

Published monthly
Annual subscription:
160 Swiss francs
Each monthly issue:
20 Swiss francs

Copyright

30th Year - No. 11
November 1994

Monthly Review of the
World Intellectual Property Organization (WIPO)

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Editor's Note

ANNOUNCEMENT

Merger of WIPO Reviews, *Industrial Property* and *Copyright*

As of January 1, 1995, the monthly reviews of the World Intellectual Property Organization (WIPO), *Industrial Property* and *Copyright*, will be merged into a single monthly review under the title *Industrial Property and Copyright*.

Current subscribers to one or both of the existing two reviews will receive the new merged review provided they send to WIPO by December 31, 1994, the completed subscription form inserted in this issue.

The annual subscription rate for the merged review will be 210 Swiss francs for Europe and outside Europe by surface mail, and 300 Swiss francs outside Europe by airmail. All subscribers will then be receiving the equivalent of two reviews instead of one as from the beginning of 1995.

As far as the legislative texts inserted in the existing reviews are concerned, all subscribers to the merged review will receive both sets of industrial property and copyright and neighboring rights laws. It will no longer be possible to subscribe separately to the legislative texts only; the merged review and the legislative inserts relating to the two fields will only be available as a single subscription.

Notifications Concerning Treaties Administered by WIPO in the Field of Copyright

WIPO Convention

Accession

LAOS

The Government of Laos deposited, on October 17, 1994, its instrument of accession to the Convention Establishing the World Intellectual Property Organization, signed at Stockholm on July 14, 1967.

Laos will belong to Class *Ster* for the purpose of

establishing its contribution towards the budget of the World Intellectual Property Organization.

The said Convention will enter into force, with respect to Laos, on January 17, 1995.

WIPO Notification No. 178, of October 18, 1994.

Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties

Accession

ECUADOR

The Government of Ecuador deposited, on October 26, 1994, its instrument of accession to the Multilateral Convention for the Avoidance of Double Taxation of Copyright Royalties, done at Madrid on December 13, 1979.

The Convention will enter into force three months after the deposit of the tenth instrument of ratifica-

tion, acceptance or accession. Such instruments, or instruments of succession, have so far been deposited by six other States (Czech Republic, Egypt, India, Iraq, Peru and Slovakia).*

* See *Copyright*, 1981, p. 316; 1982, p. 102; 1983, p. 136; 1981, p. 268; 1988, p. 261.

Governing Bodies of WIPO

Governing Bodies of WIPO

Twenty-Fifth Series of Meetings

(Geneva, September 26 to October 4, 1994)

General. From September 26 to October 4, 1994, the following Governing Bodies of WIPO held their twenty-fifth series of meetings in Geneva:

- (1) WIPO General Assembly, fifteenth session (4th extraordinary);
- (2) WIPO Coordination Committee, thirty-second session (25th extraordinary);
- (3) Paris Union Assembly, twenty-second session (11th extraordinary);
- (4) Paris Union Executive Committee, thirtieth session (30th ordinary);
- (5) Berne Union Assembly, sixteenth session (5th extraordinary);
- (6) Berne Union Executive Committee, thirty-sixth session (25th ordinary);
- (7) PCT [Patent Cooperation Treaty] Union Assembly, twenty-second session (13th extraordinary).

One hundred and twenty-two States, 17 intergovernmental organizations and 17 international non-governmental organizations were represented at the meetings.¹ They were: Algeria, Argentina, Armenia, Australia, Austria, Bangladesh, Belarus, Belgium, Benin, Bosnia and Herzegovina, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cameroon, Canada, Central African Republic, Chile, China, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Cuba, Czech Republic, Democratic People's Republic of Korea, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran (Islamic Republic of), Iraq, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Libya, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Mali, Mauritania, Mauritius, Mexico, Monaco, Mongolia, Morocco, Namibia, Netherlands, New Zealand,

Nicaragua, Niger, Nigeria, Norway, Pakistan, Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Saudi Arabia, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Swaziland, Sweden, Switzerland, Tajikistan, Thailand, The former Yugoslav Republic of Macedonia, Togo, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Ukraine, United Kingdom, United Republic of Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Viet Nam, Zambia, Zimbabwe; United Nations (UN), United Nations Development Programme (UNDP), International Labour Office (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), World Meteorological Organization (WMO), United Nations Industrial Development Organization (UNIDO), General Agreement on Tariffs and Trade (GATT), African Intellectual Property Organization (OAPI), African Regional Industrial Property Organization (ARIPO), Benelux Designs Office (BDDM), Benelux Trademark Office (BBM), European Patent Organisation (EPO), Commission of the European Communities (CEC), European Free Trade Association (EFTA), League of Arab States (LAS), Organization of African Unity (OAU), Interstate Council for the Protection of Industrial Property (ICPIP); European Broadcasting Union (EBU), European Communities Trade Mark Association (ECTA), European Federation of Audiovisual Filmmakers (FERA), International Association for the Protection of Industrial Property (AIPPI), International Chamber of Commerce (ICC), International Confederation of Music Publishers (ICMP), International Confederation of Societies of Authors and Composers (CISAC), International Federation of Actors (FIA), International Federation of Film Producers Associations (FIAPF), International Federation of Industrial Property Attorneys (FICPI), International Federation of Inventors' Associations (IFIA), International Federation of Musicians (FIM), International Federa-

¹ A full list of participants may be obtained on request from the International Bureau.

tion of Reproduction Rights Organizations (IFRRO), International Organization for Standardization (ISO), International Publishers Association (IPA), Pacific Industrial Property Association (PIPA), Union of Industrial and Employers' Confederations of Europe (UNICE).

The main subjects considered by the Governing Bodies and the main decisions that they adopted are described below.

Activities of WIPO from July 1, 1993, to June 30, 1994. The delegations of practically all the Member States expressed their satisfaction, as far as the activities of the International Bureau during the last year and a half were concerned, with the great quantity and the excellent quality of those activities and the imagination and efficiency with which they were carried out and, as far as the report on the activities was concerned, with its all-embracing coverage, transparency and clarity. They were of the view that, as far as the International Bureau was responsible, the activities had attained the objectives expressed in the program and that the staff of the International Bureau had once again demonstrated their ability, under the dynamic leadership of the Director General, to respond with verve, flair and efficiency to the challenges brought about by the changing world situation and expectations of Member States.

Particular satisfaction was expressed with respect to the development cooperation activities. The delegations of the developing countries mentioned, in particular, the great importance of technical assistance in consolidating the contribution of intellectual property to their technological, economic, cultural and social development. They expressed the hope that WIPO's development cooperation program would continue, enhance and further broaden, particularly in the light of new developments in the international intellectual property scene and the desire to achieve sustainable development. A number of delegations of industrialized and other donor countries reaffirmed their willingness to continue giving support to WIPO and its development cooperation program, both in funds and in kind.

The development cooperation activities considered most useful by many delegations were, in particular, general and specialized training, including long-term fellowships, assistance in the drafting of legislation, rationalization of the administrative operations of industrial property offices and of societies for the collective administration of authors' and composers' rights, in particular through computerization, patent information services to the public by increasing use of CD-ROM technology, the teaching of intellectual property in universities, promotion of public awareness and information for judges and for enterprises. In this connection, the WIPO Academy was mentioned as a major innovation which responded to

a perceived need for middle- to senior-level government officials to become familiar with the full policy ramifications of intellectual property issues.

A number of delegations made suggestions for the organization by WIPO of various development cooperation activities in the future.

Referring to the decline in extrabudgetary resources available to WIPO for its development cooperation activities, many delegations of developing countries requested an increased supply of funds, from the Organization's regular budget, for development cooperation activities in the 1996-97 biennium, in view of the growing demand for technical assistance from developing countries. The Group of Latin American countries requested that the Governing Bodies instruct the Budget Committee, in examining the draft budget for the 1996-97 biennium, to ensure higher allocations for such activities. A number of delegations emphasized the importance they attached to WIPO's activities in connection with the international registration systems, and they supported the pursuance of work on norm-setting and harmonization. They looked forward to the successful conclusion of the Diplomatic Conference for the Conclusion of the Trademark Law Treaty, the resumption of work, through compromise and accommodation as appropriate, on the proposed Patent Law Treaty, the proposed Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property and the continuation of the work on a possible protocol to the Berne Convention and a possible instrument for the protection of the rights of performers and producers of phonograms. A number of delegations also welcomed the establishment of the WIPO Arbitration Center for the settlement of intellectual property disputes between private parties and viewed the new institution as a potentially important support for the private sector.

WIPO and the World Trade Organization (WTO) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The WIPO General Assembly adopted the following Resolution:

“1. Having noted that the preamble of the Agreement on Trade-Related Aspects of Intellectual Property Rights states that the Members of the World Trade Organization desire to establish a mutually supportive relationship between the World Trade Organization and the World Intellectual Property Organization, the WIPO General Assembly hereby also expresses the desire to establish a mutually supportive relationship between the World Intellectual Property Organization and the World Trade Organization.

2. In accordance with its desire to establish a mutually supportive relationship between the World Intellectual Property Organization and the

World Trade Organization, the WIPO General Assembly decides to establish an *ad hoc* working group open to all Member States of WIPO:

(i) to advise and cooperate with the Director General of WIPO in his contacts with the competent organs of GATT-WTO;

(ii) to discuss matters concerning possible cooperation between WIPO and WTO;

(iii) to consider the establishment of an *ad hoc* informal WIPO/GATT-WTO Consultation Group on all matters concerning possible cooperation between WIPO and WTO.

3. The WIPO General Assembly decides that the International Bureau should be at the disposal of any State that expressly asks for advice on questions of compatibility of its existing or planned national intellectual property legislation not only with treaties administered by WIPO, but also with other international norms and trends, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, and that the International Bureau should prepare studies on the implications of the said Agreement on the treaties administered by WIPO."

It was noted that, as was the practice in WIPO, any such advice or studies would not constitute an official interpretation of any international agreement.

Patent Law Treaty (PLT). The Assembly of the Paris Union agreed that:

(a) a Consultative Meeting for the Further Preparation of the Diplomatic Conference for the Conclusion of the Patent Law Treaty should be convened by the Director General of WIPO in the first half of 1995 in order to try to recommend solutions to the principal issues involved so that, in due course, the Diplomatic Conference could be reconvened;

(b) the members of the Consultative Meeting should be States members of WIPO and/or the United Nations;

(c) in addition to the usual observer organizations, GATT-WTO should also be invited to the Consultative Meeting;

(d) the results of the Consultative Meeting should be considered by the 1995 sessions of the competent Governing Bodies of WIPO.

The discussions of the Consultative Meeting would not be limited to technical issues but would aim at recommending solutions in order to maintain the impetus toward the reconvening of the Diplomatic Conference. The proposed Treaty would no longer be referred to as a "Treaty Supplementing the Paris Convention as Far as Patents are Concerned" but as the "Patent Law Treaty," with a view to de-linking it from the Paris Convention for the Protection of Industrial Property, that is, lifting the obligation of being a party to the Paris Convention as a

condition for being a party to the proposed Treaty. A similar de-linking from the Paris Convention should, in due course, occur also in respect of the existing "special agreements" under the Paris Convention, in particular, in respect of the Patent Cooperation Treaty (PCT), the Madrid Agreement Concerning the International Registration of Marks and the future Trademark Law Treaty. As mentioned above, the results of the Consultative Meeting would be presented for consideration at the 1995 sessions (ordinary or extraordinary) of the competent Governing Bodies of WIPO, that is, not only the Assembly of the Paris Union. WIPO would offer to finance the participation (air ticket and per diem) of one person of each State that is a developing country and expresses an interest in participating in the Consultative Meeting.

Matters Concerning a Possible Protocol to the Berne Convention and a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms. The Assembly of the Berne Union decided that the preparatory documents for the December 1994 sessions of the Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, respectively, should consist of the provisional documents prepared by the International Bureau, dated April 29, 1994 (with their annexes) and the written comments submitted by the Governments of Argentina, Japan, Lesotho, South Africa and the United States of America and by the CEC, appearing in documents B/A/XVI/1 and 1 Add. It also decided that paragraphs II to 23 (relating to the protection of computer programs) of the provisional document concerning the Berne Protocol should be omitted, on the understanding that all matters raised in the paragraphs concerned could be discussed fully by the Committee, including by express reference to the text of the same paragraphs. The Assembly also decided that the two Committees had the competence to set, during the sessions in December 1994, the approximate dates for their next sessions in consultation with the Director General.

Matters Concerning the Draft Treaty on the Settlement of Disputes Between States in the Field of Intellectual Property. The WIPO General Assembly decided that the Committee of Experts on the Settlement of Intellectual Property Disputes Between States would meet again in 1995, before the September 1995 ordinary session of the WIPO General Assembly, and that the General Assembly, at that session, would decide on any further steps in that connection, including the question of whether to hold a Diplomatic Conference for the Conclusion of

a Treaty on the Settlement of Intellectual Property Disputes Between States and, if so, when.

Matters Concerning the PCT Union. The Assembly of the PCT Union decided that the proposal to increase the maximum number of designation fees payable under the PCT or an alternative proposal for a general fee increase could be considered by the Assembly in 1995 following consideration by the PCT Committee for Administrative and Legal Matters and/or the WIPO Budget Committee, as appropriate. The Assembly also noted the contents of paragraphs 1 to 21 of document PCT/A/XXII/1 concerning the cost of producing the *PCT Gazette* and *Gazette du PCT* and agreed that publication of the index of international publication numbers according to designated States should be discontinued, with the expected effect of reducing the volume of each regular Gazette in English and French by about 11%, and, consequently, of

providing savings in paper, printing and postage of about 110,000 Swiss francs a year.

Nomination to the Post of Director General. The WIPO Coordination Committee decided, by consensus, to submit the name of Dr. Arpad Bogsch, the present Director General, to the WIPO General Assembly with a view to his appointment for the continuation of his term of office at the head of WIPO, it being understood that the duration of the term of office starting on December 1, 1995, and any other conditions of the appointment would be fixed by the General Assembly.

Staff Matters. The WIPO Coordination Committee gave favorable advice on the intention of the Director General to promote Mr. Giovanni Tagnani, a national of Italy, to grade D.1, as Director, Buildings Division.

WIPO Arbitration Center

Commencement of Operations

The WIPO Arbitration Center became operational on October 1, 1994. The commencement of operations was preceded by various preparatory steps culminating in a meeting of a Group of Experts in August 1994 and the first meeting of the WIPO Arbitration Council in September 1994.

Final Preparations for Commencement of Operations

Group of Experts. Third Meeting (Geneva, August 24 and 25, 1994). The Group of Experts which

had met in April and May 1994 to review the drafts of the WIPO Mediation, Arbitration and Expedited Arbitration Rules held a final meeting on August 24 and 25, 1994.

At that meeting, the four members of the Group of Experts once more reviewed and revised the drafts of the WIPO Mediation, Arbitration and Expedited Arbitration Rules and revised draft model contract clauses for mediation, arbitration and expedited arbitration under those Rules. The draft Rules and model contract clauses had been circulated in July 1994 for observations to interested non-governmental organizations, enterprises and individuals and the observations received were reviewed by the Group of Experts.

WIPO Arbitration Council. First Meeting (Geneva, September 19, 1994). The WIPO Arbitration Council, comprising 10 persons, held its first meeting at the headquarters of WIPO on September 19, 1994.

The Council discussed and noted the WIPO Mediation, Arbitration and Expedited Arbitration Rules and the model WIPO contract clauses and submission agreements, which subsequently entered into force on October 1, 1994, as well as a draft general information brochure on the WIPO Arbitration Center entitled *The Services of the WIPO Arbitration Center—General Information Brochure*. It further considered the composition of the WIPO Arbitration Consultative Commission and the past and planned activities of the WIPO Arbitration Center.

WIPO Arbitration Consultative Commission

The WIPO Arbitration Consultative Commission was established by the Director General of WIPO. The function of the Consultative Commission is to give opinions and advice to the WIPO Arbitration Center on non-routine issues in respect of which the Center is required to take a decision in the course of the administration of an arbitration, notably the challenge, release or replacement of an arbitrator and special questions concerning fees. For the purposes of receiving such opinions and advice, the Center will constitute, whenever required, *ad hoc* committees composed of three members of the Consultative Commission. The Commission had 34 members on October 1, 1994.

Normative Activities of WIPO in the Field of Copyright

Committee of Experts on a Possible Protocol to the Berne Convention

Fourth Session

(Geneva, December 5 to 9, 1994)

QUESTIONS CONCERNING A POSSIBLE PROTOCOL TO THE BERNE CONVENTION

*Memorandum prepared by
the International Bureau*

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INTRODUCTION

I. In accordance with the program of WIPO for the 1994-95 biennium (document AB/XXIV/2, item 03(3), page 21), the International Bureau has convened the fourth session of the Committee of Experts to examine questions concerning a possible protocol to the Berne Convention (hereinafter

referred to as "the Committee of Experts" or "the Committee"). According to the program, the protocol is mainly intended to clarify the existing—or to establish new—international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which the Convention applies.

2. This program was adopted by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1993 (see document AB/XXIV/18, paragraphs 224-231 and 283-284). A similar decision was made two years earlier by the same bodies for the program of the 1992-93 biennium (document AB/XXII/22, paragraph 197), and, two years before that, for the program of the 1990-91 biennium (document AB/XX/20, paragraphs 152 and 199).

3. So far, the Committee of Experts has met three times, at the headquarters of WIPO. The first session was held in 1991 (November 4 to 8), the second in 1992 (February 10 to 17) and the third in 1993 (June 21 to 25).

4. The discussions were based on working papers prepared by the International Bureau (documents BCP/CE/I/2 and 3 in the first and second sessions, documents BCP/CE/III/2-I to III in the third session). The reports of the three sessions are contained in documents BCP/CE/I/4 (first session), BCP/CE/II/1 (second session), and BCP/CE/III/3 (third session).

5. The subjects to be covered by the Committee, beginning with its third session, were decided by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1992 (document B/A/XIII/2, paragraph 22), as follows:

- (1) computer programs;
- (2) data bases;
- (3) rental right;

- (4) non-voluntary licenses for the sound recording of musical works;
- (5) non-voluntary licenses for primary broadcasting and satellite communication;
- (6) distribution right, including importation right;
- (7) duration of the protection of photographic works;
- (8) communication to the public by satellite broadcasting;
- (9) enforcement of rights; and
- (10) national treatment.

6. On December 15, 1993, the "Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods" (hereinafter referred to as the "TRIPS Agreement") was adopted in the framework of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT). The TRIPS Agreement contains standards concerning the protection and enforcement of intellectual property rights, including copyright and related rights. In preparing the memorandum for this session of the Committee, the International Bureau has taken into account the provisions of the TRIPS Agreement which concern specific issues on the agenda for discussion.

6bis. Pursuant to the decisions of the Assembly of the Berne Union at its fifteenth session (4th extraordinary) held on April 28 and 29, 1994 (document B/A/XV/1, paragraph 25), the memorandum prepared for this session of the Committee, together with an invitation for comments, was sent as a provisional draft to the Governments of the countries of the Berne Union and to the European Commission. The International Bureau submitted the texts of all comments received (from the Governments of Argentina, Japan, Lesotho, South Africa, the United States of America, and the Commission of the European Communities) to the Assembly of the Berne Union at its sixteenth session (5th extraordinary), held in Geneva from September 26 to October 4, 1994 (see documents B/A/XVI/1 and 1 Add.) and invited the Assembly to decide what the preparatory document for the present session of the Committee should consist of (document B/A/XVI/1, paragraph 7). At the conclusion of its session, the Assembly decided that the memorandum for the present session of the Committee should consist of the provisional document prepared by the International Bureau with an annex including the above-mentioned comments. The Assembly also decided that paragraphs 11 to 23 of the provisional document should be omitted, on the understanding that all matters raised could be discussed fully at any future session of the Committee, including by reference to specific language in the said paragraphs of the provisional document. In keeping with the decisions of the

Assembly, the above-mentioned comments are included as Annex II to the present memorandum, and paragraphs 11 to 23 of the provisional document have been omitted.

I.

COMPUTER PROGRAMS

7. In the memorandum prepared by the International Bureau for the first session of the Committee of Experts, it was proposed that the protocol contain provisions requiring States party to provide the same copyright protection for computer programs that the Berne Convention provides for literary and artistic works, including both operating systems and application systems programs, and in both source and object code. In respect of limitations on rights, it was proposed to include provisions in the protocol stating that reproduction and adaptation of a computer program were permitted only where necessary (1) to use the program in connection with specific hardware for the purpose and extent intended when the program was obtained; (2) for archival purposes, or for replacement of a lost, destroyed or unusable copy; (3) for decompilation when necessary to achieve interoperability of the program with other independently created programs, provided (a) that the information to be obtained through decompilation was not otherwise available, (b) that decompilation was limited to those parts of the program necessary for interoperability, and (c) that the information obtained was not used to infringe copyright through the making of a substantially similar program or through any other act.

8. At the first session of the Committee, there was practically unanimous agreement that computer programs, both operating system and application programs, and in both source and object code, were protected by copyright and, further, that the obligation to protect such programs at the same level as literary works could be deduced from the present text of the Berne Convention. This international consensus is also reflected in Article 10(1) of the TRIPS Agreement, which obligates States party to the Agreement to protect computer programs, whether in source or object code, as literary works under the Berne Convention. The Committee also agreed that private reproduction and adaptation of computer programs should only be allowed where necessary to use the program in connection with specific hardware for the purpose and extent intended when the programs were obtained, and that reproduction of a program was permitted for the purpose of making a single archival or backup copy (although some delegations expressed doubts whether it would be desirable to include provisions on those

questions). There was, however, insufficient agreement whether or not it would be justified to include provisions on reproduction and adaptation for the purpose of decompilation of computer programs. No delegation denied the importance of such possible provisions; several delegations were, however, of the view that it would be premature to include them in the protocol. At the conclusion of the discussion, the Chairman stated that, although there were differences of opinion on some of the points, the questions concerning the protection of computer programs would remain on the Committee's agenda.

9. During the discussion, three delegations made a proposal (hereafter also called "the three-party proposal") concerning the provisions on computer programs that according to them might be generally acceptable as part of a protocol (see paragraph 78 of document BCP/CE/I/4). That proposal is quoted in the next paragraph.

10. The Committee is invited to discuss whether the provisions, if any, of the protocol on computer programs should be based on the three-party proposal, that is, whether they "should include and be limited to the following points: (i) considering that computer programs are literary works and are therefore already protected under Article 2 of the Berne Convention, [and that] such protection has to be understood as including application programs and operating systems, whether in source or object code; (ii) this protection given by the Berne Convention (1971) is understood to apply to the expression of a program and not to ideas, procedures, methods of operation or mathematical concepts; (iii) limitations or exceptions to exclusive rights should be confined to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder."

[Paragraphs 11 to 23 have been omitted in keeping with the decision of the Assembly of the Berne Union referred to in paragraph 6bis, above.]

II.

DATA BASES

24. In the memorandum prepared by the International Bureau for the first session of the Committee, the International Bureau proposed that the protocol contain a provision stating that collections of mere data or other unprotected material were to be consid-

ered literary and artistic works, and, whenever such collections constituted intellectual creations by reason of the selection, coordination or arrangement of data or other material, they were to be protected in the same way as collections of works under Article 2(5) of the Berne Convention. It was also proposed that data bases be mentioned expressly as an example of protected collections, in the same way as Article 2(5) of the Berne Convention mentions encyclopaedias and anthologies. Finally, it was proposed that the provision state that the protection of collections of data or other unprotected material did not make such data or other unprotected material eligible for copyright protection.

25. A majority of the Committee, in its first session, agreed that collections of mere data or other unprotected material should be protected by copyright in the same way as collections of literary and artistic works, provided there was originality in the selection, coordination or arrangement of the data or materials. It was said that compilations of works were already protected as collections under Article 2(5) of the Berne Convention, while compilations of data or unprotected materials could be protected as literary or artistic works under Article 2(1). It was pointed out that there was a need to protect data bases which might not qualify for protection under copyright due to a lack of originality. At the end of the discussion, the Chairman stated that provisions on the protection of data bases should be included in the protocol, and that the question of the protection of data bases that did not qualify for copyright protection, because of lack of originality, should be further discussed.

26. The Committee's views concerning the protectability of data bases are also reflected in Article 10(2) of the TRIPS Agreement, which obligates States party to that Agreement to provide copyright protection to compilations of data or other material, whether in machine-readable or other form, which, by reason of the selection or arrangement of their contents, constitute intellectual creations. Article 10(2) of the TRIPS Agreement provides further that such protection does not extend to the data or material itself, and is to be without prejudice to any copyright subsisting in the data or material itself.

27. In light of the foregoing, the Committee is invited to confirm its position that it would be desirable to include provisions in the protocol to make clear that compilations of data or other material, including data bases, whether in machine-readable or other form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected under

copyright as works, and that, further, it seems also desirable that the protocol clarify that the copyright protection of compilations (including data bases) does not extend to the data or material itself and that such protection is without prejudice to any copyright that may subsist in the data or material itself.

28. What is discussed in paragraphs 11 to 13, above, in respect of computer programs, seems also applicable, *mutatis mutandis*, in respect of data bases.

29. Therefore, the text of the protocol should make it clear that the relevant provisions concerning the obligations under the Berne Convention in respect of the protection of data bases are of a declarative nature rather than of a constitutive nature.

30. Provisions such as those outlined in the previous paragraphs seem necessary in order to make it clear that data bases that are original intellectual creations are already protected. In this sense, as indicated, the term "original" refers to the intellectual activity of the author or authors of the data base in selecting or arranging its contents. The notion of originality is one which varies from country to country and from one legal system to another; the Anglo-American or common law system requires, in general, a relatively low level of originality for protection, and the continental or civil law system requires, in general, a relatively high level of originality for protection.

31. It seems to be increasingly the case that certain data bases may lack the necessary originality to qualify for protection under copyright, notwithstanding the considerable time, effort and organizational skills that were brought to bear in order to assemble the data or other material into a commercially viable product. For data bases that do not possess the requisite originality for protection under copyright, the law of unfair competition provides, at present, a means of protection against unauthorized uses. Protection under the law of unfair competition cannot be said to offer a universal solution, however.

32. It would seem appropriate for the Committee to consider the desirability of dealing *expressis verbis* with data bases in the protocol. Such consideration would be within the present terms of reference of the Committee, which speak of "data bases" without further qualification or limitation.

33. Accordingly, the Committee is invited to consider whether or not it would be justified to include in the protocol provisions on the protection of data bases that are not original, and thus do not qualify as works

but that still deserve intellectual property protection, and, if such provisions were justified, what should be their nature and contents.

III.

RENTAL RIGHT

34. See Chapter VI on distribution right, including importation right.

IV.

NON-VOLUNTARY LICENSES FOR THE SOUND RECORDING OF MUSICAL WORKS

35. Under Article 13(1) of the Berne Convention, "[e]ach country of the [Berne] Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority." This serves as a basis for non-voluntary licenses in certain countries.

36. In the memorandum prepared by the International Bureau for the first session of the Committee, the International Bureau noted that the provision quoted above had become obsolete since its inclusion in the Berne Convention at the 1908 Berlin revision conference, when it was intended to prevent possible abuses of exclusive rights by music publishers and authors' societies vis-à-vis producers of sound recordings. It was noted that the recording industry had become one of the most vigorous in the entertainment field, and that producers of sound recordings had exclusive rights of reproduction under the Rome and Phonograms Conventions without the possibility of non-voluntary licenses. Accordingly, it was proposed that the protocol provide that those countries party to the protocol which did not provide non-voluntary licenses under Article 13(1) of the Berne Convention would not be allowed to do so in the future, and that countries party to the protocol which did provide such non-voluntary licenses would be obliged to eliminate them within a certain period, for example, five years. At the second session of the Committee, there was widespread support for elimination of the non-voluntary license for sound

recording as provided by Article 13(1) of the Convention, although several delegations referred to the existence of such a license in their national laws and one of them expressly opposed such elimination.

37. The Committee is invited to discuss whether or not the general support for the elimination from the Berne Convention of the possibility of notional laws providing for non-voluntary licenses for sound recording of musical works would be sufficient for including in the protocol provisions on such elimination. In case of a positive answer, the Committee should also discuss the time limit allowed for changing the notional laws.

