii) state the name of the State or intergovernmental organization to which the invitation is extended,

(iii) state that the invitation is extended with a view to initiating consultations under Article 4 of the Treaty,

(iv) contain an allegation that the addressee of the invitation has breached an obligation relating to a matter or to matters of intellectual property,

(v) indicate the source of the obligation by referring either to the provision or provisions of the source treaty that contains or contain the obligation or to a generally recognized principle of law concerning or applicable to intellectual property that is the basis of the obligation,

(vi) describe the matter or matters of intellectual property in respect of which the obligation relates,

(vii) specify the facts that demonstrate a breach of the obligation has occurred,

(viii) state any other legal grounds in support of the alleged breach,

(ix) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, that is extending the invitation, which is competent to enter into the consultations,

(x) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to carry out the consultations,

(xi) set forth the postal address and, if any, the telecopier number and the telex number of the authority or unit to which the reply and other written communications are to be sent,

(xii) indicate whether the reply to the invitation may be made within a period other than the two-month period referred to in Article 4(2) and, if so, what that period is,

(xiii) indicate whether the date to be offered for the consultations may be within a period other than the three-month period referred to in Article 4(2) and, if so, what that period is.

#### *Rule 10*

##### *Content of the Reply*

The reply to the invitation to enter into consultations, referred to in Article 4(2), shall

(i) state the name of the State or the intergovernmental organization that is the sender of the reply,

(ii) identify the invitation in respect of which the reply is being sent,

(iii) specify a date on which the sender of the reply proposes that the consultations commence,

(iv) indicate the place where the sender of the reply proposes that the consultations be carried out,

(v) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, which is competent, on behalf of the sender of the reply, to enter into the consultations,

(vi) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to carry out the consultations,

(vii) set forth the postal address and, if any, the telecopier number and telex number of the authority or unit to which written communications are to be sent.

#### *Rule 11*

##### *Channel and Mode of Communication of the Invitation and of the Reply*

(1) The invitation to enter into consultations, referred to in Article 4(1), and the reply to that invitation, referred to in Article 4(2), shall be

(i) addressed, in the case of a State party to the dispute, by or to the Minister for Foreign Affairs of that State and, in the case of an intergovernmental organization that is party to the dispute, by or to the executive head of that organization;

(ii) sent, by registered mail, to the addressee referred to in item (i), above; in respect of a reply to

an invitation to enter into consultations, the reply shall be sent to the place indicated in that invitation; in respect of an invitation to enter into consultations, the invitation shall be sent to the place where, to the knowledge of the sender of the invitation, the addressee normally does its official business.

(2) The sender of the invitation to enter into consultations or of the reply to that invitation may send that invitation or that reply to the Director General for transmission to the addressee of that invitation or of that reply, as the case may be.

#### *Rule 12*

##### *Place of the Consultations*

The consultations shall be carried out at the place proposed by the addressee to whom the invitation to enter into consultations has been sent, unless the sender of that invitation objects to that place. In the event of such an objection, the consultations shall be carried out at such other place as may be agreed upon by the parties to the dispute. In the absence of such an agreement, the consultations shall be carried out at the headquarters of the Organization.

#### *Rule 13*

##### *Languages of the Consultations*

The consultations shall be carried out in the language or languages agreed upon by the parties to the dispute. In the absence of such an agreement, each party to the dispute may use the language it prefers, provided that it provides interpretation from that language into a language designated by the other party to the dispute, if the latter requests such interpretation. Any party to the dispute may provide interpretation into the language it prefers to use from the language used by the other party.

## PART E

### **Rule Concerning Article 5 of the Treaty**

#### *Rule 14*

##### *Good Offices, Conciliation or Mediation of the Director General*

(1) [*The Request*] The request for the good offices, conciliation or mediation of the Director General, referred to in Article 5(1)(b), shall

- (i) be addressed to the Director General,
- (ii) state the name of the State making the request,
- (iii) state the name of the other party to the dispute,
- (iv) state that the request is being made with a view to initiating the good offices, conciliation or mediation of the Director General pursuant to Article 5(1)(b) of the Treaty,
- (v) contain an allegation that the other party to the dispute has breached an obligation relating to a matter of intellectual property,
- (vi) indicate the source of the obligation by referring either to the provision or provisions of the source treaty, if any, that contains or contain the obligation or to a generally recognized principle of law concerning or applicable to intellectual property that is the basis of the obligation,
- (vii) describe the matter or matters of intellectual property in respect of which the obligation relates,
- (viii) specify the facts that demonstrate a breach of the obligation has occurred,
- (ix) state any other legal grounds in support of the alleged breach,
- (x) identify the authority in the State making the request which is competent to take part in the procedure of good offices, conciliation or mediation,
- (xi) designate the official or officials of that authority who is or are authorized to be contacted in the course of that procedure,
- (xii) set forth the postal address and, if any, the telecopier number and telex number of the authority to which written communications are to be sent.

(2) [*Transmittal of Copy of the Request to the Other Party to the Dispute*] The Director General shall send to the other party to the dispute a copy of the request referred to in paragraph (1) and invite the said party to respond to that request.

(3) [*The Response*] The response of the other party to the dispute to the request referred to in paragraph (1) shall

- (i) state the name of the State or intergovernmental organization that is the sender of the response,
- (ii) identify the request in respect of which the response is being sent,
- (iii) state which of the facts and legal grounds in the request are admitted or denied, and, on what basis,
- (iv) state what other facts and legal grounds are relied upon,
- (v) identify the authority in the State or the unit in the intergovernmental organization, as the case may be, which is competent, on behalf of the sender

of the response, to take part in the procedure of good offices, conciliation or mediation,

(vi) designate the official or officials of that authority or that unit, as the case may be, who is or are authorized to be contacted in the course of that procedure,

(vii) set forth the postal address and, if any, the telecopier number and telex number of the authority or unit to which written communications are to be sent.

(4) [*Date, Place and Languages of the Procedure*] The date when, and the place where, as well as the language or languages in which, the procedure of good offices, conciliation or mediation is to be conducted shall be fixed by the Director General in agreement with the parties to the dispute.

## PART F

### Rules Concerning Article 6 of the Treaty

#### Rule 15

##### *Roster of Potential Members of Panels*

(1) [*Invitation to Nominate Persons*] At least two months before the first session of the Assembly, and, thereafter, before each ordinary session of the Assembly, the Director General shall address a communication to the Contracting Parties inviting each Contracting Party to nominate for inclusion in the roster of potential members of panels, to be established by the Assembly, four persons, each of whom may be a national of that Contracting Party.

(2) [*Preparation and Submission of Text*] (a) The Director General shall prepare a list in alphabetical order of all the persons thus nominated as well as twelve persons nominated by him. The list shall be accompanied by a brief description of each person, indicating his nationality, education, service in government, position in industry or status in a profession and expertise in a given branch of intellectual property.

(b) The Director General shall submit the list and the information on each person to the Assembly.

(3) [*Establishment of Roster*] The Assembly, at its first session, and, similarly, at each ordinary session, shall, on the basis of the list submitted to it, establish the roster of potential members of panels. In establishing that roster, the Assembly may delete from the list submitted to it the name of any person appearing thereon.

*Rule 16**Number of Persons from Developing Countries as Members of Panel*

Pursuant to Article 6(3)(b), the Director General shall designate as members of the panel the following number of persons from developing countries:

(i) one, in the event that the parties to the dispute have agreed that the number of members of the panel shall be three and have agreed on the designation of one or two of the members of the panel,

(ii) two, in the event that the parties to the dispute have agreed that the number of members of the panel shall be three and have agreed on the designation of none of the members of the panel,

(iii) one, in the event that the parties to the dispute have agreed that the number of members of the panel shall be four and have agreed on the designation of one or two or three of the members of the panel,

(iv) two, in the event that the parties to the dispute have agreed that the number of members of the panel shall be four and have agreed on the designation of none of the members of the panel,

(v) one, in the event that the parties to the dispute have agreed that the number of members of the panel shall be five and have agreed on the designation of all but one of the members of the panel,

(vi) two, in the event that the parties to the dispute have agreed that the number of members of the panel shall be five and have agreed on the designation of none, one, or two or three of the members of the panel.

*Rule 17**Summary of the Dispute*

(1) The summary of the dispute, referred to in Article 6(2)(iv) shall

(i) state the name of the State or intergovernmental organization that has drawn up the request for a procedure before a panel and the name of the other party to the dispute,

(ii) set forth the obligation alleged to be breached that has given rise to the dispute,

(iii) indicate the provision or provisions of the source treaty, if any, that contains or contain the obligation or a generally recognized principle of law concerning or applicable to intellectual property that is the basis of the obligation,

(iv) describe the proposed measures that should be taken by the other party to the dispute in respect of the breach.

(2) The summary of the dispute shall be drawn up in accordance with the format suggested in the Guidelines or, in the absence of such guidelines, as recommended by the International Bureau.

*Rule 18**Meetings of the Panel*

(1) The panel shall fix the date, time and place of its meetings.

(2) At its meetings, the panel shall, subject to these Rules, determine the place, languages and procedure to be followed during its proceedings, shall prepare its draft report, consider the comments on that draft report, made by the parties to the dispute, and adopt its report.

(3) All meetings of the panel shall be in private.

*Rule 19**Place of Panel Proceedings*

The place of the proceedings before the panel shall be at the headquarters of the Organization, unless the panel determines, in view of all the circumstances of the matter, that another place is more appropriate.

*Rule 20**Languages in Panel Proceedings*

(1) Subject to any agreement of the parties to the dispute, and to paragraph (2), the panel shall promptly after its convocation determine the language or languages to be used in the proceedings. This determination shall apply to written submissions of arguments, and any other written statements or documents, the draft report of the panel, the comments of the parties to the dispute on that draft report, the report [and the comments of the parties to the dispute on the report of the panel,] and, if oral hearings take place, to the language or languages to be used in such hearings.

(2) The report of the panel referred to in Article 6(7)(a) shall be prepared by the International Bureau in the English and in the French language, unless the panel decides, in agreement with the parties to the dispute, that the report shall be prepared in another language or other languages than English or French, in which event, the International Bureau shall prepare a translation in English and in French.

### Rule 21

#### *Submission of Written Arguments, Rebuttals, Statements and Documents in Panel Proceedings*

- (1) The panel shall determine the periods of time within which each party to the dispute or an intervening party shall submit its written arguments and rebuttals.
- (2) The panel shall decide which further written statement or statements, in addition to the written submissions of arguments and rebuttals, shall be required from any party to the dispute or any intervening party, or may be presented by such a party, and shall fix the period of time for communicating such statement or statements.
- (3) The period of time fixed by the panel for the submission of written arguments or rebuttals or of any further written statement shall not exceed forty-five (45) days. However, the panel may extend the time limit on such terms as it may deem appropriate.
- (4) All written arguments, rebuttals or any further statement or statements shall be accompanied by copies (or, if they are especially voluminous, lists) of all essential documents on which the party concerned relies and which have not previously been submitted by any party.
- (5) As soon as practicable following the completion of the submission of written arguments and rebuttals and any further written statement or statements, the panel may hold hearings and otherwise proceed pursuant to its authority under Article 6 and these Rules.
- (6) If any party to the dispute or intervening party fails, within the period of time fixed by the panel, to submit written arguments or rebuttals or any further written statement or statements, or, if at any point any party fails to avail itself of the opportunity to present its case in the manner directed by the panel, the panel may nevertheless proceed, conclude its proceedings, prepare its draft report, invite comments thereon, and adopt its report.

### Rule 22

#### *Hearings Before the Panel*

- (1) The panel may decide to hold hearings for the presentation of [evidence by witnesses, including expert witnesses, or for] oral argument.
- (2) The panel shall fix the date, time and place of hearings before the panel and shall give the parties

to the dispute and any intervening party reasonable notice thereof.

- (3) The panel may in advance of hearings submit to any party to the dispute or to any intervening party a list of questions which the panel wishes that party to treat with special attention.
- (4) All hearings before the panel shall be in private unless the panel decides otherwise.
- (5) The panel may declare the hearings closed if no party to the dispute or any intervening party has any further oral or written submissions or arguments to make or proof to offer [or witnesses to be heard].
- (6) The panel may on its own initiative, or upon request of any party to the dispute or of any intervening party, but before the panel adopts its report, reopen the hearings.

### Rule 23

#### *Content of the Panel Report*

- The report of the panel shall contain
- (i) the date on which it was drawn up,
  - (ii) the names of the members of the panel,
  - (iii) a description of the parties to the dispute,
  - (iv) the names of the representatives of each of the parties to the dispute,
  - (v) a summary of the proceedings,
  - (vi) a finding of the facts,
  - (vii) a statement of the arguments of each party to the dispute,
  - (viii) the opinion of the panel as to whether the facts found disclose a breach by the party to the dispute concerned of its obligation relating to a matter or to matters of intellectual property,
  - (ix) the reasons on which the opinion is based,
  - (x) the recommendations of the panel as to the measures that one or more of the parties to the dispute should take.

## PART G

### Rule Concerning Article 7 of the Treaty

#### Rule 24

#### *Reports to the Assembly*

The report or reports on the implementation of the recommendation or recommendations of the panel, referred to in Article 7, shall be submitted by each party to the dispute in such form, content, periodicity and manner, as indicated in the Guide-

lines adopted by the Assembly or as decided by the Assembly after its exchange of views on the report of the panel has taken place in accordance with Article 6(7)(d).

