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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
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**DIPLOMATIC CONFERENCE  
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

**Geneva, December 7 to 20, 2000**

**BASIC PROPOSAL  
FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT  
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES  
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE**

*prepared by the Chairman of the Standing Committee on Copyright and Related Rights*

Memorandum prepared by the Chairman of the Standing CommitteeThe Steps Towards the Diplomatic Conference

1. The international protection of audiovisual performances was among the subjects dealt with at the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, which took place in Geneva from December 2 to 20, 1996, and it had already been discussed during the preparatory steps towards the Diplomatic Conference in the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms. The Basic Proposal for the Substantive Provisions of the Treaty for the Protection of the Rights of Performers and Producers of Phonograms included an alternative solution extending the protection accorded to performers to audiovisual performances as well. However, the WIPO Performances and Phonograms Treaty (hereinafter referred to as “the WPPT”) that was adopted by the Diplomatic Conference did not extend the protection of performers to their performances fixed in audiovisual fixations.

2. Instead, the Diplomatic Conference adopted the following Resolution concerning Audiovisual Performances:

“The Delegations participating in the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions in Geneva,

“*Noting* that the development of technologies will allow for a rapid growth of audiovisual services and that this will increase the opportunities for performing artists to exploit their audiovisual performances that will be transmitted by these services;

“*Recognizing* the great importance of ensuring an adequate level of protection for these performances, in particular when they are exploited in the new digital environment, and that sound and audiovisual performances are increasingly related;

“*Stressing* the urgent need to agree on new norms for the adequate legal international protection of audiovisual performances;

“*Regretting* that, in spite of the efforts of most Delegations, the WIPO Performances and Phonograms Treaty does not cover the rights of performers in the audiovisual fixations of their performance;

“*Call* for the convocation of an extraordinary session of the competent WIPO Governing Bodies during the first quarter of 1997 to decide on the schedule of the preparatory work on a protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances, with a view to the adoption of such a protocol not later than in 1998.”

3. The Assemblies of Member States of WIPO and the Unions administered by WIPO decided in their March 1997 sessions to establish a Committee of Experts on a Protocol concerning Audiovisual Performances (document AB/XXX/4 Rev.). The Director General of WIPO convened the Committee of Experts in two sessions, the first in September 1997 and the second in June 1998.

4. The committee structure of WIPO was revised after the March 1998 sessions of the Assemblies of Member States of WIPO as part of the reform of the governance structure of the Organization. The system of Committees of Experts was replaced by Standing Committees, and the Standing Committee on Copyright and Related Rights (hereinafter referred to as “the SCCR”) was established (document A/32/INF/2). The SCCR was convened in four sessions, the first in November 1998, the second in May 1999, the third in November 1999, and the fourth in April 2000.
5. The International Bureau of WIPO (hereinafter referred to as “the International Bureau”) convened regional consultation meetings, held in the regions or in Geneva, before several sessions of the aforementioned Committees.
6. The discussions in the Committee of Experts were first based on memoranda prepared by the International Bureau containing information about existing national and regional legislation concerning audiovisual performances and information on the *de facto* situation, particularly on contractual practices. Following the recommendations of the Committee of Experts, and then the SCCR, the Director General of WIPO invited the Governments of WIPO Member States and the European Community to submit proposals in treaty language for discussion at the sessions of the Committees.
7. As a result of these invitations from the Director General, the International Bureau received the written proposals and comments listed in paragraphs 21 to 26 below. The International Bureau prepared several compendia and comparative tables containing proposals and comments received by respective deadlines to facilitate the work of the Committees. These proposals and comments, as well as reports from the regional consultation meetings, formed the basis of the work of the Committees.
8. Following the recommendations of the third session of the SCCR, a series of regional consultations, a special (fourth) session of the SCCR, a meeting of a Preparatory Committee, and the General Assembly of WIPO were convened in Geneva from April 10 to 14, 2000.
9. At its session of April 11, 12 and 14, 2000, the SCCR adopted the following recommendations:

“The Standing Committee on Copyright and Related Rights:

“*considering* that the Standing Committee on Copyright and Related Rights at its third session, from November 16 to 20, 1999, recommended that the present special session of the Standing Committee should be convened to discuss remaining issues and to assess progress of work with a view to a possible diplomatic conference in December 2000, which would consider an international instrument on the protection of audiovisual performances,

“*considering* that the work at the end of the present session of the Standing Committee is sufficiently advanced, taking into account the identification and analysis of substantive issues to be addressed in the international instrument, the progress made in these substantive issues during the deliberations in the present and previous sessions of the Standing Committee; and considering that the state of discussions concerning the international instrument allows the diplomatic conference to be held and negotiation to take place at that level,

“unanimously agreed on the following recommendations:

“1. Administrative and Final Provisions

“the Preparatory Committee for the WIPO Diplomatic Conference on the Protection of Audiovisual Performances, meeting in Geneva on April 12 and 14, 2000, should request the International Bureau to prepare a basic proposal for administrative and final provisions of the international instrument, containing alternative solutions for a protocol to the WIPO Performances and Phonograms Treaty and for a separate treaty building on the provisions of the WIPO Performances and Phonograms Treaty,

“2. Basic Proposal

“the basic proposal for the substantive provisions of the international instrument for the diplomatic conference will be prepared by the Chairman of the session of the Committee. The Chairman will be assisted by the WIPO International Bureau,

“the draft should be published and circulated by the WIPO International Bureau to the States, intergovernmental and non-governmental organizations to be invited to the diplomatic conference by August 1, 2000,

“3. Regional Consultations

“the International Bureau should organize regional consultation meetings, in Africa, the Arab countries, Asia and the Pacific, Latin America and the Caribbean and in certain countries of Europe and Asia, during the months of September, October and November, and regional consultation meetings at the location of the diplomatic conference on December 5 and 6, 2000,

“4. Diplomatic Conference

“the diplomatic conference should be held from December 7 to 20, 2000.”

10. At its meeting on April 12 and 14, 2000, the Preparatory Committee requested the International Bureau to prepare a Basic Proposal for Administrative and Final Clauses of the International Instrument, containing alternative provisions for a Protocol to the WPPT and for a separate treaty that would build on the provisions of the WPPT. The Preparatory Committee considered and approved the draft Rules of Procedure of the Diplomatic Conference, considered other necessary preparatory aspects of the Conference, and recommended that the Diplomatic Conference be convened from December 7 to 20, 2000.

11. The WIPO General Assembly considered at its session on April 13 and 14, 2000, the recommendations of the SCCR and approved the convening of a Diplomatic Conference as recommended.

### About the Basic Proposal

12. The present set of draft substantive provisions of the Basic Proposal for an Instrument on the Protection of Audiovisual Performances (set forth in this document) has been prepared by the Chairman of the session of the SCCR following the above mentioned decisions.

13. There are 20 Articles preceded by a Preamble in the Basic Proposal. Each provision is preceded by explanatory Notes.

14. The purpose of the explanatory Notes is:

- (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions,
- (ii) to indicate the reasoning behind proposals, and
- (iii) to include references to proposals and comments made at sessions of the Standing Committee, as well as references to models and points of comparison found in existing treaties.

15. In the Notes concerning each Article that contains provisions dealing with substantive issues that are also dealt with in the WPPT, the corresponding Article of the WPPT is reproduced in the Notes in a box at the bottom of the page in order to facilitate the assessment and comparison of the proposed Article with the corresponding provisions of the WPPT.

16. The present Basic Proposal has been prepared on the basis of the proposals made during the work of the Committee of Experts on a Protocol concerning Audiovisual Performances and the SCCR and taking into account the discussions in these Committees. The submitted proposals have been carefully studied, and portions of them appear in several places in the proposed Instrument, sometimes in a reformulated or combined format. Additional elements have been introduced where necessary, but not all elements of all proposals are reflected in the proposed Instrument. Because of the large number of proposals there is no indication in the Notes which delegation submitted which proposal.

17. Alternative solutions are proposed in instances where different solutions have been proposed by delegations during the work of the aforementioned Committees and it has been considered appropriate to present some alternatives for the consideration of the Diplomatic Conference. The number of proposed alternatives has, however, been kept as limited as possible. Alternatives have been designated in the text using capital letters (A), (B), (C), etc., in accordance with Rule 29(1)(b) of the draft Rules of Procedure for the Diplomatic Conference.

18. In the proposed Instrument all provisions are spelled out. This includes those provisions that could be formulated as references to the WPPT making certain provisions of that Treaty applicable *mutatis mutandis* in respect of the protection provided for in the proposed Instrument. This method of presentation has been chosen for the reasons of legal precision, comprehensiveness and readability.

19. This solution does not, however, preclude that at the end of the deliberations certain parts of the proposed Instrument would be amended to become references to the WPPT. The most evident candidates of such provisions appear to be Article 5 (Moral Rights), Article 6 (Economic Rights of Performers in their Unfixed Performances), Article 7 (Right of

Reproduction), Article 8 (Right of Distribution), Article 9 (Right of Rental), Article 10 (Right of Making Available of Fixed Performances), Article 13 (Limitations and Exceptions), Article 14 (Term of Protection), Article 15 (Obligations concerning Technological Measures), Article 16 (Obligations concerning Rights Management Information), Article 17 (Formalities), and Article 20 (Provisions on Enforcement of Rights).