V.

NON-VOLUNTARY LICENSES FOR PRIMARY BROADCASTING AND SATELLITE COMMUNICATION

38. Under Article 11^{bis}(2) of the Berne Convention, “[i]t shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the preceding paragraph [concerning broadcasting and retransmission of broadcast works] may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.” In certain countries party to the Convention, this provision serves as a basis for their national laws allowing the granting of non-voluntary broadcasting licenses.

39. In the memorandum prepared by the International Bureau for the first session of the Committee, it is stated that, as in the case of the non-voluntary license for sound recording of musical works, the non-voluntary license for broadcasting permitted under Article 11^{bis}(2) had outlived its usefulness. When Article 11^{bis} became part of the Convention in the 1928 Rome revision conference, its purpose was to ensure that works were available for broadcasting and to provide safeguards against the possible abuse of rights exercised by authors’ societies that might be in a monopoly position. It is also stated in that memorandum that any problems in respect of abuse of possible monopoly positions had been largely eliminated by the establishment of appropriate collective administration systems and that various new means of communication of works to the public, such as cable-originated programming, were not covered by the non-voluntary license. Since

broadcasters and owners of rights in cable-originated programming usually competed for the same viewing audience, it seemed inappropriate to give broadcasters an advantage that was not available to competitors. Accordingly, it was proposed that the protocol provide that those countries party to the protocol which did not provide non-voluntary licenses under Article 11^{bis}(2) of the Berne Convention would not be allowed to do so in the future, and that countries party to the protocol which did provide such non-voluntary licenses would be obliged to eliminate them within a certain period, for example, five years. As an alternative, the International Bureau proposed that non-voluntary licenses should be excluded at least in respect of direct broadcasting by satellite.

40. A large majority of the Committee favored inclusion in the protocol of provisions on the abolition of non-voluntary licenses for primary broadcasting, especially in the case of satellite broadcasting. There was no consensus in respect of the elimination of non-voluntary licenses in other cases, for example, in the case of simultaneous and unchanged retransmission by cable of a broadcast program.

41. Accordingly, it is proposed that the Committee consider two alternatives for the elimination, through the protocol, of the possibility of granting non-voluntary broadcasting licenses under Article 11^{bis}(2) of the Berne Convention: first, that such licenses would not be permitted in cases of primary broadcasting, both terrestrial and satellite; and, second, that the elimination of such licenses would be restricted to broadcasting by means of satellite.

42. Under the first alternative, the notion of “primary” broadcasting, in respect of which non-voluntary licenses might be precluded, could be interpreted as meaning the first terrestrial broadcast or satellite transmission of an original program by the originating organization; under this alternative, non-voluntary licenses could continue to be applied under national law in the case of, for example, rebroadcasting and cable retransmission.

43. Under the second alternative, abolition of non-voluntary licenses in the case of satellite broadcasts might be seen to follow from the limitation, in Article 11^{bis}(2) of the Berne Convention, that non-voluntary licenses are applicable only in the countries where they have been prescribed. Satellite signals are almost always receivable in more than one country, and it is often difficult to ascertain the intent of the originating organization in respect of the countries where reception of the satellite signal

is intended. Thus, it is in conflict with Article 11^{bis}(2) to make available a satellite program in one country on the basis of a non-voluntary license granted under the law of the country where the transmission originated. This conclusion seems to be implicit in Article 11^{bis}(2) as it is presently worded, but it could nonetheless be useful to state expressly in the protocol that, in the case of satellite broadcasting, non-voluntary licenses must not be applied.

44. *If the Committee finds provisions on the elimination of the possibility of granting non-voluntary broadcasting licenses desirable according to any of the two alternatives mentioned in paragraph 41, above, it is also invited to discuss the time limit for the elimination of such licenses where they exist.*

VI.

DISTRIBUTION RIGHT, INCLUDING IMPORTATION RIGHT

45. In the memorandum prepared by the International Bureau for the first session of the Committee, the International Bureau stated that the right to authorize first distribution of copies of a work followed inevitably from the right to authorize the making (reproduction) of such copies; it also recalled that a proposal for inclusion of an explicit general right of distribution in the Berne Convention had been rejected at the Stockholm Diplomatic Conference in 1967. Consequently, there seemed to be no need for express recognition of a right of distribution separately from the right of reproduction. Further, in light of the fact that, under numerous national laws, the right of distribution was considered to be exhausted after the first sale of copies, the International Bureau proposed that the protocol recognize only those instances of distribution in respect of which the right of distribution should survive the first distribution of copies. Specifically, it was proposed that the protocol provide an exclusive right to authorize rental or public lending of copies of audiovisual works, works the performances of which were embodied in sound recordings, computer programs, data bases and sheet music.

46. In a separate proposal, the International Bureau stated that, in order to ensure an appropriate application of the principle of territoriality of copyright in respect of the right of reproduction, the protocol should provide an exclusive right of the author to authorize importation of copies of his work, including copies which were made with his permission, and irrespective of whether the first distribution

of the said copies had already taken place in a country party to the protocol or in the territory of a group of countries party to the protocol that constituted an economic community or single market.

47. The proposals described in the two preceding paragraphs were considered during the second session of the Committee. A great majority supported the inclusion of a right to authorize rental of copies of certain works in the protocol, but there was little support for inclusion of the right of public lending. Differing views were expressed concerning the works to which the right of rental should apply, but there was consensus that works embodied in sound recordings (as well as sound recordings themselves) and computer programs should be covered. Questions were raised in respect of whether the right to authorize rental should always be an exclusive right or, rather, whether it might be appropriate in certain circumstances to limit it to a right to equitable remuneration.

48. In respect of the proposal for an exclusive right of importation, there was general support for keeping the question on the Committee's agenda, although further justification for the right was thought to be needed. There was disagreement concerning whether it was necessary to recognize the right explicitly, since it was said to be inherent in the notion of territoriality of copyright, and could thus be considered as included in the right of reproduction. Questions were also raised concerning the relationship between the proposed right of importation and contractual practice through which territorial restrictions on reproduction and distribution of copies of works were normally established.

49. At the meeting of the Assembly and Conference of Representatives of the Berne Union on September 29, 1992, the terms of reference of the Committee were modified, and the above-described proposals were folded into a single agenda item, namely, "distribution right, including importation right." Accordingly, the memorandum for the third session of the Committee contained a new set of proposals concerning the right of distribution, including rental and importation.

50. In the said memorandum, the International Bureau, first, offered definitions of certain terms used in respect of the rights involved. It seems useful to recall the following definitions:

- "The 'right of distribution' and its synonym, the 'right of circulation,' is the right to authorize any act where ownership or possession of one or more copies of the work changes or changes hands; in the case of sale, gift, etc., it is ownership, whereas, in the case of rental

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

- “The ‘right of first distribution’ (*droit de mise en circulation*) and its synonym, the ‘right of putting into circulation,’ is the right of distribution concerning any copy of the work in respect of which the right of distribution has not been exhausted through first sale.”
- “The ‘right of rental’ is a special variant of the right of distribution, namely the right to authorize the rental of a copy of the work. ‘Rental’ is the transfer of the possession of a copy of the work, for a limited period of time, for profit-making purposes.”
- “The ‘right of lending’ is also a special variant of the right of distribution, namely the right to authorize the lending of a copy of the work. ‘Lending’ is the transfer of the possession of a copy of the work, for a limited period of time, for non-profit-making purposes. Few countries recognize this right either as an exclusive right or a mere right of remuneration. Several countries recognize a limited form of this right, defined in the following paragraph and called ‘public lending right.’”
- “The ‘public lending right’ is a special form of the right of lending. In most countries that recognize this right, the lending must be by non-profit libraries open to the public. This right is usually a mere right to remuneration (not an exclusive right of authorization).”
- “The ‘*droit de suite*’ is an inalienable right of the author, or, after his death, the persons or institutions authorized by national legislation, with respect to the original or ‘original copies’ of a work of art or original manuscript, to an interest in any sale of the work subsequent to the first transfer by the author of the work.”
- “The ‘right of importation’ is the right to authorize that copies of the work, irrespective of whether or not they have been made with the consent of the author or other owner of copyright, be brought into the territory of the country. It is not a right of distribution proper since importation does not necessarily involve a change in ownership or possession. Consequently, the title of this chapter, which implies that importation is a kind of distribution, is perhaps not quite precise.”

51. Then, the International Bureau analyzed the provisions of the Berne Convention relevant to the question of distribution of copies of works, i.e., Article 9 (the right of reproduction), Article 14(1) (the right to authorize the cinematographic adaptation and reproduction of works, and the right to authorize

the distribution of the works thus adapted or reproduced), Article 14^{bis}(1) (the right of the owner of copyright in a cinematographic work to authorize the distribution of the work), Articles 13(3) and 16 (concerning seizure of works and sound recordings, in certain cases), and Article IV(4)(a) of the Appendix (the prohibition on exportation of copies made on the basis of a compulsory license for translation). The International Bureau also referred to the records of the relevant Diplomatic Conferences (Brussels (1948), when Article 14(1) was added to the Convention, and Stockholm (1967) when Articles 9 and 14^{bis} were included) of the Berne Union.

52. The International Bureau concluded that the purpose of a normal exploitation of works on the basis of the right of reproduction was to provide the author or other owner of copyright with control over the making available of copies of works to the public; thus, it was reasoned, the rights to authorize the first distribution of copies of works, and to authorize the importation of copies, whether or not the making of such copies was authorized, were inseparable corollaries to the right of reproduction in Article 9 of the Berne Convention. In respect of the right of importation, it was said to follow from the history and certain provisions of the Convention—in particular, the provision concerning national treatment—that the rights provided under the Convention had always been construed as territorial, even though the principle of territoriality of copyright was not expressly mentioned, and that, in practice, the right of importation was an important means of implementing and safeguarding the said principle.

53. On the basis of the considerations outlined in the previous paragraphs, the International Bureau proposed that the obligation to recognize the rights of first distribution and importation, as exclusive rights of the author or other owner of rights, be clarified through an interpretative provision in the protocol. Specifically, it was proposed that the protocol provide that the author or other owner of copyright had the exclusive right to authorize the distribution of the original or copies of a work through sale or other transfer of ownership, or through rental, public lending or other transfer of possession; and that the author or other owner of copyright had the exclusive right to authorize the importation of copies of a work into a country or territory, whether or not the copies were made with his or its authorization.

54. It was also proposed that the protocol allow countries party to it to provide for exhaustion of the right of distribution following the first sale or other first transfer of ownership of copies, except in the case of the *droit de suite* (Article 14^{ter} of the

Berne Convention), in the case of rental (and, as a bracketed alternative, public lending) of the original or copies of certain categories of works, and in the case of importation of copies. It was proposed that an exclusive right to authorize rental (and public lending) should apply to the original or copies of (i) musical works in the form of graphic notation; (ii) audiovisual works; (iii) works the performances of which are recorded in phonograms; (iv) computer programs; and (v) any other works stored in electronic (including digital) format. It was also proposed that those countries which provided a mere right to remuneration for rental of copies, at the time of accession to the protocol, be allowed to make a reservation declaring that they would maintain, at least temporarily, the said right to remuneration rather than providing for an exclusive right of authorization. In respect of the bracketed proposal for a right of public lending applicable to certain categories of works, it was proposed, also in brackets, that a provision be included stating that national legislation might provide exceptions to the said right in certain specific cases, provided that such exceptions did not conflict with the normal exploitation of the works and did not unreasonably prejudice the legitimate interests of authors or other owners of copyright.

55. In respect of the right of importation, while the right would normally allow the author or other owner of rights to authorize or prohibit importation of copies into individual countries, it was proposed that the existence of economic territories or customs unions, for example, the European Union, be taken into account. Within such territories, the right of importation would be considered exhausted in respect of particular copies once importation of such copies had been authorized into any country within the territory. Finally, it was proposed that an exception be recognized for importation of copies by a person for his personal and non-commercial use, as part of his personal luggage.

56. The Committee reacted to these proposals in different ways. Views were almost equally divided on whether the right of first distribution was an inseparable corollary to the right of reproduction; there was, in any case, broad support for including a general right of distribution in the protocol, subject to a limitation for exhaustion upon first sale or other transfer of ownership. There was also general support for inclusion of a right of rental, although, as during the previous session of the Committee, there was no agreement on the question of which categories of works should be covered by the said right; some delegations and observers favored applicability of the right to all works, citing, for example, the blurring of the traditional lines separating categories of works which had resulted from the use of digital

technology to combine, adapt, and manipulate works in unprecedented ways, while others argued that the right should be granted only in those cases where there was evidence of a likely negative impact on other rights of authors, in particular, on the right of reproduction. There was consensus that the right of rental should apply, at least, to computer programs and works the performances of which were included in phonograms, but questions were raised concerning the application of the right to audiovisual works and works in electronic (including digital) format. There was general agreement that the right of rental should be an exclusive right rather than a mere right to remuneration, and, on the question of phasing out the right of remuneration in favor of an exclusive right in the countries the laws of which provided a right of remuneration at the time of accession to the protocol, it was said that the transition period should be as short as possible.

57. The bracketed proposal to include a right to authorize public lending of certain categories of works which would not be subject to exhaustion, and to permit an exception to the right provided there was no conflict with the normal exploitation of the works and no unreasonable prejudice to the legitimate interests of authors or other owners of copyright, was opposed by a great majority of delegations. Accordingly, at the close of the discussion, the Chairman stated that the proposal would be removed from the Committee's agenda, but that the proposal to include public lending as a means by which the author or owner of rights might exercise the right of first distribution would be retained; he stated that the Committee should reconsider the extent of exhaustion of the said right.

58. In respect of the proposal to include an exclusive right of importation, the Committee did not support the proposition that the said right was an inseparable corollary of the right of reproduction in the Berne Convention, and opinions were divided concerning whether a right of importation should be expressly recognized in the protocol. While there was support for maintaining the principle of territoriality of copyright, it was said that the principle might be maintained by limiting the scope of exhaustion of the right of distribution to each national or regional market, rather than by, necessarily, recognizing a new right. There was also some support for the view that the principle of "international exhaustion" should apply; under such principle, the first authorized distribution of a copy of a work exhausted the right of distribution, including importation, in respect of that copy, not only in the country or territory in respect of which distribution was authorized and took place, but in respect of the whole world. The idea of "international exhaustion" was opposed by other delegations.

59. Some elements of the right of distribution were included in the final text of the TRIPS Agreement of December 15, 1993. Article 11 provides that, “[i]n respect of at least computer programs and cinematographic works, a Member shall provide authors and their successors in title the right to authorize or to prohibit the commercial rental to the public of originals or copies of their copyright works.” An exception to this obligation is permitted in the case of cinematographic works, allowing Members not to provide a right of rental unless rental practices have led to “widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors and their successors in title.” The Agreement also contains a provision dealing with exhaustion of rights; Article 6 provides that “[f]or the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 above [concerning, respectively, national treatment and most-favored nation treatment], nothing in this Agreement shall be used to address the exhaustion of intellectual property rights.” A logical interpretation of this provision is that the question of exhaustion of the distribution right, including importation, is not dealt with in the TRIPS Agreement; in other words, the TRIPS Agreement leaves countries free to legislate on exhaustion as they like.

60. *On the basis of the above considerations, it seems justified that the protocol provide a general right of distribution. It also seems justified to include a provision stating that the right of distribution is exhausted upon first sale or other transfer of ownership.*

61. From the provisions proposed in the preceding paragraph, it would follow that the right of distribution would not be exhausted if the first distribution did not take the form of transfer of ownership, but the form of transfer of possession (rental, lending or public lending).

62. The exhaustion of the right, according to the proposals discussed at, and supported by, the third session of the Committee, would prevail in respect of resale or any other transfer of ownership, except for the specific case of the *droit de suite*, and, according to the views of the Committee expressed at the session referred to above, it should also prevail in respect of public lending (and, although this was not stated separately, in respect of lending).

63. At the same time, as discussed above, the right of distribution would survive in respect of rental of certain categories of works in the form of a right of rental. Furthermore, the fact that a copy of a work was already sold in another country would not be

relevant from the viewpoint of the existence and survival of a possible right of importation. These rights are discussed separately below.

A. RENTAL

64. In the case of the exclusive right of rental, it seems that there is general support for such a right only in the case of computer programs and works the performances of which are included in phonograms. Accordingly, it seems to be feasible that the right of rental in respect of these categories of works be provided in the protocol. It also seems, based on the views of the Committee, that such rights should be exclusive. In respect of rental of works included in phonograms, however, the Committee will certainly wish to consider further the adoption of the provision of Article 14(4) of the TRIPS Agreement, under which “[i]f, on the date of the Ministerial Meeting concluding the Uruguay round of Multilateral Trade Negotiations, a Member has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of right holders.”

65. In respect of a right of rental for audiovisual works, the reservations expressed in the Committee, and the above-mentioned provisions of Article 11 of the TRIPS Agreement, under which States party to the Agreement are permitted not to provide a right of rental for audiovisual works, unless rental practices have led to widespread copying which is materially impairing the exclusive right of reproduction, it seems that there is not sufficient general support at present for the protocol to contain an unqualified obligation to recognize a right of rental applicable to the original or copies of audiovisual works. In the light of recent developments, however, it may be justified for the Committee to consider the extent to which the protocol might contain a provision under which States would recognize a right of rental applicable to audiovisual works. The said provision could be made subject to a reservation, under which States party to the protocol could declare that they would not apply the right under certain circumstances, for example, where there was no impairment of other rights of the author resulting from rental practices.

66. It seems that the same concerns that have led to recognition of a right to authorize or prevent rental of computer programs, in the national laws of a growing number of States as well as in the TRIPS Agreement, would apply in the case of rental of any works embodied in digital format (such as data

bases). At present, digital format usually means a CD-ROM or CD-Interactive. The ease of downloading works from rented CD-ROMs and CD-Interactives is, in principle, no different than in the case of downloading rented copies of computer programs, the main possible difference being that a great deal of storage space in the computer memory is required to download the data contained in CD-ROMs or CD-Interactives. Moreover, since the copy made by such downloading would result from a direct transfer of digital information, the resulting copy would be identical to the original, that is, the quality of the sound and images would be indistinguishable from the source. The risk of piracy of works embodied in digital format could, accordingly, become a real problem. Therefore, a right of rental might be a useful means of "nipping piracy in the bud" before it has a chance to develop.

67. Apart from concerns about maintaining the integrity of the right of reproduction—and about increased piracy—that might result from the absence of a right of rental, it is also conceivable that rental might become an important means of economic exploitation of works embodied in digital format. In such a case, the right of rental would make it possible for the owners of rights to decide whether or not to distribute such works to the public in the form of rental or sale, based on the prevailing market conditions in a given country or territory.

68. *It is proposed that the protocol provide for an exclusive right of rental in respect of any copy, even after its sale or other transfer of property by or pursuant to the authorization of the author or other owner of copyright, when such a copy is the copy*

(i) of an audiovisual work, whatever the format of the copy (film, analog or digital tape or disk, etc.) is;

(ii) of a work whose performance is recorded in a phonogram (sound recording), whatever the format of the copy (analog or digital tape or disk, etc.) is;

(iii) of a computer program, whatever the format of the copy (paper, analog or digital tape, etc.) is, except where the program itself is not the essential object of the rental (in which case no right of rental exists for the program concerned either before or after the sale or other transfer of property);

(iv) of any work other than those mentioned in items (i) to (iii) (for example, writings, graphic works, data bases), but only if the copy is in a digital format (a digital tape or disk, etc.) and not when the copy is in another format, for example,

paper or analog recording. (In the latter case, the author or other copyright owner has no right to prohibit the rental of the copy and has no right to any remuneration from the rental of the copy (that is, the right of rental is "exhausted").)

69. As discussed above, certain exceptions to such a right of rental might be justified, also taken into account the exceptions included in Articles 12 and 14(4) of the TRIPS Agreement.

70. *The Committee is invited to consider what exceptions and under what conditions might be justified to be provided for in the protocol concerning the right of rental in respect of audiovisual works.*

71. *It is proposed to include a provision in the protocol under which, if, on April 15, 1994, a country party to the protocol has in force a system of equitable remuneration of right holders in respect of the rental of phonograms, it may maintain such a system, provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of the right holders.*

72. The proposal as appearing in the preceding paragraph has been brought into harmony with the relevant provisions of the TRIPS Agreement. April 15, 1994, is "the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations" to which the said provisions of the TRIPS Agreement refer as the relevant date.

B. IMPORTATION

73. As noted above, the Committee of Experts expressed differing views in respect of the possible inclusion of the right of importation in the protocol. In his summary of the discussion on the right of importation during the third session of the Committee, the Chairman stated that, notwithstanding such differences of opinion, the issue should stay on the agenda, and the International Bureau should study the right of importation in relation to trade, competition and consumers' rights issues. Following the said summary, the Director General remarked that the International Bureau would provide arguments both for and against the inclusion of the right of importation in the protocol, but would not provide an economic analysis for two reasons, namely, first, that the International Bureau is not equipped to carry out such an analysis, and, second, because such an analysis would necessarily

involve a speculative comparison between what presently exists and what does not yet exist.

74. Reasons given against inclusion of the right of importation were as follows: (1) once copies of works which were made with the authorization of the copyright owner were placed on the market, wherever that may be, the right of distribution should be considered exhausted and not subject to a further right to control importation of such copies ("international exhaustion"); (2) the author could control importation of copies of his works by contractual means, so a right of importation would be superfluous; (3) the right of the owner of copyright to control the importation of copies of works was an unacceptable restriction on the free circulation of goods and cultural products; (4) importation of lawfully made copies of works was not the same as piracy, which could be addressed through other mechanisms, such as provisions on enforcement of rights, including customs controls; and (5) a separate right of importation might restrict the flow of cultural goods across national borders by requiring that licenses for the use of works be negotiated on a country-by-country basis, rather than on a worldwide basis as at present.

75. Reasons given in support of inclusion of the right of importation in the protocol included the following: (1) the investment necessary to bring works to market, and to develop new products, required the security that markets may be divided territorially; (2) the long-term effect of allowing parallel importation would be to concentrate the international distribution system in the hands of a few major entities which can afford a global presence, to the detriment of small entities that seek to promote alternative markets; (3) absence of a right of importation would vitiate the right of the author to grant exclusive territorial licenses, and would end the current system of supply from a plurality of sources; (4) erosion of the principle of territoriality of copyright might contribute to illegal copying, including piracy, of lawfully made copies of works (for example, copies of computer programs equipped with anti-copy systems) which were intended for markets where the risk of unauthorized copying was less; (5) customs controls were not a substitute for a right to authorize or prevent the importation of copies; and (6) enforcement of the right of importation by contractual means was illusory, since contracts between the owner of rights and licensees were not binding on parties not in privity to the contract.

76. During the aforementioned discussion by the Committee of Experts, the Delegation of Australia referred to legislation which has been passed in its country in recent years to restrict, in certain circum-

stances, the right of the author or owner of copyright to authorize or prohibit importation of lawfully made copies of books from other countries. It also noted that similar legislation had been introduced to impose restrictions on the right of importation in respect of sound recordings. The Delegation offered to provide the International Bureau with copies of studies carried out in its country in respect of the impact of the right of importation on retail prices of books, sound recordings and computer software; in the case of books and sound recordings, the conclusions drawn in the said studies formed the basis for the legislation mentioned above. By a letter dated July 2, 1993, Mr. C.C. Creswell, Assistant Secretary, International Trade Law and Intellectual Property Branch, Attorney-General's Department, forwarded copies of three inquiries carried out by the Prices Surveillance Authority (PSA) of Australia in 1989 (*Inquiry into Book Prices*), in 1990 (*Inquiry into the Prices of Sound Recordings*), and in 1992 (*Inquiry into the Prices of Computer Software*).

77. In all three inquiries, the PSA concluded that the right of importation in the Copyright Law of Australia had resulted in international price discrimination, with Australian consumers paying higher prices for books, sound recordings, and computer software than consumers in other countries. In the case of books and certain sound recordings, moreover, the PSA concluded that the importation provisions had the effect of restricting the availability of copies to consumers. On the basis of its conclusions, the PSA recommended repeal of the importation provisions of the Australian Copyright Law in respect of these three categories of subject matter. The PSA based its recommendations on the premise, stated expressly in the book prices inquiry, that repeal of the importation provisions would not be in conflict with Australia's obligations under the Berne Convention, since the Convention did not contain rights of distribution or importation. The PSA also took the view that Australia's trade practices legislation did not provide adequate remedies for the price discrimination and supply restrictions which it had found to exist, because the exercise of intellectual property rights was specifically exempted from the application of a number of the provisions of such legislation.

78. The PSA favored, on economic grounds, the application of the theory of "international exhaustion" of the distribution right to allow "parallel importation" into Australia of lawfully made copies of works and sound recordings. As noted above, this theory states that, once the author or other owner of copyright has authorized the first distribution of copies in one country or territory, the copies may be lawfully imported into any other country or territory, without further authorization by the author or other

owner of rights. The question of whether the theory of international exhaustion represents sound economic policy is at the heart of a deepening international debate in intellectual property and trade circles. The debate is, perhaps, an inevitable consequence of the increasing globalization of trade in products embodying intellectual property rights, and, no less important, the revolution in communications technology that has made consumers in different countries aware of market disparities to an unprecedented extent. Moreover, the question of international exhaustion has an undeniable political dimension; as the various arguments put forward by the delegations and observers in the third session of the Committee reveal, the views taken by particular countries in respect of international exhaustion bear a close relationship to whether such countries are, at present, net importers or net exporters of products embodying intellectual property rights. The PSA findings in the three inquiries mentioned in the preceding paragraph, when viewed in this context, are an instructive example of attempts at the national level to strike the proper balance between the exclusive rights under copyright and "free trade," including competition and consumers' rights.

79. From a purely legal point of view, it is quite difficult to evaluate arguments in favor of or against inclusion of the right of importation in the protocol, separated from the political, and, in particular, the economic context in which the said right operates. As the Director General stated after the Committee's discussion, the International Bureau is not equipped to carry out an economic analysis of the likely effect—on competition and consumers' interests within the international trading system—of the absence of a right of authors or other owners of rights to control the making available of their works to the public by determining the territorial limits of the distribution of copies. Moreover, the validity of any such analysis would be hampered by the fact that it would involve speculation as to the economic consequences of abolishing the right of importation, and, by extension, partially abandoning the principle of territoriality of copyright.

80. The existence of differentials in the pricing and availability of copies of works among national markets is not in doubt. But it seems questionable that, in all cases, such differences among national markets are *per se* evidence of abuse of rights by authors and other owners of copyright. More fundamentally, it does not seem to follow, from the mere existence of differences in price and availability of copies, that doing away with the right of importation, in respect of markets for all categories of works in all countries and territories, would have the effect of reducing prices and increasing the availability of lawfully made copies to consumers. It is worth

noting that, in the aforementioned inquiries, the PSA did not find that the existence of price discrimination was attributable solely to the actions of foreign authors or owners of rights having exercised the right of importation by granting exclusive licenses to Australian distributors. In the inquiry into computer software, in particular, the PSA found that the high prices were partly due to inefficiencies in the local distribution chain.

81. While no economic analysis is offered, certain observations with economic overtones may be considered by the Committee. There are a number of reasons that prices for copies of works may differ among countries, and not all of them may be anti-competitive. Markets delineated by national boundaries are naturally disparate by virtue of geographic, demographic, economic, social, and political circumstances. Also, different prices may reflect differing market conditions in either the country of origin or in importing countries: for example, the market of the country of origin may be so large that an adequate return is ensured from volume sales, thus allowing suppliers to pass on volume discounts to their larger suppliers in importing countries where distribution costs are low, but not in other importing countries where such costs are higher; it may be that price controls or compulsory licensing regimes are in place in the country of origin or in some importing countries, or that, because a particular national law provides inadequate intellectual property protection, retailers face competition from pirates who have no need to recoup investment costs.