## PART H

### Rules Concerning Article 8 of the Treaty

#### Rule 25

##### *Request for an Arbitration Tribunal*

(1) [*The Request*] The request for the establishment of an arbitration tribunal, referred to in Article 8(2)(i), shall

(i) refer to the agreement between the parties to the dispute to settle their dispute by arbitration,

(ii) set forth the obligation the alleged violation of which has given rise to the dispute,

(iii) state the facts and legal grounds on which the allegation of breach is based,

(iv) ask the other party to the dispute to proceed with the establishment of the arbitration tribunal,

(v) identify the authority in the State or the unit in the intergovernmental organization which is competent to take part in the arbitration procedure,

(vi) designate the official or officials of that authority or that unit who is or are authorized to be contacted in respect of that procedure,

(vii) set forth the postal address and, if any, the telecopier number and telex number of the authority or that unit to which written communications are to be sent.

(2) [*The Reply to the Request*] (a) The party to the dispute to which the request for the establishment of an arbitration tribunal is sent shall reply to that request within one month of the receipt of the request.

(b) The reply of the other party to the dispute shall indicate the name of the arbitrator appointed by that party and may propose the third arbitrator to be appointed with the agreement of the parties to the dispute.

(c) The reply shall contain also the information indicated in items (v), (vi) and (vii) of paragraph (1).

(3) [*Channel and Mode of Communication of the Request and the Reply*] (a) When sending the request for the establishment of an arbitration tribunal to the other party to the dispute, the sender shall also transmit a copy of the request to the Director General.

(b) Rule 11 shall apply, *mutatis mutandis*, to the request for the establishment of an arbitration tribunal and to the reply to that request.

#### Rule 26

##### *Roster of Potential Arbitrators*

Rule 15 shall apply, *mutatis mutandis*, to the invitation to nominate persons for inclusion in the roster of potential arbitrators, the preparation of the list of persons thus nominated and its submission to the Assembly, as well as to the establishment by the Assembly of the roster of potential arbitrators.

#### Rule 27

##### *Composition of the Arbitration Tribunal*

(1) [*Arbitrators appointed by the Director General*] When requested by a party to the dispute, the Director General shall appoint the arbitrator or arbitrators, in consultation with the parties, from among the persons on the roster of potential arbitrators referred to in Rule 26.

(2) [*Presiding Arbitrator*] The third arbitrator, appointed by agreement of the parties or, in the absence of such agreement, by the Director General, shall be the presiding arbitrator.

#### Rule 28

##### *Place of Arbitration Proceedings*

Except if the parties to the dispute agree otherwise, the arbitration proceedings shall take place at the headquarters of the Organization, unless, in view of the circumstances, the arbitration tribunal decides otherwise.

#### Rule 29

##### *Languages in Arbitration Proceedings*

Subject to any agreement of the parties to the dispute, the arbitration tribunal shall promptly after its convocation determine the language or languages to be used in its proceedings. This determination shall apply to written submissions of arguments, and any other written statements or documents, the award of the arbitration tribunal and, if oral hearings take place, to the language or languages to be used in such hearings.

#### Rule 30

##### *Conduct of Arbitration Proceedings*

(1) [*Procedure before the Tribunal*] Unless the parties to the dispute agree otherwise, the arbitra-

tion tribunal shall determine its procedure, assuring to each party a full opportunity to be heard and to present its case. In particular, the arbitration tribunal shall determine

(i) the periods of time within which each of the parties to the dispute shall submit its written arguments and rebuttals,

(ii) whether further written statements, documents or other information should be submitted by any of the parties and, if so, fix the period of time for communicating such statement or statements,

(iii) whether, in view of the circumstances, any period of time may be extended,

(iv) whether oral hearings shall take place and, if so, their date and place.

(2) [*Experts*] The arbitration tribunal may appoint one or more experts to report on specific issues determined by the arbitration tribunal.

(3) [*The Award*] The award shall be made in writing and shall state the reasons upon which it is based.

(4) [*Transmission of the Award*] The arbitration tribunal shall transmit the award to the parties to the dispute.

#### Rule 31

##### *Expenses*

The expenses of the arbitration proceedings, including the remuneration of the members of the arbitration tribunal, shall be borne by the parties to the dispute in equal shares unless the arbitration tribunal decides otherwise in view of the circumstances of the case.

### PART I

#### Rules Concerning Articles 9 to 18 of the Treaty

#### Rule 32

##### *Facilities and Assistance of the International Bureau*

The International Bureau shall, at the request of any party to a dispute that is the subject of consultations, good offices, mediation or conciliation, or at the request of the panel before which a procedure has been requested, or at the request of the arbitration tribunal to which a dispute has been submitted, make available, or arrange for, such facilities and assistance for the conduct of the consultations, good offices, conciliation or mediation, or the procedure before the panel, or the arbitration proceed-

ings, as may be required, including suitable accommodation therefor, and secretarial and interpretation services.

#### Rule 33

##### *Absence of Quorum in the Assembly*

In the case provided for in Article 9(5)(b), the International Bureau shall communicate the decisions of the Assembly (other than those concerning the Assembly's own procedure) to the Contracting Parties having the right to vote which were not represented and shall invite them to express in writing their vote or abstention within a period of three months from the date of the communication. If, at the expiration of that period, the number of Contracting Parties having thus expressed their vote or abstentions attains the number of Contracting Parties which was lacking for attaining the quorum in the session itself, such decisions shall take effect provided that at the same time the required majority still obtains.

#### Rule 34

##### *Requirement of Unanimity for Amending Certain Rules (ad Article 11(3))*

Amendment of Rule 33 or Rule 35 and of the present Rule of these Regulations shall require that no Contracting Party having the right to vote in the Assembly vote against the proposed amendment.

#### Rule 35

##### *Amendment of Time Limits Fixed in the Treaty (ad Article 13(1))*

(1) [*Presentation of Proposals for Amendment*] Proposals made by a Contracting Party shall be presented to the Director General.

(2) [*Decision by the Assembly*] (a) The text of a proposal shall be sent by the Director General to all Contracting Parties at least two months in advance of that session of the Assembly whose agenda includes the proposal.

(b) During the discussions of the proposal in the Assembly, the proposal may be amended or consequential amendments proposed.

(3) [*Voting by Correspondence*] (a) When voting by correspondence is chosen, the proposal shall be included in a written communication from the Director General to the Contracting Parties, inviting them to express their vote in writing.

(b) The invitation shall fix the time limit within which the reply containing the vote expressed in



writing must reach the International Bureau. That time limit shall not be less than three months from the date of the invitation.

(c) Replies must be either positive or negative. Proposals for amendments or mere observations shall not be regarded as votes.

### **Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property**

(Geneva, May 17 to 21, 1993)

The Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty on the Settlement of Disputes between States in the Field of Intellectual Property was held in Geneva from May 17 to 21, 1993. The following 69 States were represented at the session: Algeria, Argentina, Armenia, Australia, Austria, Bangladesh, Belgium, Brazil, Bulgaria, Cameroon, Chile, China, Colombia, Côte d'Ivoire, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Guinea, Honduras, Hungary, India, Indonesia, Iran (Islamic Republic of), Ireland, Israel, Italy, Japan, Kenya, Latvia, Lesotho, Libya, Malawi, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Portugal, Republic of Korea, Romania, Russian Federation, Senegal, Slovenia, Spain, Sudan, Swaziland, Sweden, Switzerland, Syria, Thailand, Togo, Turkey, United Kingdom, United States of America, Uruguay, Viet Nam, Yugoslavia, Zambia. The following four international organizations were

admitted to the Preparatory Meeting in an observer capacity: African Regional Industrial Property Organization (ARIPO), African Intellectual Property Organization (OAPI), European Communities (EC), European Patent Organisation (EPO).

The discussions of the Preparatory Meeting were based on a memorandum of the International Bureau which dealt with the following matters: substantive documents to be submitted to the Diplomatic Conference, languages of the preparatory documents, languages of interpretation, proposed agenda, proposed rules of procedure and invitations to the Diplomatic Conference.

The Preparatory Meeting decided that it should be convened to meet for a second part in conjunction with the next (sixth) session of the Committee of Experts on the Settlement of Intellectual Property Disputes between States in order to deal with certain questions the consideration of which had been postponed in view of their relevance to the issues to be further considered by the Committee of Experts at its sixth session.

*WIPO Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights (Harvard University, Cambridge, Massachusetts, United States of America).* From March 31 to April 2, 1993, WIPO organized a Worldwide Symposium on the Impact of Digital Technology on Copyright and Neighboring Rights, at Harvard University. Some 250 participants from Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Denmark, Finland, France, Germany, Ghana, Greece, Iceland, India, Ireland, Israel, Italy, Japan, Lithuania, Mexico, the Netherlands, Nigeria, Norway, Portugal, the Russian Federation, Slovakia, Spain, Swaziland, Sweden, Switzerland, the United

Kingdom, the United States of America and Hong Kong, attended the Symposium. The Symposium was opened by the Director General of WIPO, who was accompanied by several other WIPO officials. Mr. Ralph Oman, Register of Copyrights, Library of Congress, and Professor Robert Clark, Dean of Harvard Law School, also made speeches at the opening session. Papers were presented by 20 experts from France, Germany, Hungary, India, Japan, the United Kingdom and the United States of America. Those papers dealt with the following subjects: Concept and General Overview of Digital Technology; Impact of Digital Technology on the Creation, Dissemination and Protection of Works

and Subjects of Neighboring Rights (Publishing, Information Networks, Libraries); Impact of Digital Technology on the Creation, Dissemination and Protection of Works and Subjects of Neighboring Rights (Audiovisual Works, Sound Recordings, Broadcasting); Digital Technology and the Administration of Copyright and Neighboring Rights. A compendium of the papers presented at the Symposium will be published by the International Bureau of WIPO before the end of 1993.

*Consultation Meeting on the Impact of New Technologies on the Rights of Performers.* On May 17 and 18, 1993, WIPO held a Consultation Meeting on the Impact of New Technologies on the Rights of Performers at its headquarters, with the participation of the following interested non-governmental organizations: Association for the International Collective Management of Audiovisual

Works (AGICOA), European Broadcasting Union (EBU), International Confederation of Societies of Authors and Composers (CISAC), International Copyright Society (INTERGU), International Federation of Actors (FIA), International Federation of Musicians (FIM), International Federation of the Phonographic Industry (IFPI), International Literary and Artistic Association (ALAI), Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI). The meeting discussed two studies prepared by WIPO consultants from Sweden and the United Kingdom, and also the relevant parts of the working document prepared for the first session of the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, scheduled to be held from June 28 to July 2, 1993, and made useful suggestions with regard to the protection of the rights of performers.

**Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms**

First Session

(Geneva, June 28 to July 2, 1993)

**QUESTIONS CONCERNING A POSSIBLE INSTRUMENT ON THE PROTECTION OF THE RIGHTS OF PERFORMERS AND PRODUCERS OF PHONOGRAMS**

*Memorandum prepared by the International Bureau*

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**INTRODUCTION**

1. The current program of WIPO (covering the years 1992 and 1993) provides that the International Bureau will prepare, convene and service the Committee of Experts on a Protocol to the Berne Convention. As to the contents of the possible protocol, the same program distinguishes between the rights of authors and the rights of producers of sound recordings. In respect of the rights of au-

thors, the program provides that "the Protocol is mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which [the Berne] Convention applies" (document AB/XXII/2, item 03(2)). In respect of the rights of producers of phonograms, the program provides that "the desirability of covering in the protocol the rights of producers of sound recordings in sound recordings produced by them will be examined" (*ibidem*).

2. This program was adopted by the Assembly and the Conference of Representatives of the Berne Union on October 2, 1991 (see document AB/XXII/22, paragraph 197). A similar decision was made two years earlier by the same bodies for the program of the 1990-91 biennium (see documents AB/XX/2, item PRG.02(2), and AB/XX/20, paragraphs 152 and 199).

3. So far, the Committee of Experts on a Possible Protocol to the Berne Convention has met twice, both times at the headquarters of WIPO. The first session was held in 1991 (November 4 to 8), and the second in 1992 (February 10 to 17).

4. The discussions were based on working papers prepared by the International Bureau (documents BCP/CE/I/2 and 3). They contained draft provisions (that is, texts in "treaty language") for the possible protocol and explanations of the draft provisions. With the exception of one question (collective administration of rights), all the (some 20) topics covered by the working documents (including the protection of sound recordings) were considered. The results of the discussions are reflected in the reports of the two sessions (documents BCP/CE/I/4 and BCP/CE/II/1).

5. The terms of reference mentioned in paragraph I, above, were modified by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1992 (see document B/A/XIII/2, paragraph 22) in deciding, *inter alia*,

"(i) the establishment of two Committees of Experts, one for the preparation of a possible protocol to the Berne Convention and another for the preparation of a possible new instrument on the protection of the rights of performers and producers of phonograms;

"(ii) that the titles of the committees would be 'Committee of Experts on a Possible Protocol to the Berne Convention' and 'Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms,' respectively;

...

"(iv) that, in the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, the member States of WIPO and the Commission of the European Communities would have the status of members;

"(v) that the intergovernmental organizations and the non-governmental organizations that are usually invited to such meetings would be invited to the meetings of the two Committees of Experts as observers;

"(vi) that each of the two Committees of Experts would meet once in 1993, and that the meeting of the Committee of Experts on a Possible Protocol to the Berne Convention would be immediately followed by the meeting of the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms;

...