#### Proposals Presented During the Preparatory Stages

20. In the present Basic Proposal reference is often made to the working documents presented during the preparatory stages in the aforementioned Committees and to the positions and proposals presented by the Member States, regional groups of Member States, and the European Community and its Member States in the sessions of the Committees.

21. The International Bureau presented to the first session of the Committee of Experts on September 15, 16 and 19, 1997, the following working documents:

AP/CE/1/2: Existing National and Regional Legislation concerning Audiovisual Performances

AP/CE/1/3: Information Received from Member States of WIPO concerning Audiovisual Performances

AP/CE/1/3 Add.: Information Received from Member States of WIPO and from the European Community and Its Member States

22. For the second session of the Committee of Experts from June 8 to 12, 1998, the following documents were submitted:

AP/CE/2/2: Proposals and Other Submissions Received from WIPO Member States and the European Community

AP/CE/2/3: Proposal from the Republic of Korea

AP/CE/2/4: Proposal from the United States of America

AP/CE/2/4 Corr.: Corrigendum to Document AP/CE/2/4

AP/CE/2/5: Proposal from Algeria, Burkina Faso, Cameroon, Ghana, Kenya, Malawi, Mali, Morocco, Namibia, Nigeria, Senegal, South Africa, Sudan, Togo and Zambia

AP/CE/2/6: Report of the Regional Consultation Meeting for Latin America and the Caribbean, held in Quito from May 4 to 6, 1998

AP/CE/2/7: Comparative Table of Proposals Received by June 3, 1998

AP/CE/2/8: Report of the Regional Consultation Meeting for Asia and the Pacific, held in New Delhi from May 20 to 22, 1998

23. For the first session of the SCCR from November 2 to 10, 1998, the following documents were submitted:

SCCR/1/INF/2: Proposals and Other Submissions Received from WIPO Member States and the European Community

SCCR/1/4: Submissions Received from Member States of WIPO

SCCR/1/5: Report on the Regional Consultation Meeting for Asia and the Pacific, held in Shanghai from October 14 to 16, 1998

- SCCR/1/6: Submission by Brazil Relating to the Report on the Regional Consultation Meeting for Latin American and the Caribbean (Document SCCR/1/4)
- SCCR/1/7: Report on the Regional Consultation Meeting for Latin American and Caribbean Countries, Geneva, October 29 and 30, 1998
- SCCR/1/8: Submission by Canada

24. For the second session of the SCCR from May 4 to 11, 1999, the following documents were submitted:

- SCCR/2/2: Report on the Regional Consultation Meeting for Latin American and Caribbean Countries, Geneva, 6 November 1998
- SCCR/2/3: Submission by the European Community and Its Member States
- SCCR/2/4: Agenda Item 4: Protection of Audiovisual Performances, Comparative Table of Proposals Received by February 28, 1999
- SCCR/2/9: Proposal by India
- SCCR/2/13: Proposal by Senegal

25. For the third session of the SCCR from November 16 to 20, 1999, the following documents were submitted:

- SCCR/3/3: Supplementary Explanation on Japan's Proposal for a Protocol to the WIPO Performances and Phonograms Treaty concerning Audiovisual Performances
- SCCR/3/5: Submission of the United Republic of Tanzania
- SCCR/3/7: Submission of the United States of America
- SCCR/3/8: Additional Proposal of Japan concerning Moral Rights
- SCCR/3/9: Submission of Canada
- SCCR/3/10: Report on the Regional Consultation of Central European and Baltic States on the Protection of Audiovisual Performances, the Protection of Databases and the Protection of the Rights of Broadcasting Organizations held in Geneva on November 15, 1999

26. For the fourth session of the SCCR on April 11, 12 and 14, 2000, the following documents were submitted:

- SCCR/4/2: Submission on behalf of the European Community and its Member States on the protection of Performers' Rights in their Audiovisual Performances
- SCCR/4/3: Submission of the United States of America on the new Article 4
- SCCR/4/4: Submission of the United States of America on Transfer
- SCCR/4/5: Report on the Regional Consultation of Central European and Baltic States on the Protection of Audiovisual Performances, held in Geneva, on April 10, 2000
- SCCR/4/7: Report on the Regional Consultation Meeting for Countries of Latin America and the Caribbean, Geneva on April 12, 2000
- SCCR/4/8 Corr.: Proposal by certain African Countries relating to transfer

#### The Agreed Statements Adopted Together with the WPPT

27. A number of agreed statements concerning different provisions of the WPPT were adopted by the Diplomatic Conference of 1996. The Diplomatic Conference of 2000 could consider the adoption of an agreed statement referring to those of the WPPT:

"The agreed statements with respect to the WIPO Performances and Phonograms Treaty adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, December 2 to 20, 1996, are *mutatis mutandis* as valid concerning the [Protocol/Treaty] as they are as regards the WPPT."

The specific agreed statements that might be relevant to the proposed Instrument are reproduced in the following manner: the text of the agreed statement is found in paragraphs 28 to 32 and a reference to these paragraphs is made in the Notes associated with each affected Article.

28. To be considered in the context of Article 1(3) of the proposed Instrument. The first part of the agreed statement concerning Article 1(2) of the WPPT reads as follows: "It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and *vice versa*." The second part of the agreed statement reads as follows: "It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer or producer of phonograms beyond those required to be provided under this Treaty."

29. To be considered in the context of Articles 7 and 13 of the proposed Instrument. The agreed statement concerning Articles 7, 11 and 16 of the WPPT reads as follows: "The reproduction right, as set out in Articles 7 and 11, and the exceptions permitted thereunder through Article 16, fully apply in the digital environment, in particular to the use of performances and phonograms in digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."

30. To be considered in the context of Articles 8 and 9 of the proposed Instrument. The agreed statement concerning Articles 2(e), 8, 9, 12, and 13 of the WPPT reads as follows: "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects."

31. To be considered in the context of Article 13 of the proposed Instrument. According to the agreed statement concerning Article 16 of the WPPT the agreed statement concerning Article 10 of the WIPO Copyright Treaty (hereinafter referred to as "the WCT") is applicable *mutatis mutandis* to Article 16 of the WPPT. The first part of the agreed statement concerning Article 10 of the WCT reads as follows: "It is understood that the provisions of Article 10 permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital environment." The second part reads as follows: "It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."



32. To be considered in the context of Article 16 of the proposed Instrument. According to the agreed statement concerning Article 19 of the WPPT, the agreed statement concerning Article 12 of the WCT is applicable *mutatis mutandis* to Article 19 of the WPPT. The first part of the agreed statement concerning Article 12 of the WCT reads as follows: "It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration." The second part reads as follows: "It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty."



*Alternative A*

**Draft Protocol  
to the WIPO Performances and Phonograms Treaty  
concerning Audiovisual Performances**

*Alternative B*

**Draft  
WIPO Audiovisual Performances Treaty**

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Article 8: Right of Distribution

Article 9: Right of Rental

Article 10: Right of Making Available of Fixed Performances

Article 11: Right of Broadcasting and Communication to the Public

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Article 13: Limitations and Exceptions

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Article 15: Obligations concerning Technological Measures

Article 16: Obligations concerning Rights Management Information

Article 17: Formalities



Article 18: Reservations

Article 19: Application in Time

Article 20: Provisions on Enforcement of Rights

## Notes on the Title and the Preamble

0.01 During the preparatory stages no agreement was reached about the nature of the new instrument on the protection of audiovisual performances. During the preparations several delegations proposed that the new instrument should be subordinate to the WPPT and consequently entitled "Protocol." Some other delegations proposed that the new instrument should be free-standing and should be entitled "Treaty." In order to reflect both options, two alternatives have been presented in the beginning of the proposal for the *title* of this Instrument. On the cover page of this document the generic expression "Instrument" has been used.

0.02 In *Alternative A* the title "Protocol to the WIPO Performances and Phonograms Treaty concerning Audiovisual Performances" has been proposed. In *Alternative B* the title "WIPO Audiovisual Performances Treaty" has been proposed following the model adopted in the context of the WPPT and the WCT. The choice of these alternatives is also reflected in Article 1 where the relation of the proposed Instrument to other conventions and treaties is set forth.

0.03 The choice between these two alternatives is left to the Diplomatic Conference. Some considerations on the significance and the factors affecting this choice are presented in the Notes on Article 1.

0.04 To simplify the method of presentation, the expression "Treaty" has been used throughout the substantive provisions of this Basic Proposal. If *Alternative A* is chosen by the Diplomatic Conference the word "Treaty" shall be replaced by the word "Protocol" in all provisions except in Article 1(1).

0.05 The *Preamble* sets forth the objective of the proposed Instrument and the main arguments and considerations relating thereto. The first four paragraphs follow the model and the language of the Preamble of the WPPT.

0.06 The *first paragraph* of the Preamble expresses the most general objective of the proposed Instrument. It follows the first paragraph of the preamble of the WPPT which took its inspiration from the first paragraph of the preamble of the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the Berne Convention").

0.07 The *second paragraph* pronounces the recognition that new international rules are needed to achieve the objective identified in the first paragraph.

