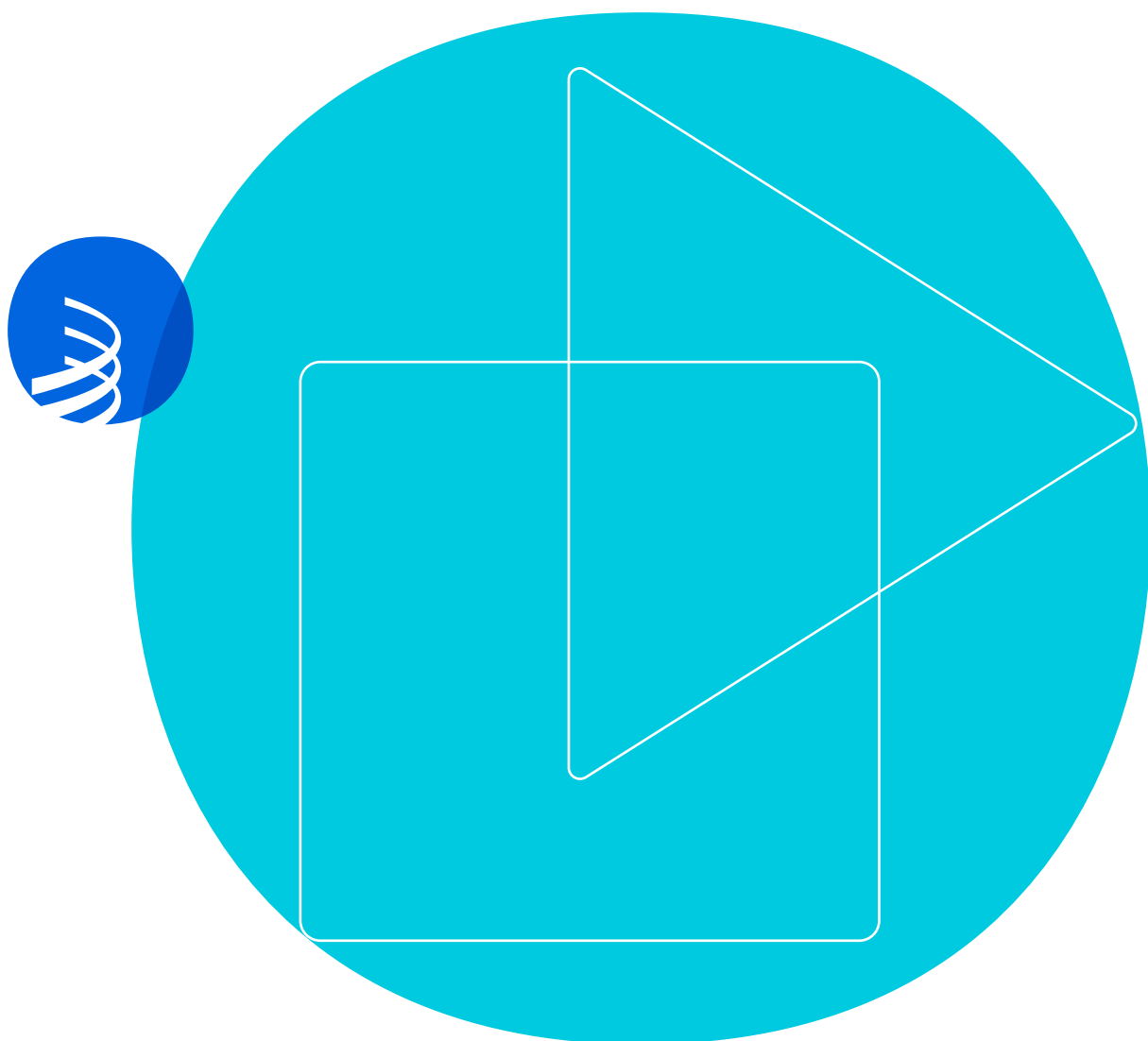


Records of the Diplomatic Conference on the Protection of Audiovisual Performances

Geneva, December 7 to 20,
2000





Records of the Diplomatic Conference on the Protection of Audiovisual Performances

Geneva, December 7 to 20,
2000

The *Records* of the Diplomatic Conference on the Protection of Audiovisual Performances held in Geneva, from December 7 to 20, 2000, contain documents relating to that Conference, which were issued before, during and after the Conference.

The Diplomatic Conference on the Protection of the Audiovisual Performances held in Beijing, from June 20 to 26, 2012, has separate Records.

The Provisional Agreement of the Diplomatic Conference on the Protection of Audiovisual Performances

This part contains the two basic proposals of the Diplomatic Conference: For the substantive provisions (page 12) and for administrative and final provisions (page 27). Since there was no consensus on the conclusion of a treaty in the 2000, these *Records* contain the Provisional Agreement of the Diplomatic Conference on the Protection of Audiovisual Performances (page 34), as circulated in the *Memorandum of the Director General*, at the 36th Series of Meetings of the Assemblies of the Member States of WIPO, held in Geneva, from September 24 to October 3, 2001 (Document A/36/9 Rev.).

A marked-up text shows the changes between the basic proposal for the substantive provisions and the text of the provisional agreement (page 44).

Conference Documents

The part entitled *Conference Documents* (pages 60 to 221) contains two series of documents distributed before, during and after the Diplomatic Conference: "IAVP/DC" (44 documents) and "IAVP/DC/INF" (two documents). A list of the conference documents, indicating on which page they are reproduced, appears in the beginning of the Conference Documents part of these Records, on page 61.

Rules of Procedure

The *Rules of Procedure* of the Diplomatic Conference, as adopted during the Conference, appear between pages 143 and 156.

Summary Minutes

The part entitled *Summary Minutes* (pages 223 to 321) contains the summary minutes of the Plenary of the Diplomatic Conference and of Main Committees I and II. Those minutes were written in their provisional form by the International Bureau on the basis of transcripts of the tape recordings made of all interventions. The transcripts are preserved in the archive of the International Bureau. The provisional minutes were then made available to the speakers with the invitation to make suggestions for changes where desired. The final minutes, published in these *Records*, take such suggestions into account.

Participants

The part entitled *Participants* (pages 323 to 370) lists the individuals who represented governments and the European Community (page 361), intergovernmental organizations other than the World Intellectual Property Organization (page 362 to 363), international non-governmental organizations (pages 364 to 369) and the World Intellectual Property Organization (pages 369 to 370). This section also lists the officers of the Diplomatic Conference and the officers and members of the committees of the Diplomatic Conference (pages 371 to 374).

Indexes

Finally, these *Records* contain four different indexes (pages 375 to 391).

The first index lists by number the Articles of the Provisional Agreement, respectively, and indicates for each Article the pages where the text of the draft and the final text of the Provisional Agreement appears in these *Records*; and the pages where the summary minutes reflecting the discussion on and adoption of the Article are reproduced.

The second index is an alphabetical list of the participants indicating, by the name of each individual, the State or Organization which he or she represented, as well as the place in these *Records* where his or her name appears.

The third index is an alphabetical list of the Member States of WIPO participating in the Diplomatic Conference showing, under the name of each State, page references for where to find the names of the members of its delegation as well as any written proposals for amendments submitted and the interventions made on behalf of that State.

Special Delegation, the two Observer States, Intergovernmental Organizations and Non-Governmental Organizations are also reflected in the fourth index together with Member States.

Geneva, June 2022

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**BASIC PROPOSALS FOR THE SUBSTANTIVE AND ADMINISTRATIVE PROVISIONS OF
THE INSTRUMENTS ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

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

Memorandum prepared by the Chairman of the Standing Committee

EDITOR'S NOTE:

The text of the memorandum prepared by the Chair of the Standing Committee and the respective notes for the articles of the Basic Proposal, both presented together with the text of the articles, are reproduced on pages 87 to 125 of these Records.

Alternative A

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

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

Contents

Preamble

- Article 1: Relation to Other Conventions and Treaties
- Article 2: Definitions
- Article 3: Beneficiaries of Protection
- Article 4: National Treatment
- 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 11: Right of Broadcasting and Communication to the Public

- Article 12: *Alternative E* Transfer
 Alternative F Entitlement to Exercise Rights
 Alternative G Law Applicable to Transfers
 Alternative H [No such provision]
- 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
- Article 18: Reservations
- Article 19: Application in Time
- Article 20: Provisions on Enforcement of Rights

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,

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:

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.

(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.

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;

(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.

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.

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.

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.

(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.

(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 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.

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.

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.

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.

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.

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.

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.

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]

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.

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.

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.

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.

Article 17

Formalities

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

Article 18**Reservations**

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

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.

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.

BASIC PROPOSAL FOR ADMINISTRATIVE AND
FINAL PROVISIONS OF THE INTERNATIONAL INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE

Observations of the International Bureau

EDITOR'S NOTE:

The text of the memorandum prepared by the Chair of the Standing Committee and the respective notes for the articles of the Basic Proposal, both presented together with the text of the articles, are reproduced on pages 126 to 142 of these Records.

Alternative A

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

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

Contents

Article 100: Assembly

Article 101: International Bureau

Article 102: Eligibility for Becoming Party to the Treaty

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Article 106: Effective Date of Becoming Party to the Treaty

Article 107: Denunciation of the Treaty

Article 108: Languages of the Treaty

Article 109: Depositary

Article 100**Assembly***Alternative A*

(1)(a) Contracting Parties shall be members of the Assembly competent for the WIPO Performances and Phonograms Treaty.

Alternative B

(1)(a) The Contracting Parties shall have an Assembly.

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

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 102(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

Alternative A

(4) No Contracting Party may vote in the Assembly on any question relating exclusively to a treaty for which the Assembly is competent and by which the Contracting Party is not bound.

Alternative B

[No such provision]

(5) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(6) The Assembly shall establish its own rules of procedure, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Article 101**International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Article 102**Eligibility for Becoming Party to the Treaty***Alternative A*

Any State or intergovernmental organization party to the WIPO Performances and Phonograms Treaty may become party to this Treaty.

Alternative B

- (1) Any Member State of WIPO may become party to this Treaty.
- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.
- (3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Article 103**Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Article 104**Signature of the Treaty**

This Treaty shall be open for signature until December 31, 2001, by

Alternative A: any State that has acceded to or ratified the WIPO Performances and Phonograms Treaty and by the European Community.

Alternative B: any Member State of WIPO and by the European Community.

Article 105**Entry into Force of the Treaty**

This Treaty shall enter into force three months after

Alternative A: five

Alternative B: 30

instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Article 106**Effective Date of Becoming Party to the Treaty**

This Treaty shall bind

(i) the

Alternative A: five

Alternative B: 30

States referred to in Article 105, from the date on which this Treaty has entered into force;

(ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 105, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

(iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Article 107

Denunciation of the Treaty

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Article 108**Languages of the Treaty**

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, “interested party” means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Article 109**Depositary**

The Director General of WIPO is the depositary of this Treaty.

TEXT OF THE PROVISIONAL AGREEMENT AS REPRODUCED IN THE ANNEX TO THE
MEMORANDUM OF THE DIRECTOR GENERAL AT THE THIRTY-SIXTH SERIES OF
MEETINGS OF THE ASSEMBLIES OF THE MEMBER STATES OF WIPO

Memorandum of the Director General

1. Pursuant to the decision of the Twenty-Fifth (11th Extraordinary) Session of the WIPO General Assembly, Geneva, April 13 and 14, 2000, the Diplomatic Conference on the Protection of Audiovisual Performances was convened in Geneva from December 7 to 20, 2000.

The Diplomatic Conference was attended by 482 delegates from 121 countries and the European Community, 19 observers from nine intergovernmental organizations and 167 observers from 47 non-governmental organizations.

2. The 19 Articles, to which the Recommendation refers, are reproduced in the Annex to this document. On one provision, the Diplomatic Conference did not succeed in reaching agreement, that is, Article 12 on ownership and transfer of rights.

3. Before closing, the Diplomatic Conference adopted the following Recommendation:

“The Diplomatic Conference

“(i) notes that a provisional agreement has been achieved on 19 Articles;

“(ii) recommends to the Assemblies of Member States of WIPO, in their

September 2001 session, that they reconvene the Diplomatic Conference for the purpose of reaching agreement on outstanding issues.”

1. The WIPO General Assembly is invited to discuss the Recommendation of the Diplomatic Conference on the Protection of Audiovisual Performances and to decide whether, and if so when and where, the Conference shall be reconvened.

[Annex follows]

Draft
WIPO Audiovisual Performances Treaty

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Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the 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, social, cultural and technological developments,

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 performances, fixed in audiovisual fixations,

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:

Article 1

Relation to Other Conventions and Treaties

- (1) 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.
- (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 treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.

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 fixation” means the embodiment of moving images, whether or not accompanied by sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;¹

(c) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of 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;

(d) “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.

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.

Article 4 National Treatment

(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) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.

¹ *Agreed statement concerning Article 2(b)*: It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(b) is without prejudice to Article 2(c) of the WPPT.

(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.

Article 5 Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, 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, taking due account of the nature of audiovisual fixations.

(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.

(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.²

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 fixation of their unfixed performances.

² *Agreed statement concerning Article 5:* For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

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.³

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.⁴

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 as determined in the national law of Contracting Parties, 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.⁵

³ *Agreed statement concerning Article 7:* The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.

⁴ *Agreed statement concerning Articles 8 and 9:* As used in these Articles, the expression “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.

⁵ *Agreed statement concerning Articles 8 and 9:* As used in these Articles, the expression “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.

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 members of the public may access them from a place and at a time individually chosen by them.

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 in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that, instead of the right of authorization provided for in paragraph (1), they establish 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 also declare that they set conditions in their legislation for the exercise of the right to equitable remuneration.
- (3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (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.

Article 12

Article 13
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 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.⁶

⁶ *Agreed statement concerning Article 13:* The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 13 (on Limitations and Exceptions) of the Treaty.

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.

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.⁷

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, performances or copies of 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.⁸

⁷ *Agreed statement concerning Article 15:* The expression “technological measures used by performers” [emphasis added] should, as this is the case regarding the WIPO Performances and Phonograms Treaty, 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.

⁸ *Agreed statement concerning Article 16:* The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable mutatis mutandis also to Article 16 (on Obligations concerning Rights Management Information) of the Treaty.

Article 17
Formalities

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

Article 18
Reservations and Notifications

- (1) Subject to provisions of Article 11(3), no reservations to this Treaty shall be permitted.
- (2) Any declaration under Article 11(2) or 19(2) may be made in the instruments referred to in Article ..., and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

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 declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 7 to 11 of this Treaty, or any one or more of those, 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 the said Articles to performances that occurred after the entry into force of this Treaty for that Contracting Party.
- (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 5 and 7 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

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.

MARKED-UP TEXT SHOWING THE CHANGES BETWEEN THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS AND THE TEXT OF THE PROVISIONAL AGREEMENT

EDITOR'S NOTE

Text deleted from the Basic Proposal is marked with ~~striketrough~~ and text added is **bold and underlined**. All other text reflects the text of the Basic Proposal. There were no agreed statements in the text of the provisional agreement.

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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~~Alternative F Entitlement to Exercise Rights~~
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- Article 16: Obligations concerning Rights Management Information
- Article 17: Formalities
- Article 18: Reservations **and Notifications**
- Article 19: Application in Time
- Article 20: Provisions on Enforcement of Rights

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of **the** 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,

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

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:

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.~~

~~(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]~~

~~(2)~~**(1)** 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)~~**(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.

~~(4)~~**(3)** This Treaty shall not have any connection with ~~other~~ treaties **other than the WIPO Performances and Phonograms Treaty**, nor shall it prejudice any rights and obligations under, any other treaties

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;~~

~~(e)~~**(b)** “audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sounds **s** or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;

~~(d)~~(c) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of 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)~~(d) “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.

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.

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~~ **extend and term of the** protection provided for in subparagraph (ii) of **accorded to the nationals of another Contracting Party under** 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.~~ **with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other 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)~~**(3)** The obligation provided for in paragraph (1) does not apply to **a Contracting Party to** the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, **nor does it apply to a Contracting Party, to the extent that it has made such reservation.**

Article 5

Moral Rights

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, **as regards his live performances or performances fixed in audiovisual fixations,** 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, **taking due account of the nature of audiovisual fixations.** ~~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~~

(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.

(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 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.

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.

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.

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.

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.

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 **in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that** establish, instead of the right of authorization provided for in paragraph (1), **they establish** 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 **also declare that they** ~~in their legislation~~ set conditions **in their legislation** 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 paragraphs **s (1) or (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.

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.~~

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]~~

Article 13

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations ~~and~~ or 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.

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.

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.

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 **copies of** 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.

Article 17

Formalities

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

Article 18

Reservations and Notifications

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

(2) Any declaration under Article 11(2) or 19(2) may be made in the instruments referred to in Article ..., and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

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~~ **declare in a notification deposited with the Director General of WIPO that it will** not to apply the provisions of Articles ~~6~~ **7** to 11 of this Treaty, **or any one or more of those,** 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 the said Articles ~~4 and 6 to 11~~ of this Treaty to performances that occurred after the entry into force of this Treaty for that Contracting Party.

(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~~ 5 and 7 after the entry into force of this Treaty for the respective Contracting Parties.

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.

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June 22, 2000 (Original: English)

DRAFT AGENDA

approved by the Preparatory Committee for the Diplomatic Conference

1. Opening of the Conference by the Director General of WIPO
2. Consideration and adoption of the Rules of Procedure
3. Election of the President of the Conference
4. Consideration and adoption of the agenda
5. Election of the Vice-Presidents of the Conference
6. Election of the members of the Credentials Committee
7. Election of the members of the Drafting Committee
8. Election of the Officers of the Credentials Committee, the Main Committees and Drafting Committee
9. Consideration of the first report of the Credentials Committee
10. Opening declarations by Delegations and by representatives of Observer Organizations
11. Consideration of the texts proposed by the Main Committees
12. Consideration of the second report of the Credentials Committee
13. Adoption of the Instrument
14. Adoption of any recommendation, resolution, agreed statement or final act
15. Closing declarations by Delegations and by representatives of Observer Organizations
16. Closing of the Conference by the President*

[End of document]

* Immediately after the closing of the Conference, the Final Act, and the Instrument, if any, will be open for signature.

IAVP/DC/2

June 22, 2000 (Original: English)

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CHAPTER I: OBJECTIVE, COMPETENCE, COMPOSITION AND
SECRETARIAT OF THE CONFERENCERule 1: Objective and Competence of the Conference

(1) The objective of the Diplomatic Conference on the Protection of Audiovisual Performances (hereinafter referred to as “the Conference”) is to negotiate and adopt the [Protocol to the WIPO Performances and Phonograms Treaty] [WIPO Treaty on Audiovisual Performances] (hereinafter referred to as “the Instrument”).

(2) The Conference, meeting in Plenary, shall be competent to:

(i) adopt the Rules of Procedure of the Conference (hereinafter referred to as “these Rules”) and to make any amendments thereto;

(ii) adopt the agenda of the Conference;

(iii) decide on credentials, full powers, letters or other documents presented in accordance with Rules 6, 7 and 8 of these Rules;

(iv) adopt the Instrument;

(v) adopt any recommendation or resolution whose subject matter is germane to the Instrument;

(vi) adopt any agreed statements to be included in the Records of the Conference;

(vii) adopt any final act of the Conference;

(viii) deal with all other matters referred to it by these Rules or appearing on its agenda.

Rule 2: Composition of the Conference

(1) The Conference shall consist of:

(i) delegations of the States members of the World Intellectual Property Organization (hereinafter referred to as “the Member Delegations”),

(ii) the special delegation of the European Community (hereinafter referred to as “the Special Delegation”),

(iii) the delegations of States members of the United Nations other than the States members of the World Intellectual Property Organization invited to the Conference as observers (hereinafter referred to as “the Observer Delegations”), and

(iv) representatives of intergovernmental and non-governmental organizations invited to the Conference as observers (hereinafter referred to as “the Observer Organizations”).

(2) References in these Rules of Procedure to Member Delegations shall be considered, except as otherwise provided (see Rules 11(2), 33 and 34), as references also to the Special Delegation.

(3) References in these Rules of Procedure to “Delegations” shall be considered as references to the three kinds (Member, Special and Observer) of Delegations but not to Observer Organizations.

Rule 3: Secretariat of the Conference

(1) The Conference shall have a Secretariat provided by the International Bureau of the World Intellectual Property Organization (hereinafter referred to as “the International Bureau” and “WIPO,” respectively).