"(viii) that the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms would discuss all questions concerning the effective international protection of the rights of performers and producers of phonograms;

"(ix) that, in the preparatory documents for the Committee of Experts on a Possible Protocol to the Berne Convention, the International Bureau would deal with items (6), (9) and (10) ('the new items') mentioned in subparagraph (vii), above, in a manner similar to the one which was followed in the preparatory documents prepared for the first two sessions of the said Committee, whereas, in respect of the questions already discussed by the said Committee (items (1) to (5), (7) and (8), above), the preparatory document would contain what was contained in the preparatory documents prepared for the first two sessions of that Committee (BCP/CE/I/2 and 3) and the relevant passages of the reports of those sessions (BCP/CE/I/4 and BCP/CE/II/1);

"(x) that, in the preparatory documents for the Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms, the International Bureau would deal with all questions in the way it will deal with the new items mentioned in the preceding subparagraph."

6. The first session of the Committee of Experts for which the present memorandum has been pre-

pared (hereinafter: "this Committee of Experts") has been convened on the basis of the above-mentioned decision.

7. Subparagraph (viii) of the decision referred to in paragraph 5, above, determines the terms of reference of the Committee of Experts as covering "all questions concerning the effective protection of the rights of performers and producers of phonograms." There seem to be two possible interpretations of these terms of reference.

8. The first possible interpretation is that the protection of the rights of performers should only be discussed as far as the fixation of their performances in phonograms and the exploitation of such fixations are concerned (and that the possible new instrument would not extend to the questions of the protection of the rights of performers in respect of audiovisual fixations of their performances). The following considerations may support this interpretation: The establishment of this Committee of Experts was the consequence of the modification of the terms of reference of the Committee of Experts on a Possible Protocol to the Berne Convention; it was decided that that Committee of Experts should not deal with the questions of the protection of phonograms (sound recordings) and that this Committee of Experts should rather deal with those questions. At the same time, there was agreement that it would not be appropriate to discuss those questions without also discussing the questions of the protection of the rights of performers whose performances are embodied in phonograms. (The fact that the protection of the rights of producers of phonograms—at least in certain aspects (such as "home taping," broadcasting, other communication to the public, public performance of the recordings)—cannot be discussed in a reasonable way separately from the protection of the rights of performers whose performances are recorded in phonograms, had been recognized at the first session of the Committee of Experts on a WIPO Model Law on the Protection of Producers of Sound Recordings (Geneva, June 15 to 19, 1992).)

9. The second possible interpretation of the terms of reference is that they cover all questions of the protection of the rights of performers. The argument supporting such an interpretation is that, although the reason for the extension of the terms of reference of the new Committee of Experts to the rights of performers was that it would have been inappropriate to discuss the rights of producers of phonograms without the rights of the performers whose performances are recorded in the phonograms, in the terms of reference, the rights of per-

formers are mentioned without any restriction or qualification.

10. The International Bureau of WIPO will seek clarification from the Governing Bodies of WIPO, at their next sessions (September 1993), on which of the above-mentioned interpretations the further preparatory work of the possible instrument should be based. It is considered that, pending such clarification, this Committee of Experts should not discuss questions covering audiovisual fixations. It is for this reason that the present memorandum does not deal with audiovisual fixations.

11. In keeping with subparagraph (vi) of the decision quoted in paragraph 5, above, the first session of this Committee of Experts immediately follows the third session of the Committee of Experts on a Possible Protocol to the Berne Convention to be held at the headquarters of WIPO from June 21 to 25, 1993. The memorandum prepared by the International Bureau for the latter Committee of Experts is contained in document BCP/CE/III/2.

12. The decision mentioned in paragraph 5, above, provides only for the organization in parallel of the sessions of the Committee of Experts on a Possible Protocol to the Berne Convention and of the Committee of Experts for which the present memorandum has been prepared. The Assembly and the Conference of Representatives of the Berne Union did not specify the nature of the relationship, if any, that should exist between the possible protocol to the Berne Convention and the possible instrument on the protection of the rights of performers and producers of phonograms, on the one hand, and between the said possible instrument and the Rome and Phonograms Conventions, on the other hand. It is proposed that those questions should only be considered once the contents of the protocol and the instrument had been more or less determined.

#### DEFINITIONS

13. The Rome Convention, in its Article 3, contains various definitions. Those definitions, as a result of technological developments, deserve reconsideration. Some additional definitions may also be necessary.

14. Article 3(a) of the Rome Convention defines "performers" as follows: "'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works." Article 9 of the

Convention adds the following: "Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary or artistic works."

15. The usefulness of Article 9 of the Rome Convention was questioned by various delegations at the Diplomatic Conference in 1961. From a practical point of view, the provision is superfluous since, even without it, any country party to the Convention might extend the scope of artists covered by the definition of "performers." It was nevertheless included in the Convention because several other delegations felt that it may serve as a reminder to countries party to the Convention that they were not obliged to limit protection to performers of literary and artistic works.

16. It is quite obvious that a provision in a national law stating only that "artists who do not perform literary or artistic works" are also performers would create legal uncertainty since, on the basis of such an open-ended definition, in many cases, users (such as broadcasting organizations) could not know clearly whether a production is a protected performance or not, since this definition does not specify which acts are covered and which are not.

17. There are two categories of performers in respect of which extension of the definition seems desirable. The first category is that of variety and circus artists, which has always been considered as the most obvious one to which Article 9 of the Rome Convention could apply. The second category is that of artists performing expressions of folklore. The absence of a reference to performances of expressions of folklore seems to be a great deficiency in the definition of "performers." As a result of the work of the WIPO/Unesco Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore (Geneva, June-July, 1982), which adopted "Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions," it was clarified that expressions of folklore do not correspond to the concept of literary and artistic works (and, thus, should be granted *sui generis* protection). At the same time, it is hardly questionable that the performances of expressions of folklore (such as folk songs, instrumental folk music, folk dances, folk plays, folk poetry and folk tales) deserve the same protection as the performances of literary and artistic works. It is justified to extend the scope of the definition of performers to cover the two above-mentioned categories.

18. Article 3(b) of the Rome Convention defines "phonogram" as follows: "'phonogram' means any exclusively aural fixation of sounds of a performance or of other sounds." With the advent of digital technology, it has become questionable whether this definition is still suitable.

19. It is true that analog phonograms are always fixations of sounds. However, this is not necessarily true in the case of phonograms produced by means of digital technology. When sounds are fixed by means of such technology, the sound waves are converted into a series of binary numbers which can then be stored electronically. If the process stops at that point, it can be said that what results is a special form of fixation of sounds. In many cases, the process does not stop there, however; the series of numbers—which represents a special form of fixation of sounds—may be, and frequently is, manipulated and changed to a greater or lesser extent. As a result of such manipulation, new series of binary numbers are produced which are digital representations of the corresponding sounds but which are not fixations thereof (in the sense that no such sounds actually existed which then would have been fixed). Series of binary codes, as digital representations of what appropriate equipment can make audible as sounds, may also be produced directly by computers without the fixation and subsequent manipulation of sounds. In such a case, it is clear that no fixation of sounds has taken place. Taking all this into account, it seems desirable to modify the definition of "phonograms" and to extend it so that, in addition to fixations of sounds, it also cover fixations of digital representations of sounds.

20. If the definition of "phonogram" is changed, as outlined above, certain changes become inevitable also in the definition of "producer of phonograms." This definition, in Article 3(c) of the Rome Convention, reads as follows: "'producer of phonograms' means the person who, or the legal entity which, first fixes the sounds of a performance or other sounds." The identification of the act of first fixation has not always been simple even in the case of analog phonograms. For many years, recording technology has made it possible to mix sounds fixed at different times and places. During the 1960s, as a result of the development of multi-track analog recording, such mixing became easier and much more widespread. Digital technology has produced even more spectacular developments in this field. There are now companies which commercialize entire catalogs of digitally fixed sounds (e.g., sounds of single instruments or sections of orchestras) for incorporation into phonograms. Digital "re-mastering" of fixations of performances (such as re-

moving noises and "bad notes," strengthening, lengthening, shortening or otherwise altering notes) makes the identification of a given fixation even more difficult.

21. To offer a solution to this problem, it may be desirable to clarify that the definition of "producer of phonograms," in addition to those persons and entities who or which actually first fix sounds or digital representations thereof, also covers those persons and entities who or which first fix previously fixed sounds or digital representations thereof to produce a new combination of sounds or digital representations thereof (with a corollary provision that the use of preexisting fixations may only take place with due respect to the rights in those fixations).

22. The new technologies have also raised questions concerning the suitability of the definition of "publication" included in Article 3(d) of the Rome Convention, which reads as follows: "'publication' means the offering of copies of a phonogram to the public in reasonable quantity." With the advent of digital technology, phonograms will be made available to the public through electronic retrieval ("digital delivery") systems (that is, through systems that make it possible for those who are connected to such systems to listen to a given phonogram at any time of their choice), rather than in the form of tangible copies. The effect of making phonograms available by means of such systems is practically the same as the traditional publication of copies. Therefore, it seems justified to extend the definition of "publication" to cover such cases.

23. The definition of "reproduction" in Article 3(e) of the Rome Convention—which now simply states that "'reproduction' means the making of a copy or copies of a fixation"—also requires modernization. Particularly, the definition should clarify that the notion of reproduction also covers any permanent or temporary storage by electronic means, in respect of which there is now fairly general agreement that they are specific forms of reproduction.

24. Items (f) and (g) of Article 3 of the Rome Convention contain two definitions concerning one kind of communication to the public, namely, "broadcasting" (considering that, as its definition also clearly indicates, "rebroadcasting" is actually also broadcasting, with the added qualification that the subject of broadcasting is specified, namely, what has been broadcast by *another* broadcasting organization). Under item (f) of Article 3, "'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds"; and, under item (g) of the same Article,

"'rebroadcasting' means the simultaneous broadcasting by one broadcasting organization of the broadcast of another broadcasting organization."

25. The Rome Convention provides for the right of communication to the public (see Articles 7.1(a), 12 and 13(d)) in certain respects; however, it does not define "communication to the public." It seems that the definition of this notion is necessary, the more so because broadcasting and communication to the public by wire (cable, telephone line, fiber-optic network) are becoming ever more interchangeable, and the common features of those different ways of communicating to the public (from the viewpoint of the protection of copyright and neighboring rights) are becoming ever more obvious and dominant. Taking these developments into account, a comprehensive definition of "communication to the public" is proposed below, which would also cover "broadcasting" (as well as "rebroadcasting"). The definition clarifies that the notion of "communication to the public" extends to transmission of images and sounds through a satellite, provided the images and sounds transmitted are actually made available to the public for reception (that is, that they can be received by equipment normally available to the public, reception itself not being a necessary part of the notion of broadcasting).

26. In addition to the definitions included in Article 3 of the Rome Convention and the definition of "communication to the public," the definitions of the following notions seem also desirable: "fixation," "public performance," "rental," and "public lending." The relevant definitions in paragraph 28, below, seem, in general, self-explanatory. Concerning the definition of "fixation," however, some remarks are necessary.

27. While the Rome Convention does not contain any definition of "fixation," the "Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations" drawn up in 1974 under the auspices of the Intergovernmental Committee established by Article 32 of the Rome Convention defines "fixation" as "the embodiment of sounds, images or both in a material form sufficiently permanent or stable to permit them to be perceived, reproduced, or otherwise communicated during the period of more than transitory duration." For the reasons discussed in paragraphs 18 to 20, above, in connection with the definitions of "phonogram" and "producers of phonograms," the notion of fixation has undergone various changes. Thus, the definition in the above-mentioned Model Law has also become outdated and should be modified.

28. *It is proposed that the instrument include the following definitions:*

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

(b) "phonogram" is an exclusively aural fixation of the sounds of a performance or of other sounds or of the digital representations thereof, regardless of the method by which, and the medium in which, the fixation was made; an audiovisual fixation or the sound part thereof (for example, the sound track of a motion picture) is not a phonogram;

(c) "fixation" is the embodiment of sounds, images or both, or digital representations thereof, in any material—including electronic—form from which they can be perceived, reproduced or communicated;

(d) "producer of phonograms" is the person, or the legal entity, who or which first fixes the sounds of a performance or other sounds, or digital representations thereof, or who or which first fixes a collection (combination) of sounds, or digital representations thereof, irrespective of whether or not the latter sounds, or digital representations thereof, were, either fully or in part, previously fixed;

(e) "publication" of a phonogram is

(i) offering of copies of a phonogram to the public in a reasonable quantity, or

(ii) making the sounds fixed in a phonogram or the digital representations thereof available to the public through an electronic retrieval ("digital delivery") system;

(f) "reproduction" of a phonogram is the making of a copy, in whole or in part, and regardless of the means by which, and the medium in which, the copy is made, of a phonogram, including the storing of its contents, even temporarily, in electronic form;

(g) "rental" of a phonogram is any transfer of the possession of a copy of a phonogram for a limited period of time, for profit-making purposes;

(h) "public lending" of a phonogram is the transfer of the possession of a copy of a phonogram for a limited period of time, for non-profit-making purposes, by an institution the services of which are available

to the public, such as a public library or archive;

(i) "communication to the public" of a performance or a phonogram is the transmission of the images or sounds of a performance, or the sounds fixed in a phonogram or the digital representation thereof, in such a way that the transmission is made available to persons outside the normal circle of a family and its closest social acquaintances at a place or places whose distance from the place where the transmission is started is such that, without the transmission, the images or sounds would not be perceivable at the said place or places, irrespective of whether the said persons may perceive the images or sounds at the same place and at the same time or at different places and/or at different times; transmission of images or sounds by a satellite is also "communication to the public" where the images or sounds can be received by equipment normally available to the public;

(j) "public performance" of a phonogram is making the sounds fixed in the phonogram, or the digital representations thereof, audible, by means of any device or process, at a place where persons outside the normal circle of a family and its closest social acquaintances are or can be present, irrespective of whether they are or can be present at the same place and at the same time, or at different places and/or different times, and where the sounds made audible can be perceived without the need for communication to the public within the meaning of item (i), above.