### Preamble of the WPPT

#### **The Contracting Parties,**

**Desiring** to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

**Recognizing** the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, social, cultural and technological developments,

[continues]

**Preamble**

**The Contracting Parties,**

**Desiring** to develop and maintain the protection of rights of performers in their audiovisual performances in a manner as effective and uniform as possible,

**Recognizing** the need to introduce new international rules in order to provide adequate solutions to the questions raised by economic, cultural and technological developments,

[Preamble continues]

[Notes on the Title and the Preamble, continued]

0.08 The *third paragraph* acknowledges the connection of the proposed Instrument to the evolution of the overall environment of the intellectual property system: the development and convergence of information and communication technologies. The proposed Instrument contains certain provisions on "traditional issues" and it also includes solutions to questions raised by technological developments in the same way as the WPPT and the WCT, which often are called the "Internet Treaties" of WIPO. The proposed Instrument updates and is a complement to the system of conventions and treaties of WIPO in the field of copyright and related rights.

0.09 The *fourth paragraph* pronounces the need to maintain a balance between the rights of performers and the larger public interest in the same way as the corresponding paragraph in the WPPT and the WCT.

0.10 The *fifth paragraph* contains a reference to the scope of protection of the WPPT.

0.11 The *sixth paragraph* contains a reference to the Resolution adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions held in Geneva from December 2 to 20, 1996 (hereinafter referred to in these Notes as "the Diplomatic Conference of 1996").

[End of Notes on the Title and the Preamble]

### Preamble of the WPPT

[continued]

**Recognizing** the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,  
**Recognizing** the need to maintain a balance between the rights of performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

**Have agreed** as follows:



[Preamble, continued]

**Recognizing** the profound impact of the development and convergence of information and communication technologies on the production and use of audiovisual performances,

**Recognizing** the need to maintain a balance between the rights of performers in their audiovisual performances and the larger public interest, particularly education, research and access to information,

**Recognizing** that the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996, does not extend protection to performers in respect of their audiovisual performances,

**Referring** to the Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference on Certain Copyright and Neighboring Rights Questions on December 20, 1996,

**Have agreed** as follows:

[End of Preamble]

## Notes on Article 1

1.01 The provisions of *Article 1* concern the nature of the proposed Instrument and define its relation to other conventions and treaties. In paragraph (1) and paragraph (4) two alternatives are presented. These alternatives are a continuation of the alternatives presented in the context of the title of the proposed Instrument. Because of the link between paragraph (1) and paragraph (4) and for ease of presentation these paragraphs are shown adjacent to each other under the alternatives in an order that does not follow their final intended order.

1.02 According to *paragraph (1)* in *Alternative A*, the proposed Instrument would constitute a Protocol to the WPPT. On the other hand, *paragraph (1)* in *Alternative B<sub>2</sub>*, which contains no text, is presented for the Diplomatic Conference in order to make it possible to consider the proposed Instrument as a free-standing treaty. In this case there would be no need for a provision defining the nature of the Instrument.

1.03 According to *paragraph (4)* in *Alternative A*, the proposed Instrument would not have a connection with any treaty other than the WPPT. The draft clause under *Alternative A* would be suitable both for a Protocol to the WPPT and for a Treaty linked to the WPPT. *Paragraph (4)* in *Alternative B* is formulated in view of a possible free-standing Treaty.

1.04 There is some legal authority indicating that the choice of designation of the proposed Instrument does not carry any specific significance. Either a "Protocol" or a "Treaty" can be linked to another treaty. Either a "Protocol" or a "Treaty" may be built on the principles of another treaty, and even incorporate by reference parts of another treaty. A good example of this is the WCT and its references to the Berne Convention.

1.05 One of the main reasons to call the proposed Instrument a "Protocol" seems to be the fact that this designation was used in the Resolution concerning Audiovisual Performances adopted by the Diplomatic Conference of 1996, and most delegations have continued to use this designation during the preparatory stages. The use of the designation "Protocol" in 1996, and perhaps also today, may be based on the view that it would be politically and technically easy to add protection of audiovisual performances to the WPPT by a protocol. Several provisions of the WPPT would then be incorporated *mutatis mutandis* into the proposed Instrument.

### **Article 1 of the WPPT Relation to Other Conventions**

- (1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").
- (2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

**Article 1**

**Relation to Other Conventions and Treaties**

*Alternative A*

(1) This Treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty done in Geneva, December 20, 1996.

[Paragraphs (2) and (3) follow on page 21]

(4) This Treaty shall not have any connection with treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.

*Alternative B*

(1) [No such provision]

[Paragraphs (2) and (3) follow on page 21]

(4) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

[Article 1 continues]

[Notes on Article 1, continued]

1.06 However, some reasons speak in favor of designating the proposed Instrument as a Treaty. First, the WPPT is mainly confined to aural performances or performances fixed in phonograms, whereas the scope of the proposed Instrument is in the audiovisual field and thus outside of the scope of the WPPT: the protected subject matter is different in the two Instruments. Second, the proposed Instrument does not supplement or amend the WPPT, nor does it extend or modify the protection under the WPPT, but adds a completely new area of protection.

1.07 It should also be noted that irrespective of whether the proposed Instrument will be called a Protocol or a Treaty, it is a treaty under international law. According to Article 2(1)(a) of the Vienna Convention on the Law of Treaties, "treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments *and whatever its particular designation.*" [emphasis added]

1.08 *Paragraph (2)* contains a "WPPT and Rome safeguard" clause modeled after Article 2.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to in these Notes as "the TRIPS Agreement"). The same formula was used in the "Rome safeguard" clause of Article 1(1) in the WPPT.

1.09 *Paragraph (3)* contains a "non-prejudice" clause concerning the protection of literary and artistic works following the model of Article 1 of the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to in these Notes as "the Rome Convention"). The Diplomatic Conference of 1996 formulated Article 1(2) of the WPPT according to the same pattern.

1.10 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 1(2) of the WPPT which is relevant for the consideration of Article 1(3) of the proposed Instrument (see paragraph 28 of the Memorandum).

[End of Notes on Article 1]

[Article 1, continued]

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Performances and Phonograms Treaty or the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961.

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

[End of Article 1]

## Notes on Article 2

2.01 *Article 2* contains definitions of the key terms used in the proposed Instrument. This follows the tradition of the treaties in the field of neighboring rights, or rights related to copyright.

2.02 *Item (a)* defines the term "performers." It reproduces the language of Article 2(a) of the WPPT. The definition used in the WPPT differs from that of the Rome Convention only in two respects: it adds the term "interpret" to the list of types of performances, and it adds "expressions of folklore" to the scope of performances.

2.03 During the work of the Committee of Experts and the SCCR proposals were made to exclude "extras" from the protection of the proposed Instrument. It was also proposed that the definition should expressly exclude "performers whose performances are casual or incidental in nature such as extras." In general, "extras," "ancillary performers" or "ancillary participants" do not qualify for protection because they do not, in the proper sense, perform literary or artistic work or expression of folklore. Thus, it appears that no explicit provision concerning extras is necessary in the proposed Instrument. Accordingly, when implementing the proposed Instrument, Contracting Parties may determine in their national legislation the threshold at which a person becomes a performer entitled to protection. When making this determination, Contracting Parties may take into consideration established industry practice and, *inter alia*, whether a person has a speaking role or forms a background to the acting.

2.04 The definition of "audiovisual performances" in *item (b)* is self-explanatory and is built on the definition of "audiovisual fixation" in the next item. The definition also makes clear that the term "performance" may be used alone in the proposed Instrument to mean audiovisual performance.

2.05 *Item (c)* defines the term "audiovisual fixation." Its structure follows the definition of "fixation" in the WPPT, and all the technical elements ("embodiment," "representations," "from which they can be perceived, reproduced or communicated" and "through a device") that are not dictated by the different subject matter addressed by the proposed Instrument are identical. What is embodied in an audiovisual fixation must be "moving images, whether or not accompanied by sound or by the representations thereof." The expression "moving images" should be understood in a broad sense covering any visual material capable of

### Article 2 of the WPPT Definitions

For the purposes of this Treaty:

- (a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;
- (b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds, other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (c) "fixation" means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;

[continues]

## **Article 2**

### **Definitions**

For the purposes of this Treaty:

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

(b) "audiovisual performances" (hereinafter "performances") mean performances that can be embodied in audiovisual fixations;

(c) "audiovisual fixation" means the embodiment of moving images, whether or not accompanied by sound or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;

[Article 2 continues]

[Notes on Article 2, continued]

incorporating or recording of visual material using whatever means and whatever medium. It should be clear that the perceiving, reproducing or communicating may take place only with the aid of a machine or device. Finally, it should be pointed out that, as in the corresponding definition in the WPPT, the definition of embodiment here does not qualify or quantify the duration of the life of the embodiment necessary to result in fixation. There are no conditions regarding the requisite permanence or stability of the embodiment. In the proposed Instrument the expression "audiovisual fixation" is used to refer to any first fixation and any fixation embodied in a subsequent copy. In addition to audiovisual performances, a given carrier may incorporate several other different types of protected subject matter, including but not limited to cinematographic or audiovisual works.

2.06 The definition of "broadcasting" in *item (d)* follows the definition found in Article 2 of the WPPT except that it replaces, for the purposes of the proposed Instrument, the expression "of sounds or of images and sounds" by "of sounds or images or images and sounds." The first sentence of the definition is built on the prototype definition of broadcasting found in Article 3(f) of the Rome Convention. Two other parts of the definition repeat the modernizing elements of the notion of broadcasting introduced in the WPPT. Their function is intended to remove uncertainties concerning the interpretation. For the same reason as in the WPPT, there is no definition of "rebroadcasting" in the proposed Instrument. According to Article 3(g) of the Rome Convention, "rebroadcasting" means the simultaneous broadcasting by one broadcasting organization of a broadcast of another broadcasting organization. Rebroadcasting is broadcasting.