(2) The Director General of WIPO and any official of the International Bureau designated by the Director General of WIPO may participate in the discussions of the Conference, meeting in Plenary, as well as in any committee or working group thereof and may, at any time, make oral or written statements, observations or suggestions to the Conference, meeting in Plenary, and any committee or working group thereof concerning any question under consideration.

(3) The Director General of WIPO shall, from among the staff of the International Bureau, designate the Secretary of the Conference and a Secretary for each committee and for each working group.

(4) The Secretary of the Conference shall direct the staff required by the Conference.

(5) The Secretariat shall provide for the receiving, translation, reproduction and distribution of the required documents, for the interpretation of oral interventions and for the performance of all other secretariat work required for the Conference.

(6) The Director General of WIPO shall be responsible for the custody and preservation in the archives of WIPO of all documents of the Conference. The International Bureau shall distribute the final documents of the Conference after the closing of the Conference.

CHAPTER II: REPRESENTATION

Rule 4: Delegations

(1) Each Delegation shall consist of one or more delegates and may include advisors.

(2) Each Delegation shall have a Head of Delegation and may have a Deputy Head of Delegation.

Rule 5: Observer Organizations

An Observer Organization may be represented by one or more representatives.

Rule 6: Credentials and Full Powers

- (1) Each Delegation shall present credentials.
- (2) Full powers shall be required for signing the Instrument. Such powers may be included in the credentials.

Rule 7: Letters of Appointment

The representatives of Observer Organizations shall present a letter or other document appointing them.

Rule 8: Presentation of Credentials, etc.

The credentials and full powers referred to in Rule 6 and the letters or other documents referred to in Rule 7 shall be presented to the Secretary of the Conference, preferably not later than twenty-four hours after the opening of the Conference.

Rule 9: Examination of Credentials, etc.

- (1) The Credentials Committee referred to in Rule 11 shall examine the credentials, full powers, letters or other documents referred to in Rules 6 and 7, respectively, and shall report to the Conference, meeting in Plenary.
- (2) The decision on whether a credential, full powers, letter or other document is in order shall be made by the Conference, meeting in Plenary. Such decision shall be made as soon as possible and in any case before the adoption of the Instrument.

Rule 10: Provisional Participation

Pending a decision upon their credentials, letters or other documents of appointment, Delegations and Observer Organizations shall be entitled to participate provisionally in the deliberations of the Conference as provided in these Rules.

CHAPTER III: COMMITTEES AND WORKING GROUPS

Rule 11: Credentials Committee

- (1) The Conference shall have a Credentials Committee.
- (2) The Credentials Committee shall consist of seven Member Delegations elected by the Conference, meeting in Plenary, from among the Member Delegations, except that the Special Delegation shall not be eligible for membership in the Credentials Committee.

Rule 12: Main Committees and Their Working Groups

- (1) The Conference shall have two Main Committees. Main Committee I shall be responsible for proposing for adoption by the Conference, meeting in Plenary, the substantive law provisions of the Instrument and any recommendation, resolution or agreed statement referred to in Rule 1(2)(v) and (vi). Main Committee II shall be responsible for proposing for

adoption by the Conference, meeting in Plenary, any administrative and the final clauses of the Instrument.

(2) Each Main Committee shall consist of all the Member Delegations.

(3) Each Main Committee may create working groups. In creating a working group, the Main Committee creating it shall specify the tasks of the Working Group, decide on the number of the members of the Working Group and elect such members from among the Member Delegations.

Rule 13: Drafting Committee

(1) The Conference shall have a Drafting Committee.

(2) The Drafting Committee shall consist of 11 elected members and two *ex officio* members. The elected members shall be elected by the Conference, meeting in Plenary, from among the Member Delegations. The Presidents of the two Main Committees shall be the *ex officio* members.

(3) The Drafting Committee shall prepare drafts and give advice on drafting as requested by either Main Committee. The Drafting Committee shall not alter the substance of the texts submitted to it. It shall coordinate and review the drafting of all texts submitted to it by the Main Committees, and it shall submit the texts so reviewed for final approval to the competent Main Committee.

Rule 14: Steering Committee

(1) The Conference shall have a Steering Committee.

(2) The Steering Committee shall consist of the President and Vice-Presidents of the Conference, the President of the Credentials Committee, the Presidents of the Main Committees and the President of the Drafting Committee. The meetings of the Steering Committee shall be presided over by the President of the Conference.

(3) The Steering Committee shall meet from time to time to review the progress of the Conference and to make decisions for furthering such progress, including, in particular, decisions on the coordination of the meetings of the Plenary, the committees and the working groups.

(4) The Steering Committee shall propose the text of any final act of the Conference (see Rule 1(2)(vii)), for adoption by the Conference, meeting in Plenary.

CHAPTER IV: OFFICERS

Rule 15: Officers and their Election; Precedence Among Vice-Presidents

(1) The Conference shall have a President and 10 Vice-Presidents.

(2) The Credentials Committee, each of the two Main Committees and the Drafting Committee shall have a President and two Vice-Presidents.

(3) Any Working Group shall have a President and two Vice-Presidents.

(4) The Conference, meeting in Plenary, and presided over by the Director General of WIPO, shall elect its President, and, then, presided over by its President shall elect its Vice-Presidents and the officers of the Credentials Committee, the Main Committees and the Drafting Committee.

(5) The officers of a Working Group shall be elected by the Main Committee that establishes that Working Group.

(6) Precedence among the Vice-Presidents of a given body (the Conference, the Credentials Committee, the two Main Committees, any Working Group, the Drafting Committee) shall be determined by the place occupied by the name of the State of each of them in the list of Member Delegations established in the alphabetical order of the names of the States in French, beginning with the Member Delegation whose name shall have been drawn by lot by the President of the Conference. The Vice-President of a given body who has precedence over all the other Vice-Presidents of that body shall be called "the ranking" Vice-President of that body.

Rule 16: Acting President

(1) If any President is absent from a meeting, the meeting shall be presided over, as Acting President, by the ranking Vice-President of that body.

(2) If all the officers of a body are absent from any meeting of the body concerned, that body shall elect an Acting President.

Rule 17: Replacement of President

If any President becomes unable to perform his or her functions for the remainder of the duration of the Conference, a new President shall be elected.

Rule 18: Vote by the Presiding Officer

(1) No President, whether elected as such or acting (hereinafter referred to as "the Presiding Officer"), shall take part in voting. Another member of his or her Delegation may vote for that Delegation.

(2) Where the Presiding Officer is the only member of his or her Delegation, he or she may vote, but only in the last place.

CHAPTER V: CONDUCT OF BUSINESS

Rule 19: Quorum

(1) A quorum shall be required in the Conference, meeting in Plenary; it shall, subject to paragraph (3), be constituted by one-half of the Member Delegations represented at the Conference.

(2) A quorum shall be required for the meetings of each Committee (the Credentials Committee, the two Main Committees, the Drafting Committee and the Steering Committee) and any working group; it shall be constituted by one-half of the members of the Committee or working group.

(3) The quorum at the time of the adoption of the Instrument by the Conference, meeting in Plenary, shall be constituted by one half of the Member Delegations whose credentials were found in order by the Conference meeting in Plenary.

Rule 20: General Powers of the Presiding Officer

(1) In addition to exercising the powers conferred upon Presiding Officers elsewhere by these Rules, the Presiding Officer shall declare the opening and closing of the meetings, direct the discussions, accord the right to speak, put questions to the vote, and announce decisions. The Presiding Officer shall rule on points of order and, subject to these Rules, shall have complete control of the proceedings at any meeting and over the maintenance of order thereat.

(2) The Presiding Officer may propose to the body over which he or she presides the limitation of time to be allowed to each speaker, the limitation of the number of times each Delegation may speak on any question, the closure of the list of speakers or the closure of the debate. The Presiding Officer may also propose the suspension or the adjournment of the meeting, or the adjournment of the debate on the question under discussion. Such proposals of the Presiding Officer shall be considered as adopted unless immediately rejected.

Rule 21: Speeches

(1) No person may speak without having previously obtained the permission of the Presiding Officer. Subject to Rules 22 and 23, the Presiding Officer shall call upon persons in the order in which they ask for the floor.

(2) The Presiding Officer may call a speaker to order if the remarks of the speaker are not relevant to the subject under discussion.

Rule 22: Precedence in Receiving the Floor

(1) Member Delegations asking for the floor are generally given precedence over Observer Delegations asking for the floor, and Member Delegations and Observer Delegations are generally given precedence over Observer Organizations.

(2) The President of a Committee or working group may be given precedence during discussions relating to the work of the Committee or working group concerned.

(3) The Director General of WIPO or his representative may be given precedence for making statements, observations or suggestions.

Rule 23: Points of Order

(1) During the discussion of any matter, any Member Delegation may rise to a point of order, and the point of order shall be immediately decided by the Presiding Officer in accordance with these Rules. Any Member Delegation may appeal against the ruling of the Presiding Officer. The appeal shall be immediately put to the vote, and the Presiding Officer's ruling shall stand unless the appeal is approved.

(2) The Member Delegation that has risen to a point of order under paragraph (1) may not speak on the substance of the matter under discussion.

Rule 24: Limit on Speeches

In any meeting, the Presiding Officer may decide to limit the time allowed to each speaker and the number of times each Delegation and Observer Organization may speak on any question. When the debate is limited and a Delegation or Observer Organization has used up its allotted time, the Presiding Officer shall call it to order without delay.

Rule 25: Closing of List of Speakers

(1) During the discussion of any given question, the Presiding Officer may announce the list of participants who have asked for the floor and decide to close the list as to that question. The Presiding Officer may nevertheless accord the right of reply to any speaker if a speech, delivered after the list of speakers has been closed, makes it desirable.

(2) Any decision made by the Presiding Officer under paragraph (1) may be the subject of an appeal under Rule 23.

Rule 26: Adjournment or Closure of Debate

Any Member Delegation may at any time move the adjournment or closure of the debate on the question under discussion, whether or not any other participant has asked for the floor. In addition to the proposer of the motion to adjourn or close the debate, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote. The Presiding Officer may limit the time allowed to speakers under this Rule.

Rule 27: Suspension or Adjournment of the Meeting

During the discussion of any matter, any Member Delegation may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote.

Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions

(1) Subject to Rule 23, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- (i) to suspend the meeting,
- (ii) to adjourn the meeting,
- (iii) to adjourn the debate on the question under discussion,
- (iv) to close the debate on the question under discussion.

(2) Any Member Delegation that has been given the floor on a procedural motion may speak on that motion only, and may not speak on the substance of the matter under discussion.

Rule 29: Basic Proposal; Proposals for Amendment

(1) (a) Documents [-] shall constitute the basis of the discussions in the Conference, and the text of the draft Instrument contained in those documents shall constitute the "Basic Proposal."

(b) Where, for any given provision of the draft Instrument, there are two or three alternatives in the Basic Proposal, consisting of either two or three texts, or one or two texts and an alternative that there should be no such provision, the alternatives shall be designated with the letters A, B and, where applicable, C, and shall have equal status. Discussions shall take place simultaneously on the alternatives and, if voting is necessary and there is no consensus on which alternative should be put to the vote first, each Member Delegation shall be invited to indicate its preference among the two or three alternatives. The alternative supported by more Member Delegations than the other one or two alternatives shall be put to the vote first.

(c) Wherever the Basic Proposal contains words within square brackets, only the text that is not within square brackets shall be regarded as part of the Basic Proposal, whereas words within square brackets shall be treated as a proposal for amendment if presented as provided in paragraph (2).

(2) Any Member Delegation may propose amendments to the Basic Proposal.

(3) Proposals for amendment shall, as a rule, be submitted in writing and handed to the Secretary of the body concerned. The Secretariat shall distribute copies to the Delegations and the Observer Organizations. As a general rule, a proposal for amendment cannot be taken into consideration and discussed or put to the vote at a meeting unless copies of it have been distributed not later than three hours before it is taken into consideration. The Presiding Officer may, however, permit the taking into consideration and discussion of a proposal for amendment even though copies of it have not been distributed or have been distributed less than three hours before it is taken into consideration.

Rule 30: Decisions on the Competence of the Conference

(1) If a Member Delegation moves that a duly seconded proposal should not be taken into consideration by the Conference because it is outside the latter's competence, that motion shall be decided upon by the Conference, meeting in Plenary, before the proposal is taken into consideration.

(2) If the motion referred to in paragraph (1), above, is made in a body other than the Conference, meeting in Plenary, it shall be referred to the Conference, meeting in Plenary, for a ruling.

Rule 31: Withdrawal of Procedural Motions and Proposals for Amendment

Any procedural motion and any proposal for amendment may be withdrawn by the Member Delegation that has made it, at any time before voting on it has commenced, provided that no amendment to it has been proposed by another Member Delegation. Any motion or proposal thus withdrawn may be reintroduced by any other Member Delegation.

Rule 32: Reconsideration of Matters Decided

When any matter has been decided by a body, it may not be reconsidered by that body unless so decided by the majority applicable under Rule 34(2)(ii). In addition to the proposer of the motion to reconsider, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing the motion, after which the motion shall immediately be put to the vote.

CHAPTER VI: VOTING

Rule 33: Right to Vote

(1) Each Member Delegation shall have the right to vote. A Member Delegation shall have one vote, may represent itself only and may vote in its name only.

(2) The Special Delegation has no right to vote and, for the purposes of paragraph (1) of this Rule and Rule 34, the Special Delegation is not covered by the term "Member Delegations."

(3) The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that

(i) the Special Delegation shall not exercise the rights to vote of the Member States of the European Community if the Member States exercise their rights to vote and vice versa, and

(ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote.

Rule 34: Required Majorities

(1) All decisions of all bodies shall be made as far as possible by consensus.

(2) If it is not possible to attain consensus, the following decisions shall require a majority of two-thirds of the Member Delegations present and voting:

- (i) adoption by the Conference, meeting in Plenary, of these Rules, and, once adopted, any amendment to them,
- (ii) decision by any of the bodies to reconsider, under Rule 32, a matter decided,
- (iii) adoption by the Conference, meeting in Plenary, of the Instrument,

whereas all other decisions of all bodies shall require a simple majority of the Member Delegations present and voting.

(3) "Voting" means casting an affirmative or negative vote; express abstention or non-voting shall not be counted. Rule 35: Requirement of Seconding; Method of Voting

(1) Any proposal for amendment made by a Member Delegation shall be put to a vote only if seconded by at least one other Member Delegation.

(2) Voting on any question shall be by show of hands unless a Member Delegation, seconded by at least one other Member Delegation, requests a roll-call, in which case it shall be by roll-call. The roll shall be called in the alphabetical order of the names in French of the States, beginning with the Member Delegation whose name shall have been drawn by lot by the Presiding Officer.

Rule 36: Conduct During Voting

- (1) After the Presiding Officer has announced the beginning of voting, the voting shall not be interrupted except on a point of order concerning the actual conduct of the voting.
- (2) The Presiding Officer may permit a Member Delegation to explain its vote or its abstention, either before or after the voting.

Rule 37: Division of Proposals

Any Member Delegation may move that parts of the Basic Proposal or of any proposal for amendment be voted upon separately. If the request for division is objected to, the motion for division shall be put to a vote. In addition to the proposer of the motion for division, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it. If the motion for division is carried, all parts of the Basic Proposal or of the proposal for amendment that have been separately approved shall again be put to the vote, together, as a whole. If all operative parts of the Basic Proposal or of the proposal for amendment have been rejected, the Basic Proposal or the proposal for amendment shall be considered rejected as a whole.

Rule 38: Voting on Proposals for Amendment

- (1) Any proposal for amendment shall be voted upon before the text to which it relates is voted upon.
- (2) Proposals for amendment relating to the same text shall be put to the vote in the order of their substantive remoteness from the said text, the most remote being put to the vote first and the least remote being put to the vote last. If, however, the adoption of any proposal for amendment necessarily implies the rejection of any other proposal for amendment or of the original text, such other proposal or text shall not be put to the vote.
- (3) If one or more proposals for amendment relating to the same text are adopted, the text as amended shall be put to the vote.
- (4) Any proposal the purpose of which is to add to or delete from a text shall be considered a proposal for amendment.

Rule 39: Voting on Proposals for Amendment on the Same Question

Subject to Rule 38, where two or more proposals relate to the same question, they shall be put to the vote in the order in which they have been submitted, unless the body concerned decides on a different order.

Rule 40: Equally Divided Votes

- (1) Subject to paragraph (2), if a vote is equally divided on a matter that calls only for a simple majority, the proposal shall be considered rejected.
- (2) If a vote is equally divided on a proposal for electing a given person to a given position as officer and the nomination is maintained, the vote shall be repeated, until either that nomination is adopted or rejected or another person is elected for the position in question.

CHAPTER VII: LANGUAGES AND MINUTES

Rule 41: Languages of Oral Interventions

(1) Subject to paragraph (2), oral interventions made in the meetings of any of the bodies shall be in Arabic, Chinese, English, French, Russian or Spanish, and interpretation shall be provided by the Secretariat into the other five languages.

(2) Any of the Committees and any working group may, if none of its members objects, decide to dispense with interpretation or to limit interpretation to some only of the languages that are referred to in paragraph (1).

Rule 42: Summary Minutes

(1) Provisional summary minutes of the meetings of the Conference, meeting in Plenary, and of the Main Committees shall be drawn up by the International Bureau and shall be made available as soon as possible after the closing of the Conference to all speakers, who shall, within two months after the minutes have been made available, inform the International Bureau of any suggestions for changes in the minutes of their own interventions.

(2) The final summary minutes shall be published in due course by the International Bureau.

Rule 43: Languages of Documents and Summary Minutes

(1) Any written proposal shall be presented to the Secretariat in Arabic, Chinese, English, French, Russian or Spanish. Such proposal shall be distributed by the Secretariat in Arabic, Chinese, English, French, Russian and Spanish.

(2) Reports of the Committees and any working group shall be distributed in Arabic, Chinese, English, French, Russian and Spanish. Information documents of the Secretariat shall be distributed in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

(3) (a) Provisional summary minutes shall be drawn up in the language used by the speaker if the speaker has used English, French or Spanish; if the speaker has used another language, the intervention shall be rendered in English or French at the choice of the International Bureau.

(b) The final summary minutes shall be made available in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

CHAPTER VIII: OPEN AND CLOSED MEETINGS

Rule 44: Meetings of the Conference and of the Main Committees

The meetings of the Conference, meeting in Plenary, and of the Main Committees shall be open to the public unless the Conference, meeting in Plenary, or the interested Main Committee, decides otherwise.

Rule 45: Meetings of Other Committees and of Working Groups

The meetings of the Credentials Committee, the Drafting Committee, the Steering Committee and any working group shall be open only to the members of the Committee or the working group concerned and to the Secretariat.

CHAPTER IX: OBSERVER DELEGATIONS AND OBSERVER ORGANIZATIONS

Rule 46: Status of Observers

(1) Observer Delegations may attend, and make oral statements in, the Plenary meetings of the Conference and the meetings of the Main Committees.

(2) Observer Organizations may attend the Plenary meetings of the Conference and the meetings of the Main Committees. Upon the invitation of the Presiding Officer, they may make oral statements in those meetings on questions within the scope of their activities.

(3) Written statements submitted by Observer Delegations or by Observer Organizations on subjects for which they have a special competence and which are related to the work of the Conference shall be distributed by the Secretariat to the participants in the quantities and in the languages in which the written statements were made available to it.

CHAPTER X: AMENDMENTS TO THE RULES OF PROCEDURE

Rule 47: Possibility of Amending the Rules of Procedure

With the exception of the present Rule, these Rules may be amended by the Conference, meeting in Plenary.

CHAPTER XI: FINAL ACT

Rule 48: Signing of the Final Act

If a final act is adopted, it shall be open for signature by any Delegation.

[End of document]

IAVP/DC/3

August 1, 2000 (Original; English)

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 Committee

The 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**

EDITOR'S NOTE:

The text of the Basic Proposal, which was presented together with the memorandum prepared by the Chair of the Standing Committee and the notes on the 20 articles of the Basic Proposal, is reproduced in pages 11 to 26 of these Records.

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]

[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:

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*, 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.

[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]

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]

[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.

[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]

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).

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.

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 6*bis* 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 6*bis*(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]

[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 6*bis*(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.

[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 6*bis*(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 6*bis* 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]

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.

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.

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.

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.

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.

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]

[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.

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.

[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*.

[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 on 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.

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.

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.

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.

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.

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.

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.

[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]

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]

[End of document]

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.