#### MORAL RIGHTS OF PERFORMERS

29. The Rome Convention does not provide moral rights for performers. However, the intensive manipulation of recorded performances made possible by digital technology may amount to distortion, mutilation or other modification of a performance which would be prejudicial to the honor or reputation of the performers. Certain other techniques, such as dubbing (that is, adding sounds to images, sounds that may also be different from the sounds originally fixed along with the images) and play-back (that is, imitation, by the same performer, or by a different performer, of a performance previously fixed in a phonogram, with the simultaneous performance of the phonogram) may also be applied in a way that might be prejudicial. Performers deserve protection against such acts.

30. Performers equally deserve a right to claim that they are the performers of their performances. Such a right should, however, be construed in a reasonable way to include only the right that the name of an individual performer—or in case of a performance by several performers (such as an orchestra), the name jointly used, the name of the artistic leader, and the names of the main performers—be indicated, provided the indication of the name or names is practicable under the given circumstances.

31. *It is proposed that the instrument provide that performers, independently of their economic rights and even where they are not or are no longer the beneficiaries of the said rights, have the right*

*(a) to claim that they are the performers of their performances, including the right that, as far as practicable, the following name or names be indicated on the copies of the fixation of their performances, and in connection with any public use of their performance or the fixation thereof:*

*(i) in the case of an individual performer, his name;*

*(ii) in the case of a performance by several performers (such as an orchestra), the name jointly used by the performers (such as the name of the orchestra), the name of the artistic leader of the performers (such as the conductor) and the names of the featured performers (such as the soloists); and*

*(b) to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their performances that would be prejudicial to their honor or reputation.*

#### ECONOMIC RIGHTS OF PERFORMERS IN THEIR UNFIXED (LIVE) PERFORMANCES

32. Under Article 7.1(a) and (b) of the Rome Convention, “[t]he protection provided for performers by this Convention shall include the possibility of preventing: (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation; (b) the fixation, without their consent, of their unfixed performance.” Under Article 7.2(1), “[i]f broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting

State where protection is claimed to regulate the protection against rebroadcasting [and] fixation for broadcasting purposes.” These are the provisions of the Convention that determine the protection of performers in respect of their unfixed (live) performances.

33. As soon as an unfixed (live) performance is communicated to the public or is fixed, it is more difficult for the performer to “prevent” (term used in the Rome Convention) the further exploitation of the performance since such further exploitation may take place outside his personal presence. This is why it is proposed that performers have an exclusive right to *authorize*—rather than a “right to *prevent*”—the communication to the public, and the fixation, of their unfixed (live) performances.

34. The simultaneous and unchanged communication to the public of an unfixed (live) performance that has itself been communicated to the public, and the fixation of a performance for subsequent communication to the public, may deserve special consideration. In these respects, even the Berne Convention allows certain exceptions: Article 11<sup>bis</sup>(2) allows the application of non-voluntary licenses, and Article 11<sup>bis</sup>(3) provides for the possibility of “ephemeral” recording of works to be broadcast. It seems that it is not justified to go beyond the limitations allowed in such cases in respect of copyright; their applicability should be extended, *mutatis mutandis*, to the rights of performers as proposed in paragraph 57(g), below.

35. *It is proposed that the instrument provide for the exclusive right of performers to authorize*

*(a) the communication to the public of their live performances; and*

*(b) the fixation of their live performances.*

#### ECONOMIC RIGHTS OF PERFORMERS IN THEIR PERFORMANCES FIXED IN PHONOGRAMS AND OF PRODUCERS OF PHONOGRAMS IN THEIR PHONOGRAMS

*Situation Under the Rome and Phonograms Conventions*

Rights of performers in their performances fixed in phonograms

36. The Rome Convention regulates the economic rights of performers in respect of their per-



performances fixed in a phonogram in the following manner.

37. Concerning reproduction: performers have the right "to prevent" the reproduction, without their consent, of a fixation of their performances that has been made without their consent (Article 7.1(c)). However, if broadcasting was consented to by the performers, it is a matter for national legislation of the Contracting States to regulate the protection against the reproduction of a fixation for broadcasting purposes (Article 7.2(1)).

38. The Rome Convention does not provide any right related to the adaptation of performances and does not contain any explicit provision concerning the right of distribution (including a possible right of rental and/or public lending right surviving the first sale of copies of fixations) and the right of importation.

39. Concerning broadcasting and other communication to the public according to the Rome Convention: performers do not have the right to prevent the broadcasting or communication to the public of their performances without their consent, where the performance used in the broadcasting or for the public communication is made from a fixation (Article 7.1(a)). If, however, a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for other communication to the public, a single remuneration is to be paid by the user to the performers, or to the producers of the phonograms, or to both (Article 12). At the same time, under Article 16.1(a) of the Convention, various reservations are possible in respect of this right to remuneration which may go so far as to completely deny the application of such a right. As mentioned in paragraph 37, above, the terms and conditions governing the use of fixations made for broadcasting purposes are to be determined in accordance with the national legislation of the Contracting States (Article 7.2(2)).

40. Possible limitations on the rights of performers are allowed in Article 15 of the Rome Convention. That Article allows Contracting States to provide for exceptions to the protection granted under the Convention as regards (i) private use; (ii) use of short excerpts in connection with the reporting of current events; (iii) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (iv) use solely for the purposes of teaching or scientific research; and furthermore, to provide for the same kind of limitations with regard to the protection of performers as

the domestic laws and regulations provide in connection with the protection of copyright in literary and artistic works.

#### Rights of producers of phonograms

41. The basic provision, in respect of the rights of producers of phonograms, is contained in Article 10 of the Rome Convention. It reads as follows: "Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms."

42. Furthermore, as mentioned in paragraph 39, above, Article 12 provides that, if a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any other communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of phonograms, or to both.

43. Article 15 of the Rome Convention allows the same exceptions to the protection of producers of phonograms with regard to the protection of performers (see paragraph 40, above).

44. The Phonograms Convention is, for all practical purposes, an anti-piracy convention. Under its Article 2, each Contracting State is obliged to protect producers of phonograms who are nationals of other Contracting States against the making of duplicates (copies) without the consent of the producers and against the importation of such duplicates, provided any such making or importation is for the purpose of distribution to the public, and against the distribution of such duplicates to the public. Article 3 leaves the implementation to the Contracting States; they may choose one or more of the following: copyright or other specific ["neighboring"] rights, the law relating to unfair competition, or protection by penal sanctions.

45. No complete list of the possible exceptions to the protection of producers of phonograms is given in the Phonograms Convention. Article 6 simply provides that, any Contracting State which affords protection by means of copyright, by other specific rights or by penal sanctions may in its domestic law provide, with regard to the protection of phonograms, the same kinds of limitations as are permitted with respect to the protection of authors of literary and artistic works. The Convention provides, however, for the possibility of applying non-voluntary licenses under certain conditions.

### *New Developments*

46. Technological developments—most notably, the advent of digital technology—have transformed the conditions and effects of the exploitation and use of phonograms (and performances fixed in phonograms). As a first important development, it became possible, by means of digital technology, to make unlimited generations of perfect copies of phonograms without any loss of quality. The use of digital technology in broadcasting and communication to the public (which has begun in certain countries) will bring about even more fundamental changes: by receiving programs in digital format, “CD quality” copies of phonograms can be made. Technology (particularly fiber optics) is also available for the use of phonograms in interactive systems, that is, in systems that make it possible for those who are connected to such systems to listen to a specific phonogram at a specific time of their choice. All this may lead to a situation where the classic rights of reproduction and distribution may lose their importance, and the owners of rights in phonograms (and in the performances fixed in them) may be unable to exploit their productions unless they are given appropriate rights in respect of the new, more relevant means of exploitation: communication to the public. Appropriate rights in this respect should be exclusive rights; otherwise, the necessary control over this means of exploitation may not be guaranteed. Therefore, in paragraph 57(f), below, it is proposed that the right of communication to the public only be allowed to be limited to a right to equitable remuneration in the case of analog (non-digital) communication to the public; such limitation is proposed to be excluded in the case of digital communication to the public.

47. The right of distribution, and particularly some of its elements, such as the right of rental and the right of importation, have also achieved increased importance. In the case of phonograms (and performances fixed in them), just as in the case of literary and artistic works, the new developments require the explicit recognition of the right of first distribution and the right of importation (which until now have had to be considered as inseparable corollaries to the right of reproduction) as well as the recognition of a right of rental surviving the first sale of copies. In addition to this, the recognition of a public lending right surviving the first sale of copies may also be considered, taking into account that public lending of copies of phonograms (combined with widespread home taping) has the same effect as rental on the normal exploitation of phonograms. In paragraph 57(c), below, the consideration of a possible exception is proposed in square brackets to facilitate the adherence

to the instrument of countries where the right of rental is granted as a mere right to remuneration.

48. The widespread practice of digital manipulation of fixations of performances, and the subsequent combination of various fixations as discussed above, seem to justify the grant, in respect of phonograms (and performances fixed in phonograms), of a right of adaptation and the right to authorize inclusion of preexisting phonograms (fixations of performances) in collections (combinations) of phonograms (fixations), rights recognized in the case of literary and artistic works.

49. Article 15 of the Rome Convention referred to in paragraph 40, above, with one exception, allows practically the same limitations as those allowed by the Berne Convention in respect of literary and artistic works. The only case where there is a really substantial difference is private use: while Article 9(2) of the Berne Convention only allows an exception to the right of reproduction in the case of private reproduction (as in the case of any other special case of reproduction) if it “does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author,” Article 15.1(a) of the Rome Convention does not limit the possibility of providing “for exceptions to the protection guaranteed by [the] Convention as regards...private use” (that is, e.g., free private reproduction of phonograms (and performances fixed in them) is not in conflict with the Rome Convention). The other possible specific limitations mentioned in Article 15(b), (c) and (d)—use of short excerpts in connection with the reporting of current events, ephemeral fixation by broadcasting organizations, use for teaching or scientific research—exist more or less in the same or a similar way under the Berne Convention (see particularly Articles 10, 10<sup>bis</sup>, 11<sup>bis</sup> of the Convention and the possible “minor exceptions [reservations]” allowed in respect of the right of public performance under Article 11), not to mention the provision of Article 15.2 of the Rome Convention on the applicability of the limitations allowed in the case of copyright.

50. In paragraph 57(g), below, it is proposed that, concerning the possible limitations on the rights of performers and producers of phonograms, there be a simple reference in the instrument to the limitations allowed under the protocol to the Berne Convention and, where applicable (because the protocol does not establish a higher level of protection), under the Berne Convention (containing the exception to the applicability of non-voluntary licenses not compatible with the instrument, which is in square brackets because the need for it depends on

what is provided in the possible protocol to the Berne Convention). This means that the possible limitations on the rights of performers and producers of phonograms would also be assimilated to the possible limitations on the rights in literary and artistic works in respect of private use, and particularly in respect of private reproduction of phonograms for personal purposes, since, as a result of the proposed provision, Article 9(2) of the Berne Convention (and the possible provisions of the protocol to the Berne Convention on such reproduction) would also be applicable in the case of phonograms (and performances fixed in phonograms).

51. Such an assimilation of possible limitations on the rights of performers and producers of phonograms to the possible limitations on the rights in literary and artistic works in the case of private reproduction of phonograms for personal purposes ("home taping") is justified for the following reasons.

52. Even before the advent of digital recording and reproduction technology in the form of digital audio tape (DAT) machines, there was a growing agreement that, although "home taping" may be considered as not being in conflict with the normal exploitation of the works, performances and phonograms concerned, it does unreasonably prejudice the legitimate interests of authors, performers and phonogram producers and, therefore, it should not be allowed without eliminating such a prejudice or, at least, reducing it to a reasonable level. In the countries where this has been recognized, a payment due to the authors, performers and producers of phonograms concerned has been introduced on recording equipment and/or on recording material (blank tapes and cassettes).

53. With the advent of digital audio technology, the situation has changed, since the quality of the reproduction is much higher with that technology than with the older one: if analog sound recordings are reproduced by analog equipment, there is always a loss in quality when a copy is made, and thus, after three or four generations of copies, such recordings are no longer enjoyable; by contrast, where digital recordings are reproduced by DAT machines, not only the first, but also the second, tenth or hundredth generation of copies is of exactly the same quality as the original recording. Such serial reproduction (that is, the reproduction of more than one generation) of perfect copies, even for private purposes, if allowed without restriction, not only unreasonably prejudices the legitimate interests of authors, performers and producers of phonograms, but also conflicts with the normal exploitation of the works, performances and

phonograms concerned. To eliminate the conflict with the normal exploitation of the works, performances and phonograms—created by serial digital reproduction—a technical system, the Serial Copy Management System (SCMS), has been developed and is applied, with legislative support, in certain countries (such as the United States of America and Japan). This system prevents serial digital copying (that is, no second generation digital copy can be made of a first generation digital copy), but it still allows making any number of first generation digital copies and does not prevent further analog copying. Thus, even in case of the application of such a system, home taping may still unreasonably prejudice the legitimate interests of authors, performers and producers of phonograms.