2.07 The definition of "communication to the public" in *item (e)* is tailored for the specific purposes of Articles 6 and 11 of the proposed Instrument. Like the corresponding definition in the WPPT, the definition here has two parts. The first part defines the "communication to the public" as transmission to the public by any medium other than by broadcasting. This definition covers any transmission by wire of an actual performance or a performance fixed in an audiovisual fixation to the public, when the public is not present in the place where the performance occurs or where the audiovisual fixation is used for initiating the transmission. The definition also includes one-way transmissions to individuals using wireless connections but excludes wireless transmissions for public reception, *i.e.* broadcasting. "Communication" according to the first part of the definition always implies transmission to a public not present

## Article 2 of the WPPT

[continued]

- (d) "producer of a phonogram" means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;
- (e) "publication" of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;
- (f) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;
- (g) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article 15, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.



[Article 2, continued]

(d) "broadcasting" means the transmission by wireless means for public reception of sounds or images or images and sounds or the representations of sounds; such transmission by satellite is also "broadcasting"; transmission of encrypted signals is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

(e) "communication to the public" of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed performance, or of a performance fixed in an audiovisual fixation. For the purposes of Article 11, "communication to the public" includes making a performance fixed in an audiovisual fixation audible or visible or audible and visible to the public.

[End of Article 2]

[Notes on Article 2, continued]

in the place where the communication originates. The distance between the members of the public and the place of origination may be longer or shorter. The definition also covers all retransmissions by wire of any other transmissions.

2.08 The second part of the definition in item (e) is included in the provision solely for the purposes of Article 11. Here, "communication to the public" also includes making a performance that has been fixed in an audiovisual fixation audible and/or visible to the public. Communication of this type may include the projection of a performance on the screen of a cinema or the projection of a performance recorded on a video cassette or DVD to the public in a café, hotel lobby, the premises of a fair or other premises open to the public. This part of the definition is also meant to include making performances that have been fixed in audiovisual fixations audible and/or visible to the public through a radio or a television set located in the type of premises mentioned above.

2.09 The expression "(any) communication to the public" has a different meaning in the Rome Convention than in the Berne Convention. This difference has been respected in the WPPT and in the WCT. The definition of "communication to the public" in the proposed Instrument follows the tradition of the Rome Convention and the WPPT. The most important differences in this definition compared to the corresponding expression in the Berne Convention and the WCT are: 1) the notion of "communication" in Article 12 of the Rome Convention, in Article 15 of the WPPT and in Article 11 of the proposed Instrument extends to "direct performances," i.e. playing of phonograms or projection of a performance recorded in an audiovisual fixation to the public present where the playing or projection occurs, and 2) the notion of "communication" in the listed related rights treaties does not extend to the interactive on-demand making available to the public of performances. In the WPPT, the "right of making available" of fixed performances has been granted to the performers in a separate article (Article 10).

2.10 In the proposed Instrument the right of making available of fixed performances is also dealt with in a separate article (Article 10) and a description of this right is found in the Notes on that article. Accordingly, there is no need for a separate definition.

2.11 It may be observed that the definition of "audiovisual performances" is broad enough to include performances that are exclusively aural. While this may at first seem surprising, it is necessary because any type of performance may be embodied in an audiovisual production. This arrangement is not inconsistent with the WPPT or any other treaty; the key is what use is made of the performance. Thus, an exclusively aural performance may fall under the WPPT if it is embodied by a producer in a phonogram, but it will fall under the proposed Instrument if the same performance is embodied as the audio portion of a film or other audiovisual production. The definitions of "broadcasting" and "communication to the public" likewise cover transmission of sounds alone. This too follows because, for example, the sound of a film may be broadcast via sound radio.

2.12 By virtue of this construction of the definitions, the proposed Instrument would extend its protection to all performances not covered by the WPPT.

[End of Notes on Article 2]

[Article 3 starts on page 29]

**Notes on Article 3**

3.01 *Article (3)* establishes the points of attachment for granting national treatment to performers under Article (4).

3.02 According to *paragraph (1)* the protection provided for in the proposed Instrument would be accorded to performers who are nationals of other Contracting Parties.

3.03 *Paragraph (2)* assimilates performers who are not nationals of a Contracting Party but who are nevertheless habitually resident in a Contracting Party to nationals of that country. Paragraph (2) reproduces the language of Article 3(2) of the Berne Convention.

3.04 The criterion of nationality, supplemented by the criterion of habitual residence, is simple and manageable and well-adapted for a new form of international protection. This single criterion should also function as a better incentive for joining the proposed Instrument than additional criteria based on territoriality. Countries will obtain protection for their nationals in other Contracting Parties by joining the proposed Instrument.

3.05 Different rules were adopted in the WPPT. In Article (3) of the WPPT, a solution similar to that adopted in the TRIPS Agreement was used. In the WPPT the criterion of nationality was extended to all points of attachment by reference to the criteria for eligibility for protection provided under the Rome Convention. This was a feasible and sound solution for the WPPT because it introduced its protection in an area where well-known and established criteria already were in place. These reasons for criteria in addition to nationality do not exist for the proposed Instrument.

[End of Notes on Article 3]

**Article 3 of the WPPT**  
**Beneficiaries of Protection under this Treaty**

- (1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.
- (2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms who would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.
- (3) Any Contracting Party availing itself of the possibilities provided in Article 5(3) of the Rome Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as foreseen in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

**Article 3**

**Beneficiaries of Protection**

(1) Contracting Parties shall accord the protection granted under this Treaty to performers who are nationals of other Contracting Parties.

(2) Performers who are not nationals of one of the Contracting Parties but who have their habitual residence in one of them shall, for the purposes of this Treaty, be assimilated to nationals of that Contracting Party.

[End of Article 3]

## Notes on Article 4

4.01 *Article 4* contains the provisions concerning national treatment. Two alternatives are included in the proposed Article.

4.02 During the preparatory stages no convergence of positions concerning national treatment was achieved. Various proposals on national treatment were made, ranging from a very broad obligation to a model limited to the granting of national treatment only as to the exclusive rights specifically granted in the proposed Instrument.

4.03 Article 5(1) of the Berne Convention provides global national treatment for the protection of literary and artistic works. This tradition was carried forward in the WCT. In the field of related rights however, there is a tradition of somewhat more limited national treatment, which takes its origin from Article 2.2 of the Rome Convention. Virtually the same solution was adopted in the WPPT.

4.04 According to *paragraph (1)* of Article 4 in *Alternative C*, the obligation of national treatment would extend to the rights specifically granted in the proposed Instrument as well as to any additional rights that a Contracting Party may accord its own nationals. The obligation would apply to both exclusive rights and rights of remuneration. As far as such additional rights are concerned, *paragraph (2)* would permit Contracting Parties to base the protection accorded to nationals of other Contracting Parties on the principle of reciprocity.

4.05 *Alternative D* reproduces the model already adopted in the WPPT.

4.06 A proposal was made during the preparatory stages to include a provision stating explicitly that no Contracting Party shall allow collection of remuneration in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. An explicit provision to this effect is not necessary because in such a case there would be no legal basis to collect remuneration in the first instance. Collection in such circumstances would be inappropriate and without legal authority.

4.07 Under either alternative, the obligation of national treatment shall apply to moral rights. Moral rights are covered by the expressions "rights" and "exclusive rights." This is also the established interpretation of the expression "exclusive rights" in Article 4 of the WPPT.

[End of Notes on Article 4]

### **Article 4 of the WPPT National Treatment**

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty, and to the right to equitable remuneration provided for in Article 15 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 15(3) of this Treaty.

## **Article 4**

### **National Treatment**

#### *Alternative C*

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, in respect of the subject matter protected under this Treaty, the treatment it accords to its own nationals with regard to:

- (i) the rights specifically granted in this Treaty; and
- (ii) such additional rights as it accords to its own nationals.

(2) A Contracting Party shall be entitled, in respect of nationals of any other Contracting Party, to limit the protection provided for in subparagraph (ii) of paragraph (1) to the extent to which, and to the term for which, the latter Contracting Party grants such rights to the nationals of the former Contracting Party.

#### *Alternative D*

(1) Each Contracting Party shall accord to nationals of other Contracting Parties the treatment it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty and the right to equitable remuneration provided for in Article 11 of this Treaty.

(2) The obligation provided for in paragraph (1) does not apply to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty.

[End of Article 4]

## Notes on Article 5

5.01 Moral rights were granted for the first time to performers at the level of an international instrument in the WPPT. These rights were limited to live aural performances or performances fixed in phonograms. In *Article 5* of the proposed Instrument it is suggested that performers would be granted moral rights as regards their audiovisual performances. The structure of the proposed Article follows the structure of Article *6bis* of the Berne Convention.

5.02 *Paragraph (1)* sets out the right of the performer to be identified as the performer of each of his performances and to object to any distortion, etc. of them that would be prejudicial to his reputation. The provisions cover all audiovisual performances whether live or fixed in audiovisual fixations. The two prerogatives of moral rights are presented in the Article in separate items for the purpose of clarity.

5.03 *Item (i)*, concerning the right to claim to be identified as the performer, is identical with the corresponding part of Article 5 of the WPPT. However, the basic right differs somewhat from that of Article *6bis(1)* of the Berne Convention. An exception has been added here, as in the WPPT, providing that the right may not be exercised "where omission is dictated by the manner of the use of the performance." This clause adds a degree of flexibility to the application of this right.