IAVP/DC/4

September 22, 2000 (Original: English)

BASIC PROPOSAL
FOR ADMINISTRATIVE AND FINAL PROVISIONS
OF THE INTERNATIONAL INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE

prepared by the International Bureau

Observations of the International Bureau

1. At its meeting on April 12 and 14, 2000, the Preparatory Committee for the WIPO Diplomatic Conference on the Protection of Audiovisual Performances requested the International Bureau to prepare a basic proposal for administrative and final clauses of an international instrument on the protection of audiovisual performances (document IAVP/PM/6, paragraph 7). The present document contains the draft of those clauses and, together with the draft substantive provisions of the instrument contained in document IAVP/DC/3, constitutes, in accordance with Rule 29(1)(a) of the draft Rules of Procedure for the Diplomatic Conference (document IAVP/DC/2), the Basic Proposal for the international instrument.

Protocol v. Separate Treaty¹

2. The request of the Preparatory Committee concerning the preparation of administrative and final clauses specified that the basic proposal should contain “alternative solutions for a protocol to the WIPO Performances and Phonograms Treaty (WPPT) and for a separate treaty” (document IAVP/PM/6, paragraph 7).

3. There does not appear to be any invariable accepted meaning of the term “protocol” in treaty practice. In general, the term “protocol” is used to signify something which is “added to a treaty in order to perfect or complete the treaty”² or, merely, “a treaty amending, or supplemental to, another treaty.”³ In the context of WIPO treaty practice, there are two instruments that are designated as “protocols”: the Protocol to the Hague Act of 1960 of the Hague Agreement Concerning the International Deposit of Industrial Designs, and the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks.

4. The main arguments in favor of describing the instrument on the protection of audiovisual performances as a protocol to the WPPT appear to be:

¹ See the discussion of this question in the Notes on Article 1 of the Basic Proposal for the substantive provisions of the instrument (document IAVP/DC/3, paragraphs 1.01 to 1.07).

² Gore-Booth, *Satow's Guide to Diplomatic Practice* (5th ed), 243.

³ McNair, *The Law of Treaties*, 23.

(i) The term “protocol” reflects the ultimate origin of the instrument in the Diplomatic Conference of December 1996 at which the WPPT was adopted. That Diplomatic Conference adopted a Resolution Concerning Audiovisual Performances which envisaged the adoption of a “protocol” to the WPPT concerning audiovisual performances.⁴

(ii) In view of the connection in origin and in substance between the WPPT and the instrument on the protection of audiovisual performances, it would be appropriate to envisage a common administrative organ (Assembly) for the two. The term “protocol” would better reflect the existence of such a shared administrative organ.

(iii) The designation of the instrument as a protocol to the WPPT offers greater opportunities, in drafting, for the incorporation by reference in the instrument of provisions contained in the WPPT, such as those on the International Bureau, denunciation, languages, and depositary.

5. The main arguments in favor of describing the proposed Instrument as a separate treaty appear to be:

(i) An instrument which requires a separate procedure of accession or ratification by States is, in any case, a separate treaty. The proposed Instrument will come into force independently of the WPPT.

(ii) It is more simple and more clear for users to set out all the provisions of an instrument *in extenso*, even if those provisions are the same as corresponding provisions to be found in another instrument. As a matter of practice, many of the administrative provisions and final clauses in treaties administered by WIPO are in the same form. It is, nevertheless, more convenient to repeat the provisions, especially as the possibility of a revision of an earlier treaty can lead to inaccuracies in cross-references.

6. The alternative descriptions of “protocol” or “treaty” are reflected in the title of the instrument given below, which follows the alternatives given in the Basic Proposal for the substantive provisions of the instrument (document IAVP/DC/3), namely, as *Alternative A*, “Draft Protocol to the WIPO Performances and Phonograms Treaty Concerning Audiovisual Performances” and, as *Alternative B*, “Draft WIPO Audiovisual Performances Treaty.” Thereafter, in the body of the draft provisions themselves, the single term “treaty” is used for convenience, again following the style established in the Basic Proposal for the substantive provisions. The use of the term “treaty” is without prejudice to the decision of the Diplomatic Conference on the description of the instrument. If that decision were in favor of Alternative A of the title, the word “treaty” would be replaced throughout the text by the word “protocol.”

Presentation of the Draft Provisions

7. The presentation of the draft administrative provisions and final clauses and of the accompanying Notes follows the same conventions as those used in the Basic Proposal for the substantive provisions. In particular, to facilitate ease of reference and comparison, the Notes concerning each Article reproduce the corresponding provision of the WPPT in a clearly distinguishable box.

⁴ The resolution is set out in paragraph 2 of document IAVP/DC/3.

8. In order to avoid any possibility of confusion, a numbering system for the Articles of the draft administrative provisions and final clauses has been used which is different from, and independent of, the numbering system used for the draft substantive provisions. Whereas the latter are numbered Articles 1 to 20, the draft administrative provisions and final clauses are numbered Articles 100 to 109. Naturally, the numbering systems will be made consistent following agreement on all provisions at the Diplomatic Conference.

Incorporation by Reference of Provisions of the WPPT

9. In the preparatory work leading to the Diplomatic Conference, a number of delegations favored, consistently with the preference for describing the proposed Instrument as a protocol to the WPPT, the incorporation by reference of provisions of the WPPT. This approach has not been followed in the draft provisions given below, which set out all provisions *in extenso*. Once agreement has been reached at the Diplomatic Conference on the content of all provisions, a decision can be taken by the relevant committee on whether to use the technique of incorporation by reference.

Alternative A

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

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

EDITOR'S NOTE:

The text of the Basic Proposal, which was presented together with the memorandum prepared by the Chair of the Standing Committee, is reproduced on pages 11 to 26 of these Records.

Alternative A

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

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

Contents

Article 100: Assembly

Article 101: International Bureau

Article 102: Eligibility for Becoming Party to the Treaty

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Article 106: Effective Date of Becoming Party to the Treaty

Article 107: Denunciation of the Treaty

Article 108: Languages of the Treaty

Article 109: Depositary

Notes on Article 100

100.01 Two options are presented for *paragraph (1)(a) of Article 100*. *Alternative A* provides for a common Assembly for Contracting Parties to the WPPT and Contracting Parties to the proposed Instrument. *Alternative B* envisages a separate Assembly for the Contracting Parties to the proposed Instrument from the Assembly for the Contracting Parties to the WPPT.

100.02 The decision whether to have a common Assembly or separate Assemblies has consequences for the provisions in Article 100 on voting (see paragraph 100.05, below) and is also logically connected with the provisions in Article 102 on eligibility for becoming party to the proposed Instrument. Each of these implications of the decision is discussed in the appropriate places below.

100.03 The provisions of *paragraphs (1)(b) and (c) and (2) of Article 100* mirror the corresponding provisions in the WPPT and strongly resemble the equivalent provisions in other treaties administered by WIPO.

**Article 24 of the WPPT
Assembly**

(1)(a) The Contracting Parties shall have an Assembly.

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

(c) The expenses of each delegation shall be borne by the Contracting Party that has appointed the delegation. The Assembly may ask WIPO to grant financial assistance to facilitate the participation of delegations of Contracting Parties that are regarded as developing countries in conformity with the established practice of the General Assembly of the United Nations or that are countries in transition to a market economy.

[continues]

[Notes on Article 100, continued]

100.04 *Paragraph (3)* is in the same form as the corresponding provision of the WPPT (Article 24(3)). The right to vote that it establishes, however, has to be understood in conjunction with *paragraph (4)*, which regulates the manner in which the right to vote may be exercised in a common Assembly for the WPPT and the proposed Instrument (*Alternative A* of paragraph (1)(a), above).

Article 24 of the WPPT

[continued]

(2)(a) The Assembly shall deal with matters concerning the maintenance and development of this Treaty and the application and operation of this Treaty.

(b) The Assembly shall perform the function allocated to it under Article 26(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

(c) The Assembly shall decide the convocation of any diplomatic conference for the revision of this Treaty and give the necessary instructions to the Director General of WIPO for the preparation of such diplomatic conference.

(3)(a) Each Contracting Party that is a State shall have one vote and shall vote only in its own name.

(b) Any Contracting Party that is an intergovernmental organization may participate in the vote, in place of its Member States, with a number of votes equal to the number of its Member States which are party to this Treaty. No such intergovernmental organization shall participate in the vote if any one of its Member States exercises its right to vote and vice versa.

[continues]

[Notes on Article 100, continued]

100.05 If Alternative A of paragraph (1) is adopted and there is a common Assembly for the WPPT and the proposed Instrument, then, depending upon the provisions on eligibility for becoming party to the proposed Instrument (Article 102), three situations are possible:

(i) The first situation would occur where there is a common Assembly and a State or intergovernmental organization is party to the WPPT, but not party to the proposed Instrument. Logically, such a member of the Assembly, not being bound by the proposed Instrument, should not have the right to vote on questions relating exclusively to the proposed Instrument.

(ii) The second situation would occur where there is a common Assembly and a State or intergovernmental organization is party to both the WPPT and the proposed Instrument. In this situation, there is no reason to envisage any restriction on the right of the party to vote in the Assembly.

(iii) The third situation would occur where there is a common Assembly and Article 102 does not require adherence to the WPPT as a condition of eligibility for becoming party to the proposed Instrument. In such a situation, a State or intergovernmental organization could be party to the proposed Instrument but not party to the WPPT. Logically, not being bound by the WPPT, it should not have the right to vote on questions relating exclusively to the WPPT.

100.06 *Alternative A of paragraph (4)* seeks to provide a viable solution to the possible situations outlined in the preceding paragraph of the Notes by establishing the rule that a Contracting Party may not vote in the Assembly on any question relating exclusively to a treaty for which the Assembly is competent and by which it is not bound.

100.07 If Alternative B of paragraph (1) is adopted and there are separate Assemblies for the WPPT and the proposed Instrument, no restrictions on the right to vote need to be envisaged and *Alternative B of paragraph (4)* (that is, no paragraph (4)) should apply.

100.08 *Paragraphs (5) and (6)* mirror the corresponding provisions in the WPPT (Article 24(4) and (5)).

Article 24 of the WPPT

[continued]

(4) The Assembly shall meet in ordinary session once every two years upon convocation by the Director General of WIPO.

(5) The Assembly shall establish its own rules of procedures, including the convocation of extraordinary sessions, the requirements of a quorum and, subject to the provisions of this Treaty, the required majority for various kinds of decisions.

Notes on Article 101

101.01 This Article is in standard form and is self-explanatory.

**Article 25 of the WPPT
International Bureau**

The International Bureau of WIPO shall perform the administrative tasks concerning the Treaty.

Notes on Article 102

102.01 *Alternative A of Article 102* reflects the preference expressed by many delegations in the preparatory work to create a connection between the WPPT and the proposed Instrument by making eligibility to become party to the proposed Instrument conditional upon being party to the WPPT.

102.02 *Alternative B of Article 102* reflects the approach of considering the proposed Instrument to be a separate and independent treaty from the WPPT. It acknowledges a kinship between the WPPT and the proposed Instrument, however, by adopting the same approach to eligibility as that contained in Article 26 of the WPPT.

Article 26 of the WPPT
Eligibility for Becoming Party to the Treaty

- (1) Any Member State of WIPO may become party to this Treaty.
- (2) The Assembly may decide to admit any intergovernmental organization to become party to this Treaty which declares that it is competent in respect of, and has its own legislation binding on all its Member States on, matters covered by this Treaty and that it has been duly authorized, in accordance with its internal procedures, to become party to this Treaty.

[continues]

[Notes on Article 102, continued]

Article 26 of the WPPT

[continued]

(3) The European Community, having made the declaration referred to in the preceding paragraph in the Diplomatic Conference that has adopted this Treaty, may become party to this Treaty.

Notes on Article 103

103.01 *Article 103* is in the same form as Article 27 of the WPPT. It is intended to clarify that, in the case of shared competence between an intergovernmental organization and a member State of that organization which are both party to the proposed Instrument, each party enjoys all of the rights and assumes all of the obligations created by the proposed Instrument.

**Article 27 of the WPPT
Rights and Obligations under the Treaty**

Subject to any specific provisions to the contrary in this Treaty, each Contracting Party shall enjoy all of the rights and assume all of the obligations under this Treaty.

Notes on Article 104

104.01 A treaty may be signed only by a State or intergovernmental organization that is eligible to become party to it. If Alternative A of Article 102 is adopted, and eligibility to become party to the proposed Instrument is limited to those States or intergovernmental organizations that are party to the WPPT, it would follow that the proposed Instrument could be signed only by such States or intergovernmental organizations. However, Article 2.1.(g) of the Vienna Convention on the Law of Treaties indicates that the term "party" is used with respect to a State which has acceded to or ratified a treaty only when that treaty is in force. Since the WPPT is not as yet in force (at the date of this document, 16 (out of a required 30) States had acceded to or ratified it), it would seem to be undesirable to restrict signature of the proposed Instrument to States that are party to the WPPT (which could lead to a situation in which no State is eligible to sign the proposed Instrument). Instead, *Alternative A* of Article 104 proposes that, where eligibility to becoming party to the proposed Instrument is conditional upon being party to the WPPT (*Alternative A* of Article 102), signature of the proposed Instrument should be open to any State that *has acceded to or ratified* the WPPT and the European Community.

104.02 *Alternative B* of Article 104 is intended to apply if the approach of the proposed Instrument being a separate and independent Treaty is adopted. It would permit the proposed Instrument to be signed (within the required timeframe) by any Member State of WIPO and by the European Community. The provision is in the same terms as Article 28 of the WPPT.

**Article 28 of the WPPT
Signature of the Treaty**

This Treaty shall be open for signature until December 31, 1997, by any Member State of WIPO and by the European Community.

Notes on Article 105

105.01 *Article 105* deals with the number of instruments of ratification or accession (by States) that would be required to bring the proposed Instrument into force.

105.02 If Alternative A of Article 102 were adopted and eligibility to accede to or ratify the proposed Instrument were limited to those States that were party to the WPPT, the number of States eligible to accede to or ratify the proposed Instrument would be relatively small in the immediate future. This would seem to favor the requirement of a small number of accessions or ratifications by States to bring the proposed Instrument into force, as provided for in *Alternative A of Article 105* (five instruments of ratification or accession).

105.03 If, on the other hand, the proposed Instrument is conceived as a separate treaty, open for accession or ratification by any Member States of WIPO, it would seem appropriate to follow the corresponding provision of the WPPT (Article 29) and require 30 instruments of ratification or accession by States to bring the proposed Instrument into force.

**Article 29 of the WPPT
Entry into Force of the Treaty**

This Treaty shall enter into force three months after 30 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

Notes on Article 106

106.01 *Article 106* is a mechanical provision that establishes when the proposed Instrument would bind a State, the European Community or any other intergovernmental organization which accedes to or ratifies it. It mirrors the equivalent provision in Article 30 of the WPPT.

Article 30 of the WPPT
Effective Date of Becoming Party to the Treaty

This Treaty shall bind

- (i) the 30 States referred to in Article 29, from the date on which this Treaty has entered into force;
- (ii) each other State from the expiration of three months from the date on which the State has deposited its instrument with the Director General of WIPO;
- (iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 29, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;
- (iv) any other intergovernmental organization that is admitted to become party to this Treaty, from the expiration of three months after the deposit of its instrument of accession.

Notes on Article 107

107.01 This provision, which is in the same form as Article 31 of the WPPT, is the standard provision on denunciation that is contained in recently concluded treaties administered by WIPO and is self-explanatory.

**Article 31 of the WPPT
Denunciation of the Treaty**

This Treaty may be denounced by any Contracting Party by notification addressed to the Director General of WIPO. Any denunciation shall take effect one year from the date on which the Director General of WIPO received the notification.

Notes on Article 108

108.01 Article 108 sets out *in extenso* the same provision on languages as is contained in Article 32 of the WPPT. It provides in *paragraph (1)* for the new Treaty to be signed in English, Arabic, Chinese, French, Russian and Spanish and establishes that each such text will be authentic. Each of the treaties concluded under the auspices of WIPO since 1990 has authentic versions in these six languages.

108.02 *Paragraph (2)* provides for the Director General to establish official texts of the new Treaty on the request of an interested party and in consultation with all interested parties.

**Article 32 of the WPPT
Languages of the Treaty**

(1) This Treaty is signed in a single original in English, Arabic, Chinese, French, Russian and Spanish languages, the versions in all these languages being equally authentic.

(2) An official text in any language other than those referred to in paragraph (1) shall be established by the Director General of WIPO on the request of an interested party, after consultation with all the interested parties. For the purposes of this paragraph, "interested party" means any Member State of WIPO whose official language, or one of whose official languages, is involved and the European Community, and any other intergovernmental organization that may become party to this Treaty, if one of its official languages is involved.

Notes on Article 109

109.01 Article 109 sets out the usual provision on depositary functions that is now to be found in treaties administered by WIPO. It is in the same terms as Article 33 of the WPPT.

109.02 The functions of the depositary of a treaty are summarized in Article 77(1) of the Vienna Convention on the Law of Treaties, which is in the following form:

“Functions of depositaries”

“1. The functions of a depositary, unless otherwise provided in the treaty or agreed by the contracting States, comprise in particular:

- (a) keeping custody of the original text of the treaty and of any full powers delivered to the depositary;
- (b) preparing certified copies of the original text and preparing any further text of the treaty in such additional languages as may be required by the treaty and transmitting them to the parties and to the States entitled to become parties to the treaty;
- (c) receiving any signatures to the treaty and receiving and keeping custody of any instruments, notifications and communications relating to it;
- (d) examining whether the signature or any instrument, notification or communication relating to the treaty is in due and proper form and, if need be, bringing the matter to the attention of the State in question;
- (e) informing the parties and States entitled to become parties to the treaty of acts, notifications and communications relating to the treaty;
- (f) informing the States entitled to become parties to the treaty when the number of signatures or of instruments of ratification, acceptance, approval or accession required for the entry into force of the treaty has been received or deposited;
- (g) registering the treaty with the Secretariat of the United Nations;
- (h) performing the functions specified in other provisions of the present Convention.”

**Article 33 of the WPPT
Depositary**

The Director General of WIPO is the depositary of this Treaty.

IAVP/DC/5

December 7, 2000 (Original: English)

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CHAPTER I: OBJECTIVE, COMPETENCE, COMPOSITION AND
SECRETARIAT OF THE CONFERENCE

Rule 1: Objective and Competence of the Conference

(1) The objective of the Diplomatic Conference on the Protection of Audiovisual Performances (hereinafter referred to as “the Conference”) is to negotiate and adopt the [Protocol to the WIPO Performances and Phonograms Treaty] [WIPO Treaty on Audiovisual Performances] (hereinafter referred to as “the Instrument”).

(2) The Conference, meeting in Plenary, shall be competent to:

(i) adopt the Rules of Procedure of the Conference (hereinafter referred to as “these Rules”) and to make any amendments thereto;

(ii) adopt the agenda of the Conference;

(iii) decide on credentials, full powers, letters or other documents presented in accordance with Rules 6, 7 and 8 of these Rules;

(iv) adopt the Instrument;

(v) adopt any recommendation or resolution whose subject matter is germane to the Instrument;

(vi) adopt any agreed statements to be included in the Records of the Conference;

(vii) adopt any final act of the Conference;

(viii) deal with all other matters referred to it by these Rules or appearing on its agenda.

Rule 2: Composition of the Conference

(1) The Conference shall consist of:

(i) delegations of the States members of the World Intellectual Property Organization (hereinafter referred to as “the Member Delegations”),

(ii) the special delegation of the European Community (hereinafter referred to as “the Special Delegation”),

(iii) the delegations of States members of the United Nations other than the States members of the World Intellectual Property Organization invited to the Conference as observers (hereinafter referred to as “the Observer Delegations”), and

(iv) representatives of intergovernmental and non-governmental organizations invited to the Conference as observers (hereinafter referred to as “the Observer Organizations”).

(2) References in these Rules of Procedure to Member Delegations shall be considered, except as otherwise provided (see Rules 11(2), 33 and 34), as references also to the Special Delegation.

(3) References in these Rules of Procedure to "Delegations" shall be considered as references to the three kinds (Member, Special and Observer) of Delegations but not to Observer Organizations.

Rule 3: Secretariat of the Conference

(1) The Conference shall have a Secretariat provided by the International Bureau of the World Intellectual Property Organization (hereinafter referred to as "the International Bureau" and "WIPO," respectively).

(2) The Director General of WIPO and any official of the International Bureau designated by the Director General of WIPO may participate in the discussions of the Conference, meeting in Plenary, as well as in any committee or working group thereof and may, at any time, make oral or written statements, observations or suggestions to the Conference, meeting in Plenary, and any committee or working group thereof concerning any question under consideration.