54. The method applied in a growing number of countries to mitigate the prejudice suffered by authors, performers and producers of phonograms as a result of widespread home taping is a payment on recording equipment and/or blank recording material, paid by the manufacturers and importers of such equipment and material, collected by collective administration organizations and distributed among the owners of rights concerned. It is submitted that if a national legislator may choose between two options, namely, (i) allowing home taping without taking action to mitigate the unreasonable prejudice caused by home taping to rights owners, or (ii) mitigating the prejudice to a reasonable level through the above-described right to remuneration, it is an obligation under Article 9(2) of the Berne Convention (the application of which, according to paragraph 57(g), below, would also be extended to the rights of performers and producers of phonograms), to choose the second option. Paragraph 58, below, contains proposals accordingly.

#### *Proposals*

55. On the basis of the considerations discussed in paragraphs 46 to 54, above, it seems justified that by and large the same sets of economic rights be granted to performers in respect of their performances fixed in phonograms and to producers of phonograms in respect of their phonograms. Therefore, in the following paragraphs, the proposals concerning the economic rights of those two categories of beneficiaries are presented jointly.

56. *It is proposed that the instrument, subject to the provisions proposed in paragraphs 57 and 58, below, provide for any performer in respect of his performance fixed in a phonogram and for any producer of phonograms in respect of his or its pho-*

nogram, the exclusive right to authorize the following acts:

(a) the reproduction of the phonogram, including the reproduction of the phonogram in another phonogram consisting of a collection (combination) of phonograms;

(b) the distribution of copies of the phonogram through sale or other transfer of ownership, or through rental, public lending or other transfer of possession;

(c) the importation of copies of the phonogram, even following the sale or other transfer of ownership of the copies by or pursuant to his or its (implicit or explicit) authorization and irrespective of whether the imported copies were made with or without his or its authorization, into the country, or where two or more countries have formed a single economic territory or customs union for purposes including the free circulation of goods, and the national legislation of the countries concerned so provides, into any of the countries concerned;

(d) the adaptation of the phonogram;

(e) the communication to the public of the phonogram; and

(f) the public performances of the phonogram.

57. It is proposed that the instrument provide that

(a) it is a matter for national legislation in the countries party to the instrument to provide that the right mentioned in item (b) of the preceding paragraph is not applicable in respect of any copy of the phonogram which has been sold or the ownership of which has been otherwise transferred by or pursuant to an (implicit or explicit) authorization of the performer and producer of phonograms concerned;

(b) the faculty provided for national legislation under item (a) does not apply in the case of the rental [and public lending] of copies of phonograms;

[(c) notwithstanding item (b), any country that, on the date of the adoption of the instrument, has in force provisions under which only a right to remuneration is recognized for the rental of copies of 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 performers and producers of phonograms concerned, but will maintain, at least temporarily, the right to remuneration;]

(d) the right mentioned in item (c) of the preceding paragraph does not apply where the importation is effected by a person for his personal and non-commercial use as part of his personal luggage;

(e) it is a matter for national legislation in the countries party to the instrument to provide for the limitation of the rights mentioned in items (e) and (f) of the preceding paragraph to a right to equitable remuneration;

(f) the faculty provided for national legislation under the preceding item does not apply in the case of digital communication to the public of phonograms;

(g) it is also a matter for national legislation in the countries party to the instrument to provide for the same kinds of limitations with regard to the protection of performers and producers of phonograms as those which may be provided for under the Berne Convention, and the protocol to it, in connection with the protection of copyright in literary and artistic works [with the exception of non-voluntary licenses which may be provided for only to the extent to which they are compatible with the instrument].

58. It is proposed that the instrument clarify that it is an obligation of countries party to the instrument to provide a right to remuneration for those performers in respect of whose performances included in phonograms and for those producers of phonograms in respect of whose phonograms it may be reasonably presumed that they have been subject of private reproduction for personal purposes, through a payment on reproduction equipment or on blank recording material, or on both, normally used for such reproduction,

(a) to be paid by those who manufacture such equipment or material (except for the equipment and material that are exported) or who import such equipment or material (except where the importation is effected by a person for his personal and non-commercial use as part of his personal luggage);

(b) to be collected by a collective administration organization; and

(c) after the deduction of the cost of administration, to be distributed to the performers and producers of phonograms concerned.

#### TERM OF PROTECTION

59. Under Article 14 of the Rome Convention, "[t]he term of protection to be granted under this Convention shall last at least until the end of a period of twenty years computed from the end of the year in which (a) the fixation was made—for phonograms and for performances incorporated therein; (b) the performance took place—for performances not incorporated in phonograms...."

60. The Phonograms Convention leaves the duration of protection to national legislation (Article 4), provided, if the domestic law prescribes a specific duration for the protection, the duration must not be less than 20 years from the end of either the year in which the sounds embodied in the phonogram were fixed or of the year in which the phonogram was first fixed.

61. Twenty years as a minimum term of protection is no longer sufficient, taking into account the increased quality and value, as well as the much longer commercial life of phonograms. It is a growing trend at the level of national laws that a 50-year term of protection is granted for performers and producers of phonograms. This term is also proposed as a minimum in the instrument.

62. In the case of phonograms, the date of fixation, due to the new recording technology and the frequent subsequent manipulation of fixations, is not always easily identifiable. It seems, therefore, more appropriate to calculate the term of protection, in general, from the first publication, and, only in the case of non-published phonograms, from fixation.

63. It is submitted that, in the case of an unfixed performance, any term of protection is meaningless, since such a performance, in the absence of fixation, does not survive the time when it takes place.

64. *It is proposed that the instrument provide that the term of protection to be granted under the instrument to performers and to producers of phonograms subsist at least until the end of a period of 50 years computed*

(a) from the end of the year in which the fixation of the performance was made;

(b) from the end of the year in which the phonogram was published and, where the phonogram is not published until the end of the 50th year following the year when the fixation was made, from the end of the year in which the fixation was made.

#### EXERCISE AND TRANSFER OF ECONOMIC RIGHTS

65. The Rome Convention contains three provisions that relate to the exercise of economic rights.

66. Article 7.2(3) of the Rome Convention states that domestic law must not deprive performers of the ability to control, by contract, their relations with broadcasting organizations. If the proposals concerning the rights of communication to the public (made in paragraphs 56(e) and 57(e) and (f), above) are adopted, it seems that there is no need for such a provision in the instrument (since the said provision is closely related to the way the right of broadcasting was regulated in Article 7.2 of the Rome Convention, which is proposed not to be maintained).

67. Under Article 8 of the Rome Convention, "[a]ny Contracting State may, by its domestic laws and regulations, specify the manner in which performers will be represented in connexion with the exercise of their rights if several of them participate in the same performance." It seems that, even in the absence of such a provision, the freedom of countries party to the instrument would exist to regulate the question of representation. Therefore, the restatement of Article 8 of the Rome Convention in the instrument is not proposed.

68. The second sentence of Article 12 of the Rome Convention provides that the domestic law may, in absence of agreement between performers and producers of phonograms, lay down the conditions as to the sharing of the remuneration provided for in the first sentence of the same Article in the case of broadcasting and communication to the public of phonograms. This provision states the freedom of national laws to provide for *dispositive* rules in case of absence of agreement. The provision indicates that the Convention is, in general, based on the principle of contractual freedom. It seems that the principle of alienability of the rights provided for in the Rome Convention would correspond to the spirit of the Convention.

69. At the same time, various national laws—mainly in countries following continental legal traditions—provide for restriction of contractual freedom in limiting or excluding the transferability (alienability) of certain rights, both in the field of copyright and in the field of “neighboring rights.” Such provisions raise complex conflict of laws questions, particularly the question of whether or not contracts concluded in countries where the rights concerned are alienable are applicable in countries where the same rights are inalienable. So far, neither the Berne Convention nor the Rome Convention nor the Phonograms Convention has dealt with those questions; it had been suggested that their solution should be left to private international law.

70. Recently, however, these private international law questions have received increased attention in bilateral and multilateral negotiations in the field of copyright and “neighboring rights,” and certain countries expressed the desire that those questions should be regulated through clear-cut international norms.

71. The regulation of the international private law aspects of contracts concerning the transfer and exercise of the rights of performers and producers of phonograms would represent such a new dimension of the international regulation of those rights that the International Bureau does not feel it appropriate to try to present concrete proposals in this respect until a discussion about it takes place in the Committee of Experts.

72. *The Committee of Experts is invited*

*(a) to discuss whether or not the instrument should include provisions on the questions of transfer and exercise of rights to be protected under the instrument; and*

*(b) in case of a positive answer, also to discuss what such provisions should contain.*

#### FORMALITIES

73. Article 11 of the Rome Convention and Article 5 of the Phonograms Convention provide in practically the same way that, if a Contracting State, under its domestic law, requires compliance with formalities, as a condition of protecting producers of phonograms, these must be considered fulfilled if all the authorized duplicates of the phonogram distributed to the public or their containers bear a notice consisting of the symbol P in a circle, accompanied by the year date of the first publication, placed in such manner as to give reasonable

notice of a claim to protection. They provide, furthermore, that, if the duplicates or the containers of the duplicates do not identify the producer, his successor in title or the exclusive licensee, the notice must also include the name of the producer, his successor in title or the exclusive licensee.

74. The above-mentioned provisions of the Rome Convention and the Phonograms Convention do not prescribe any formalities as conditions of protection, but rather determine the maximum formalities that any Contracting State may require as conditions of protection in the case of phonograms protected by the conventions concerned.

75. The general trend at the level of national legislation is to abolish formalities as conditions of the protection of both copyright and neighboring rights. (It is another matter that “formalities” may be maintained with different legal effects, e.g., registration with the effect of a rebuttable presumption according to which the registered data, until the contrary is proved, are to be recognized as true and valid (something which may be very useful for strengthening legal security and for the fight against piracy).) It is desirable that the instrument follow and strengthen this trend.

*76. It is proposed that the instrument provide that no country party to it may, as a condition of the protection of rights provided for in the instrument, require the owners of rights to comply with any formalities.*

#### ENFORCEMENT OF RIGHTS

77. The Rome Convention does not contain any direct provision on the enforcement of rights. However, Article 26 of the Convention includes provisions indirectly requiring appropriate enforcement measures in any country party to the Convention. Paragraph 1 of that Article provides that “[e]ach Contracting State undertakes to adopt, in accordance with its Constitution, the measures necessary to ensure the application of this Convention,” and paragraph 2 of the same Article provides that, “[a]t the time of deposit of its instrument of ratification, acceptance or accession, each State must be in a position under its domestic law to give effect to the terms of this Convention.” It is obvious that these provisions cannot be respected without appropriate enforcement measures.

78. The Phonograms Convention does not contain such provisions; however, the effect of its Articles 2 and 3, mentioned in paragraph 44, above, is practically the same.

## NATIONAL TREATMENT

79. The memorandum prepared for the third session of the Committee of Experts on a Possible Protocol to the Berne Convention (document BCP/CE/III/2-III) describes the consideration of standards for the enforcement of copyright and "neighboring rights" (particularly, the means of fighting piracy) at recent WIPO meetings and in other international fora, and proposes detailed provisions on provisional (conservatory) measures, civil remedies, criminal sanctions, measures against abuses in respect of technical means, "border" measures and procedural safeguards. Since the nature of infringements of the rights of performers and producers of phonograms is very similar to that of the infringements of copyright, the same provisions are justified *mutatis mutandis* concerning the enforcement of the rights of performers and producers of phonograms as concerning the enforcement of copyright.

80. 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 GATT Uruguay Round negotiations. That proposal was made without knowing what the present memorandum would contain.

81. The above-mentioned three letters indicate that certain technical amendments are necessary to adapt the said GATT text to the purposes of the possible instrument on the protection of the rights of performers and producers of phonograms. However, the letters do not specify the said amendments to be made.

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

83. *It is proposed that the instrument oblige the countries party to it to apply, mutatis mutandis, the same provisions for the enforcement of the rights of performers and producers of phonograms as those proposed for the enforcement of copyright in paragraphs 67, 69, 71, 73, 75, 77 and 79 of the memorandum prepared for the third session of the Committee of Experts on a Possible Protocol to the Berne Convention (document BCP/CE/III/2-III).*

84. Article 2.1 of the Rome Convention defines "national treatment" as meaning "the treatment accorded by the domestic law of the Contracting State in which protection is claimed...to performers who are its nationals, as regards performances taking place, broadcast, or first fixed, on its territory...[and] to producers of phonograms who are its nationals, as regards phonograms first fixed or first published on its territory." Article 2.2 clarifies that national treatment is subject to the protection specifically guaranteed (with the limitations specifically allowed) in the Convention. Articles 4 and 5 oblige Contracting States to grant national treatment to performers and phonogram producers, respectively, protected under the Convention.

85. There seems to be no reason why the possible instrument might not follow the principle of national treatment. At the same time, a specific provision seems necessary concerning the application of national treatment in respect of collective administration of rights, particularly to guarantee that remuneration collected for foreign rights owners not be used, without their consent, for so-called collective (national) purposes.

86. *It is proposed that the instrument provide that*

*(a) subject to item (b) of the present paragraph, performers and producers of phonograms must enjoy, in respect of their performances and phonograms, respectively, protected under the instrument according to the provisions proposed in paragraphs 91 and 92, below, the rights which the respective laws of the country in which protection is claimed do now or may hereinafter grant to performers who are its nationals as regards performances taking place, communicated to the public or first fixed in its territory, and to producers of phonograms who are its nationals or which have the headquarters on its territory, as regards phonograms first fixed or first published on its territory, respectively, as well as the rights specially guaranteed in the instrument; and*

*(b) national treatment be fully respected also in cases where rights are exercised through collective administration of rights, consequently, no remuneration collected by collective administration organizations and due to foreign performers and producers of phonograms be used without the authorization of such performers and producers of phonograms, given directly or through per-*

*sons or bodies representing them, for any purposes other than the distribution of such remuneration (after the deduction of the actual costs of administration) among the performers and producers of phonograms concerned.*

#### CRITERIA OF ELIGIBILITY FOR PROTECTION UNDER THE POSSIBLE INSTRUMENT

87. The Rome Convention, in its Articles 4 and 5, determines the criteria of eligibility for protection under the Convention for performers and producers of phonograms, respectively, in the following way.