82. It may be possible that, in the short term, parallel importation would result in cheaper prices of copies of works. But established patterns of economic behavior in reasonably free markets indicate that business entities will change their behavior, repeatedly if necessary, to reap the maximum return. Moreover, experience in some countries which allow parallel importation has shown at least two things: first, that parallel importers often charge the consuming public the same, rather than cheaper, prices as those charged by licensed distributors who bear the cost of market development, including advertising and product support; and second, that pirate copies of works are intermingled with authorized copies at the retail level to an ever increasing extent, making the detection and control of piracy more and more difficult. In the long term, these conditions may make it more costly for owners of rights to introduce products into markets where parallel importation is allowed. Thus, the long-term effect of parallel importation, especially in small and expensive markets, may be that the author or copyright owner will simply cease to supply products the distribution of which cannot produce an adequate reward, in the face of "free riders" which do not

bear the same costs. This would result not only in economic loss to authors and owners of rights, but also in detriment to the interest of consumers, who would be denied the product support (for example, updated versions of computer programs and associated manuals, product warranties, and maintenance services) that is generally provided by licensed distributors, but rarely by parallel—that is, unauthorized—importers.

83. While differentials in price and supply of copies of works among countries may be deemed anti-competitive, injurious to consumers, or barriers to free trade under particular circumstances, it does not seem justified to form the conclusion that restriction or abolition of the right of importation under copyright—which is clearly linked to the right of the author or owner of rights to make copies of works available to the public on a territorial basis—is the only available remedy to correct such undesirable market conditions. The possibilities offered at the national level by competition and anti-trust laws, which are designed to prevent abuses of market power where it exists, should equally be examined, including the possibility that the traditional exceptions for exercise of intellectual property rights in such laws may need to be adapted to reflect changes in market conditions and trade practices around the world, and, in particular, to take into account the effects on competition of the growing practice of supply of goods embodying intellectual property rights from a number of sources in different countries.

84. *In light of the Chairman's statement that the right of importation would stay on the agenda for discussion, it is suggested that the Committee examine the various questions concerning such a right, taking into account the considerations in the preceding paragraphs.*

VII.

DURATION OF THE PROTECTION OF PHOTOGRAPHIC WORKS

85. In its memorandum for the first session of the Committee, the International Bureau noted that a trend has emerged among certain member States of the Berne Union towards lengthening the duration of protection of works under copyright. Thus, it was proposed that the protocol include a provision under which all references to 50 years in the Berne Convention would be replaced by 70 years, and that the Committee should consider whether a period of transition should not be granted to countries with legislation currently providing shorter terms. As an

alternative, and in recognition of the growing consensus that photographic works deserved protection for the same period as other works, the International Bureau proposed that the protocol include a provision stating that the minimum term of protection for photographic works should be either 50 (or 70) years *post mortem auctoris*, or 50 (or 70) years from the making of a photographic work. If accepted, such a provision would abolish the application of Article 7(4) of the Berne Convention, which currently limits the term of protection for photographic works to 25 years from the making of such works.

86. When the aforementioned proposals were considered during the first session of the Committee, there was no agreement on the question of the general extension of the term of protection. There was general agreement, however, concerning the extension of the term of protection for photographic works to equal that provided to other literary and artistic works. Thus, during the aforementioned meeting of the Assembly and the Conference of Representatives of the Berne Union in September 1992, the terms of reference of the Committee were limited to the question of extension of the term of protection for photographic works.

87. *Accordingly, it seems justified that the protocol provide for the same term of protection of photographic works as the general terms of protection of other literary and artistic works under Article 7(1), (3), and (5) to (8) of the Berne Convention.*

VIII.

COMMUNICATION TO THE PUBLIC BY SATELLITE BROADCASTING

88. In its memorandum for the first session of the Committee, the International Bureau proposed that the protocol contain provisions stating that direct broadcasting by satellite is "broadcasting" under Article 11^{bis}(1) of the Berne Convention, and that the question of which national law was applicable should—subject to the two qualifications stated in the subsequent sentence—be settled in favor of the law of the country from which a signal was emitted towards the satellite. In keeping with the principle of territoriality of copyright, and with the rule in Article 5(2) of the Berne Convention that the extent of protection and the means of redress shall be governed exclusively by the law of the country where protection is claimed, it was also proposed that the law of the country or countries where the satellite signal was normally receivable should be applied in two specific cases: *first*, where the law of the country of emission

did not protect the right of broadcasting or where that law allowed broadcasting under non-voluntary licenses, and, *second*, where the right of broadcasting was held by different persons in the country of emission and the countries where the signal was normally receivable. It was noted that, in the cases where the right of broadcasting was held by different persons in different countries, authorizations might frequently be obtained in the framework of mutual representation agreements among collective administration organizations in the countries concerned.

89. The Committee had mixed reactions to the proposals described in the preceding paragraph. While there was little doubt that direct broadcasting by satellite was indeed broadcasting under Article 11^{bis}(1) of the Berne Convention, a great majority favored application, without qualification, of the law of the country from which the signal was emitted towards the satellite. Some within this majority expressed the view that, notwithstanding their preference for the application, without qualification, of the law of the country of emission, the rights of owners of the right of broadcasting in countries where the signal was normally receivable, if different from the owner of rights in the country of emission, should be taken into account in the framework of collective administration.

90. It seems that there would be little purpose in stating, in the protocol, what is fairly obvious, namely, that the notion of "broadcasting...or...communication...to the public by...means of wireless diffusion" in Article 11^{bis}(1) of the Berne Convention includes communication to the public by satellite broadcasting. Further, in light of what seems to be the majority view within the Committee, it would be inappropriate to include provisions in the protocol on such aspects of private international law as the question of applicable law.

91. Therefore, it is proposed that no provision on satellite broadcasting be included in the protocol, with the exception of a possible provision on the abolition of non-voluntary broadcasting licenses in case of satellite broadcasting as proposed as one of the alternatives in paragraph 41, above.

IX.

ENFORCEMENT OF RIGHTS

92. In the memorandum prepared for the third session of the Committee, the International Bureau noted that the Berne Convention contains only two provisions directly related to the enforcement of rights. First, it provides that infringing copies of a

work are subject to seizure in any country of the Berne Union where the work enjoys protection, and that this is so even when the copies come from a country where the work is not or no longer protected (Article 16(1) and (2)). Second, it provides that, if copies of recordings of musical works made in a country under a compulsory license are imported, without permission of the author or other owner of copyright, into a country where they are considered as infringing copies, they are subject to seizure (Article 13(3)). Two other provisions were identified as indirectly requiring appropriate enforcement measures, namely, Article 36(1), which provides that "[a]ny country party to this Convention undertakes to adopt, in accordance with its constitution, the measures necessary to ensure the application of this Convention," and Article 36(2), according to which "[i]t is understood that, at the time a country becomes bound by this Convention, it will be in a position under its domestic law to give effect to the provisions of this Convention."

93. In light of the scarcity of enforcement provisions in the Berne Convention as described in the preceding paragraph, the International Bureau proposed a series of provisions on the enforcement of rights for inclusion in the protocol. The proposals concerned the definition of infringement, provisional (conservatory) measures, civil remedies, criminal sanctions, measures against the abuse of technical devices, "border" measures, and general procedural safeguards. The proposals were based on the conclusions of various WIPO meetings during the 1980s dealing with questions of international standards for the enforcement of copyright and neighboring rights, and on ideas that had emerged during the negotiations leading to the TRIPS Agreement.

94. On March 3, 5 and 8, 1993, respectively, the International Bureau of WIPO received letters from government officials of Sweden, Australia and the United States of America, in which it was proposed that the discussions of enforcement of rights in the Committee be based on a text developed during the TRIPS negotiations. The three letters indicated that certain technical amendments would be necessary to adapt the enforcement provisions of the TRIPS text to the purposes of the protocol to the Berne Convention, but specific changes were not suggested. The letters and the said TRIPS text were reproduced in an annex to the memorandum for the third session of the Committee, and so are they in an annex to this memorandum (the TRIPS text, as it was included in the TRIPS Agreement).

95. During the general debate at the beginning of the third session, a great majority of the Committee took the view that the provisions of the protocol on enforcement of rights should be based on enforce-

ment provisions of the then draft TRIPS text. The primary reason given was that the said text was based on a negotiated agreement among a great number of countries. It was widely noted, however, that various adjustments would be necessary to adapt the provisions to the context of the protocol. It was also noted that the proposals of the International Bureau contained certain elements not present in the TRIPS text, namely, provisions against abuses in respect of technical means. At the conclusion of the meeting, the Chairman stated that the Committee should be given the opportunity to communicate, to the International Bureau, proposals as to how the technical adaptation of the TRIPS text should be made.

96. Accordingly, the Committee is invited to identify what technical adjustments are needed in the enforcement provisions of the TRIPS Agreement (Articles 41 to 61 of the Agreement) to adapt them to the context of the protocol.

97. The Committee is also invited to consider the inclusion of provisions on the abuse of technical devices, provisions the scope of which would differ from that of the above-mentioned enforcement provisions of the TRIPS Agreement.

98. In this respect, it is proposed that any country party to the protocol be obliged

(a) to provide for the same sanctions, to be applied by judicial authorities, as the ones provided for in case of infringement of copyright under the provisions referred to in paragraph 96, above, in case of manufacture or importation for sale or rental, or the distribution by sale or rental, of

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

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

(b) to provide that, in the application of provisional (conservatory) measures, civil remedies, criminal sanctions and border measures provided for according to the provisions referred to in paragraph 96, above, any illicit device mentioned in item

(a)(i) and (ii), above, is assimilated to infringing copies of works;

(c) to provide that the author of, or other owner of copyright in, a work shall be entitled to damages provided for according to the provisions referred to in paragraph 96, above, in the same way as in a case where his or its copyright is infringed, where

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

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

X.

NATIONAL TREATMENT

99. Article 5(1) of the Berne Convention states the principle of national treatment as follows: "Authors shall enjoy, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention." In the memorandum for the third session of the Committee of Experts, the International Bureau observed that, in recent years, a number of questions had emerged concerning the application of national treatment to certain rights and to certain categories of owners of rights. The following arguments and practices were identified according to which national treatment had been denied: (1) arguments that certain payments (such as the payments due on the basis of the right to remuneration for private reproduction of audiovisual works and works embodied in sound recordings ("home taping")) were not covered by the Berne Convention and were thus not subject to Article 5(2); (2) arguments based on the fact that certain rights were recognized in only a few countries and that, accordingly, there was no obligation to grant national treatment; (3) arguments based on the notion that

denial of national treatment might be a justified means of retaliation or reprisal; (4) the practice of transferring certain works from copyright to *sui generis* systems of protection as a means of indirect denial of national treatment to such works; and (5) in the context of collective administration of copyright, the practice of using royalties collected for the use of foreign works for purposes other than remunerating the authors or owners of rights concerned, without the authorization of the said authors or owners of rights, or of organizations representing them, which constituted an indirect denial or restriction of national treatment.

100. Accordingly, the International Bureau proposed that the principle of national treatment should be reaffirmed and strengthened in the protocol. Three specific proposals were made, namely, (1) that an exception to national treatment should be recognized allowing countries party to the protocol not to grant national treatment in respect of remuneration for public lending of books and other printed publications; (2) that, apart from the aforementioned exception, no other exceptions to national treatment should be recognized; and (3) that national treatment should be fully observed by collective administration organizations, in particular, that remuneration collected for use of the works of foreign authors and other owners of copyright should be distributed to them or to organizations representing them, after deducting actual administrative costs, unless the said authors, or other owners of copyright, or the organizations representing them, had authorized the use of such remuneration for other purposes.

101. The Committee took the view that the principle of national treatment should be maintained as a basic principle of the Berne Convention, but opinions differed as to whether it should be restated in the protocol, and, if so, to which rights and to which categories of owners of rights it should or should not apply. In any case, it was said that the question of whether to include provisions concerning national treatment could only be addressed when the contents of the protocol were known and that, at that time, decisions could be made on a case-by-case basis.

102. The Committee did not accept the proposal to recognize an exception to the obligation to grant national treatment in respect of the public lending right, and, likewise, a majority opposed the proposal to include provisions in the protocol requiring the strict observance of national treatment in the context of the activities of collective administration organizations, on the grounds that the applicability of the principle of national treatment to such activities was obvious and did not need to be restated. At the close of the discussion, the Chairman stated that the question of national treatment should remain on the

agenda; he also said that, after the Committee had further developed the contents of the protocol, it should be possible to revisit the question, though not necessarily at the next session of the Committee.

103. Reasons were given both for and against the application of national treatment under the protocol. Reasons given for the possible denial of national treatment in respect of certain rights and categories of right owners included the following: (1) the Berne Convention itself contained exceptions to the principle of national treatment, and in certain cases, further exceptions might be justified; (2) the Berne Convention had always been based on an appropriate balance between national treatment and a high level of minimum protection, but the balance had been undermined by recent technological developments; (3) pioneering countries which recognized a new right should not be obliged to grant national treatment immediately to the majority of member countries of the Berne Union where no such rights existed; (4) non-discriminatory reciprocity in such a situation might facilitate reaching the ultimate goal, namely, sufficiently broad acceptance of the new rights involved, which might open the door for the application of national treatment; (5) it was doubtful that certain rights (for example, the public lending right, the right to remuneration for home taping or the right of rental) were of the same nature as the rights protected under the Berne Convention, and, thus, that the obligation to grant national treatment would emerge at all in respect of such rights.

104. Reasons given in favor of the application of national treatment under the protocol included the following: (1) Article 5(1) of the Berne Convention clearly stated that the obligation of countries party to the Convention to grant national treatment also extended to "the rights which their respective laws...may hereafter grant to their nationals"; (2) the exceptions allowed by the Berne Convention to the obligation to grant national treatment related to situations of marginal significance, while new attempts at denying national treatment concerned certain rights of basic importance; (3) the most controversial rights, such as the right to remuneration for home taping and the right of rental, had been recognized in an ever increasing number of countries, and application of the illusory concept of "non-discriminatory" reciprocity was not necessary to stimulate such countries to amend their laws to include such rights; (4) rights in respect of which some countries would deny their obligation to grant national treatment were of the same nature as rights granted under the Berne Convention, for example, there was no doubt that the right to remuneration for private reproduction follows from Article 9(1) and (2) of the Convention concerning the most basic right recognized by the Convention, namely, the right of reproduction.

105. The TRIPS Agreement also contains a provision in respect of national treatment. Specifically, Article 3(1) provides as follows: "Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in...the Berne Convention (1971)..." This provision states, in substance, the same as Article 5(1) and the other relevant provisions of the Berne Convention.

106. It seems that the principle of national treatment as expressed in Article 5(1) of the Berne Convention should be restated, as a general rule, in the protocol. However, in light of the differences of opinion referred to in the preceding paragraphs, it does not seem to be advisable to continue the discussion in respect of possible exceptions to national treatment in the case of certain rights and categories of owners of rights until the contents of the protocol are more clearly known.

107. Accordingly, it is proposed that consideration of the question of the applicability of national treatment take place at a later session of the Committee.

ANNEX I

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, in the memorandum prepared for the third session of the Committee, was reproduced from GATT document No. UTN.TNC/W/FA made available to the International Bureau of WIPO by the Secretariat of GATT. The text became part of the TRIPS Agreement without any substantive changes. What follows was reproduced from GATT document containing the TRIPS Agreement as signed in Marrakesh on April 15, 1994.

"PART III: ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

SECTION 1: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law 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 proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a

Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.

5. It is understood that this 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 law in general, nor does it affect the capacity of Members to enforce their law 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 law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 42: Fair and Equitable Procedures

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

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 Member 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.

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

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. Members 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 authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's 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 that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

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

Article 46: Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark 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

Members 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, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 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 the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

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

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

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

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of 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 MEASURES²

Article 51: Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures³ to enable a right holder, who has valid grounds for suspecting that the importation

² Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

³ 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.

of counterfeit trademark or pirated copyright goods⁴ 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. Members 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. Members 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 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is *prima facie* an infringement of the right holder's intellectual property right and to supply a sufficiently detailed description of the goods to make them readily recognizable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 53: Security or Equivalent Assurance

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

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs 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

⁴ For the purposes of this Agreement:

- (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization 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;
- (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

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 the 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.

Article 55: Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 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.

Article 57: Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members 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 Members 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;
- (c) Members 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. In regard to counterfeit trademark 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

Members 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

Members 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. Members 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."

ANNEX II

Comments Received on the
Provisional Document⁵

SOUTH AFRICA

On September 6, 1994, the Director General of WIPO received the following note verbale from the Permanent Mission of the Republic of South Africa, Geneva:

"The Permanent Mission of the Republic of South Africa presents its compliments to the Director General of the World Intellectual Property Organization and has the honour to forward to the Director General copies of letters written by the Registrar of Trade Marks and the South African Institute of Intellectual Property Law which contain South Africa's initial comments on the draft memorandums prepared by the International Bureau on a possible protocol to the Berne Convention and on a possible instrument for the protection of the rights of performers and producers of phonograms..."

The letter of the Registrar of Trade Marks annexed to the note verbale and dated August 26, 1994, only indicates that the comments of the South African Institute of Intellectual Property Law are transmitted with it. The said comments, annexed to that letter and dated August 25, 1994, read as follows:

"The Design & Copyright Committee of this Institute has considered the draft memorandum prepared by the International Bureau of WIPO on a possible protocol to the Berne Convention and the draft memorandum prepared by the International Bureau of WIPO on a possible instrument for the protection of the rights of performers and producers of phonograms and our brief comments on these two documents are given below.

"Protocol to the Berne Convention"

"While we consider that it is appropriate that computer programs should enjoy the same level of protection under copyright law as literary works, we do not consider it appropriate that computer programs should necessarily be classified as literary works under domestic copyright law. On the contrary, we consider that computer programs are best catered for in copyright law by dealing with them as a *sui generis* category of work but at the same time giving them at least the same measure of protection as is enjoyed by literary works. For the rest, we concur with the proposals and views set forth in the document.

"It is considered desirable that the Committee should give consideration to the question of whether the decompilation of computer programs ought to fall within the exceptions to protection enjoyed by computer programs.

"In our view, the requirement of originality for the subsistence of copyright should apply to data bases as it applies to all other types of works.

"In our view, national laws should be permitted to make allowance for non-voluntary licences for sound recording of musical works.

"We do not consider it appropriate that non-voluntary licences should be available in the case of broadcasts.

"In regard to importation and distribution of works, we agree with the views expressed in paragraph 60. We likewise agree with the recommendation made in paragraph 68.

"We agree that photographic works should enjoy the same period of protection as artistic works in general.

"In our view, provisions relating to satellite broadcasting should be included in the Protocol and should be addressed by copyright law as is currently the case with our Copyright Act of 1978.

"In regard to the enforcement of copyright we agree with the proposal set forth in paragraph 98. There is, however, a lack of unanimity among our members as to whether the provisions relating to copy-protection or copy-management devices should be incorporated in the Copyright Act, but this approach enjoys the approval of the majority.

"Instrument for the Protection of the Rights of Performers and Producers of Phonograms"

[The comments relating exclusively to the possible instrument for the protection of the rights of performers and producers of phonograms are not reproduced here.]

"We consider that, in the light of the recent history of South Africa's relations with WIPO and international bodies in general, our Government should make a point of furnishing comments on the two provisional documents to the International Bureau of WIPO by the deadline date of 1 September 1994. We feel that it is important that as a country our voice should be heard in WIPO."

UNITED STATES OF AMERICA

On September 19, 1994, the Director General of WIPO received the following letter from Mr. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Washington, D.C.:

"I am sending you the United States comments on the Provisional Documents for the Meetings of the Committees of Experts on the Protocol to the Berne Convention and the New Instrument on the Protection of Performers and Producers of Phonograms, scheduled for December 5th through the 16th.

"I believe that we have benefited from having additional time for reflection over these documents. This has given us the opportunity to assess the implications of the TRIPS Agreement and to better understand the implications of new technological developments for national copyright and international systems. These comments reflect our thinking on TRIPS implications and developments in our own studies here in the United States on intellectual property and our National Information Infrastructure.

"The United States Government continues to believe that the discussions in the previous meetings of the Committees of Experts have pointed out the need for careful and deliberate thought on the part of all Governments to better understand where common issues and concerns lie. In this spirit, we look forward to discussions in December and to working with other Governments to

⁵ The comments are reproduced in the order in which they were received by the International Bureau.

find ways to provide strong and coherent copyright and neighboring rights protection at present and in the coming era of the Global Information Infrastructure.”

The following comments were annexed to the letter under the title “United States views on the Berne Protocol and the New Instrument”:

“General observations

“The United States remains committed to making progress in WIPO toward improving international protection for works protected by copyright and authors rights and the subject matter of neighboring rights, as we stated at the April Extraordinary Session of the Berne Executive Committee. As we promised at that meeting, we are offering suggestions on ways in which we believe that progress can be made. We believe that such progress is essential, especially in view of the needs to deal with the intellectual property issues associated with the emerging Global Information Infrastructure (GII). We believe that the transition into a worldwide information society demands both a narrowing of our focus on specific issues in the cases of the Berne Protocol and the New Instrument, and the expansion to encompass the digital world in both areas.

“Many countries are studying how their intellectual property laws relate to emerging digital information systems and the increasing importance of multimedia works. In our own studies here in the United States, it is becoming increasingly clear that the international implications of the development of our own NII and a GI are extremely complex and deserve careful evaluation.

“In the emerging world of the GI with its digital distribution systems and multimedia works, distinctions among the rights of authors, producers and performers that are the basis for the separation of copyright and neighboring rights are rapidly becoming irrelevant. We believe that this new world of information superhighways will mean economic growth, jobs, and exports for all economies to the benefit of authors, producers and performers. Governments need to consider carefully the implications of the inevitable development of the GI for their national economies and their copyright systems. We want to ensure that the work in WIPO is relevant to the rapidly emerging digital world of the GI in order to set sound policy. The goal should be to select the essential elements of the present Berne Protocol and New Instrument texts and work toward reaching agreement on them.

“We believe that the objectives in the December meeting of the Committees of Experts should be limited to what may be achievable. As a general matter, we do not believe that it is necessary to duplicate TRIPS achievements in the Berne Protocol and New Instrument. We believe that this would be unnecessary, time consuming and a potentially dangerous activity. We are seriously concerned that such an attempt could result in standards in WIPO that are different from those adopted in the GATT. Therefore, we prefer no inclusion of TRIPS standards in the Protocol and New Instrument, but if they are included they should be unmodified so as to cause no confusion.

“Matters common to the Protocol and the New Instrument

“The first issue common to both the Berne Protocol and the New Instrument is the incorporation of the TRIPS

enforcement text. Despite our earlier position that any new WIPO agreements should include enforcement provisions, this was when TRIPS was not a reality. The adoption of the TRIPS text has changed the balance of considerations in this regard. Consequently, the United States proposes that, should the Committee of Experts decide to retain the enforcement text, only those changes which are essential to adapting the text to the Protocol and New Instrument ought to be included. We also believe that it is important to continue to look into the possibility of including provisions on the use of technical security measures and on prohibiting devices and services that may be used to defeat technical security measures.

“We believe that the Committees of Experts should consider the recognition of a digital ‘transmission’ right for both the Berne Protocol and the New Instrument perhaps as a separate right, as an aspect of a distribution right, as part of a right of communication to the public, or an aspect of the reproduction right. While this is an issue that needs much further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GI.

“Provisions to prohibit decoders and anti-copy prevention devices and services also should be considered for inclusion. Such provisions could prohibit the making available to the public of goods or services the primary purpose of which is to defeat technical security measures. The ease of infringement and the difficulty of detection and enforcement will cause copyright owners to look to technology, as well as the law, for protection of their works. However, it is clear that technology can be used to defeat any protection technology provides. Consequently, legal protection alone may not be adequate to provide incentive to authors to create and to disseminate works to the public, unless the law also provides some protection for the technological processes and systems used to prevent unauthorized uses of copyrighted works and sound recordings.

“The prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use of works in digital form or communicated through the GI is in the public interest. Consumers of copyrighted works pay for the acts of infringers through higher prices for copyrighted works to compensate right owners for infringement losses. The public will also have access to more works and sound recordings if right owners can more effectively protect their works from infringement.

“Therefore, the United States believes that the Committees of Experts should consider including in the Berne Protocol and the New Instrument provisions to prohibit the importation, manufacture and distribution of devices, as well as the provision of services, that defeat hardware or software based anti-copying systems.

“In the future, the rights management information associated with a work or sound recording—such as the name of the copyright owner or producer and the terms and conditions for uses of the work or sound recording—may be critical to the efficient operation and success of the GI. The public should be protected from fraud in the creation or alteration of such information. Therefore, the Committees of Experts should consider including in the Protocol and the New Instrument a prohibition of the fraudulent inclusion of such management information and the fraudulent removal or alteration of such information.

"The United States continues to believe that national treatment must be the basis for protection in any intellectual property agreement. At an absolute minimum, national treatment must apply to the minimum obligations established in any agreement in WIPO. The author or rights holder should be able to realize fully the economic benefits flowing from the free exercise of his or her rights in any country party to the Protocol or New Instrument. We continue to believe that, in respect of any work, this is required by Article 5 of the Berne Convention. To do otherwise in either a Berne Protocol or another agreement on copyright protection would be contrary to Article 20 because it would be a derogation of rights existing under Berne and not be an Agreement to 'grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention' as provided for under Article 20.⁶ To the extent that we have agreed that the principles of the New Instrument should follow those of the Berne Convention, to do otherwise in respect of related rights, would be contrary to the letter and the spirit of the Convention.

"Berne Protocol issues

"In addition to these issues of common concern, there are issues that are applicable specifically to the Berne Protocol and to the New Instrument. We will first turn to those applicable to the Protocol.

"We believe that, to make progress in the Berne Protocol, we must be willing to accept agreement on a small text. As previously indicated, we are also convinced that inclusion of modifications to the TRIPS obligations may be dangerous to the effective implementation of the TRIPS Agreement. Consequently, we believe that, at a minimum, we must drop from the Berne Protocol all computer program proposals that are not in TRIPS. Thus, the issues addressed in paragraphs 11 through 23 of the provisional documentation on the Berne Protocol should be dropped from the agenda, and those paragraphs eliminated from the Document.

"In respect of data bases, the United States believes that inclusion of the TRIPS language on data bases may warrant further discussion. We also believe some further consideration of the issue of providing for a *sui generis* unfair extraction right to supplement copyright protection may prove to be useful in view of legal developments in various national laws.

"For the United States, following our Supreme Court Decision in the *Feist* case,⁷ there is increasing concern that many valuable, factually oriented data bases may be denied copyright protection, or that courts may determine infringement in ways that severely limit the scope of copyright protection for data bases. We believe that it is worthwhile to consider how a right, such as the unfair

extraction right proposed in the EU database directive, could protect such data bases.

"There is continuing interest in the Committee of Experts for the elimination of the mechanical license—the compulsory license for the use of musical works in sound recordings. The United States is prepared to continue discussions on this matter. However, any possible elimination of the mechanical license would have to be evaluated considering the entirety of the provisions contained in both the Protocol and New Instrument. This would be a major concession for the United States, since elimination of the mechanical license is supported by neither the music nor the recording industry.

"The United States can agree with the proposal for the elimination of compulsory licensing in respect of original broadcasting, either by terrestrial means or by satellite, but, as is the case in many other countries, we cannot agree to the elimination of retransmission compulsory licensing.

"The United States supports a full distribution right with first sale exhaustion except for the importation right and certain rental rights. We believe that should a right of digital transmission or distribution be included, exhaustion should not apply in the case of dissemination by such digital transmissions.

"Again, although we would prefer no duplication of TRIPS standards in the Protocol and New Instrument, we could agree with the inclusion of provisions on rental of computer programs as it is embodied in TRIPS and rental rights for musical works embodied in sound recordings. We would be willing to explore the application of rental rights to works in digital media of fixation. We believe that obligations in respect of rental rights in motion pictures or sheet music are not appropriate because the need for such rental rights has not justified.

"The United States favors a uniform term of protection for all works independent of their type. Therefore we support providing the same term of protection for photographs as for any other work.

"In respect of satellite broadcasting, we believe that further discussion of this issue is needed before determining whether it should be dropped from the agenda or if it is ripe for the establishment of some international standards.

"New Instrument issues

[The comments relating exclusively to the possible instrument for the protection of the rights of performers and producers of phonograms are not reproduced here.]