(3) The Director General of WIPO shall, from among the staff of the International Bureau, designate the Secretary of the Conference and a Secretary for each committee and for each working group.

(4) The Secretary of the Conference shall direct the staff required by the Conference.

(5) The Secretariat shall provide for the receiving, translation, reproduction and distribution of the required documents, for the interpretation of oral interventions and for the performance of all other secretariat work required for the Conference.

(6) The Director General of WIPO shall be responsible for the custody and preservation in the archives of WIPO of all documents of the Conference. The International Bureau shall distribute the final documents of the Conference after the closing of the Conference.

CHAPTER II: REPRESENTATION

Rule 4: Delegations

(1) Each Delegation shall consist of one or more delegates and may include advisors.

(2) Each Delegation shall have a Head of Delegation and may have a Deputy Head of Delegation.

Rule 5: Observer Organizations

An Observer Organization may be represented by one or more representatives.

Rule 6: Credentials and Full Powers

(1) Each Delegation shall present credentials.

(2) Full powers shall be required for signing the Instrument. Such powers may be included in the credentials.

Rule 7: Letters of Appointment

The representatives of Observer Organizations shall present a letter or other document appointing them.

Rule 8: Presentation of Credentials, etc.

The credentials and full powers referred to in Rule 6 and the letters or other documents referred to in Rule 7 shall be presented to the Secretary of the Conference, preferably not later than twenty-four hours after the opening of the Conference.

Rule 9: Examination of Credentials, etc.

(1) The Credentials Committee referred to in Rule 11 shall examine the credentials, full powers, letters or other documents referred to in Rules 6 and 7, respectively, and shall report to the Conference, meeting in Plenary.

(2) The decision on whether a credential, full powers, letter or other document is in order shall be made by the Conference, meeting in Plenary. Such decision shall be made as soon as possible and in any case before the adoption of the Instrument.

Rule 10: Provisional Participation

Pending a decision upon their credentials, letters or other documents of appointment, Delegations and Observer Organizations shall be entitled to participate provisionally in the deliberations of the Conference as provided in these Rules.

CHAPTER III: COMMITTEES AND WORKING GROUPS

Rule 11: Credentials Committee

(1) The Conference shall have a Credentials Committee.

(2) The Credentials Committee shall consist of seven Member Delegations elected by the Conference, meeting in Plenary, from among the Member Delegations, except that the Special Delegation shall not be eligible for membership in the Credentials Committee.

Rule 12: Main Committees and Their Working Groups

(1) The Conference shall have two Main Committees. Main Committee I shall be responsible for proposing for adoption by the Conference, meeting in Plenary, the substantive law provisions of the Instrument and any recommendation, resolution or agreed statement referred to in Rule 1(2)(v) and (vi). Main Committee II shall be responsible for proposing for adoption by the Conference, meeting in Plenary, any administrative and the final clauses of the Instrument.

(2) Each Main Committee shall consist of all the Member Delegations.

(3) Each Main Committee may create working groups. In creating a working group, the Main Committee creating it shall specify the tasks of the Working Group, decide on the number

of the members of the Working Group and elect such members from among the Member Delegations.

Rule 13: Drafting Committee

- (1) The Conference shall have a Drafting Committee.
- (2) The Drafting Committee shall consist of 14 elected members and two *ex officio* members. The elected members shall be elected by the Conference, meeting in Plenary, from among the Member Delegations. The Presidents of the two Main Committees shall be the *ex officio* members.
- (3) The Drafting Committee shall prepare drafts and give advice on drafting as requested by either Main Committee. The Drafting Committee shall not alter the substance of the texts submitted to it. It shall coordinate and review the drafting of all texts submitted to it by the Main Committees, and it shall submit the texts so reviewed for final approval to the competent Main Committee.

Rule 14: Steering Committee

- (1) The Conference shall have a Steering Committee.
- (2) The Steering Committee shall consist of the President and Vice-Presidents of the Conference, the President of the Credentials Committee, the Presidents of the Main Committees and the President of the Drafting Committee. The meetings of the Steering Committee shall be presided over by the President of the Conference.
- (3) The Steering Committee shall meet from time to time to review the progress of the Conference and to make decisions for furthering such progress, including, in particular, decisions on the coordination of the meetings of the Plenary, the committees and the working groups.
- (4) The Steering Committee shall propose the text of any final act of the Conference (see Rule 1(2)(vii)), for adoption by the Conference, meeting in Plenary.

CHAPTER IV: OFFICERS

Rule 15: Officers and their Election; Precedence Among Vice-Presidents

- (1) The Conference shall have a President and 10 Vice-Presidents.
- (2) The Credentials Committee, each of the two Main Committees and the Drafting Committee shall have a President and two Vice-Presidents.
- (3) Any Working Group shall have a President and two Vice-Presidents.
- (4) The Conference, meeting in Plenary, and presided over by the Director General of WIPO, shall elect its President, and, then, presided over by its President shall elect its Vice-Presidents and the officers of the Credentials Committee, the Main Committees and the Drafting Committee.
- (5) The officers of a Working Group shall be elected by the Main Committee that establishes that Working Group.

(6) Precedence among the Vice-Presidents of a given body (the Conference, the Credentials Committee, the two Main Committees, any Working Group, the Drafting Committee) shall be determined by the place occupied by the name of the State of each of them in the list of Member Delegations established in the alphabetical order of the names of the States in French, beginning with the Member Delegation whose name shall have been drawn by lot by the President of the Conference. The Vice-President of a given body who has precedence over all the other Vice-Presidents of that body shall be called "the ranking" Vice-President of that body.

Rule 16: Acting President

(1) If any President is absent from a meeting, the meeting shall be presided over, as Acting President, by the ranking Vice-President of that body.

(2) If all the officers of a body are absent from any meeting of the body concerned, that body shall elect an Acting President.

Rule 17: Replacement of President

If any President becomes unable to perform his or her functions for the remainder of the duration of the Conference, a new President shall be elected.

Rule 18: Vote by the Presiding Officer

(1) No President, whether elected as such or acting (hereinafter referred to as "the Presiding Officer"), shall take part in voting. Another member of his or her Delegation may vote for that Delegation.

(2) Where the Presiding Officer is the only member of his or her Delegation, he or she may vote, but only in the last place.

CHAPTER V: CONDUCT OF BUSINESS

Rule 19: Quorum

(1) A quorum shall be required in the Conference, meeting in Plenary; it shall, subject to paragraph (3), be constituted by one-half of the Member Delegations represented at the Conference.

(2) A quorum shall be required for the meetings of each Committee (the Credentials Committee, the two Main Committees, the Drafting Committee and the Steering Committee) and any working group; it shall be constituted by one-half of the members of the Committee or working group.

(3) The quorum at the time of the adoption of the Instrument by the Conference, meeting in Plenary, shall be constituted by one half of the Member Delegations whose credentials were found in order by the Conference meeting in Plenary.

Rule 20: General Powers of the Presiding Officer

(1) In addition to exercising the powers conferred upon Presiding Officers elsewhere by these Rules, the Presiding Officer shall declare the opening and closing of the meetings, direct the discussions, accord the right to speak, put questions to the vote, and announce decisions.

The Presiding Officer shall rule on points of order and, subject to these Rules, shall have complete control of the proceedings at any meeting and over the maintenance of order thereat.

(2) The Presiding Officer may propose to the body over which he or she presides the limitation of time to be allowed to each speaker, the limitation of the number of times each Delegation may speak on any question, the closure of the list of speakers or the closure of the debate. The Presiding Officer may also propose the suspension or the adjournment of the meeting, or the adjournment of the debate on the question under discussion. Such proposals of the Presiding Officer shall be considered as adopted unless immediately rejected.

Rule 21: Speeches

(1) No person may speak without having previously obtained the permission of the Presiding Officer. Subject to Rules 22 and 23, the Presiding Officer shall call upon persons in the order in which they ask for the floor.

(2) The Presiding Officer may call a speaker to order if the remarks of the speaker are not relevant to the subject under discussion.

Rule 22: Precedence in Receiving the Floor

(1) Member Delegations asking for the floor are generally given precedence over Observer Delegations asking for the floor, and Member Delegations and Observer Delegations are generally given precedence over Observer Organizations.

(2) The President of a Committee or working group may be given precedence during discussions relating to the work of the Committee or working group concerned.

(3) The Director General of WIPO or his representative may be given precedence for making statements, observations or suggestions.

Rule 23: Points of Order

(1) During the discussion of any matter, any Member Delegation may rise to a point of order, and the point of order shall be immediately decided by the Presiding Officer in accordance with these Rules. Any Member Delegation may appeal against the ruling of the Presiding Officer. The appeal shall be immediately put to the vote, and the Presiding Officer's ruling shall stand unless the appeal is approved.

(2) The Member Delegation that has risen to a point of order under paragraph (1) may not speak on the substance of the matter under discussion.

Rule 24: Limit on Speeches

In any meeting, the Presiding Officer may decide to limit the time allowed to each speaker and the number of times each Delegation and Observer Organization may speak on any question. When the debate is limited and a Delegation or Observer Organization has used up its allotted time, the Presiding Officer shall call it to order without delay.

Rule 25: Closing of List of Speakers

(1) During the discussion of any given question, the Presiding Officer may announce the list of participants who have asked for the floor and decide to close the list as to that

question. The Presiding Officer may nevertheless accord the right of reply to any speaker if a speech, delivered after the list of speakers has been closed, makes it desirable.

(2) Any decision made by the Presiding Officer under paragraph (1) may be the subject of an appeal under Rule 23.

Rule 26: Adjournment or Closure of Debate

Any Member Delegation may at any time move the adjournment or closure of the debate on the question under discussion, whether or not any other participant has asked for the floor. In addition to the proposer of the motion to adjourn or close the debate, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it, after which the motion shall immediately be put to the vote. The Presiding Officer may limit the time allowed to speakers under this Rule.

Rule 27: Suspension or Adjournment of the Meeting

During the discussion of any matter, any Member Delegation may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote.

Rule 28: Order of Procedural Motions; Content of Interventions on Such Motions

(1) Subject to Rule 23, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- (i) to suspend the meeting,
- (ii) to adjourn the meeting,
- (iii) to adjourn the debate on the question under discussion,
- (iv) to close the debate on the question under discussion.

(2) Any Member Delegation that has been given the floor on a procedural motion may speak on that motion only, and may not speak on the substance of the matter under discussion.

Rule 29: Basic Proposal; Proposals for Amendment

(1) (a) Documents IAVP/DC/3 and IAVP/DC/4 shall constitute the basis of the discussions in the Conference, and the text of the draft Instrument contained in those documents shall constitute the “Basic Proposal.”

(b) Where, for any given provision of the draft Instrument, there are two or three alternatives in the Basic Proposal, consisting of either two or three texts, or one or two texts and an alternative that there should be no such provision, the alternatives shall be designated with the letters A, B and, where applicable, C, and shall have equal status. Discussions shall take place simultaneously on the alternatives and, if voting is necessary and there is no consensus on which alternative should be put to the vote first, each Member Delegation shall be invited to indicate its preference among the two or three alternatives. The alternative supported by more Member Delegations than the other one or two alternatives shall be put to the vote first.

(c) Wherever the Basic Proposal contains words within square brackets, only the text that is not within square brackets shall be regarded as part of the Basic Proposal, whereas words within square brackets shall be treated as a proposal for amendment if presented as provided in paragraph (2).

(2) Any Member Delegation may propose amendments to the Basic Proposal.

(3) Proposals for amendment shall, as a rule, be submitted in writing and handed to the Secretary of the body concerned. The Secretariat shall distribute copies to the Delegations and the Observer Organizations. As a general rule, a proposal for amendment cannot be taken into consideration and discussed or put to the vote at a meeting unless copies of it have been distributed not later than three hours before it is taken into consideration. The Presiding Officer may, however, permit the taking into consideration and discussion of a proposal for amendment even though copies of it have not been distributed or have been distributed less than three hours before it is taken into consideration.

Rule 30: Decisions on the Competence of the Conference

(1) If a Member Delegation moves that a duly seconded proposal should not be taken into consideration by the Conference because it is outside the latter’s competence, that motion shall be decided upon by the Conference, meeting in Plenary, before the proposal is taken into consideration.

(2) If the motion referred to in paragraph (1), above, is made in a body other than the Conference, meeting in Plenary, it shall be referred to the Conference, meeting in Plenary, for a ruling.

Rule 31: Withdrawal of Procedural Motions and Proposals for Amendment

Any procedural motion and any proposal for amendment may be withdrawn by the Member Delegation that has made it, at any time before voting on it has commenced, provided that no amendment to it has been proposed by another Member Delegation. Any motion or proposal thus withdrawn may be reintroduced by any other Member Delegation.

Rule 32: Reconsideration of Matters Decided

When any matter has been decided by a body, it may not be reconsidered by that body unless so decided by the majority applicable under Rule 34(2)(ii). In addition to the proposer of the motion to reconsider, permission to speak on that motion shall be given only to one Member

Delegation seconding and two Member Delegations opposing the motion, after which the motion shall immediately be put to the vote.

CHAPTER VI: VOTING

Rule 33: Right to Vote

(1) Each Member Delegation shall have the right to vote. A Member Delegation shall have one vote, may represent itself only and may vote in its name only.

(2) The Special Delegation has no right to vote and, for the purposes of paragraph (1) of this Rule and Rule 34, the Special Delegation is not covered by the term "Member Delegations."

(3) The Special Delegation may, under the authority of the European Community, exercise the rights to vote of the Member States of the European Community which are represented at the Diplomatic Conference, provided that

(i) the Special Delegation shall not exercise the rights to vote of the Member States of the European Community if the Member States exercise their rights to vote and vice versa, and

(ii) the number of votes cast by the Special Delegation shall in no case exceed the number of Member States of the European Community that are represented at the Diplomatic Conference and that are present at and entitled to participate in the vote.

Rule 34: Required Majorities

(1) All decisions of all bodies shall be made as far as possible by consensus.

(2) If it is not possible to attain consensus, the following decisions shall require a majority of two-thirds of the Member Delegations present and voting:

- (i) adoption by the Conference, meeting in Plenary, of these Rules, and, once adopted, any amendment to them,
- (ii) decision by any of the bodies to reconsider, under Rule 32, a matter decided,
- (iii) adoption by the Conference, meeting in Plenary, of the Instrument,

whereas all other decisions of all bodies shall require a simple majority of the Member Delegations present and voting.

(3) "Voting" means casting an affirmative or negative vote; express abstention or non-voting shall not be counted.

Rule 35: Requirement of Seconding; Method of Voting

(1) Any proposal for amendment made by a Member Delegation shall be put to a vote only if seconded by at least one other Member Delegation.

(2) Voting on any question shall be by show of hands unless a Member Delegation, seconded by at least one other Member Delegation, requests a roll-call, in which case it shall be

by roll-call. The roll shall be called in the alphabetical order of the names in French of the States, beginning with the Member Delegation whose name shall have been drawn by lot by the Presiding Officer.

Rule 36: Conduct During Voting

(1) After the Presiding Officer has announced the beginning of voting, the voting shall not be interrupted except on a point of order concerning the actual conduct of the voting.

(2) The Presiding Officer may permit a Member Delegation to explain its vote or its abstention, either before or after the voting.

Rule 37: Division of Proposals

Any Member Delegation may move that parts of the Basic Proposal or of any proposal for amendment be voted upon separately. If the request for division is objected to, the motion for division shall be put to a vote. In addition to the proposer of the motion for division, permission to speak on that motion shall be given only to one Member Delegation seconding and two Member Delegations opposing it. If the motion for division is carried, all parts of the Basic Proposal or of the proposal for amendment that have been separately approved shall again be put to the vote, together, as a whole. If all operative parts of the Basic Proposal or of the proposal for amendment have been rejected, the Basic Proposal or the proposal for amendment shall be considered rejected as a whole.

Rule 38: Voting on Proposals for Amendment

(1) Any proposal for amendment shall be voted upon before the text to which it relates is voted upon.

(2) Proposals for amendment relating to the same text shall be put to the vote in the order of their substantive remoteness from the said text, the most remote being put to the vote first and the least remote being put to the vote last. If, however, the adoption of any proposal for amendment necessarily implies the rejection of any other proposal for amendment or of the original text, such other proposal or text shall not be put to the vote.

(3) If one or more proposals for amendment relating to the same text are adopted, the text as amended shall be put to the vote.

(4) Any proposal the purpose of which is to add to or delete from a text shall be considered a proposal for amendment.

Rule 39: Voting on Proposals for Amendment on the Same Question

Subject to Rule 38, where two or more proposals relate to the same question, they shall be put to the vote in the order in which they have been submitted, unless the body concerned decides on a different order.

Rule 40: Equally Divided Votes

(1) Subject to paragraph (2), if a vote is equally divided on a matter that calls only for a simple majority, the proposal shall be considered rejected.

(2) If a vote is equally divided on a proposal for electing a given person to a given position as officer and the nomination is maintained, the vote shall be repeated, until either that nomination is adopted or rejected or another person is elected for the position in question.

CHAPTER VII: LANGUAGES AND MINUTES

Rule 41: Languages of Oral Interventions

(1) Subject to paragraph (2), oral interventions made in the meetings of any of the bodies shall be in Arabic, Chinese, English, French, Russian or Spanish, and interpretation shall be provided by the Secretariat into the other five languages.

(2) Any of the Committees and any working group may, if none of its members objects, decide to dispense with interpretation or to limit interpretation to some only of the languages that are referred to in paragraph (1).

Rule 42: Summary Minutes

(1) Provisional summary minutes of the meetings of the Conference, meeting in Plenary, and of the Main Committees shall be drawn up by the International Bureau and shall be made available as soon as possible after the closing of the Conference to all speakers, who shall, within two months after the minutes have been made available, inform the International Bureau of any suggestions for changes in the minutes of their own interventions.

(2) The final summary minutes shall be published in due course by the International Bureau.

Rule 43: Languages of Documents and Summary Minutes

(1) Any written proposal shall be presented to the Secretariat in Arabic, Chinese, English, French, Russian or Spanish. Such proposal shall be distributed by the Secretariat in Arabic, Chinese, English, French, Russian and Spanish.

(2) Reports of the Committees and any working group shall be distributed in Arabic, Chinese, English, French, Russian and Spanish. Information documents of the Secretariat shall be distributed in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

(3) (a) Provisional summary minutes shall be drawn up in the language used by the speaker if the speaker has used English, French or Spanish; if the speaker has used another language, the intervention shall be rendered in English or French at the choice of the International Bureau.

(b) The final summary minutes shall be made available in English and French; and, whenever practicable, also in Arabic, Chinese, Russian and Spanish.

CHAPTER VIII: OPEN AND CLOSED MEETINGS

Rule 44: Meetings of the Conference and of the Main Committees

The meetings of the Conference, meeting in Plenary, and of the Main Committees shall be open to the public unless the Conference, meeting in Plenary, or the interested Main Committee, decides otherwise.

Rule 45: Meetings of Other Committees and of Working Groups

The meetings of the Credentials Committee, the Drafting Committee, the Steering Committee and any working group shall be open only to the members of the Committee or the working group concerned and to the Secretariat.

CHAPTER IX: OBSERVER DELEGATIONS AND OBSERVER ORGANIZATIONS

Rule 46: Status of Observers

(1) Observer Delegations may attend, and make oral statements in, the Plenary meetings of the Conference and the meetings of the Main Committees.

(2) Observer Organizations may attend the Plenary meetings of the Conference and the meetings of the Main Committees. Upon the invitation of the Presiding Officer, they may make oral statements in those meetings on questions within the scope of their activities.

(3) Written statements submitted by Observer Delegations or by Observer Organizations on subjects for which they have a special competence and which are related to the work of the Conference shall be distributed by the Secretariat to the participants in the quantities and in the languages in which the written statements were made available to it.

CHAPTER X: AMENDMENTS TO THE RULES OF PROCEDURE

Rule 47: Possibility of Amending the Rules of Procedure

With the exception of the present Rule, these Rules may be amended by the Conference, meeting in Plenary.

CHAPTER XI: FINAL ACT

Rule 48: Signing of the Final Act

If a final act is adopted, it shall be open for signature by any Delegation.