88. In the case of performers, the protection ("national treatment") is granted if any of the following conditions are met: (i) the performance takes place in another Contracting State; (ii) the performance is incorporated in a phonogram protected by the Convention; (iii) the performance, not being fixed on a phonogram, is carried by a broadcast which is protected by the Convention.

89. In the case of producers of phonograms, the protection ("national treatment") is granted if any of the following conditions are met: (i) the producer of the phonogram is a national of another Contracting State (criterion of nationality); (ii) the first fixation of the sound[s] [were] made in another Contracting State (criterion of fixation); (iii) the phonogram was first published in another Contracting State (criterion of publication). Under Article 5.2, if a phonogram was first published in a non-contracting State but if it was also published, within 30 days of its first publication, in a Contracting State (simultaneous publication), it is considered as first published in the Contracting State. Article 5.3 allows any Contracting State to declare that it will not apply the criterion of publication or, alternatively, the criterion of fixation. Furthermore, Article 17 of the Convention provides that any State which, on October 26, 1961 (the date of the finalization of the Convention) grants protection to producers of phonograms solely on the basis of the criterion of fixation may, at the time of ratification, acceptance or accession, declare that it will apply, for the purposes of the above-mentioned Article 5, the criterion of fixation alone and, for the purposes of paragraph 1(a)(iii) and (iv) of Article 16 (concerning certain possible reservations), the criterion of fixation instead of the criterion of nationality.

90. While the application of the same criteria of eligibility for protection seem justified in the in-

strument, the application of reservations mentioned in the last two sentences of the preceding paragraphs is no longer necessary in the light of generally accepted international standards.

91. *It is proposed that the instrument provide that it is applicable to performers if any of the following conditions are met:*

*(a) the performance takes place in another country party to the instrument;*

*(b) the performance is fixed in a phonogram protected by the instrument;*

*(c) the performance, not being fixed in a phonogram, is communicated to the public by an organization whose headquarters is situated in another country party to the instrument or communicated to the public from a place situated in another country party to the instrument.*

92. *It is proposed that the instrument provide that it is applicable to producers of phonograms if any of the following conditions are met:*

*(a) the producer of phonograms is a national of, or has his or its headquarters or habitual residence in, another country party to the instrument;*

*(b) the first fixation of the sounds was made in another country party to the instrument;*

*(c) the phonogram was first published in another country party to the instrument, where a phonogram is to be also considered as having been first published in a country if it is published in that country within 30 days of its actual first publication in another country.*

#### SUMMARY OF THE DIFFERENCES BETWEEN THE ROME AND PHONOGRAMS CONVENTIONS, ON THE ONE HAND, AND THE PROPOSED NEW INSTRUMENT, ON THE OTHER HAND

93. The main differences, after the indication of the differences in the coverage of the proposed provisions and the coverage of the Rome and Phonograms Conventions, are summed up in the order of the chapters of this memorandum.

94. *Coverage:* The proposed provisions would only cover the rights of performers in respect of their live performances and their performances fixed in phonograms, and the rights of producers of phonograms in their phonograms. (The question of



whether the instrument should also extend to the rights of performers in respect of the audiovisual fixations of their performances is pending, as mentioned in paragraph 10, above.) The Rome Convention also covers the rights of performers in respect of the audiovisual fixations of their performances, as well as the rights of broadcasting organizations. At the same time, the coverage of the Phonograms Convention is narrower: it only extends to the protection of producers of phonograms against the making, distribution and importation of infringing copies.

95. *Definitions:* The definitions contained in this memorandum are somewhat different from those contained in the Rome and Phonograms Conventions. Furthermore, this memorandum contains definitions of notions not defined in the said Conventions.

96. *Moral rights of performers:* The Rome Convention does not, while this memorandum does, provide for moral rights.

97. *Economic rights of performers in respect of their unfixed (live) performances:* According to this memorandum, the right of fixation should be an exclusive right of authorization, while the Rome Convention only provides for it as a "right to prevent." The same difference exists in respect of communication to the public (including broadcasting). Furthermore, according to this memorandum, the specific restrictions provided by the Rome Convention concerning rebroadcasting would not be admitted.

98. *Economic rights (i) of performers in respect of their performances fixed in phonograms and (ii) of producers of phonograms in respect of their phonograms:* According to this memorandum, the following rights—not recognized (or at least not explicitly recognized) by the Rome Convention and only partly recognized by the Phonograms Convention—would have to be recognized: the right of distribution, the right of importation and the right of adaptation. Furthermore, certain limitations allowed by the Rome Convention would no longer be allowed in respect of the right of reproduction (also recognized by the Phonograms Convention), the right of communication to the public (including broadcasting) and the right of public performance. Under the Rome Convention, private use is free. According to this memorandum, a right to remuneration for private reproduction of phonograms for personal purposes would have to be recognized in favor of performers and producers of phonograms.

99. *Term of protection:* According to this memorandum, the minimum term of protection would be 50 years instead of 20 years as provided in the Rome and Phonograms Conventions, and the point of departure of the term would also change in certain respects.

100. *Exercise and transfer of rights:* Reserved for discussion by the Committee of Experts.

101. *Formalities:* The Rome and Phonograms Conventions allow the application of formalities as conditions of protection and determine the conditions that may be required as a maximum in the relations among Contracting States. According to this memorandum, no formalities would be admitted as conditions of protection.

102. *Enforcement of rights:* While the Rome and Phonograms Conventions contain only a few isolated—and mostly indirect—provisions concerning enforcement of rights, according to this memorandum, there would be detailed obligations in this respect.

103. *National treatment:* According to this memorandum, the obligation to grant national treatment would expressly extend also to collective administration.

104. *Criteria of eligibility for protection under the possible instrument:* With some minor differences, the criteria of eligibility would be determined in a way similar to the way they are determined in the Rome Convention.

## 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 holders<sup>1</sup> 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 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 adequate 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

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

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 MEASURES<sup>1</sup>

##### Article 51: Suspension of Release by Customs Authorities

PARTIES shall, in conformity with the provisions set out below, adopt procedures<sup>2</sup> to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods<sup>3</sup> 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.

##### 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

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> 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.

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 consignor, 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.

## Registration Systems Administered by WIPO

### Union for the International Registration of Audiovisual Works (Film Register Treaty (FRT) Union)

#### ASSEMBLY

#### Third Session (2nd Extraordinary)

(Geneva, May 13, 1993)

The Assembly of the Union for the International Registration of Audiovisual Works (Film Register Treaty (FRT) Union) held its third session (2nd extraordinary), at the headquarters of WIPO, on May 13, 1993.

All seven member States of the Assembly were represented at the session, namely: Argentina, Austria, Burkina Faso, Czech Republic, France, Mexico, Slovakia. In addition, six States participated in an observer capacity, namely: Chile, Colombia, Hungary, Libya, Sweden, United States of America. Brazil also participated in the session. The following four non-governmental organizations were represented at the session: European Federation of Audiovisual Filmmakers (FERA), International Association of Audio-Visual Writers and Directors (AIDAA), International Federation of Film Producers Association (FIAPF), International Federation of the Phonographic Industry (IFPI).

Discussions were based on a memorandum prepared by the International Bureau and entitled "Possible Suspension of the Application of the Treaty Between the Republic of Austria and WIPO Mentioned in Article 3(3) of the FRT" (document FRT/A/III/2), which is reproduced hereafter.

The Assembly adopted the following decision:

"Until any further decision by the Assembly of the FRT Union,

(a) the application of the Treaty between the Republic of Austria and WIPO concerning the International Film Registry shall be suspended;

(b) in 1993 no ordinary session of the Assembly of the FRT Union shall be convened; but from 1995 onwards, ordinary sessions shall be convened again;

(c) the payment of the expenses of delegates to the Assembly of the FRT Union shall be suspended for any future sessions of the Assembly."

The session of the Assembly was preceded by the third session of the Consultative Committee of the FRT Union which was also held at the headquarters of WIPO on May 13, 1993. The Consultative Committee advised the Assembly to endorse the above-mentioned memorandum prepared by the International Bureau.

#### POSSIBLE SUSPENSION OF THE APPLICATION OF THE TREATY BETWEEN THE REPUBLIC OF AUSTRIA AND WIPO MENTIONED IN ARTICLE 3(3) OF THE FRT

Memorandum prepared by  
the International Bureau

*Entry into force of the FRT and the commencement  
of operations of the International Film Register*

1. Under Article 12(1) of the Treaty on the International Registration of Audiovisual Works (hereinafter referred to as "the FRT"), the Treaty enters into force, with respect to the first five States which have deposited their instruments of ratification, acceptance, approval or accession, three months after the date on which the fifth instrument of ratification, acceptance, approval or accession has been deposited.

2. The fifth such instrument (that of Czechoslovakia) was deposited on November 27, 1990, and thus the FRT entered into force, with respect to the first five States which had deposited their instruments of ratification (Austria, Burkina Faso and Mexico), approval (France) or accession (Czechoslovakia), on February 27, 1991.

3. Under Article 3(2) of the FRT, the International Registry of Audiovisual Works (hereinafter

referred as "the International Film Registry") is set up for the purpose of keeping the International Register of Audiovisual Works (hereinafter referred to as "the International Film Register"), as an administrative unit of WIPO. Under Article 3(3) of the FRT, the International Film Registry is located in Austria as long as a treaty to that effect between the Republic of Austria and WIPO is in force; otherwise, it is located in Geneva.

4. When the FRT entered into force, the treaty mentioned in the preceding paragraph was in force between Austria and WIPO. Thus, the International Film Register was set up in Austria (in Klosterneuburg, near Vienna) on March 1, 1991, and, in keeping with the decision of the first session (1st extraordinary) of the Assembly of the FRT Union held on February 27 and 28, 1991, it commenced its operations on September 1, 1991 (see document FRT/A/I/8 and paragraphs 29 and 30 of document FRT/A/I/9).

*Adherence to the FRT since entering into force and operation of the International Film Register since its establishment*

5. Since the FRT entered into force, two more countries have acceded to, or ratified, the FRT, namely, Argentina and Brazil. In respect of Argentina, the FRT entered into force on July 29, 1992, and, in respect of Brazil, it will enter into force on June 26, 1993. Furthermore, the Czech Republic on December 18, 1992, and Slovakia on December 30, 1992, declared that the FRT would continue to be applicable, from January 1, 1993, as far as they were concerned. Thus, there are eight countries that ratified, approved, or acceded to, the FRT.

6. This level of adherence to the FRT is not satisfactory. Many important film-producing countries (and particularly the United States of America, which had been one of the most active promoters of the adoption, and one of the signatories, of the FRT) have not ratified, or acceded to, the FRT. This means a twofold obstacle to the widespread use of the International Film Register. First, under Article 3(5) of the FRT, the producers and other owners of rights from the said countries are not eligible to submit initial applications to be registered, and, second, since the FRT is only applicable in a small number of countries, registration in the International Film Register is not yet sufficiently attractive.

7. So far, 397 audiovisual works have been registered in the International Film Register (188 by

Austrian owners of rights, and 209 by French owners of rights). During the 20 months' operations of the International Film Register, applications were submitted and registered only during the following eight months: September 1991: 52 (all from France); December 1991: 97 (all from France); April 1992: 50 (all from Austria); July 1992: 50 (all from Austria); September 1992: 60 (all from France); November 1992: 51 (all from Austria); January 1993: 1 (from Austria); and April 1993: 36 (all from Austria).

8. As a result of the insufficient use of the International Film Register, the total income from fees of the International Film Registry since the commencement of its operations was only 37,000 Austrian schillings. The income from publication was 4,000 Austrian schillings. Further income has also been received, including bank interest and a share of common WIPO miscellaneous income (postcards, etc.), amounting to some 347,000 Austrian schillings. The total income of the FRT Union for the period in question amounted therefore to 388,000 Austrian schillings.

9. During the same period and until May 31, 1993, the expenditures of the FRT Union will amount to 13,100,000 Austrian schillings.

10. Thus, the excess of expenditures over income for the period in question will be 12,712,000 Austrian schillings (about 1,660,000 Swiss francs). This excess is covered by advances from the Government of Austria.

*Consideration and rejection of a proposal on the establishment of an "information register"*

11. As mentioned above, one of the obstacles to a sufficient use of the International Film Register is that, under Article 3(5) of the FRT, only owners of rights from the countries party to the FRT are eligible to file initial applications.

12. The International Bureau of WIPO submitted a proposal to the second session (1st ordinary) of the Assembly of the FRT Union (held on September 24, 1991) and to the second session of the Consultative Committee established under Article 5(3)(vii) of the FRT (held during the sessions of WIPO Governing Bodies from September 23 to October 2, 1991) on the establishment of a possible "information register" service of the International Film Registry.

13. The relevant document submitted to the Assembly (FRT/A/II/1) outlined this proposal as follows:



"According to the Preamble of the Film Register Treaty, the overall aim of the Treaty is to increase the legal security in transactions relating to audiovisual works and thereby enhance the creation of such works and their international flow and contribute to the fight against piracy of audiovisual works and contributions contained therein. The value of the International Register in those respects is twofold. One element is the legal effect...which obviously is a matter of particular importance in, for instance, court cases in Contracting States. The second element lies in the fact that a centralized international register of audiovisual works and rights in such works will be an important source of information. Such a centralized information source from which quick and accurate information can be obtained about who owns which rights in which works for which geographical areas will be increasingly important in view of today's ever growing international use of such works. The latter function of the International Register is completely separate from the fact that the statements in the Register have a legal effect.