5.04 The first part of *item (ii)* also follows the corresponding part of Article 5 of the WPPT. In the WPPT the basic right to object to distortion, etc. differs from that of the Berne Convention in two respects. First, the element "or other derogatory action in relation to the said work" is not reproduced in the list of possibly prejudicial acts. Second, the word "honor" which appears in the Berne Convention in conjunction with "reputation," has been omitted.

5.05 At the end of item (ii) of Article 5(1) of the proposed Instrument a clarifying clause on normal exploitation of the performance has been added.

5.06 During the preparatory stages several proposals were made to qualify the clause concerning the right to object to any distortion, etc. of a performance. One proposal would have permitted a producer to "abridge, condense, edit or dub the work, but without thereby distorting the performance of the performer." Another proposal would have permitted modifications "considered necessary by the producer of the audiovisual fixation for the normal exploitation of such fixation." A third proposal was made to serve the same purpose: "Modifications consistent with the normal exploitation of an audiovisual work undertaken by

### **Article 5 of the WPPT Moral Rights of Performers**

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, have the right to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance, and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.

[continued]



**Article 5**

**Moral Rights**

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall have the right

(i) to claim to be identified as the performer of his performances, except where omission is dictated by the manner of the use of the performance; and

(ii) to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation. Modifications consistent with the normal exploitation of a performance in the course of a use authorized by the performer shall not be considered prejudicial to the performer's reputation.

[Article 5 continues]

[Notes on Article 5, continued]

the producer of the work or the producer's successors in interest, pursuant to the exercise of rights of authorization acquired by the producer in the performance, shall not be considered seriously prejudicial to the performer's reputation." This proposal had as the definition of "normal exploitation of an audiovisual work" that it "shall include the use of new or changed technology, media, formats and/or methods of distribution, dissemination, making available or communication to the public."

5.07 In the light of the aforementioned proposals it should be emphasized that alteration or modification, such as abridgement, condensing, editing or dubbing, *per se*, does not concern moral rights. The same goes for new or changed technology, media, formats and methods of distribution, etc. Technological platforms or carriers are content neutral. The crucial question for moral rights is whether an act of modification may be considered to be prejudicial to the performer's reputation. What may cause a change of the performance to be prejudicial is the way that the change is made. Thus, the determination as to whether an act constitutes a violation of this moral right turns on whether the modification is objectively prejudicial to the performer's reputation. This judgement should be made on objective criteria from the point of view of a reasonable viewer with experience in the pertinent category of audiovisual productions. Under standard interpretations of moral rights, a modification would not be considered a violation unless the prejudice were meaningful or substantial. For this reason it does not appear necessary to qualify the required prejudice in the Article by such terms as "serious" or "substantial."

5.08 "Normal exploitation" or standard industry practice, as such, therefore falls outside of the scope of moral rights. However, item (ii) also makes clear that Contracting Parties should take the above-mentioned aspects of moral rights into account when implementing the proposed Instrument.

5.09 During the preparatory stages a proposal was made to consider the interests of all performers and other rightholders in an audiovisual fixation when assessing the violation of the moral rights of one performer. Under the proposed Instrument a judge could appropriately undertake an equitable balancing of the rights of multiple rightholders in his judgement.

5.10 *Paragraph (2)* is identical to the corresponding provision of the WPPT and reproduces *mutatis mutandis* Article 6bis(2) of the Berne Convention, which concerns moral rights after the death of a performer.

#### **Article 5 of the WPPT**

[continued]

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where the protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

[Article 5, continued]

(2) The rights granted to a performer in accordance with paragraph (1) shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

[Article 5 continues]

[Notes on Article 5, continued]

5.11 *Paragraph (3)* is identical with the corresponding provision of the WPPT and reproduces the corresponding provision of Article *6bis*(3) of the Berne Convention.

5.12 Moral rights exist "independently of the performer's economic rights, and even after the transfer of those rights." As in other treaties no language is included in the proposal regarding inalienability or *inter vivos* transfer of these rights. The performer may exercise his moral rights, and he has the option not to exercise these rights; he may even waive them. To take an example, a performer may, by contract, agree to refrain indefinitely from identifying himself as the performer of a particular performance. The position of a performer as the performer of a given performance cannot, of course, be transferred; no one can step into his shoes in this sense.

5.13 The established interpretation of Article *6bis* of the Berne Convention should be used directly in construing all those parts of the present Article that are formulated closely in line with it.

5.14 The moral rights provided for in the proposed Instrument, like all other specific rights set forth herein, are minimum rights. The Contracting Parties may in their national legislation provide for broader protection of moral rights.

[End of Notes on Article 5]

[Article 5, continued]

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

[End of Article 5]

## Notes on Article 6

6.01 *Article 6* of the proposed Instrument provides performers with an exclusive right to control broadcasting and communication to the public and to control the fixation of their live performances. The provision follows the corresponding provisions of Article 6 of the WPPT.

6.02 The right in *item (i)* covers broadcasting and communication to the public as defined in Article 2(d) and the first part of Article 2(e) of the proposed Instrument, except that the right does not include rebroadcasting or retransmission by wire which are expressly excluded from the scope of the right. The scope of the right corresponds to the right granted to performers in Article 7.1(a) of the Rome Convention and Article 6(i) of the WPPT. This right is also addressed by Article 14.1 of the TRIPS Agreement. All these provisions extend protection to both aural and audiovisual performances.

6.03 *Item (ii)* grants performers the right to control the audiovisual fixation of their unfixed performances. The scope of this right, combined with Article 6 of the WPPT, corresponds to the scope of the right under Article 7.1(b) of the Rome Convention which is not limited to aural performances.

6.04 The overlap above is not a redundancy: there is every reason to propose a complete series of rights in the proposed Instrument. Only if the proposed Instrument is adopted as a protocol strongly linked to the WPPT, and perhaps built on references to its provisions, should the omission of item (i) be considered.

[End of Notes on Article 6]

### **Article 6 of the WPPT** **Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (i) the broadcasting and communication to the public of their unfixed performances except where the performance is already a broadcast performance; and
- (ii) the fixation of their unfixed performances.

**Article 6**

**Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

(i) the broadcasting and communication to the public of their unfixed performances  
except where the performance is already a broadcast performance; and

(ii) the audiovisual fixation of their unfixed performances.

[End of Article 6]

**Notes on Article 7**

7.01 In *Article 7* it is proposed that performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form. The operative elements of this provision are the same as those of the corresponding Article of the WPPT.

7.02 The origin of the "direct or indirect reproduction" language used in the proposed Article 7 is in Article 10 of the Rome Convention concerning the rights of producers of phonograms. The aspect "direct or indirect" was used in the clauses in the WPPT on the right of reproduction for both performers and producers of phonograms. The purpose of this provision is to make it clear that the distance between the place where an original fixed performance is situated and the place where a copy is made of it has no significance for the right of reproduction. Any form of remote copying is intended to be within the reach of this provision.

7.03 The element "in any manner or form" takes its origin from Article 9(1) of the Berne Convention. It manifests the broad scope of the right. The copying or storage of a fixed performance in any electronic or other medium, using whatever method or technique, constitutes reproduction. Inclusion of this element in the WPPT and the proposed Instrument makes it clear that there is no difference between the rights of performers in this respect.

7.04 In the Diplomatic Conference of 1996 no agreement was reached on whether to include the words "whether permanent or temporary" in the clauses on the right of reproduction. In other words, there is no explicit reference in the WPPT to the lifetime of a copy or the duration of the result of an act of reproduction; in the digital environment the lifetime of a copy may be very short. Instead, the Diplomatic Conference adopted an agreed statement according to which the reproduction right, as set forth in Articles 7 and 11 of the WPPT, fully applies in the digital environment, and in particular to the use of performances and phonograms in digital form.

7.05 The agreed statement referred above is relevant for the consideration of Articles 7 and 13 of the proposed Instrument (see paragraph 29 of the Memorandum).

[End of Notes on Article 7]

**Article 7 of the WPPT  
Right of Reproduction**

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.



**Article 7**

**Right of Reproduction**

Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in audiovisual fixations, in any manner or form.

[End of Article 7]

**Notes on Article 8**

8.01 *Article 8* provides an exclusive right of distribution to performers in their performances fixed in audiovisual fixations. The operative elements of this Article are identical with the corresponding provisions of the WPPT.

8.02 According to *paragraph (1)* the right of distribution extends to the sale or other transfer of ownership of the original and copies of fixed performances.

8.03 The provisions of *paragraph (2)* leave it up to the Contracting Parties to determine the conditions for exhaustion of the right of distribution after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer. Exhaustion concerns only physical copies that can be put into circulation as tangible objects, and the rule concerning exhaustion may be national, regional or international.

8.04 The Diplomatic Conference of 1996 adopted an agreed statement concerning Articles 2(e), 8, 9, 12 and 13 of the WPPT which is relevant for the consideration of Articles 8 and 9 of the proposed Instrument (see paragraph 30 of the Memorandum).

[End of Notes on Article 8]

**Article 8 of the WPPT**  
**Right of Distribution**

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

**Article 8**

**Right of Distribution**

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their performances fixed in audiovisual fixations through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.