EUROPEAN COMMISSION

On September 22, 1994, the Director General of WIPO received the following letter from Mr. J.F. Mogg, Director General, Directorate General XV, Internal Market and Financial Services, European Commission, Brussels:

"At the Extraordinary Session of the Assembly of the Berne Union on 28 and 29 April, 1994, it was decided to invite the Governments of the countries members of the Berne Union and the European Commission to submit comments on the provisional draft documentation of 29 April, 1994, issued by the International Bureau in

⁶ Article 20 states: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."

⁷ *Feist Publications, Inc. v. Rural Tele. Serv. Co.*, 499 U.S. 340, 345 (1991).

preparation for the next meetings of the Committees of Experts on a possible Protocol to the Berne Convention and possible New Instrument for the Protection of the Rights of Performers and Producers of Phonograms. This document sets out the response of the European Commission and the Member States of the European Union to that invitation.

"We believe strongly that the work of the two Committees should continue and that the necessary balance in the two instruments between copyright and neighbouring rights should be kept in mind. The cultural and creative aspects of intellectual property rights can best be regulated by bodies with a specialised interest in the subject matter such as WIPO and within a context which takes account of existing Conventions dealing with authors' rights and neighbouring rights.

"We attach particular importance to complementing and improving upon the minimum standards of protection set out in international agreements. This is in accordance with our policy of obtaining a high level of protection for authors and neighbouring rights holders. Although existing agreements provide a valuable framework, there are a number of areas where further clarifications and improvements to the protection of intellectual property rights could be made. For this reason, we believe work should continue in all areas covered by the current documentation even if, after mature reflection, it proves inappropriate to retain every topic in the final instruments.

"It is also clear that the advent of a more frequent use of digital technology for the fixation, exploitation and dissemination of works requires that the process of evaluating and updating existing Conventions be continued without further delay. We therefore consider that it is appropriate for these issues to be discussed in WIPO and that the current documentation provides an adequate basis on which they can be further examined in December 1994.

"As regards the appropriateness of the documentation relating to the Berne Protocol, we note with regret that 'treaty language' is absent on a number of points, such as the rights of distribution and importation, and suggest that the preceding documentation should also be retained as a basis for discussion.

[The comments relating exclusively to the possible instrument for the protection of the rights of performers and producers of phonograms are not reproduced here.]

"Without prejudice to the above mentioned considerations, the European Commission and the Member States of the European Union reserve their position on the scope and substance of the issues under discussion in connection with both the Berne Protocol and the New Instrument."

LESOTHO

On September 23, 1994, the Director General of WIPO received the following letter from the Ministry of Tourism, Sports and Culture of the Government of Lesotho, Maseru:

"Lesotho has studied both documents and after careful consideration is of opinion that both the possible instrument for the protection of performers and producers of phonograms and a possible protocol to the Berne Convention are inevitable and timeous. Lesotho further agrees

with the contents of both provisional documents and has nothing to add."

ARGENTINA

On September 26, 1994, the International Bureau received the following note verbale from the Permanent Mission of the Argentine Republic in Geneva:

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva presents its compliments to the International Bureau of the World Intellectual Property Organization (WIPO) and, with reference to the decision adopted by the Assembly of the Berne Union at its fourth extraordinary session, has the honor to convey to the said Bureau the comments of the Argentine Government on the provisional documents on 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva renews to the International Bureau of the World Intellectual Property Organization (WIPO) the assurances of its highest consideration."

The comments of the Directorate General of Copyright, Ministry of Justice, dated September 23, 1994, which accompanied the note verbale, read as follows:

"I have the honor to write to you in response to the request that we comment in writing on provisional documents relating to 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Argentine Government, through its Delegation, has expressed its constant support for the work undertaken by WIPO, and the comments given below are intended to contribute to the making of both instruments into international treaties.

"1. Matters Concerning a Possible Protocol to the Berne Convention

"According to paragraph 1, the protocol would be intended to clarify existing—or establish new—international norms. Paragraph 6 informs us moreover that the International Bureau, in drafting the memorandum, took the provisions of the TRIPS Agreement into account.

"*Computer programs.* This subject was exhaustively studied at previous meetings. Particular stress was placed on the need to devise a wording that left it in no doubt that this kind of work was already protected by the provisions of the Berne Convention and that, if provisions were required in the present instrument, they would be merely clarifying ones.

"The three-party proposal in paragraph 10 does not depart from the provisions of the Berne Convention, so that pursuant to paragraph 12 they are of a declarative nature.

"While Article 2 of the Berne Convention refers to 'literary and artistic works,' the list is illustrative and not exhaustive, so that the computer program is not neces-

sarily a literary work in the strict sense of the word, and may also come into the category of scientific creations, the protection of which is confined to their written expression. This is the criterion that the Commission appointed by the Ministry of Justice, in Resolution No. 123/91, invoked when it embarked on the reform of Law 11723, on Copyright, an undertaking that has now reached the stage of the submission of the preliminary draft. Article 1 of the preliminary draft lists the protected literary, scientific and artistic works, which include 'computer programs, their technical literature and users' manuals.' This for the time being has been the protection criterion adopted in our country, based on the non-exhaustive enumeration of works in Article 1 of Law 11723.

"With reference to paragraph 13, we agree that 'shall' form should not be used for the verb; this is a fundamental point if everything referring to computer programs is to be in the nature of a mere declaration, not an obligation.

"We also agree entirely with paragraph 14, in the sense that the Berne Convention's general provisions on literary and artistic works are applicable to computer programs, and not the specific provisions on particular literary works and particular artistic works.

"In paragraph 16, the provision referring to ideas, procedures, methods of operation or mathematical concepts as such is applicable to all types of work, in view of the fact that it involves a general principle of copyright.

"If one analyzes paragraphs 19, 20, 21, 22 and 23, the new wording of Article 9(2), in that it extends the limitations on the author's exclusive rights, is an important amendment to the Berne Convention, and indeed could become unacceptable under the provisions of the latter's Article 20. Nevertheless, national legislation will be incorporating these new limitations owing to the specific characteristics of computer programs.

"Adaptation of the program for the making of other, derived programs, and also decompilation limited to those parts of the program that are necessary to achieve interoperability with other programs, must be allowed, but in that case the provisions cannot be declarative.

"The preliminary draft to which we are referring (Ministerial Resolution 123.91) provides in its Article 86 that 'the author may not, unless otherwise agreed, object to the assignee of exploitation rights making or authorizing the making of successive versions of his program or of programs derived therefrom. Unless otherwise provided, the author may not object to the adaptation of a program made by the user for his exclusive use within the limits that the author has allowed, nor may he exercise his right to integrity or his right to disavow.'

"*Data bases.* This subject was likewise a subject of debate at earlier meetings. The problem is that of extending protection to data bases that do not meet the requirement of sufficient originality to qualify for copyright protection.

"There can be no possible objection in our country to the inclusion in the protocol of protection for any type of data base, without original or not, in view of the fact that our case law has judged the work of merely ordering and selecting data to be eligible for protection.

"Moreover, Article 1(b) of Decree 165/94 (B.O. 8.2.94) defines the data base as follows:

"'Data base works included in the category of literary works shall be construed as meaning productions consisting of an organized set of interrelated data compiled with a view to storage, processing and retrieval by means of computer techniques and systems.'

"Argentina could propose such a wording, changing the end to 'by means of any technique or system' in order to avoid confining it to the computer context.

"*Non-voluntary licenses for the sound recording of musical works.* This subject was already dealt with at the other meetings. A consensus emerged in favor of removing them for want of current relevance. It seems reasonable to allow a period of five years, or perhaps less, for States to dispose of any licenses that they may have granted. This option has never been made use of in our country.

"*Non-voluntary licenses for primary broadcasting and satellite communication.* The reasoning here is identical to that in the previous paragraph. Licenses should be removed both for primary, airwave broadcasting and for satellite broadcasting. As far as the period is concerned, up to five years is appropriate, and in principle there is a consensus in favor of it.

"*Distribution right, including importation right.* Under numerous national laws the right of distribution was exhausted after the first sale of copies. The protocol proposes recognizing, among the specific rights of the author, a right of distribution that survives the first act of sale.

"With regard to public lending, few delegations were in favor of retaining it.

"On the other hand, they were almost unanimous in considering that a right to authorize the rental of copies of certain works should be included (including among such works those that were embodied in sound recordings, and also computer programs).

"On the subject of paragraph 68, our country is able to endorse the principle of introducing an exclusive right for the author or his successor in title, copies of material on the rental of an audiovisual work, a work recorded on a phonogram or computer programs. This is what is proposed in our preliminary draft, whose Article 74(e) provides as follows:

"'That person shall be punished with imprisonment for one month to one year and a fine of one thousand to thirty thousand pesos who (...)

"(e) rents, without the written authorization of the author or his successors in title, copies of material on which computer programs, performances of musical works, sheet music or audiovisual or cinematographic works are fixed.'

"The proposal in paragraph 68 is reasonable. An attempt will be made to propose the addition to 'sheet music' of the sole paper copy the rental of which is liable to prejudice the author's interests. As far as the rental of copies of works is concerned, our country has provided for exclusive rights in the preliminary draft.

"*Importation.* While some countries have carried out economic studies with a view to taking a position on this subject, we consider that the reasoning set forth by the International Bureau in paragraph 82 is the right one: parallel importation will bring more difficulties than

advantages, even though it is presented as a way of bringing down costs and benefiting consumers.

"The preliminary draft produced in our country establishes the right of importation as an exclusive right of the author or owner of rights.

"Duration of the protection of photographic works. There are no noticeable problems in the protection periods.

"Communication to the public by satellite broadcasting. We consider ourselves in a position to subscribe to the proposal in paragraph 91.

"Enforcement of rights. The adoption of the TRIPS text seems reasonable, in view of the fact that the wording of the Agreement has been worked on for some considerable time, while the Agreement itself is an instrument that has been negotiated by a large number of countries already. The text of our preliminary draft, while it has a wording of its own, is essentially comparable, and it includes the TRIPS provisions with respect to procedures, precautionary measures, security guarantees, seizures, indemnification of the injured party, *ex officio* action, etc.

"Likewise, as proposed in paragraph 96 onwards, provision has been made in the preliminary draft for specific measures regarding the technical means of preventing the unlawful use of works. In this connection Article 75(1) provides as follows:

"that person shall be punished with imprisonment for a term of one month to three years and a fine of one thousand to thirty thousand pesos who, without the authorization of the owner of rights:

"(i) alters, removes, modifies or in any way uses the technical devices incorporated in the copies of the protected works or productions for the purpose of preventing or restricting copying;

"(ii) alters, removes, modifies or in any way renders useless coded signals with a view to restricting the communication to the public of protected works, productions or broadcasts, or to preventing the copying thereof;

"(iii) imports or markets technical apparatus, programs or devices that allow or facilitate the circumvention of the technical devices or signals incorporated in order to prevent or restrict the copying or communication of works and productions.'

"National treatment. In view of the opinions on the subject that have been encountered, consideration of this question is adjourned.

"II. *Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms*

[The comments relating exclusively to the possible instrument for the protection of the rights of performers and producers of phonograms are not reproduced here.]"

JAPAN

On September 26, 1994, the International Bureau received the following comments from the Delegation of Japan attending the meetings of the Governing Bodies of WIPO and the Unions Administered by WIPO:

"1. The Committees of Experts on 'A Possible Protocol to the Berne Convention' and 'A Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms' have a very important task of establishing the standards of international protection of copyright and neighboring rights in the future. The Government of Japan supports the continuation of the work of the two Committees and intends to participate in this exercise in an active manner.

"2. The Government of Japan believes that the following points should be taken into account when the two Committees examine the Provisional Documents before us:

"(1) In order to promote the protection of copyright and neighboring rights while keeping the necessary balance between them, the work of the two Committees should be continued in parallel and paying attention to their close relationship to each other.

"(2) In the work of the two Committees, the result of the TRIPS negotiation in the GATT Uruguay Round should be respected and adopted as a starting point of the exercise. Furthermore, taking advantage of the expertise of WIPO in the field of intellectual property rights, the Committees should aim at further harmonization to the extent possible.

"(3) Studies on copyright issues relating to the development of digital technology and network are under way in a number of countries including Japan. In order to ensure appropriate and internationally harmonized measures in this regard, these issues should be examined in the future work of the two Committees without delay, having due regard to the appropriate balance of interests between right holders and users of copyright works.

"3. The Government of Japan accepts the Provisional Documents as they stand as bases of the meetings of the Committees of Experts in December, although it reserves its positions on each specific item in the Documents until the discussions in the above meetings."

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

Third Session

(Geneva, December 12 to 16, 1994)

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

Memorandum prepared by the International Bureau

INTRODUCTION

1. The current program of WIPO (covering the years 1994-95) provides that the International Bureau will prepare, convene and service a Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to as the "Committee of Experts" or "the Committee").

2. This program was adopted by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1993 (document AB/XXIV/2, item 03(4), and document AB/XXIV/18, paragraphs 232-234 and 283-284). The program item establishing the Committee was based on a decision of the same bodies one year earlier (see document B/A/XIII/2, paragraph 22), modifying the decision of those bodies taken two years earlier concerning the terms of reference of the Committee of Experts on a Possible Protocol to the Berne Convention (see document AB/XXII/2, item 03(2), and document AB/XXII/22, paragraph 197).

3. At the time of the aforementioned decision modifying its terms of reference, the Committee of Experts on a Possible Protocol to the Berne Convention had met twice, once in November 1991 and once in February 1992. When modifying the terms of reference, the Assembly and Conference of Representatives of the Berne Union decided, *inter alia*, to establish two Committees of Experts, one to continue the work 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. In respect of the latter Committee, it was decided that the agenda would include "all questions concerning the effective international protection of the rights of performers and producers of phonograms" (document B/A/XIII/2, paragraph 22). It was also decided that the two Committees would each meet once during 1993, and that the meeting of the Committee on the instrument would follow immediately the meeting of the Committee on the possible protocol. The Assembly and the Conference of

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Representatives 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 was felt that those questions should only be considered once the contents of the protocol and the instrument had been more or less determined.

4. So far the Committee of Experts has met twice at the headquarters of WIPO. Both sessions took place in 1993. The first session was held from June 28 to July 2, and the second from November 8 to 12.

5. The discussions in the first two sessions were based on a working document prepared by the International Bureau (document INR/CE/I/2). The report of the first session is contained in document INR/CE/I/3, and the report of the second session is contained in document INR/CE/II/1.

6. The meeting of the Committee for which this memorandum has been prepared follows immediately the fourth session of the Committee of Experts on a Possible Protocol to the Berne Convention.

7. In the memorandum prepared for the first session of the Committee, the International Bureau noted that the terms of reference of the Committee referred to in paragraph 3, above, according to which the Committee should consider "all questions concerning the effective international protection of the rights of performers and producers of phonograms," could be interpreted in two ways. The first possible interpretation was that the protection of the rights of performers should only be discussed as far as the fixation of their performances in phonograms and the exploitation of such fixations were concerned (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 reasoning to support such an interpretation was that the Committee of Experts was established because the terms of reference of the Committee of Experts on a Possible Protocol to the Berne Convention were modified: it had been decided that that Committee of Experts should not deal with the questions of the protection of phonograms (sound recordings), and, rather, that this Committee of Experts should 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. Further, 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)—could not be reasonably discussed separately from the protection of the rights of performers whose performances are recorded in phonograms.

8. The second possible interpretation of the terms of reference was that they covered all questions of the protection of the rights of performers, i.e., 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, the rights of performers were mentioned in the terms of reference without any restriction or qualification. Thus, the rights of performers whose performances are included in, for example, audiovisual fixations, could be discussed by the Committee.

9. During the first session of the Committee, a majority took the view that nothing in the terms of reference precluded a discussion of the question of the possible inclusion of provisions on the rights of performers in audiovisual fixations, and arguments both for and against the inclusion of such provisions put forward by a number of delegations and observers. The Director General of WIPO stated that the International Bureau would prepare a document on audiovisual fixations in due time, and the Chairman noted this in his summary of the discussion (document INR/CE/I/3, paragraphs 63-65).

10. The document referred to in the previous paragraph, to be prepared "in due time," will necessarily entail a comparative study of relevant provisions in the national laws of various countries, as well as a survey of contractual practice and practices in the administration of rights. The International Bureau is currently in the process of collecting information on such national laws and practices from governmental and private sources. Also, discussions on various questions involving the legal protection of audiovisual fixations are taking place among certain governments at the present time, and such discussions should be completed in order that the document to be prepared by the International Bureau may deal with all relevant questions. For these reasons, the present memorandum does not deal with the questions of the rights of performers in respect of audiovisual fixations, and the International Bureau does not intend to submit a separate document to this session of the Committee.

11. However, on February 22, 1994, Mr. J.F. Mogg, Director General, Directorate General XV, Internal Market and Financial Services, Commission of the European Communities, addressed a letter to the

Director General of WIPO, in which he dealt, *inter alia*, with "the question of the coverage of the rights of performers in their visual, audiovisual as well as audio performances." The letter states that "the New Instrument should cover the rights of performers in all performances, whether of an audio, visual or audiovisual character, and in fixations of these performances." A document is attached to the letter bearing the title "Coverage of audio, visual and audiovisual performances and fixations of such performances. Possible text to form the basis for continuing discussion" which, as the letter indicates, "provides a version of the document previously circulated by the International Bureau amended with respect to possible provisions giving effect to the approach described above." The letter and the document attached to it are reproduced as Annex I to the present memorandum and may serve as a basis for discussion by the Committee, as proposed in the letter.

12. As referred to in the above-mentioned letter of the European Commission, there was broad support, during the first session of the Committee, for the proposition that the rights of performers in their performances fixed in phonograms should be dealt with separately from the rights of producers of phonograms in their phonograms. This was thought necessary and desirable in order to reflect the different nature of the contributions of performers and producers of phonograms, respectively, to the creation and dissemination of phonograms, as well as the different needs for protection which attach to the two categories of owners of rights. Accordingly, in the discussions which follow, the proposed rights of performers in their performances fixed in phonograms will be dealt with separately from the rights of producers of phonograms in their phonograms.

13. On December 15, 1993, the "Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods" (hereinafter referred to as the "TRIPS Agreement") was adopted in the framework of the Uruguay Round of negotiations under the General Agreement on Tariffs and Trade (GATT). The TRIPS Agreement contains standards concerning the protection and enforcement of intellectual property rights, including copyright and related rights. In preparing the memorandum for this session of the Committee, the International Bureau has taken into account the provisions of the TRIPS Agreement which relate to specific issues on the agenda for discussion.

13bis. Pursuant to the decisions of the Assembly of the Berne Union at its fifteenth session (4th extraordinary) held on April 28 and 29, 1994 (document B/A/XV/1, paragraph 25), the memorandum prepared for this session of the Committee, together with an

invitation for comments, was sent as a provisional draft to the Governments of the countries of the Berne Union and to the European Commission. The International Bureau submitted the texts of all comments received (from the Governments of Argentina, Japan, Lesotho, South Africa, the United States of America, and the Commission of the European Communities) to the Assembly of the Berne Union at its sixteenth session (5th extraordinary), held in Geneva from September 26 to October 4, 1994 (see documents B/A/XVI/1 and 1 Add.) and invited the Assembly to decide what the preparatory document for the present session of the Committee should consist of (document B/A/XVI/1, paragraph 7). At the conclusion of its session, the Assembly decided that the memorandum for the present session of the Committee should consist of the provisional document prepared by the International Bureau with an annex including the above-mentioned comments. In keeping with the decision of the Assembly, the above-mentioned comments are included as Annex III to the present memorandum.

I. DEFINITIONS

14. In the aforementioned memorandum prepared for the first two sessions of the Committee, the International Bureau proposed a series of definitions, some of which were based on terms defined in Article 3 of the Rome Convention with some modifications, and some of which were new. The purpose of modifying existing definitions and proposing new ones was to take into account technological developments since conclusion of the Rome Convention in 1961. The Committee did not discuss the definitions separately, but suggestions for improvements or modifications were made during the discussion of other items on the agenda, in particular, in respect of the economic rights of performers in their performances fixed in phonograms and producers of phonograms in their phonograms. The definitions proposed by the International Bureau, taking into account the said suggestions, are resubmitted for the consideration of the Committee.

15. 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."

16. 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.

17. It is quite obvious that a provision in a national law which would merely state 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.

18. 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 real 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). It seems 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.

19. On the basis of the discussions in the Committee, there are two aspects of the notion of "performers," in respect of which clarification or at least further discussion may be necessary.

20. The first aspect relates to those cases where not a performance of a work or an expression of folklore is involved but only such stylistic elements as the individual phrasing or dynamics of sounds or the rhythm of musical performances. Through the use of

electronic, and particularly digital, technology (for example, digital sampling), it is now possible to fix, manipulate and use for the production of phonograms even very small parts of performances in such a way. This is evidenced, for example, by the commercial availability of libraries of digitally-fixed sounds, such as sounds of single instruments or sections of orchestras (see, in this respect, also the discussion of the proposed definition of "producer of phonograms," below). The Committee may wish to discuss such uses of parts and stylistic elements of performances from the viewpoint of the definition of performers. A clear distinction seems, however, necessary between the use of parts of performances for the purpose of identifying and extracting the stylistic elements, on the one hand, and the use of stylistic elements for the production of phonograms, on the other. For the former use, the right of reproduction may be evoked, if the use amounts to a partial reproduction (see paragraph 25, below); if, however, the use concerns only insignificant parts, it is irrelevant from the viewpoint of that right. In the latter case, it is actually not the performance or a part of it which is used. At the first two sessions, it seemed that the Committee would consider premature extending the definition beyond performances proper to such stylistic elements of performances.

21. The other aspect is the case of actors who create performances by reading books aloud for fixation and marketing in the form of so-called "talking books." This activity has become an area of significant employment for actors in recent years, and, during the first session of the Committee, it was proposed that it be mentioned in the definition. It seems, however, that in the proposed definition the words "deliver" and "declaim" are sufficiently broad to cover such activity. Nevertheless, the Committee still may wish to consider whether this kind of activity should be expressly mentioned as coming within the scope of the definition.

22. 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 is doubtful whether this definition is still suitable. It is true that analog fixations—and thus records or tapes made by analog technology—are always fixations of sounds. However, phonograms produced by means of digital technology are not necessarily fixations of sounds. They frequently are, but they may include or consist of codes that can be used to produce sounds without having fixed any sounds (in the sense that no sounds actually existed which then would have been fixed but which can be made audible by means of appropriate electronic equipment). Digital representations of sounds may thus be either originated from a recording of sounds

or from direct production of their codes through computers. Consequently, it seems desirable to modify the definition of "phonograms" so that it covers fixations of digital representations of sounds as well as fixations of sounds.

23. 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 widespread. Digital technology has produced further, spectacular developments in this field. As mentioned, there are now companies that commercialize entire catalogs of digital representations of sounds (for example, sounds of single instruments or sections of orchestras) for incorporation into phonograms. Digital "re-mastering" of fixations of performances (such as removing noises and "bad notes," strengthening, lengthening, shortening or otherwise altering notes) makes the identification of a given fixation even more difficult.

24. 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" (emphasis added). Phonograms can be made available to the public not only through the offering of copies, but also through communication to the public of the sounds, either through radio waves or through wires, for example, through electronic retrieval ("digital delivery") systems, which make it possible for those who are connected to such systems to listen to a given phonogram at any time of their choice. 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.

25. The definition of "*reproduction*" in Article 3(e) of the Rome Convention—which states simply that "'reproduction' means the making of a copy or copies of a fixation"—also requires modernization. It seems that the definition should refer to the making of copies of fixations of performances included in phonograms, as well as to the making of copies of

phonograms, since, in the case of the rights of performers, it is the performance fixed in a phonogram which is the object of protection. During the first session of the Committee, it was not thought necessary to provide that "reproduction" included making copies of a phonogram in a collection or combination of phonograms; accordingly, the reference does not appear in the definition or in the proposal for recognition of the right of reproduction, below. The Committee also discussed whether partial reproduction and electronic storage of phonograms and performances fixed in them should be included in the definition. It seems justified that the definition should cover partial reproduction of phonograms and performances fixed in them, as well as storage, by electronic means, of phonograms and performances fixed in them, regardless of the duration of the storage. In the field of copyright, it is generally accepted that storage of literary and artistic works in the memory of a computer, even for a limited time, is a reproduction of such works, and there seems to be no logical reason that a different principle should apply to the storage of phonograms and fixed performances. Finally, in respect of partial reproduction, the term "copy" involves a determination of substantial similarity; whether a partial reproduction of a phonogram, or of a performance fixed in a phonogram, is deemed a "copy" of such phonogram or performance, will depend upon the degree to which the applicable national law and jurisprudence include criteria of substantiality and similarity in dealing with the rights of performers and producers of phonograms.

26. "*Fixation*" is not defined in the Rome Convention, but it appears in significant provisions. Under Article 5, the location where first fixation takes place is one of the points of attachment for the protection of phonograms (likewise, under Article 4(b), national treatment is to be granted to performers whose performances are incorporated in phonograms protected under Article 5), and under Article 14 the term of protection for phonograms and performances incorporated therein is to be computed from the end of the year in which the fixation was made. The "Model Law concerning the Protection of Performers, Producers of Phonograms and Broadcasting Organizations," which was 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 above in connection with the definitions of "phonogram" and "producers of phonograms," the notion of fixation has undergone various changes, and the definition in the above-

mentioned Model Law is to be modified. The phrase “during the period of more than transitory duration” should not be retained, in order to ensure that excerpts of performances that are used in the context of, for example, digital sampling, are protected as fixations regardless of their duration. See also Chapter VI, below, for a discussion of the criterion of fixation in respect of the term of protection of phonograms.

27. In the original proposals of the International Bureau, the definition of “communication to the public” was intended to also cover the traditional notions of “broadcasting” and “rebroadcasting” as defined under Article 3(f) and (g) of the Rome Convention. 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 Article 3, “‘rebroadcasting’ means the simultaneous broadcasting by one broadcasting organisation of the broadcast of another broadcasting organisation.” It was stated that broadcasting and communication to the public by wire (cable, telephone line, fiber optic network) are becoming ever more interchangeable, and that, while no definition of “communication to the public” appeared in the Rome Convention, it seemed that the common features of communicating performances and phonograms to the public could be expressed in a single definition. During the first session of the Committee, there was support for maintaining, at least for the present, the distinctions among the various means of communication to the public. Accordingly, a definition of “broadcasting” has been added, which includes broadcasting by satellite. It does not seem necessary to add a definition of “rebroadcasting,” which is also broadcasting but with the qualification that the nature of the broadcast is specified, for example, a broadcast originated by another organization. All forms of communication to the public other than by broadcasting (i.e., by wireless means), such as cable and fiber optic transmission, are intended to be covered by the definition of “communication to the public.”

28. 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: “rental” and “public lending.” The relevant definitions in paragraph 29, below, seem, in general, self-explanatory, subject to the following two comments. First, following a suggestion made during the first session of the Committee, the expression “for profit-making purposes” in the definition of “rental” has been replaced by “for commercial purposes.” Second, in respect of the definition of “public lending,” while the Committee did not accept the proposal of the International Bureau to provide a right of public

lending that would survive the exhaustion of rights through, for example, first sale of copies of phonograms, the definition is retained since public lending is a means by which the proposed right of distribution might be exercised, subject to any possible exhaustion.

29. *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 the fixation of the sounds of a performance or of other sounds, or of the digital representations of sounds, from which sounds can be produced through an appropriate device; an audiovisual fixation, the digital representation of sounds and images, or the sound part of either is not a phonogram;

(c) “fixation” is the embodiment of sounds or images, or of the digital representations thereof, from which the sounds and images can be made audible and visible through an appropriate device;

(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 who first fixes the digital representations of sounds;

(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 of sounds available to the public through an electronic retrieval (“digital delivery”) system;

(f) “reproduction” of a phonogram, or of a performance fixed in a phonogram, is the making of a copy, in whole or in part, regardless of the means by which, and the medium in which, the copy is made, including the storage of the phonogram, or the performance fixed in a phonogram, in electronic format, regardless of the duration of the storage;

(g) “rental” of a phonogram is any transfer of the possession of a copy of a phonogram for a limited period of time, for commercial 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) "broadcasting" is the transmission by wireless means for public reception of images or sounds or of the digital representations of images or sounds; transmission of images or sounds by a satellite is also "broadcasting" where the images or sounds can be received by equipment normally available to the public;

(j) "communication to the public" of a performance or a phonogram is the transmission otherwise than by broadcasting of the images or sounds of a performance, or the sounds fixed in a phonogram or the digital representation of sounds, 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;

(k) "public performance" of a phonogram is making the sounds fixed in the phonogram, or the digital representations of sounds, 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 (j), above.