"In view of what has been said now about the information aspect of the International Film Register, it would be of great value to establish an additional service of that Register for the sole purpose of providing information about audiovisual works without any particular legal effect being attributed to those elements of information. The International Film Registry would be particularly well equipped to offer such a service. The facilities for recording such information will be in place and trained staff will be available in the Registry which could deal also with such registrations. There will be no financial obligations whatsoever for any State. In fact, the increase in volume of transactions in the International Registry and the increase in the income resulting from the additional fees may contribute greatly to the proper functioning of the Registry.

"On the basis of the above considerations, it is proposed that the Assembly authorize the International Bureau to establish a separate 'Information Register' on the basis of applications from natural persons and legal entities which are not eligible to be applicants under Article 3(5) of the Treaty and on the clear understanding that those registrations shall have no legal effect and that all information concerning such registrations shall clearly state this fact.

"The procedures for entering statements in the Information Register should be the same as those which apply in respect of ordinary applications with only one exception, namely that the application shall not be rejected because the conditions relating to the eligibility for being an applicant (Article 3(5) of the Treaty and Rule 3(3) of the Regula-

tions), are not met. If, however, the holder of such a registration later becomes eligible to file an application in the International Film Register itself, procedures will be established whereby those statements which are contained in the Information Register are transferred to the other Register. The best procedure to follow in this respect will be examined. Those and other questions concerning the relations between the two Registers can be solved at the level of the Administrative Instructions which, according to Rule 9(2) of the Regulations, are to be drawn up by the Director General after consultation of the Consultative Committee.

"If the authorization referred to in paragraph 6 is given, the International Bureau will prepare the necessary modifications of the Administrative Instructions. It is proposed that this new service become operational on a date to be decided by the Director General, which will probably be during the last two months of 1991."

14. The Consultative Committee did not support, and the Assembly of the FRT Union did not adopt, this proposal. According to the report of the Assembly (document FRT/A/II/2), the Delegations of the countries party to the FRT "referred to the views expressed by the Consultative Committee established by the FRT Assembly which had been consulted by the Director General, according to Rule 9(2) of the Regulations under the Film Register Treaty, on the question of the establishment of an 'Information Register.' They considered that the establishment of such an 'Information Register' was premature for the time being, although the idea was interesting. They also said that, taking into account the views of the interested circles as expressed in the Consultative Committee, further efforts should be undertaken to encourage more States to adhere to the Treaty."

*Proposal on the suspension of the application of the Treaty between the Republic of Austria and WIPO*

15. On March 25, 1993, the International Bureau received a letter from the Permanent Mission of Austria in Geneva, in which the Government of Austria, with reference to "the present status and the disappointing level of utilization of the register," proposed (i) the suspension of the operation of the International Film Register (including in particular the acceptance of new applications for registration) until any further decision by the Assembly of the FRT Union; and (ii) the suspension of holding ordinary sessions of the Assembly "until convened by the Director General of WIPO or upon request by Parties pursuant to Art. 5(8)(b) [of the FRT]."

16. As mentioned in paragraph 9, above, there has been a very considerable excess of expenditures over income since the commencement of the operations of the International Film Registry. The excess is due to two factors. First, under the present level of adherence to the FRT, the costs of maintenance and operations of the International Film Registry in Austria are much higher than the income of the FRT Union, and, second, the excess is further increased following from Article 5(2) of the FRT, under which the travel expenses and the subsistence allowance of one delegate for each Contracting State are to be paid from the funds of the Union for all sessions of the Assembly of the Union.

17. The above-mentioned excess of expenditures over income does not correspond to Article 7(4) of the FRT according to which "[t]he amounts of fees due to the International Registry and the prices of its publications shall be so fixed that they, together with any other income, should be sufficient to cover the expenses connected with the administration of this Treaty."

18. It seems obvious that, until a greater number of countries—and, among them, further important film-producing countries—adhere to the FRT and, thus, until the use of the International Film Register becomes sufficient, the self-supporting nature of the Register cannot be realized if the International Film Registry continues operating as a separate organizational unit (with the high expenditures of the maintenance of such unit even if its capacity is far from being sufficiently exploited) in Austria or in any other location outside the headquarters of WIPO and if the expenses of the participation of one delegate of each Contracting State in the sessions of the Assembly of the FRT Union continue being paid from the budget of the Union. Therefore, the suspension of both the operations of the International Film Registry in Austria and the payment of the expenses of delegates from the budget of the Union seems justified.

19. As mentioned above, according to Article 3(3) of the FRT, the International Registry is located in Austria as long as a treaty to that effect

between the Republic of Austria and WIPO is in force; otherwise, it is located in Geneva. Consequently, if the application of the Treaty between the Republic of Austria and WIPO is suspended, during the suspension of the Treaty, the Registry must be located and operated in Geneva.

20. In Geneva, at the headquarters of WIPO, the Registry—by means of assigning tasks to staff members of WIPO on a part-time basis and using the existing infrastructure of the International Bureau—could be operated in harmony with the principle of self-supporting finances, provided the payment of expenses of delegates is also suspended.

21. The suspension of the operations of the International Film Registry itself does not seem to be possible under the Treaty, since, in respect of the works so far registered, the legal effect under Article 4 of the FRT must continue to be recognized by the Contracting States, and the possibility for filing subsequent applications must also be maintained in keeping with Article 3(5) of the FRT. In close connection with this, the services of the Registry in respect of information, certificates, inspection of applications and documents, and monitoring, as prescribed in Rule 7 of the Regulations under the FRT, must be available. Furthermore, as long as the principle of self-supporting financing can be respected, there is no reason to suspend the acceptance of initial applications either.

22. It is proposed that, until any further decision by the Assembly of the FRT Union,

(a) the application of the Treaty between the Republic of Austria and WIPO concerning the International Film Registry be suspended;

(b) no ordinary session of the Assembly of the FRT Union be convened; and

(c) the payment of the expenses of delegates to the Assembly of the FRT Union be suspended for any future sessions of the Assembly.

23. *The Assembly is invited to adopt the decision referred to in the preceding paragraph.*

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

### Africa

#### Training Courses, Seminars and Meetings

*WIPO Seminar on Copyright and Neighboring Rights for Portuguese-Speaking Countries of Africa.* From April 19 to 22, 1993, WIPO organized in Lisbon, in cooperation with the General Directorate of Arts and Entertainment of the State Secretariat (Ministry) of Culture of Portugal, a WIPO Seminar on Copyright and Neighboring Rights for Portuguese-Speaking Countries of Africa. There were seven participants from Angola, Cape Verde, Guinea-Bissau and Mozambique, and some 30 nationals of Portugal representing *inter alia* the Government, the Portuguese broadcasting organizations and various other interested circles. Papers were presented by a WIPO consultant from Switzerland, two WIPO officials and five Portuguese experts.

*WIPO National Seminar on Copyright and Neighboring Rights (Bamako).* From May 5 to 7, 1993, WIPO organized in Bamako, in cooperation with the Government of Mali, a WIPO National Seminar on Copyright and Neighboring Rights. Some 100 participants attended the Seminar; they were government officials, artists, magistrates, lawyers, police officers, authors and composers. Two WIPO consultants from Burkina Faso and Switzerland, a WIPO official and also two experts from Mali participated in the Seminar as lecturers.

*WIPO National Workshop on Copyright and Neighboring Rights (Dar es Salaam).* From May 5 to 7, 1993, WIPO organized in Dar es Salaam, in cooperation with the Government of the United Republic of Tanzania, a WIPO National Workshop on Copyright and Neighboring Rights. Over 50 participants, including authors, artists, journalists, lawyers, publishers and music composers, attended the Workshop. The Workshop was opened by Mr. Joseph Malacela, Prime Minister and First Vice-President of the United Republic of Tanzania, and by the Director General of WIPO. Two WIPO consultants from Ghana and the United Kingdom, a government official of the United Republic of Tanzania and two WIPO officials participated in the Workshop as lecturers.

Another WIPO official also participated in the Workshop.

*WIPO National Training Course on Copyright and Neighboring Rights (Cotonou).* From May 26 to 28, 1993, WIPO organized in Cotonou, in cooperation with the Government of Benin, a WIPO National Training Course on Copyright and Neighboring Rights. Eighty participants, who were government officials, artists, magistrates, lawyers, police and customs officers, authors, composers and performers, attended the Course. Two WIPO consultants from Burkina Faso and Switzerland, two government officials of Benin and a WIPO official participated in the Course as lecturers.

*Organization of African Unity (OAU).* In May 1993, four WIPO officials attended a ceremony held at the United Nations in Geneva in honor of the 30th anniversary of the OAU.

#### Assistance With Training, Legislation and Modernization of Administration

*Burundi.* In April 1993, a WIPO official undertook a mission to Bujumbura to discuss with government officials the modernization of Burundi's copyright and neighboring rights legislation and administration.

*Côte d'Ivoire.* In May 1993, a WIPO consultant from Switzerland undertook a mission to Abidjan to provide government officials with training on the collective administration of copyright.

*Gambia.* In April 1993, following a mission by a WIPO official to Banjul in March 1993, the International Bureau prepared and sent, at the request of the government authorities, recommendations regarding the introduction of modern copyright legislation and the establishment of a collective administration organization.

*Mauritius.* In May 1993, a WIPO official visited Mauritius to have discussions on industrial property and copyright legislation with government officials and officials of semipublic entities and the private sector.

*Niger.* In May 1993, the International Bureau prepared and sent to the government authorities, at their request, draft model statutes for the new Copyright Office of Niger and a draft implementing decree for the establishment of that Office.

*United Republic of Tanzania.* In May 1993, in connection with the WIPO National Workshop on Copyright and Neighboring Rights, the Director General was received in Dar es Salaam by Mr. Ali Hassan Mwinyi, President, and by Mr. Malacela, Prime Minister and First Vice-President of the United Republic of Tanzania. The Director General, who was accompanied by two other WIPO officials, visited Zanzibar where he was received by Mr. Salmin Amour Juma, Second Vice-President of the United Republic of Tanzania. The Director General had discussions with those and other gov-

ernment leaders and also with government officials on cooperation in improving the intellectual property system in the United Republic of Tanzania.

*African Intellectual Property Organization (OAPI).* In April 1993, at the invitation of the President of the OAPI Board, who is also the Minister for Commerce and Industry of Côte d'Ivoire, a WIPO official and a WIPO consultant from France attached to OAPI visited Abidjan to advise on the recruitment of candidates for various senior posts at OAPI, including that of the Director General of OAPI.

Also in April 1993, a WIPO official and a WIPO consultant from France attended, in Yamoussoukro (Côte d'Ivoire), the Fourth Special Session of the OAPI Board, convened at ministerial level to discuss the reorganization of the OAPI Secretariat.

## Arab Countries

### Training Courses, Seminars and Meetings

*WIPO Sub-Regional Seminar on Copyright and Neighboring Rights for the Member States of the Gulf Cooperation Council (GCC) (Abu Dhabi).* From May 9 to 11, 1993, WIPO organized in Abu Dhabi, in cooperation with the Ministry of Information and Culture of the United Arab Emirates, a WIPO Sub-Regional Seminar on Copyright and Neighboring Rights for the Member States of the Gulf Cooperation Council (GCC). Eight officials from Bahrain, Kuwait, Oman and Saudi Arabia participated in the Seminar, which was also attended by some 60 officials from the United Arab Emirates. Presentations were made by three WIPO consultants from Egypt, Malta and Switzerland, three WIPO officials and an expert from Abu Dhabi.

### Assistance With Training, Legislation and Modernization of Administration

*Sudan.* In May 1993, the Deputy Secretary General, Literary and Artistic Works Council, and Registrar General of Copyright visited WIPO and discussed with WIPO officials cooperation between Sudan and WIPO, and also the establishment of a National Committee which would introduce amendments to the Copyright Law of Sudan.

*United Arab Emirates.* In May 1993, at the request of the government authorities, the International Bureau prepared comments on the new Copyright Law, which two WIPO officials later transmitted to, and discussed with, officials of the Ministry of Culture in Abu Dhabi.

## Asia and the Pacific

### Assistance With Training, Legislation and Modernization of Administration

*China.* In April 1993, two WIPO officials undertook a mission to Beijing to discuss with officials of the National Copyright Administration of China (NCAC) the printing of a commemorative book in honor of 20 years of cooperation between China and WIPO.

In May 1993, Mr. Song Muwen, Director General of the National Copyright Administration of China (NCAC), and two other officials of the NCAC visited WIPO and had discussions with the Director General and other WIPO officials on copyright cooperation between China and WIPO, including the possible holding of a national seminar on the protection of folklore in China in September 1993.

Also in May 1993, WIPO organized for the Director of the Musical Copyright Society of China (MCSC) a study tour to the headquarters of WIPO, prior to a training program on the collective administration of copyright.

*Indonesia.* In April 1993, a government official had discussions with WIPO officials in Geneva on WIPO's activities in the field of dispute settlement between private parties.

In May 1993, Mr. Nico Kansil, Director General, Directorate General of Copyrights, Patents and Trademarks, had discussions in Geneva with WIPO officials on the initial work plan for the implementation of the newly approved UNDP-

financed country project entitled "Strengthening the Intellectual Property System in Indonesia."