[End of Article 8]

**Notes on Article 9**

9.01 *Article 9* provides performers with the exclusive right to authorize rental of the original and copies of their performances fixed in audiovisual fixations.

9.02 The operative elements of *paragraph (1)* of the proposed Article 9 are identical to the elements of the corresponding provision of the WPPT.

9.03 *Paragraph (2)* provides that Contracting Parties are exempt from the obligation to provide the right of rental to performers unless the commercial rental has led to widespread copying of fixed performances that materially impairs the right of reproduction. This "material impairment" test corresponds to the provisions concerning the author's right of rental in respect of cinematographic works in Article 11 of the TRIPS Agreement and in Article 7(2) of the WCT. The provision is sensible here for the same reasons that it was sensible in those treaties. Moreover, the inclusion of the provision here ensures the same treatment of different rightholders whose contributions are incorporated in the same subject matter.

9.04 The Diplomatic Conference of 1996 adopted an agreed statement concerning Articles 2(e), 8, 9, 12 and 13 of the WPPT which is relevant for the consideration of Articles 8 and 9 of the proposed Instrument (see paragraph 30 of the Memorandum).

[End of Notes on Article 9]

**Article 9 of the WPPT**  
**Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, even after distribution of them by, or pursuant to, authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

**Article 9**

**Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in audiovisual fixations even after distribution of them by, or pursuant to, authorization by the performer.

(2) Contracting Parties are exempt from the obligation of paragraph (1) unless the commercial rental has led to widespread copying of such fixations materially impairing the exclusive right of reproduction of performers.

[End of Article 9]

**Notes on Article 10**

10.01 According to *Article 10* performers would enjoy the exclusive right of making their fixed performances available to the public. The same exclusive right was granted in the WPPT to its two categories of rightholders. It corresponds to the "making available" part of the right of communication as formulated in the WCT regarding authors.

10.02 The proposed new right covers the making available of fixed performances by wire or wireless means. Making available always involves transmission, though it may occur over a short or long distance. A distinction is thus made between the distribution of copies of fixed performances in physical, tangible form, which is covered by the right of distribution in Article 8 of the proposed Instrument, and the making available of fixed performances by transmission. The technology used for transmission may be analog or digital, and it may be based on any vehicle, such as electromagnetic waves or guided optical beams, capable of carrying information.

10.03 The right of making available to the public is limited to situations where members of the public may access performances fixed in audiovisual fixations from a place and at a time individually chosen by them. Thus, availability is based on interactivity and on-demand access; in this way, the making available right differs from the right of communication.

10.04 In the same way as in the WPPT, the right is designed to operate as a basic rule of proper functioning of the electronic marketplace.

10.05 No rights are exhausted in connection with the making available to the public. The performance may not be made further available or distributed to the public by the recipient without authorization. Exhaustion of rights may only be associated with the distribution of tangible copies put on the market by the rightholder or with his consent.

10.06 Finally, while the designation "right of making available" may sound generic and broader than the subject matter of this Article, after the adoption of the WPPT this designation has come to be understood as an "on-demand right" of performers.

[End of Notes on Article 10]

**Article 10 of the WPPT**  
**Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

**Article 10**

**Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in audiovisual fixations, by wire or wireless means, in such a way that the members of the public may access them from a place and at a time individually chosen by them.

[End of Article 10]

## Notes on Article 11

11.01 *Article 11* provides for a regime of performers' rights in respect of broadcasting and communication to the public. It offers a wide range of choices for Contracting Parties ranging from an exclusive right of authorization to no right at all. The latter option would leave the position of performers dependent on national law and their contractual relations with producers.

11.02 In *paragraph (1)* it is proposed that performers would enjoy the exclusive right of authorizing broadcasting and communication to the public of their performances fixed in audiovisual fixations. The expressions "broadcasting" and "communication to the public" are defined in Article 2.

11.03 *Paragraph (2)* permits Contracting Parties to limit the right of performers to the level of a right to equitable remuneration for direct or indirect use of fixed performances for broadcasting or for communication to the public. This corresponds to the level of protection of performers in the WPPT. According to paragraph (2) Contracting Parties could set conditions for the exercise of the right to remuneration: Contracting Parties could, for instance, provide for collective management of the right and regulate some modalities of the rights administration. Contracting Parties could also set forth in their national legislation provisions on the question of who is responsible to pay the remuneration.

11.04 The provisions in *paragraph (3)* set forth a possibility for a reservation concerning the rights provided for in paragraphs (1) and (2). The reservations clause leaves open the degree of reservation concerning the right of remuneration. Contracting Parties may make small or more extensive reservations to the right of remuneration, leaving it up to them if they wish to provide the right of remuneration concerning only certain uses or to limit the right in some other way.

11.05 When considering the level of protection of performers in respect of broadcasting and communication to the public of their fixed performances, Contracting Parties should take into account the differences between the audiovisual industry and the phonogram industry, as well as the differences in the markets and structures of exploitation and use of the products of these industries.

### **Article 15 of the WPPT** **Right to Remuneration for Broadcasting and Communication to the Public**

- (1) Performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public.
- (2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration.
- (3) Any Contracting Party may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all.

[continues]



**Article 11**

**Right of Broadcasting and Communication to the Public**

(1) Performers shall enjoy the exclusive right of authorizing the broadcasting and communication to the public of their performances fixed in audiovisual fixations.

(2) Contracting Parties may establish, instead of the right of authorization provided for in paragraph (1), a right to equitable remuneration for the direct or indirect use of performances fixed in audiovisual fixations for broadcasting or for communication to the public. Contracting Parties may in their legislation set conditions for the exercise of the right to equitable remuneration.

(3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (2) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply the provisions of paragraphs (1) and (2) at all.

[End of Article 11]

[Notes on Article 11, continued]

11.06 Article 11 does not include the language "published for commercial purposes" which is found in the corresponding provisions of the WPPT. As was pointed out during the preparatory stages by some delegations, broadcasters almost never obtain through retail trade channels the audiovisual fixations that they broadcast. The same goes for most cable transmissions and films shown in cinemas. The producers or agents representing them license broadcasting and communication to the public in direct contractual relations with broadcasters and other users. This is true also for the distribution of audiovisual productions on videograms: producers and distributors agree on licensing terms directly between themselves. Because performers are in direct contractual relations with the producers of audiovisual productions, they are, in principle, in a position to bargain with the producers about the conditions of later exploitation of their performances fixed in audiovisual fixations.

11.07 The market structure described above differs greatly from the structure of secondary mass uses of phonograms. However, given the developing technology in the field of digital high-quality recordings, it is quite possible that the market structure of audiovisual fixations will develop in a direction that is more similar to the present market structures for music. Contracting Parties should pay attention to these present and possible future market realities when considering the nature and scope of the rights of performers.

11.08 When according new rights to performers, Contracting Parties should also bear in mind that there should be an overall balance between the rights of different categories of rightholders. One decisive factor in this respect is what kind of solution Contracting Parties will adopt in relation to the contractual arrangements on which there are provisions in Article 12 of the proposed Instrument.

[End of Notes on Article 11]

**Article 15 of the WPPT**

[continued]

(4) For the purposes of this Article, phonograms made available to the public by wire or wireless means in such a way that members of the public may access them from a place and at a time individually chosen by them shall be considered as if they had been published for commercial purposes.

[Article 12 starts on page 55]

## Notes on Article 12

12.01 In *Article 12* the Diplomatic Conference is offered alternative solutions concerning contractual arrangements on the rights of performers. The question to be resolved is how to strike a proper balance between the need for producers to secure the necessary business certainty for the distribution and exploitation of audiovisual fixations and the objective to strengthen the international legal framework for protection of performers' rights, while preserving the potential for bargaining. During the preparatory stages, several proposals were made employing different legal methods to provide a solution for the same problem.

12.02 It has been suggested that an express provision concerning transfer of rights in respect of audiovisual performances is necessary because audiovisual productions frequently involve contributions of a multitude of performers who are often of different nationalities. The relative novelty of the proposed protection has also been noted as a factor: when new rights are introduced, the legal system should provide for all the necessary means and modalities to deal with them.

12.03 Perhaps the most important justification for clear rules on contractual arrangements is that very different systems have developed in different countries, some based on legal statutory rights provisions and some on contracts and collective bargaining. The goal of Article 12 is to make the systems interoperable or to build a bridge between them. Producers should be able to secure financing for their productions and a return for their investment in predictable business conditions. If there were no clear arrangement concerning the rights of all of the performers, a certain performer could, in principle, block the use of the production on the basis of his exclusive rights.

12.04 Clauses in the proposed Instrument concerning contractual arrangements may also be considered beneficial to performers. Legal certainty in the exploitation of an audiovisual production is not inconsistent with the interests of performers. Moreover, the vesting of rights in the producer facilitates individual and collective bargaining with a single rightholder.

12.05 It should be pointed out that, as far as authors' rights are concerned, there are provisions on different kinds of solutions to this same problem in the Berne Convention and in many countries' national legislation. Article 14*bis*(2)(b) of the Berne Convention contains provisions on the so-called presumption of legitimation. The most extreme solution is found in Article 19 of the Rome Convention according to which the provisions on performers' rights cease to be applicable "once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation."