II.

MORAL RIGHTS OF PERFORMERS

30. In the memorandum for the first session of the Committee, the International Bureau noted that the Rome Convention did not provide moral rights for performers. It was also noted, however, that the manipulation of recorded performances made

possible by digital technology might amount to distortion, mutilation or other modification of such performance in a way that it would be prejudicial to the honor or reputation of the performers, and that certain other techniques, such as dubbing (that is, adding sounds to images, sounds that might 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) might have the same effect. Furthermore, it was stated that performers deserved a right to claim that they were the performers of their performances, provided that the exercise of the right was subject to a consideration of reasonableness, for example, 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—would be indicated as far as was practicable under the given circumstances.

31. The International Bureau proposed that the possible instrument provide that performers, independently of their economic rights, and even when they are no longer the beneficiaries of such rights, have the right to claim that they are the performers of their performances (the right of paternity), and the right 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 (the right of integrity). In respect of the right to be named as the performer, the International Bureau proposed that, as far as practicable, the following name or names be indicated on copies of fixed performances, and in connection with all public uses of unfixed and fixed performances: in the case of the individual performer, his name; in the case of a performance by several performers (for example, an orchestra), the name jointly used by the performers (for example, the name of the orchestra), the name of the artistic leader of the performers (for example, the conductor), and the names of the featured performers (for example, the soloists).

32. There was general support in the Committee for inclusion of provisions on moral rights in the possible new instrument. However, it was suggested that the obligations be worded more generally. In respect of the relationship between the moral right of integrity and the economic right of adaptation, it was pointed out that the modification of performances was becoming increasingly common with the advent of digital technology; it was said that not all modifications to, or adaptations of, performances should be considered "derogatory" within the meaning of the right of integrity, and that the exercise of economic

rights in respect of digital modifications of performances might become an important source of income to performers. Thus, it was suggested that a limitation based on practicability should apply to the right of integrity as well as to the right of paternity. Opinions were divided in respect of the term of protection of moral rights, and three possibilities were mentioned, namely, a term identical with the term of protection of the economic rights, the lifetime of the performer, and a term without limitation.

33. On the basis of the Committee's discussion, it seems appropriate that provisions on the moral rights of performers be included in the possible instrument. It seems also that such provisions should be phrased in general terms, which would allow each State party to the instrument to implement moral rights protection for performers based on its own legal traditions and with due regard to the requirements of the cultural industries in its national territory. Furthermore, it seems necessary to take into account that for performers and performances it is more difficult to identify those cases where a modification or other derogatory action prejudices honor or reputation than for authors and literary and artistic works. It should also be taken into account that, in the case of performances, parody is a much more widespread phenomenon than in the case of literary and artistic works, and that restricting the possibility of that form of free expression would be undesirable. Therefore, the language proposed in paragraph 35(o), below, is different from the language used in Article 6^{bis} of the Berne Convention; it is intended to cover only the obviously serious cases where the application of such a right is clearly justified.

34. In respect of the term of protection, it seems justified, as in the case of Article 6^{bis} of the Berne Convention, to provide that the moral rights of performers shall last at least as long as the economic rights (see the discussion and proposals under Chapter VI, below, in respect of the term of protection of economic rights in phonograms and performances fixed in phonograms). The second sentence of paragraph (2) of Article 6^{bis} contains an exception, allowing certain countries to provide that the term of protection of moral rights may be limited to the life of the author, provided the legislation of such countries so provided at the time of their becoming party to the 1971 Paris Act of the Berne Convention. The interests of performers in respect of moral rights are largely the same as the interests of authors, i.e., the interest in being recognized as the creator and in ensuring the integrity of the work or performance involved. Thus, it seems justified that those countries which limit the moral rights of authors to the lifetime of the author under paragraph (2) of Article 6^{bis} should be allowed to provide a term of protection for the moral rights of performers

that would expire on the death of the performers. It seems, in any case, given the parallel nature of the moral rights of performers and authors, that the term of protection of the moral rights of performers should not be shorter than the term of protection of the moral rights of authors.

35. Accordingly, 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 such rights, have

(a) the right to claim that they are performers of their performances, including the right that, as far as it is practicable, their names be indicated, in the customary way, on the copies of the fixations of their performances and in connection with any public uses of their performances or fixations thereof; and

(b) the right to object to any serious distortion, mutilation or other modification of, or other derogatory action in relation to, their performances, that would result in grave prejudice to their honor or reputation.

36. It is also proposed that the instrument provide that the rights granted in accordance with the preceding paragraph shall, after the death of the performer, be maintained at least until the expiration of the economic rights of the performer, and shall, after the death of the performer, be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries which do not provide for the protection of the moral rights of authors after the death of the authors, may provide that the rights set out in the preceding paragraph, after the death of the performer, cease to subsist.

III.

ECONOMIC RIGHTS OF PERFORMERS IN THEIR LIVE PERFORMANCES

37. In the memorandum for the first session of the Committee, the International Bureau described the rights of performers in respect of their unfixed (live) performances, and proposed that such rights be recognized in the possible instrument. Article 7.1(a) and (b) and Article 2.1 of the Rome Convention establish the protection of performers in respect of their unfixed (live) performances. Article 7.1(o)

and (b) of the Convention provide that “[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”; while 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...”

38. The International Bureau 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. The International Bureau also referred to the limitations on the rights of broadcasting and recording (reproduction) of works to be broadcast contained in Article 11^{bis} of the Berne Convention, i.e., Article 11^{bis}(2), which allows the application of non-voluntary licenses, and Article 11^{bis}(3), which provides for the possibility of “ephemeral” recording of works to be broadcast. It was stated that it did not seem to be justified, in the case of the economic rights of performers in respect of their unfixed performances, to exceed the limitations allowed in such cases in respect of copyright. Accordingly, it was proposed that the said limitations should apply, *mutotis mutandis*, to the rights of performers in their unfixed performances.

39. The TRIPS Agreement contains provisions in respect of the rights of performers in their unfixed performances. Specifically, Article 14(1) provides as follows: “In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance....Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.” Under Article 14(6), moreover, “[a]ny Member may, in relation to the rights conferred...above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.” It is to be noted, however, that Article 14(1) of the Agreement itself contains a very important limitation, since it grants performers a right of fixation only against a fixation in a phonogram. The TRIPS Agreement does not protect performers against unauthorized fixation of their live performances (bootlegging) if an audiovisual fixation is involved.

40. Based on the Committee’s general support of the aforementioned proposals, it seems appropriate that the possible instrument provide that performers have the right to authorize the broadcasting, the communication to the public and the fixation of their live performances. As is indicated in the discussion of the definition of “fixation” in Chapter I, above, the proposed right to authorize fixation would extend to the fixation of individual sounds, whatever their duration, which may be subsequently manipulated and reused commercially in the context of digital sampling or for other purposes. While there was some discussion concerning the possible use of the phrase “to authorize or prohibit” rather than “to authorize” in respect of the rights involved, the latter formulation is retained because the notion of a right to prohibit or prevent is implicit in the notion of a right to authorize.

41. Accordingly, it is proposed that the instrument provide for the exclusive right of performers to authorize

(a) the broadcasting of their live performances;

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

(c) the fixation of their live performances.

IV.

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

42. As noted in the Introduction, there was broad support in the Committee for the idea that the rights of performers in their performances fixed in phonograms should be stated separately from the rights of producers of phonograms in their phonograms. Accordingly, following the discussion below, the proposals in respect of the rights are set out separately for those two categories of owners of rights.

Protection of the rights of performers under the Rome Convention and the TRIPS Agreement

43. In the memorandum prepared for the first session of the Committee, the International Bureau summarized the protection, under the Rome Convention, of the rights of performers in their performances fixed in phonograms. In respect of the right of 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 performers have consented to broadcasting, 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)). Likewise, Article 7.2(2) provides that 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.

44. The Convention does not provide rights of adaptation, distribution (including rights of rental and/or public lending which survive the first sale of copies of fixations) or importation; nor are performers provided 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 communication to the public 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, Article 12 of the Convention provides that a single remuneration is to be paid by the user to the performers, or to the producers of the phonograms, or to both. Under Article 16.1(a) of the Convention, various reservations are possible in respect of the right to remuneration under Article 12, which may go so far as to completely deny such a right.

45. Limitations on the rights of performers are permitted under Article 15 of 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; and (iv) use solely for the purposes of teaching or scientific research. Furthermore, Contracting States may 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, including the possibility of non-voluntary licenses.

46. The TRIPS Agreement contains provisions in respect of the rights of performers in their fixed performances included in phonograms. Specifically, Article 14(1) provides as follows: "In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation." Under subparagraph (4) of the same article, an exclusive right to authorize or prohibit the commercial rental to the public of originals or copies of phonograms is

provided to producers of phonograms "and any other right holders in phonograms as determined in domestic law." However, States party to the Agreement which presently have in force systems of equitable remuneration may maintain such systems "provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders." Finally, Article 14(6) provides that "[a]ny Member may, in relation to the rights conferred...above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention."

Protection of the rights of producers of phonograms under the Rome Convention, the Phonograms Convention and the TRIPS Agreement

47. In the memorandum for the first session of the Committee, the International Bureau summarized the protection, under the Rome Convention and the Phonograms Convention, of the rights of producers of phonograms in their phonograms.

48. 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 authorize or prohibit the direct or indirect reproduction of their phonograms." As noted 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. Article 15 of the Rome Convention allows the same exceptions to the protection of producers of phonograms as it does with regard to the protection of performers, including the possibility of non-voluntary licenses.

49. 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.

50. 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 producers 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.

51. The TRIPS Agreement contains provisions in respect of the rights of producers of phonograms. Article 14(2) provides that “[p]roducers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.” Further, under subparagraph (4) of the same Article, a right to authorize or prohibit the commercial rental to the public of originals or copies of phonograms is provided to producers of phonograms; however, as mentioned above, States party to the Agreement which presently maintain systems of equitable remuneration may maintain them “provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders.” Finally, Article 14(6) provides that “[a]ny Member may, in relation to the rights conferred...above, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention.”

Discussion of both kinds of rights at the first two sessions of the Committee

52. In the memorandum prepared for the first session of the Committee, the International Bureau cited a number of developments which indicated that the rights of performers and producers of phonograms need to be modernized, and made proposals for the contents of, and exceptions to, the economic rights of performers and producers of phonograms in their fixed performances and phonograms, respectively. These developments related principally to the effect of digital technology on the creation, exploitation, and use of phonograms and fixed performances, and are summarized in the following paragraphs. The comments and suggestions made by the Committee during its first session, as well as the summaries of the Chairman, have been taken into account in the discussion and proposals.

53. The capacity to make perfect copies of phonograms and fixed performances from either existing copies or from digital broadcasts or interactive systems, and the capacity of persons who subscribe to “pay-per-listen” services for on-demand access to

phonograms and fixed performances, have blurred the distinction among the traditional rights of reproduction and distribution, broadcasting and communication to the public, and public performance. At the same time, the potentially broad scope of an existing right—communication to the public—may offer the possibility of embracing many of the new forms of access to and use of phonograms and fixed performances, without erring on the side of “over-legislating” at a time when new commercial arrangements, particularly at the international level, are still developing.

54. This does not mean that the traditional rights of reproduction and distribution have lost importance. As in the case of the protection of literary and artistic works in the context of the possible protocol to the Berne Convention, the Committee recognized that the new developments might require explicit inclusion in the possible instrument of the rights of reproduction, first distribution and importation, as well as a right of rental surviving the first sale of copies. (During its first session, the Committee discussed the possible anti-competitive effects of the proposed right of importation; for a detailed discussion of the various questions concerning the said right, see the memorandum prepared for the fourth session of the Committee of Experts on the possible protocol, which will meet immediately before the present session of the Committee.) Moreover, while there was insufficient support in the Committee for recognition of a public lending right surviving the first sale of copies, there was no objection to maintaining the right as a possible means of exercise of the right of first distribution, subject to exhaustion upon first sale. As far as the proposed exception to an exclusive right of rental is concerned for countries where only a right to remuneration is granted, it seems appropriate to bring the text of the proposed provision into harmony with Article 14(4) of the TRIPS Agreement. The date mentioned in the text—April 15, 1994—is the date of the Ministerial Meeting concluding the Uruguay Round of Multilateral Trade Negotiations referred to in the said provisions of the TRIPS Agreement.

55. There were divisions of opinion in the Committee concerning the proposal for a right of adaptation for both performers and producers of phonograms, but there was, as the Chairman noted, sufficient support for it to remain on the agenda for discussion. In light of the widespread practice of digital manipulation of fixations of performances and of other sounds for new commercial uses, it seems justified for performers and producers of phonograms to have the right to control such uses by authorizing adaptation of their fixed performances and phonograms, respectively. The right of reproduction does not seem adequate to provide such control, because

adaptation implies transformation and change, while reproduction refers to direct copying of protected elements which can be perceived in a substantially similar form in their new embodiment. In the case of performers, neither the moral right of integrity nor the so-called right of "personality" seem to correspond to the nature of the restricted acts covered by a right of adaptation. The right of integrity applies only to derogatory uses which are prejudicial to the honor or reputation of the performer, but not to uses which may have a salutary effect on the original fixed performance; likewise, the right of "personality" relates more to imitation of the style of a performer than to use of a fixed performance which he has created. There was some disagreement in the Committee over the use of the term "adaptation" to apply to a right of performers (since some participants were of the view that the term was only appropriate in respect of modifications to literary and artistic works). The term has nonetheless been retained because it has a widely understood meaning in the context of intellectual property rights, and it seems unlikely that it will have a negative effect on the right of authors or other owners of copyright to authorize adaptations of their works or, more generally, on the balance between the rights of authors and neighboring rights beneficiaries referred to in Article 1 of the Rome Convention.

56. In respect of the rights of [broadcasting,] communication to the public and public performance, the International Bureau proposed that the instrument include those rights, for performers and producers of phonograms, on an exclusive basis. It was also proposed that those rights, with the exception of the right of [digital broadcasting and] digital communication to the public of phonograms, could be limited to the payment of equitable remuneration. (The reference to broadcasting appears here in square brackets before the term "communication to the public" due to the fact that, in the memorandum prepared for the first two sessions of the Committee, the term "communication to the public" was used with a broader meaning also covering broadcasting.)

57. The Committee discussed the questions of the proposed rights of [broadcasting,] communication to the public and public performance in great detail. The emergence of new means of making fixed performances and phonograms available to the public led to some degree of hesitation in respect of the proposed definitions of rights (see, for example, the discussion of the definition of "communication to the public" in Chapter 1, above), and, likewise, in respect of whether exclusive rights or mere rights to remuneration should be provided to performers, to producers of phonograms, or to both. There was consensus, however, that, even if exclusive rights might not be appropriate for all means of digital

broadcasting, communication to the public and public performance, an exclusive right should apply at least in the case of on-demand, interactive digital delivery of phonograms and performances included therein, for example, where a member of the public can request the delivery of recorded music or other sounds, for reception at a time and place chosen by the member of the public making the request. The role of collective administration in administering any exclusive rights was also stressed, in order to ensure that users had easy access to phonograms for, for example, broadcasting purposes.

58. It seems to be the case that the concept of "secondary use" of phonograms and performances, reflected in the provision for a single equitable remuneration for broadcasting and communication to the public of phonograms in Article 12 of the Rome Convention, is no longer applicable in the case of digital uses as a result of which the commercial making available of phonograms and fixed performances is tending away from providing copies, and toward direct delivery by electronic means from centrally stored sources of digital information. As the Committee's discussion revealed, however, established practices in the licensing and administration of rights in respect of "secondary uses" of phonograms will have to be adjusted to the new reality in stages, and it seems that the time is not yet ripe for the recognition, at the international level, of full exclusive rights in all the cases involved. It does seem justified that the possible instrument provide exclusive rights of broadcasting, communication to the public, and public performance to both performers and producers of phonograms as a first step, followed by the possibility that the said rights may be limited to rights of equitable remuneration, except that an exclusive right should be maintained for both performers and producers of phonograms in the case of communication to the public of phonograms by digital means in the form of on-demand delivery.

59. In the memorandum prepared for the first session of the Committee, the International Bureau proposed, in general terms, that the possible limitations on the rights of performers and producers of phonograms be assimilated to the possible limitations on the rights of authors in literary and artistic works under the Berne Convention and the possible protocol (see Chapter V, below, for the general discussion of exceptions to rights). Noting that Article 15.1(a) of the Rome Convention allows free private reproduction of phonograms and performances included therein, it was suggested that the criteria for exceptions to the right of reproduction in Article 9(2) of the Berne Convention should be applied to determine the appropriate scope of private reproduction of phonograms for personal purposes in the form of home copying.

60. Even before digital technology, there was fairly general agreement that home copying unreasonably prejudiced the legitimate interests of authors, performers and phonogram producers (even if it could not necessarily be said to conflict with a normal exploitation of the works, performances, and phonograms concerned within the terms of Article 9(2) of the Berne Convention). With the advent of digital technology, the situation became more serious because each copy, whether made from an original or a copy, is of exactly the same quality as the original recording. It was noted that, in order to mitigate the prejudice suffered by performers and producers of phonograms as a result of widespread home taping, and to minimize any conflict with a normal exploitation of the phonograms and performances concerned, a growing number of countries have enacted legislation providing for a payment on recording equipment and/or blank recording material, to be paid by the manufacturers and importers of such equipment and material, collected by collective administration organizations, and distributed among the owners of rights concerned after the deduction of administrative costs. The International Bureau noted the existence of other systems, including copy-protection or copy-management systems such as the Serial Copy Management System (SCMS), which prevents serial digital copying, but took the view that a system of payment on recording equipment and/or material was the most appropriate means of minimizing harm to the rights of performers and producers of phonograms caused by widespread home copying.

61. The Committee generally supported the inclusion of provisions concerning remuneration for copying for private purposes in the possible instrument. A number of suggestions and comments were made during the discussion, and have been taken into account in the following discussion and proposals.

62. There is general support for the proposition that home taping of phonograms and performances fixed therein, in particular, by digital means, both conflicts with a normal exploitation of phonograms and performances included therein, and unreasonably prejudices the legitimate interests of the performers and producers of phonograms concerned, and that a system of remuneration applied to recording equipment and/or recording media is an appropriate means of reducing such conflict and prejudice. During the second session of the Committee, the question was raised whether the same conclusion may uniformly be drawn in the case of home taping by analog means; however, in light of the aforementioned general agreement that analog home copying unreasonably prejudices the legitimate interests of performers and phonogram producers (even if it cannot necessarily be said to conflict with a normal

exploitation of the performances and phonograms concerned in all cases), it seems logical that the proposed remuneration scheme should not distinguish between analog and digital means of copying. It also seems reasonable that the obligation to make payment should be linked to the existence of a similar obligation concerning home copying of literary and artistic works under the national laws of the States party to the instrument. Limited exceptions to the payment obligation may be justified for the use of equipment and/or media not normally used for copying of phonograms and fixed performances, for example, for recording equipment and/or material purchased and used for copying by handicapped persons. While it seems justified for a number of reasons that the payment obligation should rest on manufacturers and importers of equipment and material, it might also be justified to permit States party to the instrument to determine that the obligation may be imposed elsewhere in the chain of distribution of such equipment and material, for example, at the retail level. It seems appropriate to recognize that collection and distribution of the remuneration may be carried out by a collective administration organization or a government agency on behalf of such organization. In light of the Committee's consideration of the question, it also seems appropriate to provide that, in addition to deductions from collected remuneration for the costs of administration, deductions from the proceeds of remuneration by collective administration organizations may be permitted for other specific purposes, on the condition that the right owners, or the statutory bodies of the collective administration organizations representing them, have expressly authorized such deductions.

Rights of performers in their performances fixed in phonograms

63. *It is proposed that the instrument, subject to the provisions proposed in paragraphs 64 to 66, below, provide for any performer in respect of his performance fixed in a phonogram, the exclusive right to authorize the following acts:*

(a) the direct or indirect reproduction of the fixation of the performance;

(b) the distribution of copies of the fixation of the performance through sole or other transfer of ownership, or through rental, public lending or other transfer of possession;

(c) the importation of copies of the fixation of the performance, even following the sale or other transfer of ownership of the copies by or pursuant to his authorization and irrespective of whether the imported

copies were made with or without his 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 fixation of the performance;

(e) the broadcasting of the fixation of the performance;

(f) the communication to the public of the fixation of the performance; and

(g) the public performance of the fixation of the performance.

64. *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 fixation of the performance which has been sold or the ownership of which has been otherwise transferred by or pursuant to an authorization of the performer concerned;

(b) the faculty provided for national legislation under item (a) does not apply in the case of the rental of copies of fixations of performances;

(c) notwithstanding item (b), any country that, on April 15, 1994, has in force a system of equitable remuneration of performers in respect of the rental of copies of fixations of performances, may maintain such a system, provided that the commercial rental of such copies is not giving rise to the material impairment of the exercise of the exclusive right of reproduction of performers;

(d) the right mentioned in item (c) of paragraph 63 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) to (g) of paragraph 63 to a right to equitable remuneration;

(f) the faculty provided for national legislation under the preceding item does

not apply in the case of communication to the public of fixations of performances by digital means in the form of on-demand delivery to a place and at a time specified by the person or entity making the demand;

(g) it is a matter for national legislation in the countries party to the instrument to require that the rights in items (e) to (g) of paragraph 63 be administered by collective administration organizations and, after the deduction of the cost of administration, and any deductions for other purposes which have been authorized by the performers concerned or by organizations representing them, be distributed to the performers concerned;

(h) 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 as those which they provide for 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].

65. *It is proposed that the instrument provide that, subject to the existence, in the national laws of the countries party to the instrument, of a right to remuneration for authors in respect of whose literary and artistic works it may be reasonably presumed that they have been subject of private reproduction for personal purposes, 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 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, whether of a private or public (governmental) nature; and

(c) after the deduction of the cost of administration, and any deductions for other specific purposes which have been expressly authorized by the performers concerned or by the organizations representing them, to be distributed to the performers concerned.

66. It is proposed that the instrument provide that

(a) it is a matter for national legislation in the countries party to the instrument to determine that the remuneration shall be paid by persons or entities other than those mentioned in subparagraph (a) of paragraph 65;

(b) it is a matter for national legislation in the countries party to the instrument to provide for exceptions to the payment of remuneration in the case of reproduction equipment and/or blank recording material in respect of which it may be reasonably presumed that such equipment and/or material were used for purposes other than private reproduction for personal purposes of performances fixed in phonograms.

Rights of producers of phonograms in their phonograms

67. It is proposed that the instrument, subject to the provisions proposed in paragraphs 68 to 70, below, provide for any producer of phonograms in respect of his or its phonogram, the exclusive right to authorize the following acts:

(a) the direct or indirect reproduction of the phonogram;

(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 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 broadcasting of the phonogram;

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

(g) the public performance of the phonogram.

68. 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 (h) 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 authorization of the producer of phonograms concerned;

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

(c) notwithstanding item (b), any country that, on April 15, 1994, has in force a system of equitable remuneration of producers of phonograms in respect of the rental of copies of their phonograms, may maintain such a system, provided that the commercial rental of such copies is not giving rise to the material impairment of the exercise of the exclusive right of reproduction of producers of phonograms;

(d) the right mentioned in item (c) of paragraph 67 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) to (g) of paragraph 67 to a right to equitable remuneration;

(f) the faculty provided for national legislation under the preceding item does not apply in the case of communication to the public of phonograms by digital means in the form of on-demand delivery to a place and at a time specified by the person or entity making the demand;

(g) it is a matter for national legislation in the countries party to the instrument to require that the rights in items (e) to (g) of paragraph 67 be administered by collective administration organizations and, after the

deduction of the cost of administration, and any deductions for other purposes which have been authorized by the performers concerned or by organizations representing them, be distributed to the producers of phonograms concerned;

(h) 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 producers of phonograms as those which they provide for, 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].

69. *It is proposed that the instrument provide that, subject to the existence, in the national laws of the countries party to the instrument, of a right to remuneration for authors in respect of whose literary and artistic works it may be reasonably presumed that they have been subject of private reproduction for personal purposes, it is an obligation of countries party to the instrument to provide a right to remuneration 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, whether of a private or public (governmental) nature; and

(c) after the deduction of the cost of administration, and any deductions for other specific purposes which have been expressly authorized by the producers of phonograms concerned or by the organizations representing them, to be distributed to the producers of phonograms concerned.

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

(a) it is a matter for national legislation in the countries party to the instrument to determine that the remuneration shall be paid by persons or entities other than those mentioned in subparagraph (a) of paragraph 69;

(b) it is a matter for national legislation in the countries party to the instrument to provide for exceptions to the payment of remuneration in the case of reproduction equipment and/or blank recording material in respect of which it may be reasonably presumed that such equipment and/or material were used for purposes other than private reproduction for personal purposes of phonograms.

V.

EXCEPTIONS TO ECONOMIC RIGHTS

71. In the memorandum for the first two sessions of the Committee, the International Bureau proposed that the possible instrument provide the same kinds of exceptions to the rights of performers and producers of phonograms as those provided in the Berne Convention, and the possible protocol to it, in respect of the protection of copyright in literary and artistic works. The Committee took the view that, while a reference to the exceptions to authors' rights might be inevitable, as in the case of Article 15.2 of the Rome Convention, the exceptions to rights in the possible instrument should be spelled out in that instrument itself. In summarizing the discussion, the Chairman said that further discussions should be postponed until there was more clarity in respect of the rights to be covered in the instrument.

72. Thus, while the provision concerning the possible exceptions remains in the proposed text—including the reference to the possibility of non-voluntary licenses—it seems advisable that the Committee should discuss the possible scope of exceptions at a later session. The question of the possible applicability of non-voluntary licenses, in particular, the assimilation of the non-voluntary license in Article 11^{bis} of the Berne Convention as a limitation on the rights of broadcasting and communication to the public (not including the proposed exclusive right for communication to the public of phonograms by digital means in the form of on-demand delivery), is a matter which might justify some discussion by the Committee at the present session.

73. *Accordingly, it is proposed that the discussion on the exceptions to rights be postponed until a later session of the Committee.*

VI.

TERM OF PROTECTION OF ECONOMIC RIGHTS

74. In the memorandum prepared for the first two sessions of the Committee, the International Bureau proposed extending the term of protection of the economic rights of performers and producers of phonograms beyond the terms provided in the Rome Convention and the Phonograms Convention. The Committee did not discuss these proposals, and they are resubmitted for consideration during this session. For the discussion and proposals in respect of the term of protection of the moral rights of performers, see Chapter II, above.

75. 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..."

76. 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 published.

77. 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. At the national level, there is a growing trend towards providing a 50-year term of protection for performers and producers of phonograms. This trend is also reflected in Article 14(5) of the TRIPS Agreement, which provides that the rights of performers and producers of phonograms shall last at least until the end of a period of 50 years computed from the end of the calendar year in which the fixation was made or the performance took place. The same term is hereby proposed as a minimum in the instrument.

78. As noted above, advances in recording techniques made possible by digital technology—in particular, the possibility of manipulating and combining existing fixations for inclusion in new fixations—make it difficult to identify the date of fixation of a particular phonogram. It seems, therefore, more appropriate to calculate the term of protection of economic rights, in general, from first publication, and, only in the case of non-published phonograms, from fixation.

79. It is submitted that there is no point in establishing a term of protection for unfixated performances, since, absent fixation, such performances do not survive the time when they take place.

80. 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.

VII.