[End of document]

IAVP/DC/6

December 8, 2000 (Original: English)

FIRST REPORT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. The Credentials Committee ("the Committee"), established on December 7, 2000, by the Diplomatic Conference on the Protection of Audiovisual Performances, met on December 8, 2000.
 2. The delegations of the following States, elected members of the Committee by the Diplomatic Conference, attended the meeting: Bulgaria, China, Costa Rica, Luxembourg, Malaysia, Morocco and Ukraine.
 3. The President of the Committee, elected by the Diplomatic Conference, was Mr. Dimiter Gantchev (Bulgaria). The Vice-Presidents, elected by the Diplomatic Conference, were Ms. Christiane Daleiden-Distefano (Luxembourg) and Mr. Raja Reza Raja Zaib Shah (Malaysia).
 4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on December 7, 2000 (document IAVP/DC/5; "the Rules of Procedure"), the Committee examined the credentials, full powers, letters or other documents of appointment presented for the purposes of Rules 6 and 7 by delegations of the States members of the World Intellectual Property Organization ("WIPO"), participating in the Conference in accordance with Rule 2(1)(i) of the Rules of Procedure ("the Member Delegations"), by the Delegation of the European Community, participating in the Conference in accordance with Rule 2(1)(ii) of the Rules of Procedure ("the Special Delegation"), and by delegations of States members of the United Nations other than the States members of WIPO, participating in the Conference in accordance with Rule 2(1)(iii) of the Rules of Procedure ("the Observer Delegations"), as well as by the representatives of intergovernmental and non-governmental organizations, participating in the Conference in accordance with Rule 2(1)(iv) of the Rules of Procedure ("the Observer Organizations").
2. On the basis of the information provided by the Secretariat as to the practice prevailing in other diplomatic conferences, and in particular in diplomatic conferences convened by WIPO, the Committee decided to recommend to the Conference, meeting in Plenary, that the following criteria should be applied by the Committee in its examination of, and should govern the decision of the Conference on, the credentials, full powers, letters or other documents presented for the purposes of Rules 6 and 7 of the Rules of Procedure:
- (i) as far as any State is concerned, its delegation's credentials and full powers should be accepted if they were signed by that State's Head of State, Head of Government or Minister for Foreign Affairs; credentials, but not full powers, should be accepted if they were contained in a *note verbale* or letter of that State's Permanent Representative in Geneva or in a *note verbale* of that State's Ministry of Foreign Affairs or its Permanent Mission in Geneva and should not otherwise be accepted; in particular, a communication emanating from a minister other than the Minister for Foreign Affairs, or from an official other than the Permanent Representative or Chargé d'affaires a.i. in Geneva, should not be treated as credentials;

(ii) as far as any Organization is concerned, its representative's letter or other document of appointment should be accepted if it was signed by the Head (Director General, Secretary General or President) or Deputy Head or official responsible for external affairs of the Organization;

(iii) facsimile and telex communications should be accepted if, as to their source, the requirements stated in points (i) and (ii) were fulfilled.

3. Pending a final decision by the Conference, meeting in Plenary, on the said criteria, the Committee decided to apply those criteria to the documents received by it.

4. Accordingly, the Committee found in order

(a) as far as the *Member Delegations* are concerned,

(i) the *credentials and full powers* (that is, credentials for participating in the Conference and signing the Final Act of the Conference, and full powers to sign the Instrument to be adopted by the Diplomatic Conference) of the delegations of the following 17 States:

| | |
|----------------|-------------|
| Austria | Netherlands |
| Cameroon | Portugal |
| Czech Republic | Romania |
| Denmark | Slovenia |
| Greece | Spain |
| Germany | Sudan |
| Italy | Switzerland |
| Kyrgyzstan | Tunisia |
| Lebanon | |

(ii) the *credentials without full powers* (that is, credentials for participating in the Conference and signing the Final Act of the Conference) of the delegations of the following 73 States:

| | |
|------------------------|------------------------|
| Albania | Jamaica |
| Algeria | Japan |
| Angola | Kazakhstan |
| Argentina | Kenya |
| Australia | Latvia |
| Azerbaijan | Liberia |
| Bangladesh | Libyan Arab Jamahiriya |
| Barbados | Luxembourg |
| Belarus | Madagascar |
| Belgium | Malaysia |
| Bosnia and Herzegovina | Malta |
| Brazil | Mauritania |
| Bulgaria | Mexico |
| Canada | Morocco |
| Colombia | Nepal |
| Congo | Nicaragua |
| Costa Rica | Nigeria |

| | |
|---------------------------------------|-----------------------------|
| Côte d'Ivoire | Norway |
| Croatia | Panama |
| Democratic People's Republic of Korea | Paraguay |
| Dominican Republic | Peru |
| Ecuador | Philippines |
| Egypt | Republic of Korea |
| El Salvador | Republic of Moldova |
| Eritrea | Russian Federation |
| Ethiopia | Singapore |
| Finland | Slovakia |
| France | South Africa |
| Gabon | Sweden |
| Ghana | Thailand |
| Guatemala | Togo |
| Guinea | Uganda |
| Iceland | United Kingdom |
| India | United Republic of Tanzania |
| Indonesia | United States of America |
| Iraq | Uruguay |
| Ireland | |

(b) as far as the *Special Delegation* is concerned, the *credentials* and *full powers* of the European Community (1).

(c) as far as the *Observer Delegations* are concerned, the *credentials* of the delegation of the following State:

Djibouti

(d) as far as the *Observer Organizations* are concerned, the *letters* or *documents of appointment* of representatives of the following Observer Organizations (listed in the alphabetical order of the name of the organization according to its name in French if it exists or, if it does not exist, according to its name in another language):

(i) *intergovernmental organizations*: International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Telecommunication Union (ITU), World Trade Organization (WTO), League of Arab States (LAS), Organization of African Unity (OAU), Organization of the Islamic Conference (OIC) (7);

(ii) *non-governmental organizations*: *Asociación Argentina de Intérpretes* (AADI), Association of European Performers' Organizations (AEPO), Association of Commercial Television in Europe (ACT), International Association of Broadcasting (IAB), The National Association of Commercial Broadcasters in Japan (NAB-Japan), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), Central and Eastern European Copyright Alliance (CEECA), Copyright Research and Information Center (CRIC), Actors, Interpreting Artists Committee (CSAI), International Confederation of Societies of Authors and Composers (CISAC), International Council of Societies of Industrial Design (ICSID), European Film Companies Alliance (EFCA), European Federation of Joint Management Societies of Producers for Private Audiovisual Copying (EUROCOPYA), International Federation of the Phonographic Industry (IFPI), International Video Federation (IVF), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF),

International Federation of Journalists (IFJ), International Federation of Musicians (FIM), Inter-American Copyright Institute (IIDA), Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Institute of Intellectual Property (IIP), Media and Entertainment International (MEI), International League of Competition Law (LIDC), *Organización Iberoamericana de Derechos de Autor* (LATINAUTOR), Performing Arts Employers Associations League Europe (PEARLE), Asia-Pacific Broadcasting Union (ABU), Union of Industrial and Employers' Confederations of Europe (UNICE), European Broadcasting Union (EBU), International Publishers Association (IPA), World Blind Union (WBU), Video Software Dealers Association (VSDA) (33).

5. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph 7(a)(i) and 7(b), above, the credentials of the delegations mentioned in paragraph 7(a)(ii) and 7(c), above, and the letters or documents of appointment of the representatives of the organizations mentioned in paragraph 7(d), above.

6. The Committee expressed the wish that the Secretariat should bring Rules 6 ("Credentials and Full Powers"), 7 ("Letters of Appointment"), 8 ("Presentation of Credentials, etc.") and 10 ("Provisional Participation") of the Rules of Procedure to the attention of the Member Delegations or the Observer Delegations not having presented credentials or full powers and of the representatives of Observer Organizations not having presented letters or other documents of appointment.

7. The Committee decided that a report on its first meeting should be prepared by the Secretariat and issued as its first report, to be presented by the President of the Committee to the Conference, meeting in Plenary.

8. The Committee decided that it would re-convene to examine any further communications concerning the Member Delegations, the Observer Delegations, or the Observer Organizations which might be received by the Secretariat after the close of its first meeting.

[End of document]

IAVP/DC/6 Rev.

December 8, 2000 (Original: English)

FIRST REPORT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. The Credentials Committee ("the Committee"), established on 7 December 2000, by the Diplomatic Conference on the Protection of Audiovisual Performances, met on 8 December 2000.
2. The delegations of the following States, elected members of the Committee by the Diplomatic Conference, attended the meeting: Bulgaria, China, Costa Rica, Luxembourg, Malaysia, Morocco and Ukraine.
3. The President of the Committee, elected by the Diplomatic Conference, was Mr Dimiter Gantchev (Bulgaria). The Vice-Presidents, elected by the Diplomatic Conference, were Ms Christiane Daleiden-Distefano (Luxembourg) and Mr Raja Reza Raja Zaib Shah (Malaysia).
4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on December 7, 2000 (document IAVP/DC/5; "the Rules of Procedure"), the Committee examined the credentials, full powers, letters or other documents of appointment presented for the purposes of Rules 6 and 7 by delegations of the States members of the World Intellectual Property Organization ("WIPO"), participating in the Conference in accordance with Rule 2(1)(i) of the Rules of Procedure ("the Member Delegations"), by the Delegation of the European Community, participating in the Conference in accordance with Rule 2(1)(ii) of the Rules of Procedure ("the Special Delegation"), and by delegations of States members of the United Nations other than the States members of WIPO, participating in the Conference in accordance with Rule 2(1)(iii) of the Rules of Procedure ("the Observer Delegations"), as well as by the representatives of intergovernmental and non-governmental organizations, participating in the Conference in accordance with Rule 2(1)(iv) of the Rules of Procedure ("the Observer Organizations").
5. On the basis of the information provided by the Secretariat as to the practice prevailing in other diplomatic conferences, and in particular in diplomatic conferences convened by WIPO, the Committee decided to recommend to the Conference, meeting in Plenary, that the following criteria should be applied by the Committee in its examination of, and should govern the decision of the Conference on, the credentials, full powers, letters or other documents presented for the purposes of Rules 6 and 7 of the Rules of Procedure:
 - (i) as far as any State is concerned, its delegation's credentials and full powers should be accepted if they were signed by that State's Head of State, Head of Government or Minister for Foreign Affairs; credentials, but not full powers, should be accepted if they were contained in a *note verbale* or letter of that State's Permanent Representative in Geneva, or in a *note verbale* of that State's Ministry of Foreign Affairs or its Permanent Mission in Geneva, and should not otherwise be accepted; in particular, a communication emanating from a minister

other than the Minister for Foreign Affairs, or from an official other than the Permanent Representative or Chargé d'affaires a.i. in Geneva, should not be treated as credentials;

(ii) as far as any organization is concerned, its representative's letter or other document of appointment should be accepted if it was signed by the Head (Director General, Secretary General or President) or Deputy Head or official responsible for external affairs of the Organization;

(iii) facsimile and telex communications should be accepted if, as to their source, the requirements stated in points (i) and (ii) were fulfilled.

6. Pending a final decision by the Conference, meeting in Plenary, on the said criteria, the Committee decided to apply those criteria to the documents received by it.

7. Accordingly, the Committee found in order

(a) as far as the *Member Delegations* are concerned,

(i) the *credentials* and *full powers* (that is, credentials for participating in the Conference and signing the Final Act of the Conference, and full powers to sign the Instrument to be adopted by the Diplomatic Conference) of the delegations of the following 17 States:

| | |
|----------------|-------------|
| Austria | Netherlands |
| Cameroon | Portugal |
| Czech Republic | Romania |
| Denmark | Slovenia |
| Greece | Spain |
| Germany | Sudan |
| Italy | Switzerland |
| Kyrgyzstan | Tunisia |
| Lebanon | |

(ii) the *credentials* without full powers (that is, credentials for participating in the Conference and signing the Final Act of the Conference) of the delegations of the following 77 States:

| | |
|------------------------|------------------------|
| Albania | Ireland |
| Algeria | Jamaica |
| Angola | Japan |
| Argentina | Kazakhstan |
| Australia | Kenya |
| Austria | Latvia |
| Azerbaijan | Liberia |
| Bangladesh | Libyan Arab Jamahiriya |
| Barbados | Luxembourg |
| Belarus | Madagascar |
| Belgium | Malaysia |
| Bosnia and Herzegovina | Malta |
| Brazil | Mauritania |
| Bulgaria | Mexico |
| Canada | Morocco |
| Colombia | Nepal |

| | |
|--|-----------------------------|
| Congo | Nicaragua |
| Costa Rica | Nigeria |
| Côte d'Ivoire | Norway |
| Croatia | Panama |
| Czech Republic | Paraguay |
| Democratic People's Republic of Korea | Peru |
| Dominican Republic | Philippines |
| Ecuador | Republic of Korea |
| Egypt | Republic of Moldova |
| El Salvador | Romania |
| Eritrea | Russian Federation |
| Ethiopia | Singapore |
| Finland | Slovakia |
| France | South Africa |
| Gabon | Sweden |
| Ghana | Thailand |
| Germany | Togo |
| Guatemala | Uganda |
| Guinea | United Kingdom |
| Iceland | United Republic of Tanzania |
| India | United States of America |
| Indonesia | Uruguay |
| Iraq | |

(b) as far as the *Special Delegation* is concerned, the *credentials* and *full powers* of the European Community (1).

(c) as far as the *Observer Delegations* are concerned, the *credentials* of the delegation of the following State:

Djibouti

(d) as far as the *Observer Organizations* are concerned, the *letters* or *documents of appointment* of representatives of the following Observer Organizations (listed in the alphabetical order of the name of the organization according to its name in French if it exists or, if it does not exist, according to its name in another language):

(i) *intergovernmental organizations*: International Labour Organization (ILO), United Nations Educational, Scientific and Cultural Organization (UNESCO), International Telecommunication Union (ITU), World Trade Organization (WTO), League of Arab States (LAS), Organization of African Unity (OAU), Organization of the Islamic Conference (OIC) (7);

(ii) *non-governmental organizations*: *Asociación Argentina de Intérpretes* (AADI), Association of European Performers' Organizations (AEPO), Association of Commercial Television in Europe (ACT), International Association of Broadcasting (IAB), The National Association of Commercial Broadcasters in Japan (NAB-Japan), International Bureau of Societies Administering the Rights of Mechanical Recording and Reproduction (BIEM), Central and Eastern European Copyright Alliance (CEECA), Copyright Research and Information Center (CRIC), Actors, Interpreting Artists Committee (CSAI), International Confederation of Societies of Authors and Composers (CISAC), International Council of Societies of Industrial Design (ICSID), European Film Companies Alliance (EFCA), European Federation of Joint Management Societies of Producers for Private Audiovisual Copying (EUROCOPYA),

International Federation of the Phonographic Industry (IFPI), International Video Federation (IVF), International Federation of Actors (FIA), International Federation of Associations of Film Distributors (FIAD), International Federation of Film Producers Associations (FIAPF), International Federation of Journalists (IFJ), International Federation of Musicians (FIM), Inter-American Copyright Institute (IIDA), Max-Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI), Institute of Intellectual Property (IIP), Media and Entertainment International (MEI), International League of Competition Law (LIDC), *Organización Iberoamericana de Derechos de Autor* (LATINAUTOR), Performing Arts Employers Associations League Europe (PEARLE), Asia-Pacific Broadcasting Union (ABU), Union of Industrial and Employers' Confederations of Europe (UNICE), European Broadcasting Union (EBU), International Publishers Association (IPA), World Blind Union (WBU), Video Software Dealers Association (VSDA) (33).

8. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph 7(a)(i) and 7(b), above, the credentials of the delegations mentioned in paragraph 7(a)(ii) and 7(c), above, and the letters or documents of appointment of the representatives of the organizations mentioned in paragraph 7(d), above.

9. The Committee expressed the wish that the Secretariat should bring Rules 6 ("Credentials and Full Powers"), 7 ("Letters of Appointment"), 8 ("Presentation of Credentials, etc.") and 10 ("Provisional Participation") of the Rules of Procedure to the attention of the Member Delegations or the Observer Delegations not having presented credentials or full powers and of the representatives of Observer Organizations not having presented letters or other documents of appointment.

10. The Committee decided that a report on its first meeting should be prepared by the Secretariat and issued as its first report, to be presented by the President of the Committee to the Conference, meeting in Plenary.

11. The Committee decided that it would reconvene to examine any further communications concerning the Member Delegations, the Observer Delegations, or the Observer Organizations which might be received by the Secretariat after the close of its first meeting.

[End of document]

IAVP/DC/7

December 11, 2000 (Original: English)

AMENDMENT TO ARTICLES 4 AND 11
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegations of the European Community and its Member States

**The European Community and its Member States
Proposal**

In the view of the European Community and its Member States, the following modifications in Article 4 and Article 11 of the Basic Proposal for the Substantive Provisions are required, should the present structure of Article 11 be retained. It is without prejudice to the final outcome of the discussions on Article 11 and subject to further deliberations on this provision.

1. Article 4 and agreed statement

**Article 4
National Treatment**

(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 Agreement and the right to equitable remuneration provided for in Article 11 of this Agreement.

(2) A Contracting Party shall be entitled, in respect of nationals of another Contracting Party, to limit the protection provided for in paragraph (1) with respect to rights provided for in Article 11 (1) and 11 (2) of this Agreement 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.

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

Agreed statement concerning Article 4: When making the comparison in Article 4(2) between the Contracting Parties concerned, the material equivalence of the right in question effectively applied for the benefit of the performer should be considered.

2. Article 11

**Article 11
Right of Broadcasting and Communication to the Public**

(1) [Wording as stated in the Basic Proposal]

(2) [Wording as stated in the Basic Proposal]

(3) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraphs (1) and (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 document]

IAVP/DC/8

December 11, 2000 (Original: English)

AMENDMENT TO ARTICLE 4
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE (DOCUMENT IAVP/DC/3)

Proposal by the Delegation of the United States of America

It is proposed to amend Alternatives C and D of Article 4 by inserting a new paragraph:

“(3) No Contracting Party shall allow collection of remuneration in respect of performances of nationals of another Contracting Party unless distribution of such remuneration is made to those nationals.”

[End of document]

IAVP/DC/9

December 11, 2000 (Original: English)

AMENDMENT TO ARTICLE 5
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT LA VP/DC/3)

Proposal by the Delegations of the European Community and its Member States

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 to claim to be identified as the performer of his performance, 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.

(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 agreement, 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.

[End of document]

IAVP/DC/9 CORR.

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 5
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Revised proposal by the Delegations of the European Community and its Member States

EDITOR'S NOTE:

This document was issued solely to make a correction in the Chinese version of document IAVP/DC/9.

IAVP/DC/9 Rev.

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 5
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Revised proposal by the Delegations of the European Community and its Member States

Revised version of the amendment to Article 5 (IAVP/DC/9)

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 to claim to be identified as the performer of his performance, 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.

(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 Agreement, 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.

Agreed statement concerning Article 5

It is understood that the modifications of an audiovisual fixation, which are required in the course of, or the preparation for, a use authorized by the performer, which form part of the exploitation of the performance as intended by the parties, such as formatting, editing, or the use of new or changed technology or media, and which are neither substantially nor objectively prejudicial to the performer's reputation, do not concern the performer's moral rights.

[End of document]

IAVP/DC/10

December 12, 2000 (Original: English)

AMENDMENT TO ARTICLE 5
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegation of the United States of America

I. Article 5(1)(ii) to read:

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

II. Agreed Statement concerning Article 5:

It is generally understood that modifications of any protected subject matter, including performances, which are "consistent with customary practices", do not violate moral rights under treaties protecting any such works or performances. Moral rights are concerned only with changes that are objectively prejudicial to the performer's reputation in a meaningful or substantial way.

Customary practices in modifying a performance in an audiovisual work include practices such as editing, compression, dubbing, changes by censorship or in response to local sensibilities, and the mere use of new or changed technology, media, formats or methods of distribution.

The reference to these "customary practices" in Article 5(1)(ii) is included in this instrument as a confirmation because such modifications are standard practice in the audiovisual industry.

[End of document]

IAVP/DC/11

December 12, 2000 (Original: English)

AMENDMENT TO ARTICLE 19
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE (DOCUMENT IAVP/DC/3)

Proposal by the Delegation of Australia

1. It is proposed to amend Article 19(2) by:

- (a) replacing "Articles 6 to 11" with "Articles 5 and 7 to 11" in the second line;
- (b) replacing "Articles 4 and 6" with "Articles 4, 5 and 7" in the fourth line; and
- (c) adding at the end: "for that Contracting Party."

2. In the event that this amendment is not agreed to, it is proposed to amend Article 19(4) to replace "Articles 6" with "Articles 5 and 7".