*Thailand.* In April 1993, the International Bureau sent to the Government of Thailand, at its request, information concerning the protection of computer programs under the laws of the States party to the Berne Convention.

*Tonga.* In May 1993, a WIPO official and a WIPO consultant from the United Kingdom undertook a mission to Nuku'alofa and gave advice to the government authorities concerned on the implementation of the copyright law and the establishment of an industrial property system.

## Latin America and the Caribbean

### Training Courses, Seminars and Meetings

*WIPO International Seminar on Copyright (São Leopoldo, Rio Grande do Sul, Brazil).* From May 18 to 21, 1993, WIPO organized in São Leopoldo, in cooperation with the Ministry of Culture of Brazil and the Law Faculty of the University of the Vale do Rio dos Sinos (UNISINOS), a WIPO International Seminar on Copyright. Some 200 participants attended the Seminar. Three WIPO consultants from Argentina and Venezuela, a WIPO official and also five experts from Brazil participated in the Seminar as lecturers.

*WIPO Regional Seminar on Copyright for Central American Countries and Caribbean Countries (Washington, D.C.).* From May 17 to 22, 1993, WIPO organized in Washington D.C., in cooperation with the International Copyright Institute (ICI) of the Copyright Office of the United States of America, a WIPO Regional Seminar on Copyright for Central American and Caribbean Countries. Twenty-seven participants from the following countries attended the Seminar: Bahamas, Barbados, Belize, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Guyana, Honduras, Jamaica, Nicaragua, Panama, Saint Lucia, Suriname, Trinidad and Tobago, Venezuela. The Seminar was opened by Mr. Ralph Oman, Register of Copyrights of the United States of America and by a WIPO official. Three WIPO consultants from Costa Rica, Mexico and Venezuela and three experts from Brazil, Jamaica and the United Kingdom, as well as two other WIPO officials and several experts from the United States of America, participated in the Seminar as speakers.

### Assistance With Training, Legislation and Modernization of Administration

*Bolivia.* In April 1993, Mr. Luis Campero Prudencio, Minister for Exports and Competitiveness, visited WIPO and was received by the Director General. During the visit, the Minister handed to the Director General the instrument of accession of Bolivia to the WIPO Convention and discussed with him cooperation between WIPO and Bolivia.

*Dominican Republic.* In April 1993, as a follow-up to the mission undertaken by two WIPO officials to Santo Domingo in January 1993, the International Bureau sent a draft copyright law to the Government, at its request.

*Honduras.* In April 1993, a WIPO consultant from Costa Rica undertook a mission to Tegucigalpa to discuss the new draft copyright law with government officials.

*Nicaragua.* In May 1993, at the request of the Government of Nicaragua, the International Bureau sent comments on the draft copyright law which was being discussed by the National Assembly.

*MERCOSUR.* In May 1993, the Director General met with the Permanent Representatives in Geneva of Argentina, Brazil, Paraguay and Uruguay to discuss WIPO's role in MERCOSUR's cooperation efforts in the field of intellectual property.

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

### Regional Activities

*Baltic States.* In April 1993, a WIPO official had discussions with government officials in Vilnius on the preparations for a Regional Workshop for the Baltic States on the Exercise, Administration and Enforcement of Copyright and Neighboring Rights, to be held in Vilnius from June 2 to 4, 1993.

### National Activities

*Bulgaria.* In April 1993, a member of Parliament had discussions with WIPO officials in Geneva on issues relating to the country's Patent and Industrial Designs Laws and on the revision of its Copyright Law.

*Romania.* In May 1993, the International Bureau prepared and sent to the government authorities, at their request, comments on the draft copyright law.

*Russian Federation.* In May 1993, the Director General, accompanied by two other WIPO officials and a WIPO consultant from the Russian Federation, had discussions in Moscow with Mr. Yuri Ryzhov, Chairman of the Subcommittee on Science and Modern Technology of the Supreme Soviet of the Russian Federation, Mr. V.P. Rassokhin, Chairman of ROSPATENT, and other government officials on intellectual property matters. The Director General called on Mr. Yuri Voronin, First Deputy Chairman of the Supreme Soviet of the

Russian Federation, with whom he discussed copyright legislative matters and the Russian Federation's possible accession to the Berne Convention. Also, the Director General called on Mr. Andrei Kozyrev, the Minister for Foreign Affairs.

During his stay in Moscow, the Director General was awarded the degree of Doctor *honoris causa* of the Institute of State and Law of the Academy of Sciences of the Russian Federation at a ceremony which was attended by some 150 people. The Director General also had discussions with the Director of the said Institute on cooperation between WIPO and the Institute, in particular in the organization of a seminar on contemporary trends in intellectual property law in Moscow in early 1994.

*Ukraine.* In April 1993, a WIPO official undertook a mission to Kiev to discuss the new draft copyright law of Ukraine. He had discussions, *inter alia*, with Mr. Mykola H. Zhulynsky, Vice Prime Minister of Ukraine and the President and other officials of the State Copyright Agency of Ukraine (SCAU). Following this mission, the International Bureau sent its comments on the draft copyright law to the Government.

In May 1993, Mr. Yuri V. Gnatkevich, Deputy Chairman of the Standing Committee on Education and Science of the Supreme Soviet of Ukraine, Mr. Vladymir S. Drobyazko, President of the State Copyright Agency (SCAU), and another official of the same Agency had discussions with the Director General and other WIPO officials in Geneva on the new draft copyright law and on current questions concerning cooperation between WIPO and Ukraine in the field of copyright and neighboring rights.

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

### National Contacts

*Germany.* In April 1993, at the invitation of the Government of Germany, the Director General, ac-

companied by another WIPO official, visited Bonn and was presented by Mrs. Sabine Leutheusser-Schnarrenberger, Minister of Justice, with the insignia of the Grand Cross of the Order of Merit of the

Federal Republic of Germany. After the ceremony, the Director General had discussions with the Minister and government officials on cooperation between Germany and WIPO.

*Portugal.* In April 1993, on the occasion of the WIPO Seminar on Copyright and Neighboring Rights for Portuguese-Speaking African Countries, held in Lisbon, a WIPO official had discussions with members of the Faculty of Law of Lisbon University on the teaching of intellectual property.

*Turkey.* In May 1993, a WIPO official and a WIPO consultant from the United Kingdom undertook a mission to Ankara to discuss with government officials and other interested circles the legal protection of computer software and other issues concerning the Turkish data processing sector. The mission was carried out in cooperation with the World Bank.

*United States of America.* In April 1993, at the invitation of the Subcommittee on Intellectual Property and Judicial Administration of the United States House of Representatives Committee on the Judiciary, in Washington, D.C., a WIPO official participated in a hearing on the two questions of the right of distribution and the right of importation in the context of a possible protocol to the Berne Convention.

In May 1993, a WIPO official testified on the principle of national treatment in respect of the proposed Protocol to the Berne Convention at a hearing before the Subcommittee on Intellectual Property and Judicial Administration of the United States House of Representatives Committee on the Judiciary, in Washington, D.C. He was accompanied by another WIPO official.

### United Nations

*United Nations Environment Programme (UNEP).* In May 1993, a WIPO official attended the 17th session of the Governing Council of UNEP in Nairobi.

*United Nations Administrative Committee on Coordination (ACC) and its Organizational Committee (ACC(OC)).* In April 1993, a WIPO official attended the ACC(OC), hosted by FAO in Rome, to prepare for the first regular 1993 session of the ACC, scheduled to take place in Rome later in the same month.

Also in April 1993, the Director General and another WIPO official attended the above session of the ACC.

Later in April 1993, a WIPO official attended, in Rome, the post-ACC meeting of members of the ACC(OC).

*United Nations Advisory Committee on Post Adjustment Questions (ACPAQ).* In May 1993, a WIPO official attended the 17th session of ACPAQ in New York.

*United Nations Consultative Committee on Administrative Questions (CCAQ).* In May 1993, a WIPO official attended the 17th session of a CCAQ Subcommittee on Staff Training in Vienna.

*United Nations Consultative Committee on Substantive Questions (CCSQ) Task Force on Support Costs.* In April 1993, a WIPO official attended the 15th meeting of the Inter-Agency Task Force on Support Costs convened by the CCSQ in Vienna.

*International Computing Centre (ICC).* In April 1993, two WIPO officials attended the ICC Management Meeting in Rome.

### Intergovernmental Organizations

*Council of Europe (CE).* In April 1993, a WIPO official participated in a meeting of the Committee of Legal Experts in the Media Field, in Strasbourg (France).

*European Communities (EC).* In May 1993, two officials of the Commission of the EC had discussions with the Director General in Geneva on current intellectual property activities in the European Communities and possible cooperation between WIPO and the Commission.

*European Space Agency (ESA).* In April 1993, an official of ESA had discussions with WIPO officials in Geneva on the protection of intellectual property rights, especially with respect to inventions in space.

*European Space Agency (ESA)/European Center for Space Law.* In May 1993, a WIPO official attended, in Madrid, the ESA/European Center for Space Law Workshop on Intellectual Property Rights in Outer Space. The Workshop recommended the establishment of international rules for the protection of inventions made in outer space.

### Other Organizations

*Agency for the Protection of Programs (APP).* In April 1993, Mr. Daniel Duthil, President, and

another representative of APP had discussions with WIPO officials in Geneva concerning a study being prepared by APP for the International Bureau on a possible system of digital identification numbers of literary and artistic works.

In May 1993, Mr. Daniel Duthil, President of APP, and another representative of the same Agency had further discussions with WIPO officials in Geneva on a study APP is preparing for the International Bureau on a possible system of identification numbers of certain categories of literary and artistic works.

*Association of International Libraries (AIL).* In May 1993, a WIPO official attended a meeting of the Executive Committee of AIL held in Geneva.

*Chartered Institute of Arbitrators.* In May 1993, a WIPO official spoke at the Conference on the Arbitration of Intellectual Property Disputes organized by the Institute in London.

"*Computer 93.*" In April 1993, two WIPO officials visited the exhibition "Computer 93," held in Lausanne (Switzerland).

*Federation of German Industry (BDI).* In April 1993, at the invitation of BDI, the Director General, accompanied by another WIPO official, attended a meeting of BDI's Industrial Property Committee specially convened in Cologne for the

purpose of meeting the Director General. The discussions covered all the important normative activities of WIPO.

*Institut international d'administration publique (IIAP).* In May 1993, 32 government officials from countries in Africa, Asia, Eastern Europe and Latin America and enrolled at IIAP (Paris) visited WIPO and were briefed by WIPO officials on WIPO's activities and intellectual property in general.

*International Confederation of Societies of Authors and Composers (CISAC).* In May 1993, a WIPO official presented a paper at the Annual Meeting of the Legal and Legislation Committee of CISAC, held in Funchal, Madeira, Portugal.

*International Literary and Artistic Association (ALAI).* In April 1993, a WIPO official spoke at ALAI Canada's bimonthly meeting, held in Montreal, on WIPO's possible instrument on the protection of the rights of performers and producers of phonograms.

*International Publishers Copyright Council (IPCC).* In May 1993, Mr. Charles Clark, General Counsel of IPCC, discussed with WIPO officials in Geneva the possibility of including in WIPO's draft program for the 1994-95 biennium work on a neighboring-rights-type publishers' right.

## Miscellaneous News

### National News

*Niger.* The Ordinance on the Protection of

Copyright, Neighboring Rights and Expressions of Folklore, No. 93/93-27/PM/MCCJ/S, was adopted on March 30, 1993.



## Calendar of Meetings

### WIPO Meetings

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

1993

- September 13 and 14 (Beijing)**      **Symposium on the Patent Cooperation Treaty (PCT) and China (organized by the Chinese Patent Office in cooperation with WIPO)**
- The Symposium is aimed at informing interested Chinese circles of different aspects concerning the PCT, of which China is expected to become a Contracting State as from January 1, 1994. It will also provide an opportunity to non-Chinese patent circles to learn how China intends to administer and use the PCT.
- Invitations:* The Symposium is open to any member of the public (against payment of a registration fee).
- 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 11 to 13 (Geneva)**      **Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations: Intergovernmental Committee (Fourteenth Ordinary Session) (convened jointly with ILO and Unesco)**
- The Committee will review the status of adherence to the Rome Convention and related questions concerning the protection of neighboring rights.
- Invitations:* States members of the Intergovernmental Committee and, as observers, other Contracting States, 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 Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (Second Session)**
- The Committee will continue to 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.
- November 29 to December 10 (Geneva)**      **Committee of Experts on the Harmonization of Laws for the Protection of Marks (Sixth Session) and Preparatory Meeting for the Diplomatic Conference for the Conclusion of a Treaty on the Harmonization of Laws for the Protection of Marks**
- The Committee of Experts is expected to complete the preparations for a possible multilateral treaty on the harmonization of laws for the protection of marks. The Preparatory Meeting will decide which substantive documents should be submitted to the Diplomatic Conference and which States and organizations should be invited to the Diplomatic Conference. The Preparatory Meeting will also establish the draft Rules of Procedure of the Diplomatic Conference. Subject to the decision of the Governing Bodies in September 1993, the Diplomatic Conference will be scheduled for late 1994.
- Invitations:* States members of the Paris Union, the European Communities and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

## UPOV Meetings

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

### 1993

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

## Other Meetings

### 1993

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|------------------------------|--|
| 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

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|------------------------------|--|
| 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 23 to 25 (Turin)         | International Publishers Association (IPA): Symposium on the theme "Publishers and New Technology."  |
| 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 19 to 24 (Vienna)       | International Federation of Industrial Property Attorneys (FICPI): Congress.   |