12.06 According to Article 14*bis*(2)(b) of the Berne Convention, in the absence of any contract to the contrary, authors who have undertaken to bring contributions to the making of a cinematographic work, may not object to reproduction, distribution and other uses of the work. The application of this rule may be limited according to the provisions of Article 14*bis*(3) as far as certain key authors of the work are concerned and may be further limited by national legislation. On the national level, legislative solutions with respect to authors' rights vary from the system of the so-called "film copyright" to rebuttable or irrebuttable presumptions of assignment of authors' right to the maker or producer of the film.

[Article 12 starts on page 55]

[Notes on Article 12, continued]

12.07 *Alternative E* provides for a rebuttable presumption of transfer of the performer's exclusive rights of authorization to the producer of the audiovisual fixation. The performer's consent to the incorporation of his performance triggers the transfer of rights. This rule covers all exclusive rights of authorization granted under the proposed Instrument. It does not apply to possible rights of remuneration on which there may be provisions in the national legislation of Contracting Parties. This becomes clear from the expression "exclusive rights of authorization" in the provision. For the same reason the presumption does not extend to performers' moral rights. Moral rights are certainly "rights" or "exclusive rights" but not "exclusive rights of authorization," which is the expression used in all articles concerning performers' economic rights. It should be emphasized that the proposed rule is applicable only to the particular audiovisual fixation for which the performer gave his consent. The inclusion of the same fixed performance in another audiovisual production is subject to the authorization of the performer.

12.08 The provisions of *Alternative E* would be mandatory for all Contracting Parties. It would, of course, be possible to consider a similar solution on an optional basis. *Alternative H*, where there is no provision at all, does just this; it would permit Contracting Parties to create a solution based on *Alternative E* or any other variant at the national level.

12.09 If optional, a model based on a rebuttable presumption of transfer of rights cannot place producers in a fully secure position internationally, *i.e.* they will not have predictability in the recognition of the transfer in other countries.

12.10 During the preparatory stages a model that took its inspiration from Article 14*bis*(2)(b) of the Berne Convention was considered by some delegations. *Alternative F* is based on this approach, and it provides for a presumed entitlement to exercise the rights; it would be applied in the absence of written contractual clauses to the contrary. It would be applicable only to performers' exclusive rights of authorization, and only to the particular audiovisual fixation, in the same way as *Alternative E*.

12.11 One aspect of obscurity has been removed from the provision in *Alternative F* compared to the corresponding provisions of the Berne Convention. The legal operation of the so-called clause on "presumption of legitimation" of Article 14*bis*(2)(b) of the Berne Convention is based on the expression "authors ... may not ... object." Authors continue to be owners of their respective rights, but the rights are not exercisable against the user. *Alternative F* is similar in its effect but is phrased as a presumption of entitlement. The producer would be expressly and properly "entitled to exercise the exclusive rights of authorization provided for in this Treaty." Performers would still own their rights and they could assert them against third parties to the extent of any unauthorized use or, subject to applicable contracts or national legislation, claim remuneration from the producer. Producers would have certainty in their ability to exploit the audiovisual production in the marketplace.

12.12 In the same way as *Alternative E*, *Alternative F* would be mandatory for the Contracting Parties. Note 12.09 is equally valid as to *Alternative F*.

## **Article 12**

### *Alternative E*

#### **Transfer**

Once a performer has consented to the incorporation of his performance in an audiovisual fixation, he shall be deemed to have transferred all exclusive rights of authorization provided for in this Treaty with respect to that particular fixation to its producer, subject to written contractual clauses to the contrary.

### *Alternative F*

#### **Entitlement to Exercise Rights**

In the absence of written contractual clauses to the contrary, once the performer has consented to the audiovisual fixation of his performance, the producer shall be deemed to be entitled to exercise the exclusive rights of authorization provided for in this Treaty with respect to that particular fixation.

[Article 12 continues]

[Notes on Article 12, continued]

12.13 The proposed Instrument is directed to addressing international situations. The purpose of *Alternative G* is to build a bridge between different legal systems, leaving each country to determine its own policy concerning transfer, while still providing business certainty. It is based on the principles of private international law.

12.14 The main function of *Alternative G* would be to guarantee the recognition of different arrangements for the transfer of rights that are in use in different Contracting Parties. It does so providing in *paragraph (1)* that a transfer of any of the exclusive rights of authorization to the producer shall be governed by the law of the country most closely connected with the audiovisual fixation, a principle well established in private international law. This rule would be applicable in all cases of transfer of rights, whether by agreement or by operation of law. The rule would be rebuttable: it would be applicable only in the absence of any contractual clauses to the contrary, and like the previous alternatives, it would apply only to the exclusive rights of authorization and only to the particular audiovisual fixation.

12.15 This alternative would not impose on the Contracting Parties any model of transfer of rights or contractual arrangements. Contracting Parties would be free to choose their models according to their legal traditions or refrain from legislating about the transfer of rights. All Contracting Parties joining the proposed Instrument could maintain their own solutions. The only strict obligation for Contracting Parties would be to provide for the application of the law of the "country most closely connected." The ownership of rights would thus be determined only once and each audiovisual production would have its own set of rules that would follow the production throughout its international distribution.

12.16 *Paragraph (2)* of *Alternative G* provides for a hierarchy of three points of attachment for the choice of applicable law. The first point of attachment, the place of headquarters or habitual residence of the producer, is similar to that of Article 5(4)(c)(i) of the Berne Convention. It guarantees the application of a single law to all participating performers. The second criterion, nationality of the majority of the performers, and the third point of attachment, the principal place of filming, would serve the same objective of uniformity. There might be situations in which there is no Contracting Party which meets the criteria laid down in *paragraph (2)*. In such situations ordinary rules of private international law apply.

12.17 During the preparatory stages it was also suggested that the proposed Instrument should be silent on the question of transfer of rights. According to *Alternative H*, which contains no provisions on transfer of rights or contractual arrangements, it would be a matter for legislation in the Contracting Parties whether or not to provide for a transfer of rights and to determine its nature and scope. In this respect *Alternative H* is similar to *Alternative G*.

12.18 The solutions proposed in *Alternatives G* and *H* provide for less harmonization and less certainty with respect to the position of producers than *Alternatives E* and *F*. *Alternative G* gives some certainty as to what national law will apply but does not harmonize national laws. *Alternative H* would perpetuate the current situation: the new rights would be introduced but they would operate without harmonization in this respect.

[End of Notes of Article 12]



*Alternative G*

**Law Applicable to Transfers**

(1) In the absence of any contractual clauses to the contrary, a transfer to the producer of an audiovisual fixation of a performance, by agreement or operation of law, of any of the exclusive rights of authorization granted under this Treaty, shall be governed by the law of the country most closely connected with the particular audiovisual fixation.

(2) The country most closely connected with a particular audiovisual fixation shall be

(i) the Contracting Party in which the producer of the fixation has his headquarters or habitual residence; or

(ii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, the Contracting Party of which the majority of performers are nationals; or

(iii) where the producer does not have his headquarters or habitual residence in a Contracting Party, or where there is more than one producer, and where there is no single Contracting Party of which a majority of the performers are nationals, the principal Contracting Party in which the photography takes place.

*Alternative H*

[No such provision]

[End of Article 12]

**Notes on Article 13**

13.01 *Article 13* sets forth limitations of and exceptions to the rights of performers provided for in the proposed Instrument. It follows, as exactly as possible, the corresponding provisions in the WPPT. The only changes are consequences of the different subject matter addressed by the proposed Instrument.

13.02 *Paragraph (1)* reproduces the main principle of Article 15.2 of the Rome Convention, and it corresponds to Article 16(1) of the WPPT.

13.03 *Paragraph (2)* contains the provisions of the three-step test originally established in Article 9(2) of the Berne Convention. Corresponding provisions were used in Article 13 of the TRIPS Agreement, Article 16(2) of the WPPT, and Article 10(2) of the WCT. Interpretation of the proposed Article, as well as of this whole family of provisions, follows the established interpretation of Article 9(2) of the Berne Convention.

13.04 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 16 of the WPPT which is relevant for the consideration of Article 13 of the proposed Instrument (see paragraph 31 of the Memorandum).

[End of Notes on Article 13]

**Article 16 of the WPPT**  
**Limitations and Exceptions**

- (1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers and producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.
- (2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram.

**Article 13**

**Limitations and Exceptions**

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations and exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with a normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.

[End of Article 13]

## Notes on Article 14

14.01 The provision on the term of protection in *Article 14* follows the corresponding provision in the WPPT as closely as possible. The only change is a consequence of the different subject matter addressed by the proposed Instrument.

14.02 Article 14 is based on the recognition that a term of 50 years counted from the year of fixation is the new worldwide standard for the term of protection for performers established by the TRIPS Agreement, the WPPT and the proposed Instrument.

[End of Notes on Article 14]

### **Article 17 of the WPPT** **Term of Protection**

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

**Article 14**

**Term of Protection**

The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in an audiovisual fixation.

[End of Article 14]

**Notes on Article 15**

15.01 *Article 15* contains provisions on obligations concerning technological measures. It follows the corresponding provisions of the WPPT.

15.02 The provisions would introduce the obligation to provide adequate legal protection and effective legal remedies against unauthorized circumvention of technological measures. Qualifications "adequate" and "effective" should be understood to require on a national level provisions that provide genuine support for the rights provided for in the proposed Instrument. The effective protection of technological measures is an essential precondition for the establishment of a well-functioning legal framework of electronic commerce.

15.03 The expression "technological measures *used by performers*" [emphasis added] should be construed broadly, referring also to those acting on behalf of performers, including their representatives, licensees or assignees, including producers, service providers, and persons engaged in communication or broadcasting using performances on the basis of due authorization.