[End of document]

IAVP/DC/12

December 12, 2000 (Original: English)

AMENDMENT TO ARTICLE 12
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE (DOCUMENT IAVP/DC/3)

Proposal by the Delegations of the European Community and its Member States

Article 12

Transfer

Contracting Parties may provide that exclusive rights of authorization provided for in this Agreement are transferred, with respect to a particular audiovisual fixation, from the performer to the producer of that particular fixation.

Agreed statement concerning the law applicable to a transfer by agreement

Without prejudice to international obligations, the understanding is hereby confirmed that a transfer by agreement of exclusive rights of authorization granted under this Agreement shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the contract has not been chosen, by the law of the country most closely connected with it, without prejudice to any mandatory rules, including on inalienability and unwaivability of rights, in the law of the country where protection is sought.

[End of document]

IAVP/DC/13

December 12, 2000 (Original: English)

AMENDMENT TO ARTICLE 19
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE (DOCUMENT IAVP/DC/3)

Proposal by the Delegations of the European Community and its Member States

Article 19

Application in Time

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

Agreed statement concerning Article 19

For the purposes of this Agreement, it is hereby confirmed that Article 18 of the Berne Convention is without prejudice to any acts concluded and rights acquired in any Contracting State before the date of coming into force of the Convention for that State, and that Article 18 of the Berne Convention allows Contracting States to establish transitional provisions under which any person who engaged in lawful acts with respect to a work, prior to the entry into force of the Convention for the respective State, may undertake with respect to the same work acts within the scope of the rights provided for in the Convention after the entry into force of the Convention for the respective Contracting State.

[End of document]

IAVP/DC/14

December 13, 2000 (Original: French)

AMENDMENTS TO ARTICLES 2, 6, 7, 8, 9, 10, 11, 12, 14, 16 AND 19
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegation of Switzerland

1. **Article 2** is drafted as follows:

Article 2

Definitions

For the purposes of this Treaty:

- (a) “performers” (unchanged);
- (b) “fixation” means the embodiment of a performance in a medium other than a phonogram within the meaning of Article 2(c) of the WPPT;
- (c) “broadcasting” (text of the present Article 2(d), without change);
- (d) “communication to the public” of a performance means the transmission to the public by any medium, otherwise than by broadcasting, of an unfixed or a fixed performance. For the purposes ... (remainder of the text of Article 2(e), without change).

2. In **Article 6(ii)**, delete the word “audiovisual.”

3. In **Articles 7, 8, 9, 10, 11, 12, 14, 16 and 19**, replace the phrase “of their performances fixed in audiovisual fixations” with “of their fixed performances.”

[End of document]

IAVP/DC/15

December 15, 2000 (Original: French)

AMENDMENT TO ARTICLE 3
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegation of Canada

Article 3

Beneficiaries of Protection

- (1) [Existing text]
- (2) If a Contracting Party grants to its habitual residents the same protection as its nationals with respect to audiovisual fixations made on its territory, for purposes of this Treaty such habitual residents shall be assimilated to nationals of that Contracting Party with respect to such audiovisual works.

Comment

The presentation of this possible amendment is not an indication that the Canadian Delegation seeks to change the current Article 3(2). However, we would be opposed to the complete deletion of paragraph (2). If the majority of delegations are opposed to the current paragraph (2), we would suggest this as an alternative.

[End of document]

IAVP/DC/15 Rev.

December 13, 2000 (Original: French)

AMENDMENT TO ARTICLE 3
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegation of Canada

Article 3

Beneficiaries of Protection

(1) [Existing text]

(2) If a Contracting Party grants to its habitual residents the same protection as its nationals with respect to audiovisual fixations made on its territory, for purposes of this Treaty such habitual residents shall be assimilated to nationals of that Contracting Party with respect to such audiovisual fixations.

Comment

The presentation of this possible amendment is not an indication that the Canadian Delegation seeks to change the current Article 3(2). However, we would be opposed to the complete deletion of paragraph (2). If the majority of delegations are opposed to the current paragraph (2), we would suggest this as an alternative.

[End of document]

IAVP/DC/16

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 2
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of the United States of America

In relation to Article 2, the following is proposed:

“Agreed statement concerning the definition of ‘performer’ in the text:

It is understood that, in general, ‘extras’, ‘ancillary performers’ or ‘ancillary participants’ do not qualify for protection under this Instrument because they do not, in the proper sense, perform literary or artistic works or expressions of folklore.”

[End of document]

IAVP/DC/17

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 3
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of the United States of America

Article 3

Beneficiaries of Protection

1. Replace current paragraph (1) with the following new paragraph:

“(1) Contracting Parties shall accord the protection granted under this Treaty to:

 - (a) performers who are nationals of other Contracting Parties;
 - (b) performers whose unfixed performance takes place on the territory of a Contracting Party;
 - (c) performers whose performance is fixed (other than in a phonogram) on the territory of another Contracting Party.”

2. Paragraph (2): Same as in the Basic Proposal.

[End of document]

IAVP/DC/18

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 2
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of Japan

Article 2

Definitions

It is proposed to insert the following additional item in Article 2:

“(f) ‘producer’ means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first audiovisual fixation.”

Agreed statement concerning Article 2(f)

For the application of Article 2(f), it is understood that the expression “first” is used to exclude any fixation embodied in a subsequent copy.

[End of document]

IAVP/DC/19

December 13, 2000 (Original: Spanish)

AMENDMENT TO ARTICLE 5
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE
DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of Peru with the support of the Delegations of Argentina, Brazil, Chile, Dominican Republic, Ecuador, El Salvador, Jamaica, Mexico, Panama and Uruguay

The text of Article 5 should be as follows:

“Article 5

Moral Rights

- (1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall have, in relation to his unfixated audiovisual performances, with or without sound, or his performances fixed in audiovisual works, 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 the right to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his reputation.
- (2) Modifications that are made by the producer and are necessary for the exploitation of the audiovisual fixation, such as abridgement, condensing, editing or dubbing, shall not be considered modifications within the meaning of the foregoing paragraph.
- (3) The rights granted to the performer shall be maintained after his death at least until the expiry of his 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 the protection after the death of the performer of all the rights set forth in this Article, may provide that some of those rights will, after his death, cease to be maintained.
- (4) 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 document]

IAVP/DC/20

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 11
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of India

The Delegation of India proposes to delete Article 11.

[End of document]

IAVP/DC/21

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 11
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of Thailand

The Delegation of Thailand proposes to delete Article 11.

[End of document]

IAVP/DC/22

December 13, 2000 (Original: English)

AMENDMENT TO ARTICLE 12
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of the United States of America

The United States believes that it would be helpful in focusing the debate over Article 12 to present in one document a new version of the current Article 12 of the Basic Proposal.

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.

New Alternative, to replace Alternatives F and G

Law Applicable to Exercise of Exclusive Rights of Authorization

(1) The entitlement to exercise any of the exclusive rights of authorization shall, in the absence of an agreement to the contrary by the performer regarding applicable law, be governed by the law of the country which is most closely connected with a particular audiovisual fixation.

(2) Among the factors that may be considered in determining “the country which is most closely connected with a particular audiovisual fixation” are: the Contracting Party in which the producer of the fixation, or the person or entity which owns or controls the producer, has its headquarters or habitual residence; the Contracting Party of which the majority of performers are nationals; and the Contracting Party in which most of the photography takes place.

Agreed Statement

Agreed statement concerning Article 12:

Because Article 12(1) applies only to exclusive rights of authorization, it has no effect on any other type of rights including moral rights and rights of equitable remuneration.

Alternative H

[No such provision].

[End of document]

IAVP/DC/23

December 14, 2000 (Original: French)

AMENDMENT TO ARTICLE 2
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE
DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

*Proposal by the Delegations of Algeria, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire,
Egypt, Eritrea, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Nigeria,
Senegal, South Africa, Sudan, Togo, Tunisia
and the United Republic of Tanzania*

Article 2(c) is worded as follows:

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

[End of document]

IAVP/DC/23 Rev.

December 14, 2000 (Original: French)

AMENDMENT TO ARTICLE 2
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE
DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3 REV.)

*Proposal by the Delegations of Algeria, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire,
Egypt, Eritrea, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Nigeria,
Senegal, South Africa, Sudan, Togo, Tunisia
and the United Republic of Tanzania*

Article 2(c) is worded as follows:

“(c) “audiovisual fixation” means the embodiment of a series of moving images or images giving an impression of movement, whether or not accompanied by sound or by the representations thereof, from which they can be perceived, reproduced or communicated through a device, with the exception of phonograms;”

[End of document]

IAVP/DC/24

December 14, 2000 (Original: English)

AMENDMENT TO ARTICLE 11
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of Bangladesh

The Delegation of Bangladesh proposes to delete Article 11.

[End of document]

IAVP/DC/25

December 14, 2000 (Original: English)

AMENDMENT TO ARTICLE 2
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegations of the European Community and its Member States

Agreed statement concerning Article 2(c)

It is hereby confirmed that the definition of “audiovisual fixation” contained in Article 2(c) is without prejudice to Article 2(b) of the WPPT.

[End of document]

IAVP/DC/25 Rev.

December 14, 2000 (Original: English)

THE PROVISIONAL SUMMARY MINUTES
RELATING TO THE MORNING OF MAY 26, 2000*prepared by the Secretariat***EDITOR'S NOTE:**

Document IAVP/DC/25 Rev. was listed on the Diplomatic Conference webpage but it was not created. The Summary Minutes of the conference are available between pages 223 and 321 of these Records.

IAVP/DC/26

December 14, 2000 (Original: Russian)

AMENDMENT TO ARTICLE 11 AND A PROPOSED NEW ARTICLE 18*bis*
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE
DIPLOMATIC CONFERENCE
(IAVP/DC/3)

*Proposal by the Delegations of Azerbaijan, Belarus, Kyrgyzstan, the Republic of Moldova,
the Russian Federation and Ukraine*

1. It is proposed to amend Article 11(3)¹ as follows:

Article 11

Right of Broadcasting and Communication to the Public

...

- (3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (2) only in respect of certain uses or it will limit their application in some other way.

2. It is proposed to insert a new Article 18*bis* as follows:

Article 18*bis*

Notifications

A Contracting Party which limits the application of Articles ... shall in a notification deposited with the Director General, inform him accordingly.

[End of document]

¹ The Delegations of the Azerbaijani Republic, the Republic of Moldova and Ukraine have reserved their position with regard to Article 11(3).

IAVP/DC/27

December 14, 2000 (Original: English)

SECOND REPORT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. The Credentials Committee ("the Committee"), established on December 7, 2000, by the Diplomatic Conference on the Protection of Audiovisual Performances, met for the second time on December 14, 2000.

2. The delegations of the following States, elected members of the Committee by the Diplomatic Conference, attended the meeting: Bulgaria, China, Costa Rica, Luxembourg, Malaysia, Morocco and Ukraine.

3. The President of the Committee, elected by the Diplomatic Conference, was Mr. Dimiter Gantchev (Bulgaria). The Vice-Presidents, elected by the Diplomatic Conference, were Ms. Christiane Daleiden-Distefano (Luxembourg) and Mr. Raja Reza Raja Zaib Shah (Malaysia).

4. In accordance with Rule 9(1) of the Rules of Procedure adopted by the Conference on December 7, 2000 (document IAVP/DC/5; "the Rules of Procedure"), the Committee examined the credentials and full powers received since its first meeting on December 8, 2000.

5. The Committee found in order the following further communications:

(a) as far as the *Member Delegations* are concerned,

(i) the *credentials* and *full powers* (that is, credentials for participating in the Conference and signing the Final Act of the Conference, and full powers to sign the Instrument to be adopted by the Diplomatic Conference) of the delegations of the following 14 States:

| | |
|--------------|--------------------------|
| Belarus | Hungary |
| Benin | Kenya |
| Bulgaria | Madagascar |
| Burkina Faso | Mali |
| China | Morocco |
| Ghana | Togo |
| Guinea | United States of America |

(ii) the *credentials* without full powers (that is, credentials for participating in the Conference and signing the Final Act of the Conference) of the delegations of the following 11 States:

| | |
|-----------|-----------|
| Haiti | Rwanda |
| Israel | Senegal |
| Jordan | Ukraine |
| Lithuania | Venezuela |
| Namibia | Viet Nam |
| Poland | |

(b) as far as the *Observer Delegations* are concerned, the *credentials* of the delegation of the following State:

Iran (Islamic Republic of)

(c) as far as the *Observer Organizations* are concerned, the *letters or documents of appointment* of representatives of the following Observer Organizations:

non-governmental organizations: American Film Market Association (AFMA), International Association of Audio-Visual Writers and Directors (AIDAA), International Literary and Artistic Association (ALAI) (3).

6. The Committee recommends to the Conference, meeting in Plenary, to accept the credentials and full powers of the delegations mentioned in paragraph 5(a)(i), above, the credentials of the delegations mentioned in paragraph 5(a)(ii) and 5(b), above, and the letters or documents of appointment of the representatives of the organizations mentioned in paragraph 5(c), above.

7. The Committee noted that, as at the end of its second meeting, the total number of full powers, credentials and letters or documents of appointment was as follows:

28 full powers: 27 *Member Delegations* and one *Special Delegation*;
81 credentials: 79 *Member Delegations* and two *Observer Delegations*;
43 letters or documents of appointment: seven *intergovernmental organizations* and 36 *non-governmental organizations*.

8. The Committee re-expressed the wish that the Secretariat should bring Rules 6 (“Credentials and Full Powers”), 7 (“Letters of Appointment”), 8 (“Presentation of Credentials, etc.”) and 10 (“Provisional Participation”) of the Rules of Procedure to the attention of the Member Delegations or the Observer Delegations not having presented credentials or full powers and of the representatives of the Observer Organizations not having presented letters or other documents of appointment.

9. The Committee decided that a report on its second meeting should be prepared by the Secretariat and issued as its second report, to be presented by the President of the Committee to the Conference, meeting in Plenary.

10. The Committee authorized its President to examine any further communications concerning the Member Delegations, the Observer Delegations, or the Observer Organizations which might be received by the Secretariat after the close of its second meeting and to report thereon to the Conference, meeting in Plenary, unless the President deemed it necessary to convene the Committee to examine and report on those communications.

[End of document]

IAVP/DC/28

December 15, 2000 (Original: English)

AMENDMENT TO ARTICLE 12
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

*Proposal by the Delegations of Algeria, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire,
Egypt, Eritrea, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Nigeria,
Senegal, South Africa, Sudan, Togo, Tunisia
and the United Republic of Tanzania*

Article 12**Law Applicable to Exercise of Right of Authorization**

In the absence of a written agreement to the contrary, the exercise 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.

Agreed statement concerning Article 12

Without prejudice to international obligations, it is understood that the country most closely connected with a particular audiovisual fixation as used in this Article, to the extent that the law applicable to the contract has not been chosen, shall be determined considering the following: (i) the country of which the majority of the performers are nationals; (ii) the country in which the producer has its headquarters; and (iii) the country in which the greater part of the performance took place.

[End of document]

IAVP/DC/28 Rev.

December 14, 2000 (Original: English)

THE PROVISIONAL SUMMARY MINUTES
RELATING TO THE MORNING OF MAY 26, 2000*prepared by the Secretariat***EDITOR'S NOTE:**

Document IAVP/DC/28 Rev. was listed on the Diplomatic Conference webpage but it was not created. The Summary Minutes of the conference are available between pages 223 and 321 of these Records.

[End of document]

IAVP/DC/29

December 15, 2000 (Original: Chinese)

AMENDMENT TO ARTICLE 11
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS OF AN INSTRUMENT
ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE CONSIDERED BY THE
DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegation of China

Article 11

Right of Broadcasting and Communication to the Public

(1) [unchanged]

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

(3) [unchanged]

[End of document]

IAVP/DC/30

December 15, 2000 (Original: French)

AMENDMENT TO ARTICLE 4
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(DOCUMENT IAVP/DC/3)

Proposal by the Delegations of Algeria, Benin, Burkina Faso, Cameroon, Congo, Côte d'Ivoire, Egypt, Eritrea, Ghana, Guinea, Kenya, Liberia, Madagascar, Mali, Morocco, Namibia, Senegal, South Africa, Sudan, Togo, Tunisia and the United Republic of Tanzania

Article 4**National Treatment**

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

(2) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this agreement, to those rights that its own nationals enjoy in that other Contracting Party.

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

[End of document]

IAVP/DC/31

December 15, 2000 (Original: Chinese)

AMENDMENT TO ARTICLE 12
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

Proposal by the Delegation of China

Article 12**Transfer and Consent to the Exercise of Rights**

Contracting Parties may provide that exclusive rights of authorization with respect to a particular audiovisual fixation as provided for in this agreement may, by agreement or operation of law, be transferred from the performer to the producer of the particular fixation or exercised by the producer with the consent of the performer.

[End of document]

IAVP/DC/32

December 16, 2000 (Original: English)

AMENDMENT TO ARTICLE 19
OF THE BASIC PROPOSAL FOR THE SUBSTANTIVE PROVISIONS
OF AN INSTRUMENT ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES TO BE
CONSIDERED BY THE DIPLOMATIC CONFERENCE
(IAVP/DC/3)

*Proposal by the Delegations of Albania, Bulgaria, Croatia, Czech Republic, Hungary, Latvia,
Lithuania, Poland, Romania, Slovak Republic and Slovenia*

Article 19**Application in Time**

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers provided for in this Protocol.

Agreed Statement concerning Article 19

It is understood that, for the purposes of this Agreement, Article 18 of the Berne Convention is without prejudice to any acts committed, agreements concluded or rights acquired in any Contracting State before the date of coming into force of the Convention for that State; and that Article 18 of the Berne Convention allows Contracting States to establish transitional provisions under which any person who engaged in lawful acts with respect to a work, prior to the entry into force of the Convention for the respective State, may undertake with respect to the same work acts within the scope of the rights provided for in the Convention after the entry into force of the Convention for the respective Contracting State.

[End of document]

IAVP/DC/33

December 16, 2000 (Original: English)

UNDERSTANDING ON PROVISIONS OF THE INSTRUMENT

prepared by the Secretariat of Main Committee I

(Understanding covers only text in **bold letters**. Text deleted from the Basic Proposal is marked with ~~strike through~~ and text added is underlined. All other text reflects the text of the Basic Proposal.)

Alternative A

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

Alternative B

**Draft
WIPO Audiovisual Performances Treaty**

Contents

Preamble

- Article 1: Relation to Other Conventions and Treaties
- Article 2: Definitions
- Article 3: Beneficiaries of Protection
- Article 4: National Treatment
- 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 11: Right of Broadcasting and Communication to the Public

- Article 12: *Alternative E* Transfer
 Alternative F Entitlement to Exercise Rights
 Alternative G Law Applicable to Transfers
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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

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the 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, social, cultural and technological developments,

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 performances, fixed in audiovisual fixations,

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:

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.

(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.¹

(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) 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.

(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.²

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

¹ Agreed statement concerning Article 1(3): It is understood that Article 1(3) clarifies the relationship between rights in audiovisual fixations under this Treaty and copyright in works embodied in the fixations. In cases where authorization is needed from both the author of a work embodied in the fixation and a performer owning rights in the fixation, the need for the authorization of the author does not cease to exist because the authorization of the performer is also required, and vice versa. It is further understood that nothing in Article 1(3) precludes a Contracting Party from providing exclusive rights to a performer beyond those required to be provided under this Treaty.

² Agreed statement concerning Article 1(2): It is understood that Article 1(2) clarifies the relationship between rights in audiovisual fixations under this Treaty and copyright in works embodied in the fixations. In cases where authorization is needed from both the author of a work embodied in the fixation and a performer owning rights in the fixation, the need for the authorization of the author does not cease to exist because the authorization of the performer is also required, and vice versa. It is further understood that nothing in Article 1(2) precludes a Contracting Party from providing exclusive rights to a performer beyond those required to be provided under this Treaty.

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 sounds or by the representations thereof, from which they can be perceived, reproduced or communicated through a device;

(d) “broadcasting” means the transmission by wireless means for public reception of sounds or of images or of images and sounds or of 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.

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.

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.

**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.

(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.

(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 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 fixation of their unfixed performances.**

**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.³

**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.⁴

**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 as determined in the national law of Contracting Parties, 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.⁴

**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 members of the public may access them from a place and at a time individually chosen by them.

**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.

³ Agreed statement concerning Article 7: The reproduction right, as set out in Article 7, and the exceptions permitted thereunder through Article 13, fully apply in the digital environment, in particular to the use of performances in digital form. It is understood that the storage of a protected performance in digital form in an electronic medium constitutes a reproduction within the meaning of this Article.