EXERCISE AND TRANSFER OF ECONOMIC RIGHTS

81. In the memorandum prepared for the first session of the Committee, the International Bureau noted that the Rome Convention was, in general, based on the principle of contractual freedom, but that the national laws of some countries contained provisions restricting such freedom by limiting or precluding the transferability of certain rights. It was said that such provisions raised problems involving conflicts of laws, and in particular, in respect of whether contracts concluded in countries where the rights concerned were alienable should be given effect in countries where such rights were inalienable. It was noted that, until now, the solutions had been left to private international law, but that increased attention was being paid to the need for international norms, both at the bilateral and multi-lateral levels. Accordingly, the International Bureau proposed that the Committee discuss whether the possible instrument would be a vehicle for international norms to regulate the private international law aspects of the transfer and exercise of economic rights of performers and producers of phonograms, and, if so, what those norms should be.

82. The Committee expressed divided opinions when it considered the aforementioned questions, and the Chairman said that further analysis should be carried out before a final position was taken. After consultation with the Director General, the Chairman suggested that the International Bureau issue a circular letter inviting governments and non-governmental organizations to indicate whether they consid-

ered provisions on exercise and transfer of rights desirable, and if they did, to propose specific provisions that they would like to have included in the new instrument, with the necessary explanatory comments, in the style of the memorandum.

83. The said circular letter was issued on November 30, 1993; and, as of March 1, 1994, 18 responses had been received. Ten responses were received from governments, namely, from Belgium, Brazil, Colombia, Ecuador, El Salvador, Hungary, Ireland, Mexico, the Netherlands and Spain. One response was received from an intergovernmental organization, namely, from the European Commission, and seven responses were received from international non-governmental organizations, namely, from the *Société civile pour l'administration des droits des artistes et musiciens interprètes* (ADAMI); the International Literary and Artistic Association (ALAI); the *Associação Portuguesa de Actores* (APA); the International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM); the European Broadcasting Union (EBU); the International Federation of Musicians (FIM); and the International Association of Broadcasting (IAB).

84. All but two of the responses from governments stated that the possible new instrument should not contain provisions on the exercise and transfer of economic rights; the European Commission expressed the same view.

85. The two governments which expressed support for including provisions on the transfer and exercise of economic rights were the Governments of El Salvador and Mexico. The response from the Government of El Salvador stated that the Government was in favor of provisions on the exercise and transfer of rights. The response did not include specific proposals, but simply referred to the copyright and neighboring rights legislation of El Salvador, containing provisions that regulate transfers of rights in detail, in the manner traditional to countries following the civil law tradition. The response from the Government of Mexico stated that, if the possible instrument only included provisions in respect of performances fixed in phonograms, such provisions should require that contracts for the use of performances be in writing, and should state that producers of phonograms have the right to authorize or prohibit the reproduction, first distribution, and rental of the original or copies of phonograms. If the possible instrument included provisions in respect of all performances, whether or not fixed in phonograms, such provisions should state that, absent agreement to the contrary, the appearance of performers in radio and television programs should not give broadcasting organizations the right to

reproduce fixations of such appearances; such provisions should also grant to broadcasting organizations the right to make ephemeral recordings, for later broadcast, of performances.

86. Of the responses from international non-governmental organizations, ALAI, EBU and IAB took the view that such provisions should be left out of the possible instrument. BIEM took no position but indicated that it would follow developments closely. The remaining three organizations, ADAMI, APA and FIM, argued that the instrument should contain provisions on exercise and transfer of rights in order to ensure that performers were protected against transfers of their rights to producers or other entities with greater bargaining power. In particular, it was said that any rights to remuneration provided under the instrument should only be transferable to collective administration organizations.

87. It seems, on the basis of the Committee's discussion and the responses to the aforementioned circular letter, that there is insufficient support for the time being for including provisions on the exercise and transfer of economic rights of performers and producers of phonograms in the new instrument.

VIII.

FORMALITIES

88. The proposals of the International Bureau in respect of the abolition of formalities were not discussed during the first session of the Committee. Accordingly, the said proposals are resubmitted for consideration during the present session.

89. 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 © 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.

90. 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.

91. 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, for example, 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.

92. 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.

IX.

ENFORCEMENT OF RIGHTS

93. In the memorandum of the International Bureau prepared for the first session of the Committee, it was noted that the Rome Convention and the Phonograms Convention did not contain any direct provisions on the enforcement of rights, but that Article 26 of the Rome Convention, and Articles 2 and 3 of the Phonograms Convention, included provisions indirectly requiring appropriate enforcement measures in any country party to the Convention. Paragraph 1 of Article 26 of the Rome Convention 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."

94. Likewise, the International Bureau noted that, under Article 2 of the Phonograms Convention 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. It was pointed out that 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.

95. The International Bureau stated that it was obvious that these provisions could not be respected without appropriate enforcement measures, and proposed that the possible new instrument contain provisions for enforcement of the rights of performers and producers of phonograms that were the same as those proposed for the enforcement of copyright in the memorandum prepared for the third session of the Committee of Experts on a Possible Protocol to the Berne Convention. The proposals were based on the conclusions of various WIPO meetings during the 1980s dealing with questions of international standards for the enforcement of copyright and neighboring rights, and on ideas that had emerged during the TRIPS negotiations. Specifically, the proposals concerned the definition of infringement, provisional (conservatory) measures, civil remedies, criminal sanctions, measures against the abuse of technical devices, "border" measures, and general procedural safeguards.

96. On March 3, 5 and 8, 1993, respectively, the International Bureau received letters from government officials of Sweden, Australia and the United States of America, in which it was proposed, in essence, that the discussions of enforcement of rights, in the Committee, be based on a text developed during the TRIPS negotiations. The letters made the same proposal in respect of the discussion on enforcement provisions by the Committee of Experts on a Possible Protocol to the Berne Convention. The three letters indicated that certain technical amendments would be necessary to adapt the enforcement provisions of the TRIPS text to the purposes of the possible instrument on the protection of the rights of performers and producers of phonograms, but specific changes were not mentioned. The letters and the said TRIPS text were reproduced in an annex to the memorandum for the first session of the Committee, so are they in an annex (Annex II) to this memorandum (the TRIPS text, as it is included in the TRIPS Agreement).

97. The Committee did not discuss the questions of enforcement of rights in its first two sessions, but discussion did take place during the aforementioned third session of the Committee of Experts on a Possible Protocol to the Berne Convention, when a large majority took the position that the provisions of the protocol on enforcement of rights should be

based on enforcement provisions of the then draft TRIPS text. The primary reason given was that the said text was based on a negotiated agreement. It was widely noted, however, that various adjustments would be necessary to adapt the provisions to the context of the protocol. It was also noted that the proposals of the International Bureau included elements not present in the TRIPS text, in particular, proposed provisions against the abuse of technical devices. At the conclusion of the meeting, the Chairman stated that the Committee should be given the opportunity to communicate, to the International Bureau, proposals as to how the technical adaptation of the TRIPS text should be made.

98. In the memorandum prepared for the fourth session of the Committee of Experts on a Possible Protocol to the Berne Convention, which will take place immediately before the present session of this Committee, the Committee was invited to identify the technical adjustments in the enforcement provisions of the TRIPS Agreement (Articles 41 to 61 of the Agreement) needed to adapt them to the context of the possible protocol. The Committee was also invited to consider inclusion of provisions on the abuse of technical devices, provisions the scope of which would differ from that of the enforcement provisions of the TRIPS Agreement.

99. *This Committee is also invited to identify the technical adjustments in the enforcement provisions of the TRIPS Agreement needed to adapt them to the context of the possible new instrument on the protection of the rights of performers and producers of phonograms. The Committee may also wish to consider the inclusion of provisions for the application of appropriate legal measures against the abuse of technical devices, provisions the scope of which would differ from that of the above-mentioned provisions of the TRIPS Agreement.*

100. *In the latter respect, it is proposed that any country party to the new instrument be obliged*

(a) to provide for the some sonctions, to be applied by judicial authorities, as the ones provided for in case of infringement of the rights of performers in their performances fixed in phonograms and of producers of phonograms in their phonograms under the provisions referred to in paragraph 99, above, in case of manufacture or importation for sale or rental, or the distribution by sale or rental, of

(i) any device specifically or predominantly designed or adapted to circumvent

any device intended to prevent or restrict the making of copies of phonograms or to impair the quality of copies made (the latter device hereinafter referred to as "copy-protection or copy-management device");

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

(b) to provide that, in the application of provisional (conservatory) measures, civil remedies, criminal sanctions and border measures provided for according to the provisions referred to in paragraph 99, above, any illicit device mentioned in item (a)(i) and (ii), above, is assimilated to infringing copies of phonograms;

(c) to provide that the performers and the producers of phonograms concerned shall be entitled to damages provided for according to the provisions referred to in paragraph 99, above, in the same way as in a case where their rights in their performances fixed in phonograms or in their phonograms, respectively, are infringed, where

(i) copies of phonograms have been made by them, or with their authorization, and offered for sale or rental combined with a copy-protection or copy-management device, and a device specifically or predominantly designed or adapted to circumvent the said device is made or imported for sale or rental or is distributed through sale or rental;

(ii) the phonograms in which they have rights are included in encrypted programs broadcast or otherwise communicated to the public by them, or with their authorization, and a device enabling or assisting the reception of the programs by those who are not entitled to receive the programs is made or imported for sale or rental or is distributed through sale or rental.

X.

NATIONAL TREATMENT

101. In the memorandum for the first session of the Committee, the International Bureau noted that Article 2.1 of the Rome Convention defined "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." It was also noted that Article 2.2 clarified that national treatment was subject to the protection specifically guaranteed (with the limitations specifically allowed) in the Convention, while Articles 4 and 5 obliged Contracting States to grant national treatment to performers and phonogram producers, respectively, protected under the Convention.

102. It was proposed that the principle of national treatment be affirmed in the possible new instrument, i.e., that States party to the instrument would be required to grant national treatment in respect of rights which their national laws "do now or may hereinafter grant" to eligible performers and producers of phonograms. Also, it was proposed that a specific provision be included in respect of collective administration of rights, particularly to guarantee that remuneration collected for foreign rights owners not be used, without their express consent, for so-called collective (national) purposes.

103. The Committee generally supported the application of national treatment in the new instrument, but opinions differed on the question of the rights to which national treatment would apply, and in particular with respect to rights, other than those protected under the possible instrument, which States party might grant to performers and producers of phonograms in the future. It was said that the application of national treatment could not be determined until the contents of the possible instrument were known, and that the relationship between national treatment under the instrument and national treatment under the existing international conventions would have to be decided before final positions could be taken. The opinion was also expressed that the specific reference to application of national treatment in the context of collective administration was unnecessary and redundant.

104. The TRIPS Agreement contains a provision concerning the application of national treatment to performers and producers of phonograms. Article 3(1) of the Agreement provides as follows: "Each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions provided in...the Rome Convention...In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement."

105. On the basis of the Committee's discussion, it seems that there is support for restatement of the principle of national treatment in the possible instrument, as a general rule and subject to as few exceptions as possible. In light of the differences of opinion referred to in the preceding paragraphs concerning the rights to which national treatment would apply and the relationship of the instrument to other international conventions, it does not seem practical to continue the discussion in respect of the application of national treatment until the contents of the instrument are more clearly known.

106. *Accordingly, it is proposed that consideration of the question of the applicability of national treatment take place at a later session of the Committee.*

XI.

CRITERIA OF ELIGIBILITY FOR PROTECTION UNDER THE POSSIBLE INSTRUMENT

107. During its first session, the Committee did not discuss the International Bureau's proposals in respect of the criteria of eligibility for protection of performers and producers of phonograms under the possible instrument. Accordingly, the said proposals are resubmitted for consideration during this session.

108. 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.

109. In the case of performers, 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.

110. In the case of producers of phonograms, 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(o)(iii) and (iv) of Article 16 (concerning certain possible reservations), the criterion of fixation instead of the criterion of nationality.

111. While the application of the same criteria of eligibility for protection seems appropriate in the instrument, the application of reservations mentioned in the last two sentences of the preceding paragraphs seems no longer desirable in the light of generally accepted international standards.

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

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

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

(c) *the live performance 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.*

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

(o) *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, or of the digital representations of 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.*

ANNEX 1

Letter of February 22, 1994, Addressed by Mr. J.F. Mogg, Director General, Directorate General XV, Internal Market and Financial Services, Commission of the European Communities, to the Director General of WIPO

1. The text of the letter reads as follows:

"I am writing to you in connection with the work of the Committee of Experts of the World Intellectual Property Organization on a possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms. First, I would like to address the question of the coverage of the rights of performers in their visual, audiovisual as well as audio performances for the future meetings. Secondly, I would like to reply to your circular letter of 30 November, 1993 (ref. C.L 109g DV-0g) concerning the question of the transfer and exercise of rights.

"With regard to the coverage of a possible New Instrument, the position of the European Union has always been that, in order to take full account of the interests of all parties concerned, the New Instrument should cover the rights of performers in all performances, whether of an audio, visual or audiovisual character, and in fixations of these performances. As you may recall, statements to this effect were made by the delegate of the European Commission at the First Session of the Committee of Experts, held from 28 June to 2 July, 1993 and are recorded in the official Report (Doc. INR/CE/1/3 of 2 July, 1993, in particular paragraph 1g). The conclusion reached by the Chairman on this point was that nothing precluded continuing discussion of the question of possible provisions on the rights of performers in audiovisual productions and you yourself concluded that, consequently, the International Bureau would prepare a document on audiovisual fixations.

"In order to assist the work of the International Bureau in this respect, I submit the attached document which provides a version of the document previously circulated by the International Bureau amended with respect to possible provisions giving effect to the approach described above. The document further takes account of the general view expressed in the Committee that it would be useful for the provisions on performers and phonogram producers to be set out separately. This document provides a basis on which the discussion in this area could be continued in accordance with the conclusions of the last meeting of the Committee.

"The document is submitted without prejudice to the position of the European Union on the substantive rights involved, or any other part of present or future documents prepared by the International Bureau, which either appear sufficiently widely drafted as they stand or could more appropriately be reviewed at a later stage in the light of progress made on the substantive issues. The presentation of these adaptations based on the text already circulated is not, of course, intended to restrict the development of this part of the text by the International Bureau to take account of the discussions in the Committee so far.

"As to your above-mentioned circular letter of 30 November 1993, I would like to confirm that, in the view of

the European Commission, the subject of the exercise and transferability of rights is not suitable to be included in the New Instrument. This view has already been expressed by a number of delegations, including the representative of the European Commission, during the Second Session of the Committee of Experts held from 8 to 12 November 1993 (Doc. INR/CE/II/1 of 12 November 1993, in particular paragraph 64).

"In general, these delegations referred to the related aspects of, first, the transferability of rights in domestic law, second, conflict of laws issues and, third, implications for the principle of national treatment. It seems clear that some of these aspects give rise to issues of a considerably broader content than generally envisaged in the terms of reference of the Committee of Experts. More particularly, these delegations indicated the relevance of considerations specific to domestic legal regimes involving concepts of public order and public policy and made reference to existing international conventions regulating questions of choice of applicable law, rules governing the forum for contractual litigation and the enforceability of foreign judgments in the context of commercial relations more generally. In this latter respect, the conventions which already exist between Member States of the European Union or between these States and the members of the

European Free Trade Association include the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the 1988 Lugano Convention and the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

"It seems, therefore, that the scope for the development of specific rules on conflicts of laws within the framework of the New Instrument would be very restricted and give rise to questions of compatibility with a number of related domestic intellectual property and wider-ranging domestic and international principles and rules of law. The problems sought to be addressed by the provisions on the exercise and transfer of rights have also not yet been sufficiently clarified for these various aspects to be properly assessed.

"In conclusion, the discussion of such issues in the context of the New Instrument would appear likely to over-extend and unnecessarily complicate the work of the Committee. This position is without prejudice to the further elaboration of arguments already presented, or any additional considerations as might appear appropriate at a later date."

2. A document was attached to the letter which reads as follows:

"Coverage of audio, visual and audiovisual performances and fixations of such performances"

Possible text to form the basis for continuing discussion

Phonograms

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

Performances

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 fixed performance, the exclusive right to authorize the following acts:

(a) the reproduction of the fixation of the performance, including the reproduction of the fixation of the performance in another fixation consisting of a collection (combination) of fixations of performances;

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

(c) the importation of copies of the fixation of the performance, even following the sale or other transfer of ownership of the copies by or pursuant to his (implicit or explicit) authorization and irrespective of whether the imported copies were made with or without his 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 fixation of the performance;

(e) the communication to the public of the fixation of the performance; and

(f) the public performances of the fixation of the performance.

Phonograms (Cont'd)

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 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 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 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 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);

Performances (Cont'd)

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 fixation of the performance 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 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 fixations of performances;

[(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 fixations of performances, 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 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 fixations of performances;

(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 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 fixed performances 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);

Phonograms (Cont'd)

- (b) to be collected by a collective administration organization; and
- (c) after the deduction of the cost of administration, to be distributed to the producers of phonograms concerned.

Performances (Cont'd)

- (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 concerned."

ANNEX II

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, in the memorandum prepared for the third session of the Committee, was reproduced from GATT document No. UTN.TNC/W/FA made available to the International Bureau of WIPO by the Secretariat of GATT. The text became part of the TRIPS Agreement without any substantive changes. What follows was reproduced from GATT document containing the TRIPS Agreement as signed in Marrakesh on April 15, 1994.

“PART III: ENFORCEMENT OF
INTELLECTUAL PROPERTY RIGHTS

SECTION I: GENERAL OBLIGATIONS

Article 41

1. Members shall ensure that enforcement procedures as specified in this Part are available under their law 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 proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.

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

5. It is understood that this 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 law in general, nor does it affect the capacity of Members to enforce their law 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 law in general.

SECTION 2: CIVIL AND ADMINISTRATIVE
PROCEDURES AND REMEDIES

Article 42: Fair and Equitable Procedures

Members shall make available to right holders' 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

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 Member 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. Members 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

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

addressing use by governments, or by third parties authorized by a government, without the authorization of the right holder are complied with, Members may limit the remedies available against such use to payment of remuneration in accordance with subparagraph (h) of Article 31. In other cases, the remedies under this Part shall apply or, where these remedies are inconsistent with a Member's 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 that person's intellectual property right by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

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

Article 46: Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark 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

Members 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, Members shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 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 the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

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

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

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

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of 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 MEASURES²

Article 51: Suspension of Release by Customs Authorities

Members shall, in conformity with the provisions set out below, adopt procedures³ to enable a right holder, who has valid grounds for suspecting that the importation of counterfeit trademark or pirated copyright goods⁴

² Where a Member has dismantled substantially all controls over movement of goods across its border with another Member with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

³ 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.

⁴ For the purposes of this Agreement:

- (a) "counterfeit trademark goods" shall mean any goods, including packaging, bearing without authorization 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;
- (b) "pirated copyright goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation.

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

Article 53: Security or Equivalent Assurance

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

2. Where pursuant to an application under this Section the release of goods involving industrial designs, patents, layout-designs 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 the 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.

Article 55: Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 50 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.

Article 57: Right of Inspection and Information

Without prejudice to the protection of confidential information, Members shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Members 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 Members 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;

- (c) Members 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. In regard to counterfeit trademark 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

Members 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

Members 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. Members 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."

ANNEX III

Comments Received on the Provisional Document⁵

SOUTH AFRICA

On September 6, 1994, the Director General of WIPO received the following note verbale from the Permanent Mission of the Republic of South Africa, Geneva:

⁵ The comments are reproduced in the order in which they were received by the International Bureau.

"The Permanent Mission of the Republic of South Africa presents its compliments to the Director General of the World Intellectual Property Organization and has the honour to forward to the Director General copies of letters written by the Registrar of Trade Marks and the South African Institute of Intellectual Property Law which contain South Africa's initial comments on the draft memorandums prepared by the International Bureau on a possible protocol to the Berne Convention and on a possible instrument for the protection of the rights of performers and producers of phonograms..."

The letter of the Registrar of Trade Marks annexed to the note verbale and dated August 26, 1994, only indicates that the comments of the South African Institute of Intellectual Property Law are transmitted with it. The said comments, annexed to that letter and dated August 25, 1994, read as follows:

"The Design Copyright Committee of this Institute has considered the draft memorandum prepared by the International Bureau of WIPO on a possible protocol to the Berne Convention and the draft memorandum prepared by the International Bureau of WIPO on a possible instrument for the protection of the right of performers and producers of phonograms and our brief comments on these two documents are given below.

"Protocol to the Berne Convention"

[The comments relating exclusively to the possible protocol to the Berne Convention are not reproduced here.]

"Instrument for the Protection of the Rights of Performers and Producers of Phonograms"

"We agree with the proposals set forth in paragraphs 29, 35, 36, 41, 63 and 64.

"We agree in principle with the proposal set forth in paragraph 65 but have reservations about the practicalities of the administration of a system of exacting payment on reproduction equipment or on blank recording material. We likewise support the proposal contained in paragraphs 67 and 68 and express a similar reservation regarding the proposals set forth in paragraph 69.

"We agree with the proposals set forth in paragraphs 80 and 92.

"We agree with the proposals made in paragraphs 99 and 100 subject to making the same reservation as is expressed in [previous] paragraph.

"We agree with the proposals set forth in paragraph 112.

"General"

"In general we agree with the proposals and views set forth in the document.

"We consider that, in the light of the recent history of South Africa's relations with WIPO and international bodies in general, our Government should make a point of furnishing comments on the two provisional documents to the International Bureau of WIPO by the deadline date of 1 September 1994. We feel that it is important that as a country our voice should be heard in WIPO."

UNITED STATES OF AMERICA

On September 19, 1994, the Director General of WIPO received the following letter from Mr. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Washington, D.C.:

"I am sending you the United States comments on the Provisional Documents for the Meetings of the Committees of Experts on the Protocol to the Berne Convention and the New Instrument on the Protection of Performers and Producers of Phonograms, scheduled for December 5th through the 16th.

"I believe that we have benefited from having additional time for reflection over these documents. This has given us the opportunity to assess the implications of the TRIPS Agreement and to better understand the implications of new technological developments for national copyright and international systems. These comments reflect our thinking on TRIPS implications and developments in our own studies here in the United States on intellectual property and our National Information Infrastructure.

"The United States Government continues to believe that the discussions in the previous meetings of the Committees of Experts have pointed out the need for careful and deliberate thought on the part of all Governments to better understand where common issues and concerns lie. In this spirit, we look forward to discussions in December and to working with other Governments to find ways to provide strong and coherent copyright and neighboring rights protection at present and in the coming era of the Global Information Infrastructure."

The following comments were annexed to the letter under the title "United States views on the Berne Protocol and the New Instrument":

"General observations"

"The United States remains committed to making progress in WIPO toward improving international protection for works protected by copyright and authors rights and the subject matter of neighboring rights, as we stated at the April Extraordinary Session of the Berne Executive Committee. As we promised at that meeting, we are offering suggestions on ways in which we believe that progress can be made. We believe that such progress is essential, especially in view of the needs to deal with the intellectual property issues associated with the emerging Global Information Infrastructure (GII). We believe that the transition into a worldwide information society demands both a narrowing of our focus on specific issues in the cases of the Berne Protocol and the New Instrument, and the expansion to encompass the digital world in both areas.

"Many countries are studying how their intellectual property laws relate to emerging digital information systems and the increasing importance of multimedia works. In our own studies here in the United States, it is becoming increasingly clear that the international implications of the development of our own NII and a GI are extremely complex and deserve careful evaluation.

"In the emerging world of the GI with its digital distribution systems and multimedia works, distinctions among the rights of authors, producers and performers that

are the basis for the separation of copyright and neighboring rights are rapidly becoming irrelevant. We believe that this new world of information superhighways will mean economic growth, jobs, and exports for all economies to the benefit of authors, producers and performers. Governments need to consider carefully the implications of the inevitable development of the GII for their national economies and their copyright systems. We want to ensure that the work in WIPO is relevant to the rapidly emerging digital world of the GII in order to set sound policy. The goal should be to select the essential elements of the present Berne Protocol and New Instrument texts and work toward reaching agreement on them.

"We believe that the objectives in the December meeting of the Committees of Experts should be limited to what may be achievable. As a general matter, we do not believe that it is necessary to duplicate TRIPS achievements in the Berne Protocol and New Instrument. We believe that this would be unnecessary, time consuming and a potentially dangerous activity. We are seriously concerned that such an attempt could result in standards in WIPO that are different from those adopted in the GATT. Therefore, we prefer no inclusion of TRIPS standards in the Protocol and New Instrument, but if they are included they should be unmodified so as to cause no confusion.

"Matters common to the Protocol and the New Instrument"

"The first issue common to both the Berne Protocol and the New Instrument is the incorporation of the TRIPS enforcement text. Despite our earlier position that any new WIPO agreements should include enforcement provisions, this was when TRIPS was not a reality. The adoption of the TRIPS text has changed the balance of considerations in this regard. Consequently, the United States proposes that, should the Committee of Experts decide to retain the enforcement text, only those changes which are essential to adapting the text to the Protocol and New Instrument ought to be included. We also believe that it is important to continue to look into the possibility of including provisions on the use of technical security measures and on prohibiting devices and services that may be used to defeat technical security measures.

"We believe that the Committees of Experts should consider the recognition of a digital 'transmission' right for both the Berne Protocol and the New Instrument perhaps as a separate right, as an aspect of a distribution right, as part of a right of communication to the public, or an aspect of the reproduction right. While this is an issue that needs much further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GII.

"Provisions to prohibit decoders and anti-copy prevention devices and services also should be considered for inclusion. Such provisions could prohibit the making available to the public of goods or services the primary purpose of which is to defeat technical security measures. The ease of infringement and the difficulty of detection and enforcement will cause copyright owners to look to technology, as well as the law, for protection of their works. However, it is clear that technology can be used to defeat any protection technology provides. Consequently, legal protection alone may not be adequate to provide incentive to authors to create and to disseminate works to

the public, unless the law also provides some protection for the technological processes and systems used to prevent unauthorized uses of copyrighted works and sound recordings.

"The prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use of works in digital form or communicated through the GII is in the public interest. Consumers of copyrighted works pay for the acts of infringers through higher prices for copyrighted works to compensate right owners for infringement losses. The public will also have access to more works and sound recordings if right owners can more effectively protect their works from infringement.

"Therefore, the United States believes that the Committees of Experts should consider including in the Berne Protocol and the New Instrument provisions to prohibit the importation, manufacture and distribution of devices, as well as the provision of services, that defeat hardware or software based anti-copying systems.

"In the future, the rights management information associated with a work or sound recording—such as the name of the copyright owner or producer and the terms and conditions for uses of the work or sound recording—may be critical to the efficient operation and success of the GII. The public should be protected from fraud in the creation or alteration of such information. Therefore, the Committees of Experts should consider including in the Protocol and the New Instrument a prohibition of the fraudulent inclusion of such management information and the fraudulent removal or alteration of such information.

"The United States continues to believe that national treatment must be the basis for protection in any intellectual property agreement. At an absolute minimum, national treatment must apply to the minimum obligations established in any agreement in WIPO. The author or rights holder should be able to realize fully the economic benefits flowing from the free exercise of his or her rights in any country party to the Protocol or New Instrument. We continue to believe that, in respect of any work, this is required by Article 5 of the Berne Convention. To do otherwise in either a Berne Protocol or another agreement on copyright protection would be contrary to Article 20 because it would be a derogation of rights existing under Berne and not be an Agreement to 'grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention' as provided for under Article 20.⁶ To the extent that we have agreed that the principles of the New Instrument should follow those of the Berne Convention, to do otherwise in respect of related rights, would be contrary to the letter and the spirit of the Convention.

"Berne Protocol issues"

[The comments relating exclusively to the possible protocol to the Berne Convention are not reproduced here.]

⁶ Article 20 states: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable."

"New Instrument issues

"The situation in the United States in respect of the issues to be dealt with in the New Instrument is so uncertain that it makes meaningful progress impossible for us at this time. However, because the New Instrument Document is drafted in 'treaty language,' we have many concerns with the specific proposals and the issues raised by them. We are prepared to discuss these concerns; however, we must state that such discussion does not imply any agreement with the substance of the proposals or the content of the proposed New Instrument as a whole.