15.04 It should be recalled, as in the context of the Basic Proposal of the WPPT, that Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and sufficient sanction against the prohibited acts.

15.05 The interpretation of the proposed Article 15 follows the interpretation of the corresponding provisions of the WPPT and Contracting Parties should implement it in a parallel manner. It is expected that the types of provisions in national legislation that are sufficient to comply with the anti-circumvention requirements of the WPPT will be similarly sufficient to comply with the same requirements of the proposed Instrument.

[End of Notes on Article 15]

**Article 18 of the WPPT**  
**Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

**Article 15**

**Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, which are not authorized by the performers concerned or permitted by law.

[End of Article 15]

**Notes on Article 16**

16.01 *Article 16* contains provisions on obligations with regard to rights management information. It follows the corresponding provisions of the WPPT as closely as possible.

16.02 The operative parts of the provisions in *paragraph (1)* and *paragraph (2)* are intended to be identical with the corresponding provisions of the WPPT. As defined in paragraph (2), rights management information may be attached to or associated with a fixed performance that is distributed, imported for distribution, broadcast, communicated or made available to the public in any way.

16.03 As in the WPPT, the provisions of Article 16 are minimum obligations: nothing precludes the adoption of broader national legislation on rights management information.

16.04 Finally, it should be pointed out that the use of electronic rights management information is voluntary. The obligations of Contracting Parties concerning rights management information apply only in cases where such information has been attached.

16.05 The interpretation of the proposed Article 16 follows the interpretation of the corresponding provisions of the WPPT and Contracting Parties should implement it in a parallel manner. It is expected that the types of remedies in national legislation that are sufficient to comply with the requirements of Article 19 of the WPPT will be similarly sufficient to comply with the remedy requirements of the proposed Instrument.

16.06 The Diplomatic Conference of 1996 adopted an agreed statement concerning Article 19 of the WPPT which is relevant for the consideration of Article 16 of the proposed Instrument (see paragraph 32 of the Memorandum).

[End of Notes on Article 16]

**Article 19 of the WPPT**  
**Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.



## **Article 16**

### **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing, or with respect to civil remedies having reasonable grounds to know, that it will induce, enable, facilitate, or conceal an infringement of any right covered by this Treaty:

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, unfixed performances or performances fixed in audiovisual fixations knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the performer, the performance of the performer, or the owner of any right in the performance, or information about the terms and conditions of use of the performance, and any numbers or codes that represent such information, when any of these items of information is attached to a performance fixed in an audiovisual fixation.

[End of Article 16]

**Notes on Article 17**

17.01 *Article 17* states the fundamental principle of formality-free protection. The provisions of this Article reproduce exactly the corresponding provisions of Article 20 of the WPPT.

17.02 The wording of this Article follows the wording of the first half of the first sentence of Article 5(2) of the Berne Convention.

[End of Notes on Article 17]

**Article 20 of the WPPT**  
**Formalities**

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

**Article 17**

**Formalities**

The enjoyment and exercise of the rights provided for in this Treaty shall not be subject to any formality.

[End of Article 17]

### **Notes on Article 18**

18.01 The driving principle behind this Article is that no reservations are permitted to the proposed Instrument. The provision follows the model of the corresponding Article of the WPPT.

18.02 It has, however, been necessary to propose in *Article 18* that reservation would be permitted in respect of one issue, namely Article 11(3) of the proposed Instrument which contains a possibility for Contracting Parties to make a reservation concerning the exclusive right of authorization of, or the right of remuneration for, broadcasting and communication to the public.

[End of Notes on Article 18]

### **Article 21 of the WPPT Reservations**

Subject to the provisions of Article 15(3), no reservations to this Treaty shall be permitted.

**Article 18**

**Reservations**

Subject to the provisions of Article 11(3), no reservations to this Treaty shall be permitted.

[End of Article 18]

## Notes on Article 19

19.01 *Article 19* contains the provisions that govern application of the proposed Instrument in respect of performances that occurred before or after the proposed Instrument comes into force.

19.02 Under *paragraph (1)* Contracting Parties would be obligated to accord protection to fixed performances that exist at the moment of the coming into force of the proposed Instrument and to all performances that occur after its entry into force. This principle, and the application of it by as many Contracting Parties as possible, would provide a foundation for uniform introduction of this new form of protection. The protection would extend to both "old" and "new" performances. "Old" performances can, of necessity, only exist if fixed.

19.03 It is recognized that some Contracting Parties might encounter difficulties in the retrospective application of the proposed economic rights. In some legal systems the introduction of new rights might be more disruptive to established agreements than in others. For this reason, *paragraph (2)* introduces an option not to apply the provisions of Articles 6 to 11 of the proposed Instrument to fixed performances that exist at the moment of its entry into force. This possibility would concern both the exclusive rights of authorization and the rights to equitable remuneration for broadcasting and communication to the public that might be introduced in Contracting Parties on the basis of Article 11(2) of the proposed Instrument. In such a case, the protection of economic rights would be prospective; only "new" performances would enjoy economic rights. In these cases, other Contracting Parties could limit protection of economic rights with respect to such Contracting Parties to "new" performances only. The provisions of *paragraph (2)* do not apply to performers' moral rights under Article 5 of the proposed Instrument.

19.04 *Paragraph (3)* uses the well-established principle of non-retroactivity. It makes clear that the protection accorded by the proposed Instrument is not retroactive in the proper sense of the word. First, it specifies that the protection accorded by the proposed Instrument is without prejudice to any acts performed before the entry into force of the proposed Instrument. In this provision the expression "acts committed" refers to acts of use or exploitation of a performance that took place during the time when it was not protected under the proposed Instrument. Second, it safeguards previously acquired rights and previously concluded agreements.

19.05 *Paragraph (4)* allows each Contracting Party to make transitional arrangements concerning fixations of performances lawfully made before the entry into force of the

### **Article 22 of the WPPT Application in Time**

- (1) Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.
- (2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances which occurred after the entry into force of this Treaty for that Party.

## **Article 19**

### **Application in Time**

(1) Contracting Parties shall accord the protection granted under this Treaty to fixed performances that exist at the moment of the entry into force of this Treaty and to all performances that occur after the entry into force of this Treaty for each Contracting Party.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party may choose not to apply the provisions of Articles 6 to 11 of this Treaty to fixed performances that existed at the moment of the entry into force of this Treaty for each Contracting Party. In respect of such Contracting Party, other Contracting Parties may limit the application of Articles 4 and 6 to 11 of this Treaty to performances that occurred after the entry into force of this Treaty.

(3) The protection provided for in this Treaty shall be without prejudice to any acts committed, agreements concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(4) Contracting Parties may in their legislation establish transitional provisions under which any person who, prior to the entry into force of this Treaty, engaged in lawful acts with respect to a performance, may undertake with respect to the same performance acts within the scope of the rights provided for in Articles 6 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

[End of Article 19]

[Notes on Article 19, continued]

proposed Instrument. The purpose of this provision is to guarantee a smooth introduction of the protection without causing the need for new negotiations between the producers and performers concerning "old" productions. Contracting Parties would be free to choose the design of the transitional provisions: they may provide for a limited duration for such arrangements; the legal effect of some of them may be permanent; they may or may not concern all the economic rights of performers; and they may include an obligation to provide for an equitable remuneration for performers for some types of exploitation. Contracting Parties who introduce transitional arrangements should take into consideration their economic implications. The objective of paragraph (4) is to enable Contracting Parties to provide appropriate protection for those who may have invested in good faith in the production and exploitation of audiovisual fixations at a time when the performances were not protected.

19.06 It would be possible to consider as an alternative to employ the provisions of Article 18 of the Berne Convention *mutatis mutandis* as was done in the WPPT. In fact, the effect of the proposed Article 19(1) and (4) would largely correspond to the effect of Article 18 of the Berne Convention.

19.07 However, the approach of Article 18 of the Berne Convention is not adopted in the proposed Instrument. There are several reasons underlying this proposal. First, the proposed form of protection is relatively new compared to that of the WPPT. Second, Article 18 of the Berne Convention does not allow limiting the retrospective protection as allowed in Article 19(2) of the proposed Instrument. Furthermore, the provisions of Article 18(3) of the Berne Convention, concerning transitional provisions, have in certain cases caused doubts as to their proper interpretation. The need for legal certainty is the guiding principle of the proposed Article 19(4). Finally, the Berne Convention does not contain clear provisions on acts undertaken, rights acquired, and contracts concluded prior to the entry into force of that treaty. In fact, the inclusion of the proposed Article 19(3) should be considered irrespective of the model for the rest of Article 19 chosen by the Diplomatic Conference.

[End of Notes on Article 19]



[Article 20 starts on page 75]

**Notes on Article 20**

20.01 *Article 20* contains provisions on enforcement of rights. The provisions of this Article reproduce exactly the corresponding provisions in Article 23 of the WPPT.

20.02 *Paragraph (1)* corresponds to the provisions of Article 36(1) of the Berne Convention.

20.03 *Paragraph (2)* reproduces the first sentence of Article 41.1 of the TRIPS Agreement.

[End of Notes on Article 20]

**Article 23 of the WPPT**  
**Provisions on Enforcement of Rights**

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

**Article 20**

**Provisions on Enforcement of Rights**

(1) Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty.

(2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

[End of document]