⁴ Agreed statement concerning Articles 8 and 9: As used in these Articles, the expression "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.

(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.

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.

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]

Article 13 Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations and or 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.⁵

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.

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.⁶

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

⁵ Agreed statement concerning Article 13: The agreed statement concerning Article 10 (on Limitations and Exceptions) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 13 (on Limitations and Exceptions) of the [instrument]. [The text 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 network environment. "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."]

⁶ Agreed statement concerning Article 15: The expression "technological measures used by performers" [emphasis added] should, as this is the case regarding the WIPO Performances and Phonograms Treaty, 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.

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 copies of 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.⁷

Article 17 Formalities

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

Article 18 Reservations

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

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~~7 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~~7 to 11 of this Treaty to performances that occurred after the entry into force of this Treaty.

⁷ Agreed statement concerning Article 16: The agreed statement concerning Article 12 (on Obligations concerning Rights Management Information) of the WIPO Copyright Treaty is applicable *mutatis mutandis* also to Article 16 (on Obligations concerning Rights Management Information) of the [instrument]. [The text 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. “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.”]

(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 67 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

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 working paper]

IAVP/DC/34

December 19, 2000 (Original: English)

OUTCOME OF THE DISCUSSIONS IN THE WORKING GROUP

*prepared by the Secretariat of Main Committee I***Title****WIPO Audiovisual Performances Treaty****Article 1****Relation to Other Conventions and Treaties**

(1) 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.

(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 treaties other than the WIPO Performances and Phonograms Treaty, nor shall it prejudice any rights and obligations under any other treaties.

Article 4**National Treatment**

(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) A Contracting Party shall be entitled to limit the extent and term of the protection accorded to nationals of another Contracting Party under paragraph (1), with respect to the rights granted in Article 11(1) and 11(2) of this Treaty, to those rights that its own nationals enjoy in that other Contracting Party.

(3) The obligation provided for in paragraph (1) does not apply to a Contracting Party to the extent that another Contracting Party makes use of the reservations permitted by Article 11(3) of this Treaty, nor does it apply to a Contracting Party, to the extent that it has made such reservation.

Article 5 Moral Right

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live performances or performances fixed in audiovisual fixations, 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, taking due account of the nature of audiovisual fixations.

Agreed statement concerning Article 5

For the purposes of this Treaty and without prejudice to any other treaty, it is understood that, considering the nature of audiovisual fixations and their production and distribution, modifications of a performance that are made in the normal course of exploitation of the performance, such as editing, compression, dubbing, or formatting, in existing or new media or formats, and that are made in the course of a use authorized by the performer, would not in themselves amount to modifications within the meaning of Article 5(1)(ii). Rights under Article 5(1)(ii) are concerned only with changes that are objectively prejudicial to the performer's reputation in a substantial way. It is also understood that the mere use of new or changed technology or media, as such, does not amount to modification within the meaning of Article 5(1)(ii).

Article 9 Right of Rental

(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.

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 in a notification deposited with the Director General of the World Intellectual Property Organization (WIPO) declare that, instead of the right of authorization provided for in paragraph (1), they establish 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 also declare that they set conditions in their legislation for the exercise of the right to equitable remuneration.

(3) Any Contracting Party may declare that it will apply the provisions of paragraphs (1) or (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.

Article 12 **Transfer and Exercise of Exclusive Rights of Authorization**

(1) Contracting Parties may provide that exclusive rights of authorization provided for in this Treaty are transferred from the performer to the producer of an audiovisual fixation, or may be exercised by the producer with the consent of the performer to the fixation.

(2) Without prejudice to international obligations and to public or private international law a transfer by agreement of exclusive rights of authorization granted under this Treaty, or [an agreement to exercise such rights] [an entitlement to exercise such rights based on the consent of the performer to the fixation], shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the agreement between the performer and the producer has not been chosen, by the law of the country with which the agreement is most closely connected.

Agreed statement concerning Article 12

It is understood that Article 12 applies only to exclusive rights of authorization, consequently it does not apply to moral rights and rights of equitable remuneration.

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.

Article 18 **Reservations and Notifications**

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

(2) Any declaration under Article 11(2) or 19(2) may be made in the instruments referred to in Article 105, and the effective date of the declaration shall be the same as the date of entry into force of this Treaty with respect to the State or intergovernmental organization having made the declaration. Any such declaration may also be made later, in which case the declaration shall have effect three months after its receipt by the Director General of WIPO or at any later date indicated in the declaration.

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 declare in a notification deposited with the Director General of WIPO that it will not apply the provisions of Articles 7 to 11 of this Treaty, or any one or more of those, 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 the said Articles to performances that occurred after the entry into force of this Treaty for that Contracting Party.

(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 5 and 7 to 11 after the entry into force of this Treaty for the respective Contracting Parties.

[End of document]

IAVP/DC/35

(Original: English)

REPORT OF THE PRESIDENT OF THE CREDENTIALS COMMITTEE

prepared by the Secretariat

1. Since the meetings of the Credentials Committee on December 8 and 14, 2000 (see documents IA VP/DC/6 Rev. and 27), the full powers of the Delegations of Belgium, Jamaica and Niger, the credentials of the Delegations of Chile and Saudi Arabia, and the letters or documents of appointment of representatives of the Arab States Broadcasting Union (ASBU), the Ibero-Latin-American Federation of Performers (FILAIÉ), the *Groupement européen des sociétés de gestion des droits des artistes interprètes (ARTIS)*, and the North American Broadcasters Association (NABA) have been received.

2. The President of the Credentials Committee noted that, as at the end of Tuesday, December 19, 2000, the total number of full powers, credentials and letters or documents of appointment was as follows:

31 full powers: 30 *Member Delegations* and one *Special Delegation*;
83 credentials: 81 *Member Delegations* and two *Observer Delegations*;
47 letters or documents of appointment: eight *intergovernmental organizations* and
39 *non-governmental organizations*.

[End of document]

IAVP/DC/36

March 6, 2002 (Original: French, English, Spanish)

SUMMARY MINUTES (PLENARY)

EDITOR'S NOTE:

Document IAVP/DC/36 contains the Summary Minutes of the Plenary Sessions of the Diplomatic Conference. It is reproduced between pages 223 and 240 of these Records.

IAVP/DC/37

March 6, 2002 (Original: French, English, Spanish)

SUMMARY MINUTES (MAIN COMMITTEE I)

EDITOR'S NOTE:

Document IAVP/DC/37 contains the Summary Minutes of the Sessions of Main Committee I of the Diplomatic Conference. It is reproduced between pages 241 and 311 of these Records.

IAVP/DC/38

March 6, 2002 (Original: French, English, Spanish)

SUMMARY MINUTES (MAIN COMMITTEE II)

EDITOR'S NOTE:

Document IAVP/DC/38 contains the Summary Minutes of the Sessions of Main Committee II of the Diplomatic Conference. It is reproduced between pages 312 and 321 of these Records.

IAVP/DC/39

December 20, 2000 (Original: English)

EDITOR'S NOTE:

At the close of the Diplomatic Conference, the text of this document was handed to the Secretariat by the Presidency of the European Community. As it could not be included in the Summary Minutes of the Conference when they were published, it was subsequently issued as a conference document. [Reference is made to the discussions at the Twenty-Eighth (13th Extraordinary) Session of the WIPO General Assembly, which took place in Geneva from September 23 to October 1, 2002, document WO/GA/28/7, pp. 3 ff.]

DECLARATION CONCERNING ARTICLE 4

prepared by the European Community and its member States

The European Community and its member States have taken note of the declaration of the Chairman of Main Committee I regarding Article 4.

In reaction to this, the European Community and its member States submit the following declaration for inclusion in the proceedings of the Conference:

“The declaration made by the Chairman of Main Committee I in relation to Article 4 is of a unilateral nature and in no way implies a commitment for the members of Main Committee I or for the future Contracting Parties to the Treaty.”

[End of document]

TEXT OF THE CONFERENCE DOCUMENTS OF THE "IAVP/DC/INF" SERIES

IAVP/DC/INF/1

December 20, 2000 (Original: French / English)

LIST OF PARTICIPANTS

EDITOR'S NOTE:

Document IAVP/DC/INF/1 contains the List of Participants of the Diplomatic Conference. It is reproduced between pages 323 and 370 of these Records.

IAVP/DC/INF/2

December 20, 2000 (Original: English)

OFFICERS AND COMMITTEES

EDITOR'S NOTE:

Document IAVP/DC/INF/2 contains the list of Officers and Committees of the Diplomatic Conference. It is reproduced in the List of Participants between pages 371 and 374 of these Records.

IAVP/DC/INF/3

December 20, 2000 (Original: English)

GENERAL INFORMATION

EDITOR'S NOTE:

Document IAVP/DC/INF/3 contained practical information concerning the venue and conference facilities of the Diplomatic Conference. It has not been reproduced as part of these Records.

SUMMARY MINUTES OF THE CONFERENCE

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SUMMARY MINUTES OF THE PLENARY

prepared by the International Bureau

President: Mr. Gupine NGUYEN (Viet Nam)

Secretary: Mr. Shozo UEMURA (WIPO)

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| First Meeting Thursday, December 7, 2000 Morning |
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Opening of the Conference

1. Dr. IDRIS (Director General of WIPO) opened the Diplomatic Conference on the Protection of Audiovisual Performances and expressed optimism for its success. The successful adoption of an instrument for the protection of audiovisual performances was of foremost importance to performers. It would also have a major impact on the film, music and television industries. The main beneficiaries would be performers whose economic and moral rights would be protected, including at the international level. As part of its program for progressive development of copyright and related rights, WIPO hoped to establish a comprehensive system of protection which would respond to the challenges and opportunities of digital and network technologies.

Consideration and Adoption of the Rules of Procedure

2. Dr. IDRIS (Director General of WIPO) proposed two modifications to the Rules of Procedure as set out in document IAVP/DC/2. The words “documents shall constitute” in paragraph (1) of Rule 29, should be replaced with “documents IAVP/DC/3 and 4 shall constitute” for a precise reference to the documents, while Rule 13.2 should be amended to provide for 14 Members in the Drafting Committee instead of 11.

3. *The Diplomatic Conference adopted the Rules of Procedure with the two modifications proposed by the Director General.*

Election of the President of the Conference

4. Dr. IDRIS (Director General of WIPO) invited the delegations to turn to the next item of the Agenda, namely, the election of the President of the Conference.
5. Ms. BANYA (Uganda), speaking on behalf of the African Group, proposed Ambassador Nguyen Gupine of Viet Nam for the presidency of the Diplomatic Conference.
6. Mr. PETIT (France), speaking on behalf of Group B, of which France was the Coordinator, supported the proposal made by the delegate of Uganda on behalf of the African Group to elect Ambassador Nguyen Gupine of Viet Nam to the presidency of the Diplomatic Conference, as his competence, talent and impartiality were the best guarantees of the success of the Conference.
7. *The Diplomatic Conference elected unanimously and by acclamation, Ambassador Gupine Nguyen of Viet Nam as President.*
8. The PRESIDENT thanked the Delegates for the election and for their trust vested in him.

Consideration and Adoption of the Agenda

9. The PRESIDENT opened the floor for discussion on the Agenda as set out in document IAVP/DC/1. He noted that no delegation asked for the floor.
10. *The Diplomatic Conference adopted unanimously the Agenda.*

Election of the Vice-Presidents of the Conference

11. The PRESIDENT invited the delegations to turn to the next item of the Agenda, namely, the election of the Vice-Presidents of the Conference. He invited the Secretariat to provide the necessary information.
12. Mr. GURRY (WIPO Secretariat) presented the list of proposed Vice-Presidents: Mr. IMANOV of Azerbaijan, Mr. SHEN of China, Mr. KOPČIĆ of Croatia, Mr. DICKINSON of the United States of America, Mr. PETIT of France, Ms. DALEY of Jamaica, Mr. WATANABE of Japan, Mr. ASEIN of Nigeria, Mr. CHOE of the Republic of Korea and Mr. TEYSERA ROUCO of Uruguay.
13. *The Diplomatic Conference elected unanimously Mr. IMANOV of Azerbaijan, Mr. SHEN of China, Mr. KOPČIĆ of Croatia, Mr. DICKINSON of the United States of America, Mr. PETIT of France, Ms. DALEY of Jamaica, Mr. WATANABE of Japan, Mr. ASEIN of Nigeria, Mr. CHOE of the Republic of Korea and Mr. TEYSERA ROUCO of Uruguay as its Vice-Presidents.*

Election of the Members of the Credentials Committee

14. The PRESIDENT invited the delegations to turn to the next item of the Agenda, namely, the election of the Members of the Credentials Committee. He invited the Secretariat to provide the necessary information.

15. Mr. GURRY (WIPO Secretariat) read the list of proposed Delegations: Bulgaria, China, Costa Rica, Luxembourg, Malaysia, Morocco and Ukraine.

16. *The Diplomatic Conference approved the election of the Members of the Credentials Committee.*

Election of the Members of the Drafting Committee

17. The PRESIDENT invited the delegations to turn to the next item of the Agenda, namely, the election of the Members of the Drafting Committee. He invited the Secretariat to provide the necessary information.

18. Mr. GURRY (WIPO Secretariat) announced the list of proposed members: Algeria, Argentina, Australia, Belgium, Cameroon, China, France, Mexico, Morocco, the Russian Federation, Spain, the United Kingdom and the United States of America.

19. *The Diplomatic Conference elected unanimously Algeria, Argentina, Australia, Belgium, Cameroon, China, France, Mexico, Morocco, the Russian Federation, Spain, the United Kingdom and the United States of America as Members of the Drafting Committee.*

Election of the Officers of the Credentials Committee, the Main Committees and Drafting Committee

20. The PRESIDENT invited the delegations to turn to the next item of the Agenda, namely, the election of the office bearers of the various committees. He invited the Secretariat to provide the necessary information.

21. Mr. GURRY (WIPO Secretariat) announced the list of proposed Officers: Mr. GANTCHEV of Bulgaria as President of the Credentials Committee; Mr. RAJA REZA of Malaysia and Ms. DALEIDEN-DISTEFANO of Luxembourg as Vice-Presidents of the Credentials Committee; Mr. LIEDES of Finland as President of Main Committee I; Mr. RASHID SIDDIK of Egypt and Ms. PERALTA of the Philippines as Vice-Presidents of Main Committee I; Mr. SARMA of India as President of Main Committee II; Mr. KARKLINS of Latvia and Mr. HERMANSEN of Norway as Vice-Presidents of Main Committee II. He suggested that the election of the officers of the Drafting Committee be deferred as consultations were still taking place.

22. *The Diplomatic Conference elected unanimously Mr. GANTCHEV of Bulgaria as President of the Credentials Committee; Mr. RAJA REZA of Malaysia and Ms. DALEIDEN-DISTEFANO of Luxembourg as Vice-Presidents of the Credentials Committee; Mr. LIEDES of Finland as President of Main Committee I; Mr. RASHID SIDDIK of Egypt and Ms. PERALTA of the Philippines as Vice-Presidents of Main Committee I; Mr. SARMA of India as President of Main Committee II; Mr. KARKLINS of Latvia and Mr. HERMANSEN of Norway as Vice-Presidents of Main Committee II.*

Opening Declarations by Delegations and by Representatives of Observer Organizations

23. The PRESIDENT opened the floor for opening declarations.

24. Ms. KUNADI (India) congratulated the President on his election, WIPO was at the forefront when it came to the protection of intellectual property rights in a digital environment. Issues relating to the rights of audiovisual performers were not to be looked at in isolation. An audiovisual work was not only made up of works and performances, but also to a large extent a result of the efforts of the producer. Audiovisual works involved significant investments, and thus clear-cut provisions on the ownership of rights were essential to promote the development and growth of the industry. At the same time, there was a need to ensure that performers were not deprived of their rights in relation to the new forms of exploitation of audiovisual fixations in a digital environment. The Copyright Act of her country provided performers with rights in relation to their live performances, but these rights ceased to apply when a performer agreed to the incorporation of his or her performance in a cinematographic film. However, performers remained free to negotiate their remuneration prior to giving consent. Collective administration systems were important for the rights of audiovisual performers to be exercised, but such systems did not exist in most developing countries.

25. Mr. SIMANJUNTAK (Indonesia) congratulated the President on his election. Performers' rights had to be strengthened because of globalization and the development of information and communication technologies. There was also a need to strike a balance between the rights of performers and those of other stakeholders in audiovisual works, in particular, the producers. The rules had also to be compatible with the existing legal systems of all countries. This would encourage broad participation, which was important for the instrument to be effective.

26. Ms. BANYA (Uganda), speaking on behalf of the African Group, congratulated the President on his election. Strengthening the rights of audiovisual performers was important to developing countries, including the least developed, particularly in relation to expressions of folklore. The Group hoped that the creation of an instrument for protection would curb exploitation and provide better remuneration for performers. During the 1996 Diplomatic Conference, the African Group had proposed that an instrument for the protection of audiovisual performances be concluded as soon as possible. The instrument should constitute a protocol to the WIPO Performances and Phonograms Treaty (WPPT). The Group opted for Article (1) as proposed in the Basic Proposal, but was open to further discussions on Article 3(2). On the question of national treatment, the Group opted for Alternative C under Article 4. On the question of moral rights, the Group was convinced that the provisions under the WPPT were

broad enough to protect the interests of performers. However, in the spirit of compromise, the Group could accept Article 5(2) with the deletion of the last sentence of that section. The Group accepted, in principle, the proposal on the right of broadcasting and communication to the public but was open to further discussion in the search for better alternatives. On the issue of the transfer of rights, the Group hoped that its proposal, Alternative G under Article 12, would help bridge the positions.

27. Mr. BEN SALEM (Tunisia) congratulated the President and Vice-Presidents on their election, and said that the draft instrument submitted to the Conference for consideration was a reflection of the level of protection that WIPO and its Member States were endeavoring to afford authors and performers in an environment where image was a medium through which culture could evolve and flourish. The protection of literary and artistic property was tied up with the different cultural policies of the Member States, which considered them an important incentive for creation, contributing as they did, to the growth and viability of the main underlying activities. International rules were necessary to ensure the protection of works, and it was important to ensure the best balance between the various interests at stake, but without losing sight of the fact that the main aim of the legal instruments to be adopted in that area was the protection of creators.

28. His country was intent on honoring its commitments to the WTO and the association agreement concluded with the European Union, by revising its legislation and acceding to the Rome Convention and the WIPO Conventions on Copyright (WCT) and Performances and Phonograms (WPPT) of December 1996. The new instrument should be concluded in the same spirit as those that had preceded it, and there was also a case for negotiating an additional instrument on the protection of folklore and traditional knowledge.

29. Mr. ISHINO (Japan), congratulated the President on his election. Copyright protection systems were required to respond adequately to the development of digital technology and the proliferation of communication networks. Although the Internet Treaties were adopted in 1996, the issue of the protection of audiovisual performances was left to further consideration. The Basic Proposal proposed by Mr. Jukka Liedes and the Secretariat provided an excellent basis for discussions. The new instrument would be of vital importance to the global information society in the twenty-first century.

30. Mr. STOLL (European Community), speaking on behalf of the European Community and its Member States, stated that his Delegation had actively participated in the 1996 Diplomatic Conference, which had led to the adoption of the WCT and the WPPT. The protection of audiovisual performers had to be on an equal footing with sound performers and this was already provided within the legal framework of the European Community and its Member States. The proposed Directive on Copyright in the Information Society sought to reinforce the protection of performers of all categories, including audiovisual performers. Thus, it had anticipated a successful outcome to this Conference. His Delegation wished to reaffirm the importance of the protection of audiovisual performances, particularly in the digital environment. Solutions had to provide for a high level of protection with the necessary flexibility to be acceptable to all countries, but any unjustified differentiation on the basis of the nature of the performance should be avoided.

31. The legitimate claims of audiovisual performers for better protection should be balanced against the legitimate interests of others, and due account should be taken of the different legal traditions. The WPPT provided an important reference point, which could be adapted for the protection of audiovisual performances. His Delegation disagreed with those who claimed that the key to the protocol was the rapid transfer of performers' rights to producers, or other provisions, which were designed to safeguard the interests of producers rather than performers. The protocol concerned the protection of performers, balanced against the legitimate interests of producers, and the future instrument should therefore include no provision on the transfer of rights.

Second Meeting
Thursday, December 7, 2000
Afternoon

32. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltic States, stated that the countries in his Group were among those who had strongly supported the convening of this Conference since 1996. Almost half of the countries that had ratified the WPPT were from that region. The group looked forward to an international instrument that would strike a balance between the rights of the various right holders and the interests of all users. He proposed that discussions on the specific form of the instrument be deferred until agreement was reached on the substantive issues.