"There are issues such as digital fixation, storage and delivery that will need to be taken into account in the discussion of the scope and extent of several of the definitions. There are also questions concerning the scope of rights and the right owners that might be covered by the New Instrument which will affect the definitions. To the extent possible, definitions in the New Instrument should be identical to those in the Berne Protocol. Otherwise, differences in phrasing could lead to differences in interpretation, and jeopardize the 'bridging' of the New Instrument with the Berne Convention and the Protocol. Many of these issues are critical to the United States and other countries.

"Definitions

"There are a number of questions that are raised by the definitions that merit further discussion. If the New Instrument is intended to address rights in phonograms and the rights directly associated with them the definitions should be crafted narrowly. The subject matter covered by the definitions goes beyond what is needed for improving protection for phonograms. Particularly, inclusion of all performers, including performers in audiovisual works, may well create a political situation for the United States that will make participation in the New Instrument out of the question.

"The definitions often refer to both fixations of both sounds and images. We believe that the exclusion of fixations of audiovisual works from the definition is necessary to avoid confusion, since audiovisual fixations of musical or other performances are entitled to copyright status, and thus are protected under the Berne Convention.

"The definitions, read as a whole, could imply that rights would have to be granted in respect of any phonogram in which sounds are fixed. Since many countries provide such protection under copyright, the New Instrument should specifically provide that a Party may satisfy its obligations by means of copyright.

"The definition of publication as including electronic retrieval systems, or digital delivery, requires considerable study in the context of the concerns raised in respect of the development of the GII. Questions such as what constitutes publication, delivery, public performance and distribution all must be considered in this broader context.

"The definition of public lending appears to be unnecessary, in view of the rejection at the last meeting of the Committee of Experts of including a public lending right.

"Distinctions among rights of communication to the public, public performance and distribution are becoming increasingly irrelevant in the face of technological change. Digital, or more properly non-analog, storage, retrieval and communication technologies are forcing us to rethink

how rights are defined and allocated in the world of information superhighways and national information infrastructures. Exclusive rights of communication to the public by any means are extremely important in this context. Our Congress is considering legislation to extend a limited public communication right to sound recordings in the realm of digital communication. Consequently, the United States is not able to take any final position on these definitions at this time, and believes that considerable further discussions on these issues are required.

"As noted earlier, the inclusion of 'images' in the definition of communication to the public is troublesome. Images are parts of audiovisual works protected under the Berne Convention, and as such, have no place in the New Instrument. Audiovisual works are protected under copyright and enjoy a broad public performance right under the Berne Convention. The reference to images should be deleted.

"Rights

"As drafted, the New Instrument would give performers certain moral rights: (a) the right, where practicable, to have their names indicated on copies and when publicly performed, and (b) the right to object to distortions of their performances. Each of these rights raises serious concerns for the United States.

"Although the draft says that the moral right of paternity is only a right where practicable, it nowhere defines what is, or is not, practicable. This could lead to conflicts over what could be essentially trivial exclusions. The need for paternity rights in respect of performers in, or producers of, sound recordings has not been demonstrated. Matters such as credits can be properly dealt with by contract provisions, and do not require moral rights.

"Concerning the right of integrity, the United States has a strong tradition of parody and burlesque. If a song artist had a right to object to any distortions, he or she might object to legitimate parodies of his or her song styling. We might see the Supreme Court declare such moral rights provision unconstitutional because of its conflict with free speech.

"The provisions on the rights of performers, including moral rights, in respect of fixations of their performances expand the concept of performers rights far beyond that which is incorporated in the Rome Convention. It is uncertain how far the United States can go in harmonizing its level of performer's protection. These issues need further consideration.

"As noted in the case of works under the Berne Protocol, and equally, in the case of phonograms under the New Instrument, digital technology has greatly facilitated the ease of making and the quality of reproductions. Unlike analog recordings, digital recordings can be reproduced without degradation of sound quality. The tenth serially reproduced copy of a digital recording is indistinguishable from the original. Equally, the technology has provided new means to adapt, modify and transform phonograms or parts of phonograms. This highlights the importance of the basic reproduction right, and also emphasizes the importance of carefully considering how the adaptation right can apply for phonograms.

"Digital audio technology has also seriously changed the impact of private copying. As discussed in the items of

general concern, the United States generally supports technical means to limit unauthorized copying such as the Serial Copy Management System (SCMS) employed in the United States and Japan. The United States also supports statutory royalty payment systems for digital audio equipment and blank digital media to compensate rights owners for the copying that will inevitably take place in a digital environment.

"The New Instrument should incorporate express minima for the important issue of distribution rights. These provisions should secure the right of first public distribution on a territorial basis in all of the countries party to the Instrument. It may also be appropriate for the Instrument to include provisions regarding distribution of copies by transmission.

"It is likely that the New Instrument will also need to provide for the possibility of limited exceptions to the right of distribution and the right of importation. In that regard, we believe that the New Instrument could include a general provision based on Article 9(2) of the Berne Convention that permits limited exceptions, as long as their grant does not unreasonably prejudice the interests of the rights owners in the normal exploitation of the sound recording.

"Just as in the case of works in the Berne Protocol, an exclusive right to authorize or prohibit the importation of sound recordings even after first sale is important. Intellectual property rights are essentially territorial in nature. Permitting the rights owner to determine where and how to market a product allows the rights owner to respond to the needs of domestic markets. Just as book publishers enter into contracts that provide for low cost books in developing countries, so do sound recording producers adjust pricing to the demands of local markets. Pricing to the local market helps to discourage piracy and protects domestic rights owners as well as foreign rights owners. If the relevant interests abuse this ability to price to the market, competition laws and policies can be employed in a targeted fashion to address specific anticompetitive practices. It is essential that we ensure the ability to limit the distribution of these copies to the market for which they are priced and for which licenses are negotiated.

"An exclusive right in communications to the public and public performances for digital works, is important; however, in the United States, legislation is pending in our Congress and we are unable to take a final position on this issue.

"As we have noted, we would prefer not to duplicate TRIPS obligations in the Protocol and New Instrument, if explicit rental rights are included, they should be exclusive rights, without the possibility of a right of remuneration. However, we could agree to allow countries that, at the time of the adoption of the New Instrument, recognize an exclusive right for only one year followed by a right of remuneration for the remainder of the term of protection, to temporarily continue a regime of remuneration.

"The Instrument must provide for the possibility of limited exceptions to rights. In that regard, the New Instrument should include a general limitation that permits limited exceptions to the public performance right, as long as their grant does not unreasonably prejudice the interests of the rights owner in the normal exploitation of the sound recording. Such a provision could be based on Article 9(2) of the Berne Convention.

"Term of protection

"The New Instrument expands the international protection from 20 years to 50 years for producers of phonograms and performers. The United States supports this proposal and would be willing to consider a term of protection commensurate with that provided for copyrighted works.

"Formalities

"The United States believes that no formalities for the existence, protection, exercise or enjoyment of rights should be permitted under the New Instrument. There should also be an explicit prohibition against the requirement of conditioning rights on the formality of 'first fixation.' Some countries have argued that this is not a formality. This has led, in some instances, to a denial of national treatment, especially in the distribution of home taping royalties.

"National treatment

"With respect to national treatment, the United States believes that a comprehensive national treatment obligation is an essential element of the New Instrument. Parties to the New Instrument must grant national treatment to all members in respect of the rights provided under the Instrument and under domestic law, now and in the future, as well as in respect of the benefits flowing from those rights. Foreign and domestic rights owners must have the same possibility of the protection, exploitation and enjoyment of their rights.

"National treatment is one of the bedrock principles of the Berne Convention. Many have expressed the view that the principles and provisions of the Berne Convention should apply to the maximum extent possible in respect to the New Instrument. From the U.S. perspective, our copyright law provides no instances where eligible foreign copyright owners are treated less favorably than American owners. The United States believes the same should be true in international conventions. There are no exceptions to national treatment proposed in the text, and no exceptions should be included."

EUROPEAN COMMISSION

On September 22, 1994, the Director General of WIPO received the following letter from Mr. J.F. Mogg, Director General, Directorate General XV, Internal Market and Financial Services, European Commission, Brussels:

"At the Extraordinary Session of the Assembly of the Berne Union on 28 and 29 April, 1994, it was decided to invite the Governments of the countries members of the Berne Union and the European Commission to submit comments on the provisional draft documentation of 29 April, 1994, issued by the International Bureau in preparation for the next meetings of the Committees of Experts on a possible Protocol to the Berne Convention and possible New Instrument for the Protection of the Rights of Performers and Producers of Phonograms. This document sets out the response of the European Commission and the Member States of the European Union to that invitation.

"We believe strongly that the work of the two Committees should continue and that the necessary balance in the two instruments between copyright and neighbouring rights should be kept in mind. The cultural and creative aspects of intellectual property rights can best be regulated by bodies with a specialised interest in the subject matter such as WIPO and within a context which takes account of existing Conventions dealing with authors' rights and neighbouring rights.

"We attach particular importance to complementing and improving upon the minimum standards of protection set out in international agreements. This is in accordance with our policy of obtaining a high level of protection for authors and neighbouring rights holders. Although existing agreements provide a valuable framework, there are a number of areas where further clarifications and improvements to the protection of intellectual property rights could be made. For this reason, we believe work should continue in all areas covered by the current documentation even if, after mature reflection, it proves inappropriate to retain every topic in the final instruments.

"It is also clear that the advent of a more frequent use of digital technology for the fixation, exploitation and dissemination of works requires that the process of evaluating and updating existing Conventions be continued without further delay. We therefore consider that it is appropriate for these issues to be discussed in WIPO and that the current documentation provides an adequate basis on which they can be further examined in December 1994.

[The comments relating exclusively to the possible protocol to the Berne Convention are not reproduced here.]

"As to the appropriateness of the new draft documentation relating to the New Instrument, we continue to request the incorporation of treaty language dealing explicitly with the rights of performers in the audiovisual sector.

"Without prejudice to the above mentioned considerations, the European Commission and the Member States of the European Union reserve their position on the scope and substance of the issues under discussion in connection with both the Berne Protocol and the New Instrument."

LESOTHO

On September 23, 1994, the Director General of WIPO received the following letter from the Ministry of Tourism, Sports and Culture of the Government of Lesotho, Maseru:

"Lesotho has studied both documents and after careful consideration is of opinion that both the possible instrument for the protection of performers and producers of phonograms and a possible protocol to the Berne Convention are inevitable and timeous. Lesotho further agrees with the contents of both provisional documents and has nothing to add."

ARGENTINA

On September 26, 1994, the International Bureau received the following note verbale from the Permanent Mission of the Argentine Republic in Geneva:

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva presents its compliments to the International Bureau of the World Intellectual Property Organization (WIPO) and, with reference to the decision adopted by the Assembly of the Berne Union at its fourth extraordinary session, has the honor to convey to the said Bureau the comments of the Argentine Government on the provisional documents on 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva renews to the International Bureau of the World Intellectual Property Organization (WIPO) the assurances of its highest consideration."

The comments of the Directorate General of Copyright, Ministry of Justice, dated September 23, 1994, which accompanied the note verbale, read as follows:

"I have the honor to write to you in response to the request that we comment in writing on provisional documents relating to 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Argentine Government, through its Delegation, has expressed its constant support for the work undertaken by WIPO, and the comments given below are intended to contribute to the making of both instruments into international treaties.

"I. Matters Concerning a Possible Protocol to the Berne Convention

[The comments relating exclusively to the possible protocol to the Berne Convention are not reproduced here.]

"II. Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms

"*Scope of the new instrument.* We confirm our position, which was that the scope of the new instrument should be limited to the rights of performers in audio recordings.

"The Argentine Government agrees with the urgent need to bring up to date and otherwise modernize the protection of performers, but, as far as the new instrument is concerned, that updating should not go beyond its original objective and its *raison d'être*, which was to maintain the parallels between the updating and modernization of the rights of producers of phonograms and that of the rights of those who, like performers, are inseparably tied up with the sound recording of musical works.

"If one were to introduce the subject of performers in relation to audiovisual recordings, this would be bound to involve reconciling their rights with those of the authors of such works, which is not within the terms of reference of the new instrument.

"*Definitions.* In conformity with the stance adopted by us in the earlier discussions, we agree that it would be

appropriate to broaden the definition of *phonograms* to include fixations of digital representations of sounds.

"By the same token, it is not only justified but essential, for provisions projected towards the technology of the future, that the definition of *publication* be broadened to include the transmission of phonograms 'across electronic retrieval systems (digital media) that enable the persons connected to such systems to listen to a given phonogram at any moment, at their own discretion.'

"In our preliminary draft, Article 103 is intended to settle the rights of authors and producers in relation to such forms of digital communication.

"Moral rights of performers. The establishment of the moral rights of performers in an international instrument is a widely perceived necessity. We agree with the proposal set forth in paragraphs 35 and 36.

"Economic rights of performers

"(a) *In their live performances.* Having examined the proposal in paragraph 41, we find it adequate and consistent with the amendment to Article 58 of Law 11723 as proposed in our preliminary draft.

"(b) *In performances fixed on phonograms.* We have no objection to the recognition of rights of reproduction (63(a)), distribution (63(b)) and importation (63(c)); nevertheless we would point out that there should be a provision in the international instrument to the effect that those rights are seldom or never exercised in practice by the performers on their own initiative, neither are they a feature of the collective management of their rights, but it is rather the producers of phonograms who are responsible for the defense of their phonographic repertoires—which contain performances—against piracy, unauthorized rental or lending and parallel importation.

"With regard to the right of adaptation (63(d)), when it came under discussion, the Argentine Delegation was among those advocating a change of terminology with a view to distinguishing that right of performers from the right of the same name belonging to authors. Even the WIPO Glossary supported this view, defining it thus: 'generally understood as the modification of a preexisting work from one genre of work to another.' This definition does not apply to modification by digital manipulation of performances. The definition of the word adaptation that applies to the concept of performers' rights is the one that speaks of 'altering the work (performance) within the same genre to make it suitable for different conditions of exploitation'; this is the definition of the term adaptation that comes closest to the conception of the right that is to be protected, which is why we repeat the suggestion that the right should be called a right of *modification*, which moreover is the one used in Article 91(a) of our preliminary draft. With regard to the rights of communication to the public and broadcasting (63(e), (f) and (g)), Argentina has opted for retention of the equitable remuneration solution written into Article 12 of the Rome Convention, but with the exception of digital communication, which enables those connected to electronic retrieval systems to select phonograms at their discretion, at any time, in which case there is justification for exclusive rights.

"With regard to paragraph 64(a), we repeat that the concept of 'exhaustion rights on first sale' is foreign to our legal system, and we consider it undesirable.

"With regard to the right of rental (64(c)), we are strongly in favor of the exclusive right to authorize or prohibit, and would mention once again that the exercise of the right generally falls to the producer of phonograms.

"As for paragraph 65(a), (b) and (c), we have given our support to equitable remuneration for private copying of phonograms for the benefit of authors, performers and producers, and we support the proposed solutions.

"Rights of producers of phonograms. All the rights advocated for the producers of phonograms in paragraph 67(a), (b), (c) and (d) are recognized in Article 91 of the preliminary draft, with the right of adaptation in paragraph 61(d) called 'modification,' which is why we support its inclusion.

"With regard to the rental of phonograms, we have opted for the right to authorize or prohibit and for not including the concept of exhaustion in our legislative system. With regard to the rights of communication to the public and broadcasting, we appreciate the wisdom of limiting them to equitable remuneration, but conceding exclusive rights when the communication takes place by digital means in the form of transmission, at the request of the user, to a specified place at a set time. We reserve our position, pending closer study, on the possibility of exclusive rights in other forms of digital communication.

"The approach mentioned was adopted in Article 103 of the preliminary draft under the heading of 'rights in relation to digital distribution,' on the understanding that this form of communication was equivalent to an act of distribution.

"With regard to the proposal in paragraph 69(a), (b) and (c), we confirm our support. This right belonging to authors, performers and producers is recognized in Articles 104 to 111 of our preliminary draft.

"Exceptions to economic rights. Without prejudice to the adjournment to a later session of the Committee of the matter of what specific limitations would be peculiar to neighboring rights, the principle according to which 'all the limitations laid down in this law with respect to copyright shall likewise be applicable to the rights of performers and producers of phonograms' could already be written into the new instrument.

"Term of protection of economic rights. The term of 50 years from the end of the year in which the fixation of the performance was made seems acceptable as a minimum level of protection.

"Formalities. The proposal is endorsed under which no country may demand of the owners of rights that they comply with any formality as a condition of protection. It is however suggested that it might be appropriate for the new instrument to reproduce the provision in Article 11 of the Rome Convention and Article 5 of the Phonograms Convention, in view of the fact that the use of the circled letter P symbol has proved very useful in practice for the protection in our country of phonograms published abroad.

"Enforcement of rights. To ensure the effective protection of the rights recognized, we would consider the inclusion of appropriate judicial measures such as those proposed in the TRIPS Agreement extremely useful. Our

preliminary draft contains a chapter on criminal sanctions, another on preventive measures, another on civil proceedings and also specific guidelines on compensation for damages due to unlawful acts, all of which are somewhat above the proposed minimum levels. In particular we should mention, as indeed we already have, our Article 76(iii) which includes criminal provisions to punish the abuse of technical devices.

“Criteria of eligibility for protection. We agree with the eligibility criteria proposed in paragraph 112.”

JAPAN

On September 26, 1994, the International Bureau received the following comments from the Delegation of Japan attending the meetings of the Governing Bodies of WIPO and the Unions Administered by WIPO:

“1. The Committees of Experts on ‘A Possible Protocol to the Berne Convention’ and ‘A Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms’ have a very important task of establishing the standards of international protection of copyright and neighboring rights in the future. The Government of Japan supports the continuation of the work of the two Committees and intends to participate in this exercise in an active manner.

“2. The Government of Japan believes that the following points should be taken into account when the two

Committees examine the Provisional Documents before us :

“(1) In order to promote the protection of copyright and neighboring rights while keeping the necessary balance between them, the work of the two Committees should be continued in parallel and paying attention to their close relationship to each other.

“(2) In the work of the two Committees, the result of the TRIPS negotiation in the GATT Uruguay Round should be respected and adopted as a starting point of the exercise. Furthermore, taking advantage of the expertise of WIPO in the field of intellectual property rights, the Committees should aim at further harmonization to the extent possible.

“(3) Studies on copyright issues relating to the development of digital technology and network are under way in a number of countries including Japan. In order to ensure appropriate and internationally harmonized measures in this regard, these issues should be examined in the future work of the two Committees without delay, having due regard to the appropriate balance of interests between right holders and users of copyright works.

“3. The Government of Japan accepts the Provisional Documents as they stand as bases of the meetings of the Committees of Experts in December, although it reserves its positions on each specific item in the Documents until the discussions in the above meetings.”

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

Africa

Assistance With Training, Legislation and Modernization of Administration

Ghana. In August 1994, the International Bureau prepared and sent a draft copyright law to the government authorities at their request.

African Intellectual Property Organization (OAPI). In August 1994, Mr. Albert Makita-Mbama, *administrateur délégué* of OAPI, and another OAPI official visited WIPO and met the Director General and other WIPO officials. Measures aimed at revitalizing OAPI through cooperation with WIPO were discussed.

Arab Countries

Assistance With Training, Legislation and Modernization of Administration

Jordan. In August 1994, the Director General, accompanied by two other WIPO officials, undertook

an official visit to Jordan at the invitation of the Prime Minister. He was received by H.M. King Hussein and also discussed with the Prime Minister, other members of the Government and government officials matters relating to industrial property and copyright cooperation between Jordan and WIPO.

Asia and the Pacific

Training Courses, Seminars and Meetings

WIPO National Seminar on Copyright and Neighboring Rights (Mongolia). From August 9 to 11, 1994, WIPO organized that Seminar in Ulaanbaatar in cooperation with the Ministry of Culture of Mongolia and the Mongolian Copyright Office. The Seminar was attended by some 60 Mongolian government officials, lawyers, customs officers, authors and composers as well as by officials from the Mongolian Copyright Office. Presentations were made by two WIPO consultants from Japan and Switzerland and two WIPO officials.

Assistance With Training, Legislation and Modernization of Administration

Indonesia. In August and September 1994, a WIPO consultant from the United States of America undertook a mission to Jakarta to assist in the development of curricula and teaching materials for the teaching of intellectual property in the law faculties of universities in Indonesia. The mission was carried out under the country project financed by the United Nations Development Programme (UNDP).

Mongolia. In August 1994, a WIPO official and a WIPO consultant from Switzerland had discussions in Ulaanbaatar with the Prime Minister and the Minister of Culture of Mongolia on various matters related to the implementation of the Mongolian Copyright Law, in particular the development of a system of collective administration of copyright, as well as the possible accession of Mongolia to the Berne Convention for the Protection of Literary and Artistic Works.

Thailand. In August 1994, a WIPO consultant from Switzerland visited Bangkok and met government officials to discuss matters related to the implementation of the copyright legislation in respect of collective administration. He also participated as a speaker in a Roundtable Seminar on Collective

Administration of Copyright organized by the government authorities.

SUMMARY OF THE COPYRIGHT LEGISLATION OF THE SIX ASEAN COUNTRIES

Memorandum prepared by the International Bureau of WIPO

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Preliminary Observations

1. This is a summary analysis of the copyright legislation of the six countries of the Association of South East Asian Nations (ASEAN)—Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand—based on the legislative texts available to the International Bureau of WIPO. The list of those texts appears in Annex I. Summary tables of the legislation appear in Annex II. Annex III shows the status of accession of the said countries to the Berne Convention for the Protection

of Literary and Artistic Works. The analysis of the copyright laws has also extended to the question of their compatibility with the 1971 Paris Act of the Berne Convention.

1. Works Protected

2. National copyright laws usually contain a general definition of protected works and/or enumerate the works belonging to the various categories of works protected.

3. The types of works usually protected under national copyright laws are literary works, dramatic works, musical works, works of fine art, choreographic works, maps and technical drawings, photographic works and cinematographic works. The majority of copyright laws protect also works of applied art. Some regard phonograph records and broadcasts also as works.

4. General provisions on protected works exist in all the legislations examined. However, only the legislations of Indonesia and Thailand contain a general definition of "work."

5. In the Copyright Act of Indonesia (Article 1(c)), a work is defined as "any result of an author's work in an exclusive form, whatever it may be, in the field of science, arts and literature." In the Copyright Act of Thailand (Section 4) a "work" is defined as "a creative work in the form of literary, dramatic, artistic, musical, audio-visual, cinematographic, sound and video broadcasting work, or any other work in the literary, scientific or artistic domain."

6. Similar definitions are not provided under the other legislations examined. However, the Copyright Act of Malaysia contains general provisions on protected works (such as that "works shall be protected regardless of their quality and the purpose for which they were created" (Section 7(2)) to be protected, and that, to be protected, a work must be original and fixed (Article 7(3)). In the Philippines, the law gives an extensive enumeration of the different types of works protected (Decree No. 49, Section 2). In the Copyright Act of Singapore, protected works are not defined as such, but they are stated to include literary, dramatic, musical or artistic works (Section 7(1) ("work")).

7. As to the main categories of (typically) protected works, the following remarks can be made.

8. A "literary work" is defined in the Act of Thailand as "...every production in the literary domain, irrespective of its mode or form of expression, such as books, pamphlets, writings, printings, lectures,

sermons, addresses, speeches, sound records and/or other pictures" (Section 4). A comprehensive enumeration of "literary works" is contained in the Act of Malaysia (Article 3). The Act of Singapore does not define "literary works," but states that they include tables and compilations, expressed in words, figures or symbols, and computer programs or compilations of computer programs (Section 7(1)).

9. Provisions on *artistic works* are contained in all the legislations examined. Also, all the legislations examined contain specific provisions on the protection of *adaptations, compilations, cinematographic works and photographic works*.

10. *Computer programs* are protected as a sub-category of literary works in Malaysia (Section 3(d)) and Singapore (Section 7(1)). They are protected as a separate kind of works in Indonesia (Article 11(1)(k)) and the Philippines (Section 2(4)). No specific provisions concerning computer programs can be found in the copyright legislation of Thailand.

11. *Works of applied art* are specifically mentioned as protected works in the legislations of the Philippines (Section 2(i)) and Thailand (Section 4(7)). In Indonesia, they appear to be protected under the provisions of Article 11(1)(e), (f) and (g) of the Copyright Act. In Malaysia, the definition of "artistic work," given in Section 3 of the Copyright Act, includes "works of artistic craftsmanship including pictorial woven tissues, tapestry and articles of applied handicraft and industrial arts," and seems therefore to cover also works of applied art. The same appears to be the case for the Copyright Act of Singapore, where the definition of the term "artistic work" given in Section 7(1) encompasses works of "artistic craftsmanship" other than paintings, sculptures, drawings, engravings or photographs, buildings or models of a building.

2. Rights Protected

2.1 Economic Rights

12. Most copyright laws define the acts in relation to a work which cannot be performed by persons other than the copyright owner without the authorization of the copyright owner. Such acts, requiring the authorization of the copyright owner, normally are the following: copying or otherwise reproducing the work ("reproduction right"); performing the work in public ("performing right"); communicating the work to the public ("communication right"); broadcasting the work ("broadcasting right"); translating the work ("translation right"); adapting the work ("adaptation right"). Those rights are usually referred to as "economic rights."

13. Provisions on economic rights are contained in all the legislations examined. However, these legislations differ, to a certain extent, in terms of (i) the types of (exclusive) economic rights provided for; (ii) the scope of each of those rights; and (iii) the definition of possible limitations to those rights.

14. In general, all the legislations examined grant exclusive rights of reproduction, publication and adaptation of protected works.

15. Explicit provisions on exclusive rights to perform protected works in public are contained in the legislations of Indonesia (Articles 1(d) and 2), Malaysia (Section 13(1)), the Philippines (Section 5(c)), and Singapore (Section 26).

16. Explicit provisions on exclusive rights to broadcast protected works are contained in the Copyright Act of Indonesia (Articles 1(d) and 2), the Copyright Act of Malaysia (Section 13(1), as amended by the Copyright Act of 1990), and the Copyright Act of Singapore (Section 26).

17. As to the scope of the right of adaptation, it is noted that, while under all the other legislations examined it seems to cover adaptation in connection with all kinds of use covered by copyright protection, the Indonesian Act (Articles 1(e) and 2) seems to grant it only in connection with the reproduction of the adapted work, and the Act of Singapore (Section 26) grants it for literary, dramatic or musical works, but not for artistic works.

18. The Berne Convention contains provisions allowing limitations on exclusive rights. These provisions provide for the possibility of using protected works without having to obtain the authorization of the owner of copyright and without having to pay any remuneration for such use. Such exceptions (commonly referred to as "free use" of protected works) are included in the following Articles of the Convention: Article 9(2) (reproduction in certain special cases), Article 10 (quotations and use of works by way of illustration for teaching purposes), Article 10^{bis} (reproduction of newspaper or similar articles and use of works for the purpose of reporting current events) and Article 11^{bis}(3) (ephemeral recordings).

19. Provisions limiting the exclusive rights of the copyright owner can be found under all the legislations examined. In this connection, reference can be made to, in particular, Articles 13 to 23 of the Indonesian Act; Sections 10 to 14 of the Philippines Decree No. 49; Articles 13(2), 14, 15(2) and 16(2) of the Malaysian Act; Sections 35 to 74 and 109 to 116 of the Singapore Act; and Sections 30 to 41 of the Thai Act.

20. In certain cases, questions can be raised as to the compatibility of such provisions with the Berne Convention. For instance, Article 14(e) of the Indonesian Act permits reprographic reproduction of any work in a limited number, if "conducted by a public library, scientific or educational institution or documentation center on a noncommercial basis in the exclusive furtherance of [its] activities." It may be questioned whether this provision is compatible with Article 9(2) of the Berne Convention, insofar as it contains no restrictions concerning how much can be taken from each work.

21. Also, Section 10(2) of the Philippines Decree No. 49 permits free reproduction, translation and adaptation of works which have been made available to the public lawfully, if meant exclusively for personal and private use. This provision seems to be incompatible with Article 9(2) of the Berne Convention insofar as it contains no restrictions regarding the categories of works concerned (e.g. private reproduction of computer programs is not excluded) and how much can be taken from each work, nor does it limit the number of copies which may be reproduced, translated and adapted.

22. Finally, Section 34(1) of the Copyright Act of Thailand provides that the performance of an audiovisual or cinematographic work for the pleasure of the persons using the service of a restaurant, hotel, resort, transport station or vehicle, shall not constitute copyright infringement provided it is not made for profit purposes. This provision is not compatible with Articles 14 and 14^{bis}(1) of the Berne Convention.

23. The Berne Convention (Article 11^{bis}(3)) provides for exceptions to the exclusive right to record the work broadcast for the so-called ephemeral recordings, that is, recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. Provisions on ephemeral recordings are contained in the legislations of Indonesia (Article 17(2)), Malaysia (Section 13(2)(j)) and Singapore (Section 68). Similar provisions are absent from the other legislations examined.

2.2 Moral Rights

24. Under Article 6^{bis} of the Berne Convention, authors must be granted the right to claim authorship of their works and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, their works which would be prejudicial to their honor or reputation. These rights, which are generally known as the "moral rights" of authors, are required to be independent of the usual

economic rights and to remain with the author even after he has transferred his economic rights.

25. Moral rights are granted under the legislations of Indonesia (Article 24), Malaysia (Section 25), the Philippines (Sections 34 to 40) and Thailand (Section 15). The Act of Singapore contains only provisions on false attribution of authorship (Sections 187 to 193).

3. Duration of Protection

26. The basic duration of protection provided in the legislations examined is 50 years after the end of the year in which the author died. This corresponds to the minimum standard of protection provided for in Article 7 of the Berne Convention as far as duration of protection is concerned.

27. In addition, all the legislations examined provide for specific protection terms for certain categories of works. The said specific protection terms, which do not appear to be always compatible with the corresponding provisions of the Berne Convention, can be summarized as follows:

- (i) in the Copyright Act of Indonesia, discourses, lectures, speeches and similar works, maps and translations are only protected for a period of 50 years from their first publication (Article 27(1)). (The term required under Article 7(1) of the Berne Convention is—it is recalled—50 years after the death of the author);
- (ii) under the same Act, photographic works, computer programs, adaptations, compilations and anthologies are only protected for a period of 25 years after they have been made available to the public (Article 27(2));
- (iii) cinematographic works are protected for a period of 50 years after they have been made available to the public under the legislations of Indonesia (Article 27(1)), Malaysia (Section 22) and Singapore (Section 93). In the Philippines, the term of protection is 30 years from such event (Section 24). The latter does not appear to be compatible with the 50-year term provided for in Article 7(2) of the Berne Convention;
- (iv) anonymous and pseudonymous works are protected for a period of 50 years from the first publication under the legislations of Malaysia (Section 17(3)), the Philippines (Section 22) and Singapore (Section 29). Similar provisions exist under the legislation of Thailand; however, if the works are unpublished, the term of protection is

50 years from the date of creation (Section 16(3));

- (v) posthumous works are protected for a period of 50 years from the time of the first publication in Malaysia (Section 17(2)) and Thailand (Section 16(3)). In the Philippines, the term of protection is 50 years after the death of the author, unless covered by shorter terms (Section 23). In Singapore, posthumous works are protected for 50 years after the work has first been made available to the public (Section 28(3));
- (vi) in the Philippines, the term of protection for newspapers, periodicals, works of applied art, cinematographic or photographic works and audiovisual recordings is 30 years from publication (Section 24); however, if the material contained in periodicals and newspapers can be the subject of an independent copyright, it shall enjoy the relevant term of protection for that kind of work;
- (vii) in Thailand, works of applied art are protected for a period of 25 years from publication or, if unpublished, from creation (Section 18).

4. Compulsory Licensing

28. The Appendix to the Paris (1971) Act of the Berne Convention provides for special facilities open to developing countries concerning translation and reproduction of works of foreign origin. According to these provisions of the Berne Convention, developing countries may, under certain conditions, grant non-exclusive and non-transferable compulsory licenses in respect of (i) translation for the purposes of teaching, scholarship or research, and (ii) reproduction for use in connection with systematic instructional activities, of works protected under the Convention. These licenses, which represent exceptions to the author's exclusive rights provided for in Articles 2^{bis}, 9(2), 10(2), 10^{bis} and 30(2)(b) of the Convention, may be granted, after the expiry of certain time limits and after compliance with certain procedural steps, by the competent authority of the developing country concerned, to any national of a developing country which has availed itself of one or both of the above-mentioned faculties.

29. Except for Thailand, all the legislations examined contain provisions on non-voluntary licenses for translation and publication of works. In the case of Indonesia and the Philippines, questions can be raised as to the compatibility of those provisions with the Berne Convention. In particular, Article 15 of the Indonesian Act seems to cover translation and publication not only for teaching, scholarship or record purposes, but also "[in the interest of] devel-

opment activities." Likewise, the two-month time limit set in Section 14 of the Philippines Decree No. 49 is not compatible with the provisions of Article II(4)(a) of the Appendix to the Berne Convention.

5. Constitutive Formalities

30. Article 5(2) of the Berne Convention states that the enjoyment and exercise of copyright shall not be subject to any formality. This rule does not prevent national laws from providing for registration or other formalities that are not conditions of copyright protection (but, e.g., have the effect of *prima facie* evidentiary value).

31. Most of the laws examined do not include provisions on formalities. The Act of Indonesia provides for registration of works (Articles 29 to 38), but such registration is not a condition for copyright protection (Article 29(4)).

32. The Philippines Decree No. 49 (Section 26) contains rules concerning registration and deposit of works. Although the compliance with these rules is not a condition for copyright protection, non-observance compromises the entitlement to recover damages in an infringement suit.

6. Remedies for Infringement*

33. Remedies for infringement of copyright usually consist of civil redress, where infringers are obliged by court order to cease the infringement and to undertake reparatory action by any appropriate means. Some laws also provide for penal remedies in the form of fines and/or imprisonment. Infringing copies, benefits resulting from infringement and any implement used for the same are usually subject to seizure.

34. Other remedies which are usually available to a copyright owner in respect of infringement in common law jurisdictions are an injunction to restrain the continuation of the infringement, and damages to compensate the copyright owner for the depreciation caused by the infringement to the value of his copyright.

* The remedies in case of infringement are generally governed not only by copyright legislation but also by general civil, commercial and criminal law. It is therefore possible that the information therein is incomplete as it is necessarily based only on the copyright legislation available at WIPO.

35. Except for Thailand, all the legislations examined provide for the right to request provisional (conservatory) measures to prevent acts of infringement, and notably injunctions and seizure of infringing copies. The legislations of Indonesia, the Philippines and Singapore, however, seem to be more restrictive in that provisions on seizure do not appear to cover, in addition to infringing copies, also reproducing equipment and other implements, such as accounting books and other material which, without constituting in itself an infringement of copyright, may serve as evidence.

36. Compensation in the form of damages is provided for under all the legislations examined. However, Article 43(2) of the Indonesian Act limits such compensation only to cases of deliberate infringement.

37. Special criminal sanctions for copyright infringement are provided for in the legislations of Indonesia (Article 44), Malaysia (Section 41), the Philippines (Section 29), Singapore (Section 136) and Thailand (Sections 43 to 46).

38. Many national copyright laws contain provisions to the effect that customs authorities may be authorized, at the request of the copyright owner, to suspend the release of copies of works or other goods for which the copyright owner has valid grounds to believe that they infringe his copyright. Similar provisions are absent from the copyright legislations of Indonesia and Thailand, while according to Section 39(1)(b) of the Copyright Act of Malaysia, copyright owners can request that infringing copies be treated as prohibited goods. Also, according to Section 30(5) of the Philippines Decree No. 49, customs authorities are empowered to make rules and regulations to (i) prevent imports of infringing articles, and (ii) enable seizure of infringing articles which have been unlawfully imported.

39. Likewise, under Section 142 of the Singapore Act, the owner of the copyright in a published literary, dramatic or musical work, cinematographic film or sound recording, may notify the Trade Development Board that he objects to the importation into the country of copies of the work, cinematographic work or sound recording, made outside Singapore and the making of which was carried out without his consent. If, notwithstanding the notice, any such copies are imported into Singapore for trade or other given purposes, they may be seized and forfeited to the Government.

ANNEX I

Copyright Legislation Texts of
the Six ASEAN Countries

The foregoing text is based on the following national legislations:

Brunei Darussalam

No information is available to the International Bureau on copyright legislation in Brunei Darussalam.**

Indonesia

Copyright Act 1982 (No. 6 of April 12, 1982), as amended by Act No. 7 of September 19, 1987.

** After this study was finalized, it has been clarified that the Copyright Act 1911 of the United Kingdom is in force in Brunei Darussalam.

Malaysia

Copyright Act 1987 (No. 332 of April 30, 1987), as amended by Copyright (Amendment) Act 1990 (Act No. 775 of August 22, 1990).

Philippines

Decree No. 49 on the Protection of Intellectual Property of November 14, 1972, as amended by Decree No. 285 of September 3, 1973, and further amended by Decree No. 400 (details not available), by Decree No. 1203 of September 27, 1977, and by Decree No. 1988 of October 5, 1985.

Singapore

The Copyright Act 1987, No. 2 of 1987.

Thailand

Copyright Act, B.E. 2521 (1978).

ANNEX II

**Summary Tables of the Copyright
Legislation of the Six ASEAN Countries**

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
GENERAL DESCRIPTION OF PROTECTED WORKS	No information available	A "work" is any result of an author's work in an exclusive form, whatever it may be, in the field of science, arts and literature (Art. 1(b))	A "work" must be original and fixed (Art. 7(3)); protection is granted regardless of quality and purpose (Sec. 7(2)); infringement of copyright in some other work does not in itself exclude copyright in a given work (Sec. 7(4))	No general definition of protected works, but an extensive enumeration of different kinds of works (Sec. 2)	No general definition of protected works; protected works include literary, dramatic, musical or artistic works (Sec. 7(1)) ("work")	"Work" is defined as "a creative work in the form of literary, dramatic, artistic, musical, audiovisual, cinematographic, sound and video broadcasting work, or any other work in the literary, scientific or artistic domain" (Sec. 4)
LITERARY WORKS	No information available	Books, pamphlets and all other written works (Art. 11(1)(a)); discourses, lectures, speeches, etc. (Art. 11(1)(b))	Comprehensive enumeration given in Art. 3 ("literary work")	Enumeration given in Sec. 2(a) to (e)	No comprehensive enumeration, but reference to tables or compilations, expressed in words, figures or symbols (whether or not in a visible form) (Sec. 7(1))	A "literary work" is defined as every production in the literary domain, irrespective of its mode or form of expression (Sec. 4)
ARTISTIC WORKS	No information available	"Performances like music ... dramas, dances, ... pantomimes and broadcast works..." (Art. 11(1)(c)); "choreography, songs and musical works ... or sound recordings" (Art. 11(1)(d)); "all forms of arts and crafts such as paintings, sculptures, statues and calligraphy for which folklore protection is granted" (Art. 11(1)(a)); "betik arts" (Art. 11(1)(f)); "architectural design" (Art. 11(1)(g)); "maps" (Art. 11(1)(h))	A comprehensive enumeration of artistic works given in Art. 3; musical works are considered a separate kind of works (Sec. 7(1)(b))	Non-exhaustive enumeration of artistic works given in Sec. 2(g), (j) and (k) and specific mention of reproductions of works of art in Sec. 2(h); works of applied arts, including original ornamental designs or models for articles of manufacture (Sec. 2(i)); scientific or technical drawings (Sec. 2(k))	Enumeration of different kinds of artistic works given in Sec. 7(i); such enumeration includes works of fine art, architecture and artistic craftsmanship	Extensive enumeration of artistic works given in Sec. 4, including architecture and works of applied arts

ANNEX II (Cont'd)

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
COMPUTER PROGRAMS	No information available	Computer programs or program computers are protected as "works" under the Act (Art. 11(1)(k))	Computer programs or compilation of computer programs are considered literary works (Sec. 3)	Computer programs are considered a separate kind of works (Sec. 2(n))	Computer programs or compilations of computer programs are considered literary works (Sec. 7(l))	No specific provisions
DATA BASES	No information available	No specific provisions	No specific provisions	No specific provisions	No specific provisions	No specific provisions
ADAPTATIONS AND COMPILATIONS	No information available	Translations, interpretations, adaptations, anthologies (Art. 11(1)(l))	Defined in Sec. 3; they include translations, transformations of computer programs, arrangement of music and the making of screen versions; protected as original works (Sec. B)	Mentioned as separate kinds of works (Sec. 2(p) and (q))	"Adaptations" defined in Sec. 7(1); compilations considered as "literary work"	"Adaptations" defined in Sec. 4; the definition of literary works covers also compilations; other compilations covered by Sec. 10
CINEMATOGRAPHIC WORKS	No information available	Protected as works (Art. 11(1)(i))	Films are protected as a separate kind of works (Sec. 7(1)(d))	Cinematographic works and works produced by an analogous process (Sec. 2(m))	Covered by copyright protection as subject matter other than "works" (Sec. 83 and Sec. 88)	Covered by protection (Sec. 4) ("works" and "cinematographic works")
PHOTOGRAPHIC WORKS	No information available	Protected as works (Art. 11(1)(j))	Photographs not comprised in a film are considered artistic works (Sec. 3) ("artistic works")	Photographic works and works produced by a process analogous to photography covered (Sec. 2(1))	Photographic works protected as a kind of artistic work (Sec. 7(1))	Photographic works protected as a kind of artistic work (Sec. 4) ("artistic works")
OTHER WORKS	No information available	Broadcast works and sound recordings protected as "works" (Art. 11(1)(c) and (d))	Sound recordings and broadcasts protected as "works" (Sec. 7(1)(e) and (f)); published editions separately protected (Sec. 9)	Full scale of neighboring rights, Sec. 41 et seq.	Subject matter other than "works" covers sound recordings, cinematograph films, broadcasts, cable programs and published editions (Sec. 82 to 86)	Audiovisual works, sound or video broadcasting work covered under "works" (Sec. 4)

ANNEX II (Cont'd)

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
MORAL RIGHTS	No information available	Granted in Art. 24	Granted in Sec. 25	Granted in Sec. 34 to 40	Provisions on false attribution of authorship (Sec. 187 to 193)	In case of assignment, "the author still has a personal right to prohibit the assignee from distorting, abridging, adapting or doing any acts in relation to the work to such extent as to cause injury to the reputation or goodwill of the author" (Sec. 15)
ECONOMIC RIGHTS	No information available	Right to "publicize" and to reproduce (Art. 2); this includes rights in reading, voicing, broadcasting, or distributing in any way (Art. 1(d))	Reproduction right, right to performance, showing or playing to the public, broadcasting, communication to the public and distribution of copies to the public by sale, rental, lease or lending (Sec. 13(1))	Right to print, reprint, publish, copy, distribute, multiply, sell and make photographs, photo-engravings, and pictorial illustrations (Sec. 5(a)); right to exhibit, perform, represent, produce or reproduce the work, and to sell copies not manufactured for sale (Sec. 5(c)); to make any use or disposition of the work consistent with the law of the land (Sec. 5(d))	Rights to reproduction, publication, public performance, broadcasting, including of the work in a cable program (Sec. 26); importation, selling, letting for hire, and certain other acts of distribution of articles, which are known to be, or ought reasonably to be known to be, made without permission of the rights owner (Sec. 32 and 33)	Rights to reproduction and publication (Sec. 13); distribution of unlawfully made copies (Sec. 27)
RIGHTS OF TRANSLATION AND ADAPTATION	No information available	Reshaping the work is included under the right of reproduction (Art. 1(a))	Economic rights cover use of the work in its original or derivative form (Sec. 13(1))	Right to make translations or other versions or arrangements or adaptations (Sec. 5(b))	For literary, dramatic and musical works, right to make an adaptation of the work and to use the adaptation (Sec. 26(a)(vi) and (vii))	Right of adaptation (Sec. 13(1))
EXCEPTIONS AS CONCERNS REPRODUCTION	No information available	Reproduction in limited numbers in public libraries and certain other institutions (Art. 14(e))	"Fair dealing" for non-profit research, private study, criticism, review or the reporting of current events (Sec. 13(2)(a)); recording for private and domestic use, Sec. 13(2)(gg) and (ggg)	Free reproduction, translation and adaptation for personal and private use (Sec. 10(2))	"Fair dealing" for the purpose of research or study (Sec. 35(1)); publication of unpublished works kept in libraries (Sec. 49(1))	Free use of works for research and study (Sec. 30(1)); free reproduction, adaptation, exhibition or making available by a teacher for teaching purposes (Sec. 30(6)); subject to certain conditions, free non-profit publication by teachers or educational institutions for students (Sec. 30(7))

ANNEX II (Cont'd)

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
EPHEMERAL COPIES FOR BROADCASTING ("EPHEMERAL RECORDINGS")	No information available	Preservation of works for the broadcasters' own broadcasts: no time-limit; continued broadcasting subject to reasonable compensation (Art. 17(2))	Reproduction by governmental broadcasting services; copies can be kept for six months, or, if of exceptional documentary character, in the archives of the broadcasting service (Sec. 13 (j))	No provisions	Reproduction solely for the purpose of non-infringing broadcasting (Sec. 43); owners of rights in films are entitled to an equitable remuneration (Sec. 68)	No provisions
COPYING OF COMPUTER PROGRAMS	No information available	The owner of a computer program may make a reserve copy but solely for personal use (Art. 14(g))	The owner of the lawful copy of a computer program may reproduce it for security purposes, unless the owner of the rights has given other directions at the latest at the time of the acquisition of the original copy (Sec. 40)	No provisions	The owner of the lawful copy of a computer program may reproduce it for security purposes, unless the owner of the rights has given other directions at the latest at the time of the acquisition of the original copy, and reproduce or adapt it if this is essential for the use of the program on a computer (Sec. 39)	No provisions
NON-VOLUNTARY LICENSES	No information available	Translation and reproduction (Art. 15); radio and television broadcasting, conducted by the Government (Art. 17(1))	Translation and publication (Sec. 31)	Translation and publication (Sec. 14)	Educational copying (Sec. 52); copying in certain institutions specifically for handicapped readers (Sec. 54); mechanical reproduction of musical works (including lyrics) (Sec. 55 to 62); translation and publication (Sec. 146); printing and reproduction (Sec. 145); governmental use (Sec. 198)	No provisions

ANNEX II (Cont'd)

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
DURATION OF PROTECTION	No information available	<p><i>General duration :</i> 50 years after the death of the author ("p.m.a.") (Art. 26)</p> <p><i>Specific categories :</i> (i) discourses, lectures, speeches and similar works, maps, cinematographic works, translations and interpretations : 50 years from the first making available to the public (Art. 27(1)); (ii) photographic works, computer programs, adaptations, compilations, and anthologies : 25 years from the first making available to the public (Art. 27(2)); (iii) works the rights of which are owned or held by a legal body : 50 years from the first making available to the public (Art. 27(3))</p>	<p><i>General duration :</i> 50 years p.m.a. (Sac. 17(1))</p> <p><i>Specific categories :</i> (i) anonymous and pseudonymous works : 50 years from first publication (Sec. 17(3)); (ii) posthumous works : 50 years from first publication (Sac. 17(2)); (iii) cinematographic works : 50 years from first publication (Sac. 22); (iv) photographic works : 50 years from first publication (Sec. 21); (v) works of the Government, etc. and international bodies: 50 years from first publication (Sec. 23); (vi) published editions : 50 years from first publication (Sec. 18)</p>	<p><i>General duration :</i> 50 years p.m.a. (Sec. 21)</p> <p><i>Specific categories :</i> (i) anonymous and pseudonymous works : 50 years from first publication (Sec. 22); (ii) posthumous works : 50 years p.m.a., unless covered by shorter terms (Sec. 23); (iii) newspapers, periodicals, works of applied art, cinematographic or photographic works and audiovisual recordings : 30 years (Sac. 24); (iv) the protection of moral rights is perpetual (Sac. 39)</p>	<p><i>General duration :</i> 50 years p.m.a. (Sac. 28(2))</p> <p><i>Specific categories :</i> (i) anonymous and pseudonymous works : 50 years from first publication (Sec. 9); (ii) posthumous works : 50 years after first publication, public performance, broadcast, inclusion in a cable program or offering or exposure of records for sale, whichever event is the earliest (Sec. 28(3)); (iii) posthumous engravings : 50 years from first publication (Sac. 28(5)); (iv) cinematographic films : 50 years after first publication (Sac. 93); (v) photographs : 50 years from first publication (Sec. 28(4)); (vi) works, cinematographic films and sound recordings, published by international organizations : 50 years after first publication (Sec. 185); (vii) editions of works published by international organizations : 25 years from first publication (Sac. 185)</p>	<p><i>General duration :</i> 50 years p.m.a. (Sac. 16(1))</p> <p><i>Specific categories :</i> (i) anonymous and pseudonymous works : 50 years from first publication, or, if unpublished, from creation (Sac. 17); (ii) posthumous works : 50 years from publication (Sac. 16(3)); (iii) photographic, audiovisual, and cinematographic works : 50 years from publication, or, if unpublished, from creation (Sec. 18); (iv) works of applied art : 25 years from publication, or, if unpublished, from creation (Sec. 19); (v) works, the author of which is a legal entity : 50 years from publication, or, if unpublished, from creation (Sac. 20)</p>

ANNEX II (Cont'd)

	BRUNEI DARUSSALAM	INDONESIA	MALAYSIA	PHILIPPINES	SINGAPORE	THAILAND
REMEDIES FOR INFRINGEMENT	No information available	Seizure of infringing copies (Art. 42(1)); injunctions against continued infringing activities (Art. 42(4)); confiscation and destruction of infringing works or objects (Art. 45); civil claims, but only when the offender has deliberately caused a copyright offense (Art. 42(3) and 43(2)); imprisonment and/or fines for infringement (Art. 44); no provisions on withholding in customs	Search and seizure (Sec. 44); relief by way of damages, injunctions, accounts or otherwise (Sec. 37); forfeiture of articles, books, documents, copies or contrivances, and destruction or deliverance to the right owner thereof (Sec. 54); imprisonment and/or fines for infringements (Sec. 41); subject to written notice from the right owner, seizure and forfeiture of imported copies (Sec. 39)	Injunctions (Sec. 28(e)); delivery for impounding during the pendency of the action of articles alleged to infringe copyright (Sec. 28(c)); claim for damages (Sec. 28(b) and (e)); delivery for destruction of infringing copies and certain implements (Sec. 28(d)); imprisonment and/or fines for infringements (Sec. 29); customs authorities empowered to make rules and regulations to prevent imports of infringing articles (Sec. 30(5))	Search and seizure (Sec. 136(9)); delivery and destruction of infringing copies and contrivances (Sec. 136(8)); injunctions, damages or accounts of profit (Sec. 119(2)); delivery to the plaintiff of infringing copies and contrivances, damages (Sec. 120); imprisonment and/or fines for infringements (Sec. 136); subject to written statement from the right owner, seizure and forfeiture of imported copies (Sec. 142)	No provisions or provisional measures; claim for civil and punitive damages (Sec. 49); delivery to the owner of rights of infringing copies and forfeiture of contrivances (Sec. 47); imprisonment and fines for infringements (Sec. 43 to 46); no provisions concerning withholding in customs

ANNEX III

**Status of Accession of the Six ASEAN Countries
to the Berne Convention for the Protection of
Literary and Artistic Works**

Malaysia: On October 1, 1990, became party to the Convention as revised at Paris in 1971.

Philippines: On August 1, 1951, became party to

the Convention as revised at Brussels in 1948; on July 16, 1980, it also became party to the Convention as revised at Paris in 1971, as far as Articles 22 to 38 are concerned.

Thailand: On July 17, 1931, became party to the Convention as revised at Berlin in 1908; on December 29, 1980, it also became party to the Convention as revised at Paris in 1971, as far as Articles 22 to 38 are concerned.

Latin America and the Caribbean

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

Handuras. In August 1994, the International Bureau prepared and sent to the government authori-

ties, at their request, comments on the Law on Copyright and Neighboring Rights.

Trinidad and Tobago. In August 1994, the International Bureau prepared and sent to the government authorities, at their request, a draft copyright law.

Development Cooperation (in General)

Training Courses, Seminars and Meetings

WIPO/Sweden Training Course on Copyright and Neighboring Rights. From August 8 to 18, 1994, WIPO organized that Course in Stockholm, in cooperation with the Government of Sweden and with the assistance of the Swedish International Development Authority (SIDA). Eleven government officials from China, Ethiopia, the Gambia, Ghana, Jamaica,

Kenya, Malawi, Nigeria, Trinidad and Tobago and the United Republic of Tanzania attended the Course. Presentations were made by a government official from Sweden, a representative of an inter-governmental organization, Swedish experts from various non-governmental organizations and two WIPO officials. At the end of the Course, the participants visited the headquarters of WIPO in Geneva and met WIPO officials.

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

United Nations

United Nations Administrative Committee on Co-ordination (Organizational Committee) (ACC(OC)). In late August and early September 1994, a WIPO official attended, in New York, an OC meeting to prepare for the second regular session in 1994 of the ACC, to be held in New York in September 1994.

United Nations Consultative Committee on Administrative Questions (Financial and Budgetary Questions) (CCAQ(FB)). In late August and early September 1994, a WIPO official attended the 81st session of this Committee, which took place in New York.

Other Organizations

International Association of Young Lawyers (AIJA). In August 1994, a representative of AIJA had discussions with WIPO officials in Geneva on WIPO's and AIJA's activities in connection with the arbitration of intellectual property disputes.

Toyama University (Japan). In August 1994, a professor from Toyama University had discussions with WIPO officials in Geneva on the arbitration of intellectual property disputes.

University of New York School of Continuing Education. In August 1994, a WIPO official briefed a group of 27 students from this University on WIPO and its activities. The group was visiting the United Nations system of organizations in Geneva.

Calendar of Meetings

WIPO Meetings

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

1994

December 5 to 9 (Geneva)

Committee of Experts on a Possible Protocol to the Berne Convention (Fourth Session)

The Committee will continue to examine the question of the preparation of a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works.

Invitations: States members of the Berne Union, the European Commission and, as observers, States members of WIPO not members of the Berne Union and certain organizations.

- December 9 (a.m.) (Geneva)** **Information Meeting for Non-Governmental Organizations on Intellectual Property**
Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright and their comments on the same will be invited and heard.
Invitations: International non-governmental organizations having observer status with WIPO.
- December 12 to 16 (Geneva)** **Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (Third 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 European Commission and, as observers, certain organizations.
- 1995**
- April 5 and 6 (Melbourne, Australia)** **Symposium on the International Protection of Geographical Indications (organized by WIPO in cooperation with the Government of Australia)**
The Symposium will deal with the protection of geographical indications (appellations of origin and other geographical indications) both on the national and multilateral level and, in particular, with the coexistence of geographical indications and trademarks.
Invitations: Governments, selected intergovernmental and non-governmental organizations and any member of the public (against payment of the registration fee).
- May 8 to 12 (Geneva)** **Consultative Meeting for the Preparation of the Second Part of the Diplomatic Conference for the Conclusion of the Patent Law Treaty**
The meeting will discuss the preparation of the second part of the said Diplomatic Conference.
Invitations: States members of WIPO or the Paris Union and, as observers, certain organizations.
- May 29 to June 2 (Geneva)** **Committee of Experts on the Settlement of Intellectual Property Disputes Between States (Seventh Session)**
The Committee of Experts will continue the preparations for a possible treaty on the settlement of intellectual property disputes between States. In particular, the Committee of Experts will consider the question of the relationship between the dispute settlement system to be established by the proposed Treaty and other dispute settlement systems, including the dispute settlement system to be established as a result of the Uruguay Round of GATT.
Invitations: States members of WIPO or party to treaties administered by WIPO not members of WIPO and, as observers, certain organizations.
- September 25 to October 4 (Geneva)** **Governing Bodies of WIPO and the Unions Administered by WIPO (Twenty-sixth 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 1995, the Governing Bodies will, *inter alia*, review and evaluate WIPO's activities undertaken since July 1994, and decide the program and budget of the International Bureau for the 1996-97 biennium.
Invitations: States members of WIPO and the Paris and Berne Unions and, as observers, other States members of the United Nations and certain organizations.