33. Mr. RASHID SIDDIK (Egypt) supported the statement made by the Delegation of Uganda on behalf of the African Group. He believed that the new instrument should be strongly linked to the WPPT and should therefore be a protocol to the WPPT. The question of the transfer of rights should be left to each country. The importance the developing countries attached to the protection of traditional knowledge and folklore expressions should also be kept in mind.

34. Mr. BENFREHA (Algeria) subscribed to the statement made by Uganda on behalf of the African Group, and expressed his best wishes for the conclusion of an instrument governing audiovisual performances. He mentioned that his country had well established traditions in the field of copyright and related rights, and that it had in recent years embarked on the renovation of its framework of laws, and had acceded to the Berne Convention in 1998.

35. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, stressed that the majority of the provisions in the Basic Proposal were acceptable to those countries in their current wording and reflected a reasonable balance of interest between all the parties involved. The Delegation of the region believed it would be necessary to pay particular attention to Articles 1, 4, 11, 12, 18 and 19. As far as the title of the document was concerned, they would need to defer the discussion until they had actually reached agreement on the substantive provisions of the Basic Proposal, in order to concentrate the efforts on the main and principal issues. The wording of Article 11

needed improvement and Article 12 raised some doubts in respect of its necessity. Alternatives E, F and G were not acceptable in the way they were currently worded.

36. Mrs. BELLO DE KEMPER (Dominican Republic) said that her Group had an interest in ensuring an improvement in the level of appropriate protection given to audiovisual performances in the face of the fresh opportunities and challenges thrown up by new information and communication technology. Finally, she expressed thanks and pleasure at the fact that the present meeting was the first official one at which Portuguese was used as a working language.

37. Mr. SIMAS MAGALHÃES (Brazil) conveyed his gratitude for the decision enabling Portuguese-speaking delegates to speak in their own language. His country expected to take active part in the discussions so as to adapt the rights of performers to the profound impact of new technology. The efforts made by the developing countries should be recognized and taken into account when drawing up new rules. Hopefully, deliberations related to national treatment, the rights of broadcasting and communication to the public as well as transfer of rights would result in the establishment of a flexible, realistic and well-balanced instrument. Flexibility would be especially important for developing countries.

38. Mr. DICKINSON (United States of America) underlined that the purpose of the Conference was to build a consensus on a new international instrument that would enhance the protection of audiovisual performers. The contributors to movies for example, often came from many different countries and legal systems. Because of that diversity, there was a genuine concern regarding how to ensure the transfer of economic rights from performers to producers. His Delegation was eager to resolve that issue, which would be critical to the success of the whole undertaking. Given the state of current technology, the audiovisual industry and the performers, in particular, were under threat from unauthorized digital manipulation of their images. Moral rights had become increasingly critical in the digital environment. However, certain modifications were part of the normal exploitation of a work, including modifications necessary for the use in different formats and markets. His country had ratified the WCT and the WPPT, and had implemented them by way of the Digital Millennium Copyright Act. It already provided extensive protection to those vital creators, particularly in the increasingly economically important digital environment.

39. Mr. SHEN (China) stated that the ideas and opinions of performers, as workers in the artistic domain and major contributors in the audiovisual productions, should be reflected in the instrument. His Delegation believed that audiovisual performers needed to have a right to be recognized and protected, and the Basic Proposal was therefore acceptable.

40. Mr. HERMANSEN (Norway) stressed the importance his Delegation attached to the protection of performances in audiovisual productions in light of the technological changes and their consequences. Performers were crucial contributors to audiovisual productions, and that should be properly reflected in the international protection system, in line with the protection provided to sound performers under the WPPT. It would be difficult for his Delegation to support an international instrument, which automatically transferred the rights of performers to producers.

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41. Mrs. PÂRVU (Romania) stated that under the 1996 law on copyright and related rights of her country, performers' rights were granted equally for aural and audiovisual performances. Her Delegation fully supported the opening statement made by the Delegation of Bulgaria, on behalf of the Central European and Baltic States, and believed that the work should lead towards the construction of an adequate and balanced protection system for audiovisual performances.
42. Mr. CRESWELL (Australia) said that, on the one hand, the new instrument should not stray too far from the pattern of the WPPT. On the other hand, performers' rights in audiovisual productions would be new to a number of countries, including Australia, and the proposed instrument therefore had to be flexible. It should be a Treaty and not a protocol to the WPPT, although it could have some linkage with the latter. His Delegation supported the Basic Proposal text on moral rights, the rental right, the rights of broadcasting and communication to the public and the application of the economic rights to existing performances as necessary variations and departures from the WPPT, whereas it supported the WPPT model for national treatment.
43. Mr. OUADRHIRI (Morocco) indicated that many professionals and trade unions in the field were expecting to have balanced protection for their cultural heritage, including the audiovisual production industries. His Delegation therefore expressed satisfaction with the Basic Proposal, and associated itself with the proposal made by the Delegation of Uganda on behalf of the African Group, including their preference for designating the instrument as a protocol.
44. Mr. OMOROV (Kyrgyzstan) indicated that his country had enacted a copyright law, which provided for the protection of audiovisual performances, and had joined the Berne Convention as well as the WTO. His Delegation associated itself with the statement made by the Delegation of the Russian Federation on behalf of the region.
45. Mr. MAHINGILA (United Republic of Tanzania) fully supported the statement made by the Delegation of Uganda. The importance his country attached to the protection of audiovisual performances was evidenced by the inclusion of such protection in its Copyright and Neighboring Rights Act. He wished that an international instrument acceptable to all the stakeholders would be adopted successfully.
46. Ms. DA SILVA (Angola) thanked WIPO for the adoption of Portuguese as a working language of the Conference. She supported the statement made by the Delegation of Uganda on behalf of the African Group, and offered full cooperation for the successful conclusion of the Conference.
47. Ms. GERVAIS (Canada) stated that a flexible solution for protecting performers should be sought, which would cover many forms of performances, and that such an approach was well reflected in the Basic Proposal. Her Delegation would oppose Alternative E, but individual countries should be entitled to have a provision on transfer of rights. A minimum of international harmonization on the question of voluntary transfer should be put into place, and therefore Alternative G could be a good starting point for discussions.

48. Ms. MOHAMED (Kenya) stated that the new instrument would enhance the protection of audiovisual performers, especially in Africa. Fixed performances was one of the modes through which cultural heritage was passed down to the next generation, and this was why her Delegation placed great importance on the protection of copyright. For the successful conclusion of the Conference, it looked forward to cooperating in a spirit of frankness and flexibility.

49. Mr. CHOE (Republic of Korea) attached the utmost importance to the implications of the application of the rights of broadcasting and communications to the public. Providing not only a right for secondary use of commercial audiovisual fixations, but rights of broadcasting and communication to the public in general, even if it might be subject to reservations, would have a serious impact on current business practices. It therefore seemed reasonable to leave it for the later stage of the harmonization process. A fair balance between musical performances and audiovisual performances had to be struck. On national treatment, his Delegation preferred Alternative D to Alternative C. Finally, the number of States acceding to or ratifying the new instrument should be reasonable for its entry into force.

50. Mr. MYERS (ILO) declared that his organization had concerns about the proposed instrument with regard to the question of transfer of rights, as this could affect contractual relations between performers and their employers. Presumptions of transfer of rights could have a negative impact on contractual relations, bargaining and collective management of performers' rights; therefore, flexibility on this issue was needed. Effective representation, bargaining and social dialogue between workers, employers and governments were important elements in successful economic and social performance across all industries, including the audiovisual sector.

51. Mr. BOLME (FIA) stated that performers' work was integral to the internationalization of production and distribution of audiovisual performances, the development of digital technology, the huge reach of the Internet and the massive convergence of company ownership in the international media and entertainment sector. That work was a serious creative profession, which deserved to be treated with the same respect as that of other creative contributors. Performers wanted to be able to negotiate with producers about the terms on which their creative work could be exploited now and in the future in the worldwide digital marketplace. In some countries, they had achieved protection through collective bargaining, through statutory rights or through a mix of the two systems. The instrument should allow these systems to co-exist and flourish together. Moral rights should be applied retrospectively to protect the integrity of performers and their images. The focus should be on performers, not on the producer whose economic strength was always greater than that of the individual performer and even that of the collective organizations of performers.

52. Mr. VINCENT (FIM) said that the new instrument should not affect or alter the protection established by the WPPT, whether at a strictly legal level or with respect to certain aspects of contractual relations.

53. Mr. MASUYAMA (CRIC), speaking on behalf of GEIDANKYO, supported the joint statement made by FIA and FIM. The rights of performers in the field of moral and economic rights had to be recognized broadly in respect of both sound and audiovisual performances.

54. Mr. PÉREZ SOLÍS (FILAIE) expressed concern at the lack of a reference in the Basic Proposal to audiovisual producers and to the contractual assignment or possible transfer of rights to them. With reference to the nature of the Treaty, his preference was ultimately for a Protocol that would retain some proximity to the WPPT and thereby conform to the mandate given by the Diplomatic Conference of December 1996. Finally, with regard to moral rights, he expressed his misgivings with respect to “normal exploitation”, in view of the fact that it could offer the producer an infinite variety of attacks under the guise of “normal marketing,” which was insufficiently clarified.

55. Ms. MANALASTAS (ABU) said that fees paid by broadcasters fuelled the engine of investment, which drove audiovisual creations. Even though Article 11 was an all-options provision, it could alter the well-established “one-stop shop” mechanism for licensing, and give audiovisual performers a higher level of protection than performers benefiting from the WPPT. Therefore, broadcasters expressed their opposition to the inclusion of Article 11 in the instrument.

56. Mr. SHAPIRO (IVF) stated that the Treaty was a chance to build bridges between legal systems for the benefit of not only performers but also the entire audiovisual sector and cultural diversity. The issue of transfer had to be addressed in the Treaty. Failure to address this vital issue would risk unraveling existing national rules on transfer and therefore could be a barrier to the ratification of the new instrument.

57. Ms. MARTIN-PRAT (IFPI) supported the adoption of new international rules to ensure the protection of performers when the performances were part of an audiovisual fixation. International rules in this area should be developed in a manner that allowed the continued commercial use of audiovisual productions. The new Treaty had to ensure legal certainty and should avoid hampering the use and licensing of audiovisual products now or in the future.

58. Mr. MANN (WBU) referred to the technique known as audio description by which additional sound channels were added to videos, films and television broadcasts in order to describe facial expressions, costumes, scenery or movements. It was essential that any international agreement on audiovisual rights would reflect that audio description and would not constitute an infringement of the moral rights of performers or producers. No constraint should exist on the development, production and distribution of audio described material. Blind and partially sighted people had the same rights as their fellow sighted citizens to access any published material at the same time and at no additional costs.

59. Mrs. LEPINE-KARNIK (FIAPF) expressed her support for the international harmonization of laws and practices on performers and audiovisual concerns. Producers were certain that such harmonized protection would serve the interests of the industry as a whole. FIAPF considered it necessary to incorporate in the Treaty a provision assuring producers of the transfer of economic rights in order to allow creators, performers, producers and distributors to continue to exercise their professions.

60. Mr. PARROT (ARTIS GEIE) said that the possibility of the new instrument having a lesser level of protection than the WPPT could not be contemplated. He wanted a Protocol adopted.

The question of continuity of remuneration arose. Lump-sum repurchase practices were liable to spread and cause performers to lose a measure of control. Collective management organizations should play a special part. He emphasized the importance of moral rights, and supported the position taken by the European Union regarding Article 12.

61. Mr. BLANC (AEPO) observed that at present there was no balance between the interests of performers and their opposite numbers in the audiovisual industry. Such balance should be restored by giving performers rights at the international level. He preferred to have no provision on transfer in the new instrument. With regard to the right of broadcasting and communication to the public, the essential point was that of the real benefit to performers and the important role of collective management. He was in favor of a wording identical to that of the WPPT on moral rights. With regard to national treatment, a balanced solution such as that adopted in the WPPT should be found. He mentioned a number of difficulties regarding definitions.

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| Third Meeting Monday, December 11, 2000 Afternoon |
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Election of the Officers of the Drafting Committee

62. At the invitation of the President, Mr. UEMURA (WIPO) announced that, after consultations, the groups proposed Mr. Roger Knights of the United Kingdom as President, and Mr. Christophe Seuna of Cameroon and Mr. Roman O. Omorov of Kyrgyzstan as Vice-Presidents of the Drafting Committee.

63. *The Diplomatic Conference elected unanimously Mr. Roger Knights of the United Kingdom as President, and Mr. Christophe Seuna of Cameroon and Mr. Roman O. Omorov of Kyrgyzstan as Vice-Presidents of the Drafting Committee.*

Consideration of the First Report of the Credentials Committee

64. Mr. GANTCHEV (Bulgaria), speaking in his capacity as the Chairman of the Credentials Committee, presented the First Report of the Committee as contained in document IAVP/DC/6.

65. The PRESIDENT invited the delegations to make observations and comments.

66. Mr. AUER (Austria) pointed out that his Delegation had credentials without full powers, and therefore should be listed under 7(a) (ii), instead of 7(a) (i), which listed Member Delegations with credentials and full powers.

67. Mrs. SCHULZ (Germany) said that Germany should also be listed under 7(a)(ii), and not 7(a)(i). Even though their credentials had been signed by the Minister for Foreign Affairs, they only extended to signing the final act, not to full powers for signature of the instrument.
68. Mr. AHOKPA (Benin) said that Benin did not appear in paragraph (ii), although his country had conveyed a *note verbale* to the WIPO Secretariat designating its representative to the Diplomatic Conference.
69. Mrs. BERNAL IBARRA (Venezuela) said that her Delegation had given notice, in a *note verbale* from the Permanent Mission to the United Nations, of the participation of a representative of her country in the Conference and yet there was no mention of the fact in item (ii) of page 3 of the document submitted.
70. Mr. SAFIR (AFMA) stated that his organization was not listed as a Non-Governmental Organization and requested to be included in the Second Report.
71. The PRESIDENT indicated that all the suggestions made would be reflected in the Second Report of the Credentials Committee.
72. *The Diplomatic Conference adopted unanimously the First Report of the Credentials Committee, as contained in document IAVP/DC/6.*
73. The PRESIDENT adjourned the Plenary.

Fourth Meeting
Wednesday, December 20, 2000
Morning

74. The PRESIDENT opened the meeting and invited Mr. Liedes, Chairman of Main Committee I, to report on the state of deliberations in that Committee.
75. Mr. LIEDES (Finland) provided an overview of the discussions that had taken place in Main Committee I. Work on the substantive clauses had progressed extremely well in the early stages of the Diplomatic Conference and understandings had been established on the majority of articles. Later a working group had been established by Main Committee I to discuss the remaining issues. Further progress had been made within the working group and treaty language had been established on many provisions on the conditional understanding that a satisfactory solution would be found for all elements. However, certain elements required informal consultations before work could proceed any further. Discussions remained at the stage where a convergence of views was still not possible on certain elements. He thanked all delegations for their active participation and their willingness to work together.

76. The PRESIDENT noted that tremendous efforts had been made by all the delegations, the Chairman of Main Committee I, the Director General of WIPO and his staff to promote consensus, particularly with regard to the more difficult issues. He invited the Director General to provide some guidance on the possible means to conclude the Diplomatic Conference.

77. Dr. IDRIS (Director General of WIPO) suggested four points relating to the conclusion of the Diplomatic Conference, based on the mandate given by the General Assembly of WIPO: (1) The Diplomatic Conference on the Protection of Audiovisual Performances met in Geneva from December 7 to 20, 2000; (2) the Conference made substantial progress towards reaching agreement on a set of provisions which could constitute the basis of a Treaty on the protection of audiovisual performances; (3) the Conference was unable to reach consensus on certain specific areas; and (4) the Conference requested the Director General to report the results of the Conference to the meeting of the Assemblies of the Member States of WIPO in September 2001. He stressed that those points were proposed without prejudice to any suggestions or proposals that the Plenary might wish to make at that late stage. However, the Diplomatic Conference had to be concluded the same day on the basis of the mandate given by the General Assembly.

78. The PRESIDENT noted that substantial progress had been made, as consensus had been achieved on most of the articles, and that should form the basis for further work. He opened the floor for discussion on the possible means to conclude the Diplomatic Conference.

79. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, appealed to all delegations to engage in a last minute effort to achieve further progress in order for the Diplomatic Conference to conclude on a positive note.

80. Dr. IDRIS (Director General of WIPO) stated that the Secretariat was more than ready to provide the necessary support and assistance should delegations decide to continue their efforts for a successful outcome of the Diplomatic Conference.

81. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, felt that there was little to lose in convening a meeting of Main Committee I. It would also contribute to a better understanding of the issues that were discussed at the informal consultations the day before.

82. The PRESIDENT suggested that the Plenary session be adjourned to allow Main Committee I to meet.

83. Dr. IDRIS (Director General of WIPO) suggested that the Plenary be resumed at 4 p.m. at the latest in order for the Diplomatic Conference to conclude on time.

84. Mrs. BELLO DE KEMPER (Dominican Republic) said that the Group of Latin American and Caribbean Countries had listened with the utmost interest to what had been said by the Groups of African and Central European and Baltic States, and reaffirmed the willingness of the countries of the region to work towards the achievement of a good Treaty, which would persuade the majority of States that it was right and necessary to accede to it.

85. Mr. STOLL (European Community) stated that his Delegation would continue its efforts for a successful outcome to the Diplomatic Conference.
86. Mr. RAJA REZA (Malaysia), speaking on behalf of the Group of Countries of Asia and the Pacific stated that the Group had demonstrated both cooperation and flexibility in the discussions of the working group. The working group had made substantial progress, and the Group would be willing to participate in the final efforts to make further progress.
87. Mr. KEPLINGER (United States of America) stated that his Delegation appreciated the spirit of all delegations to continue working towards achieving good results. Although not much time was left, efforts could still be made towards achieving further progress.
88. Mr. BLIZNETS (Russian Federation) welcomed the proposal to make a final effort towards achieving further progress. His Delegation was willing to work as long as possible for a successful conclusion of the Diplomatic Conference.
89. Mr. SHEN (China) stated that his Delegation was willing to participate in the final efforts to make further progress.
90. Mr. GURRY (WIPO Secretariat) informed the meeting that two Reports of the Credentials Committee had just been circulated. The adoption of these Reports would be dealt with when the Plenary meeting resumed.
91. Mr. SARMA (India) stated that his Delegation was willing to participate in the final efforts to make further progress in order to conclude the Diplomatic Conference on a successful note. Although all previously expected results might not be achieved, at least it would be possible to state that the Diplomatic Conference had been able to reach an understanding on the need to improve the protection accorded to audiovisual performers.

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| Fifth Meeting Wednesday, December 20, 2000 Afternoon |
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Consideration of the Second Report of the Credentials Committee

94. The PRESIDENT referred to the Second and Third reports of the Credentials Committee contained in documents IAVP/DC/27 and IAVP/DC/35, respectively. He proposed that the Conference adopt both Reports.
95. *The Conference adopted by consensus the Second and Third Report of the Credentials Committee, as contained in documents IAVP/DC/27 and IAVP/DC/35, respectively.*

Adoption of the InstrumentAdoption of Any Recommendation, Resolution, Agreed Statement or Final Act

96. The PRESIDENT read the Recommendation proposed by Main Committee I:

“The Diplomatic Conference

“(i) notes that a provisional agreement has been achieved on 19 Articles;

“(ii) recommends to the Assemblies of Member States of WIPO, in their September 2001 session, that they reconvene the Diplomatic Conference for the purpose of reaching agreement on outstanding issues.”

97. *The Diplomatic Conference adopted by consensus the Recommendation proposed by Main Committee I.*

Closing Declarations by Delegations and by Representatives of Observer Organizations

98. Mrs. PENAGOS (Colombia) referred to the great dismay felt by the community of performers on having wasted the opportunity of experiencing an important, historic moment, which in fact had been reduced to nothing more than a stage in a process of work, with effects contrary to what had been hoped. After eight years of work, unperturbed by the failure of 1996, performers had taken part in the Committees of Experts and the Diplomatic Conference in the hope of achieving a minimum of recognition of their rights, so that thousands of their numbers throughout the world, might derive benefit from what they had produced through their work and creative genius. She stated that the century had started very badly, and wondered how the results of the Diplomatic Conference were going to be explained.

99. Mr. ZAFERA (Madagascar) took the floor on behalf of the African Group and expressed regret that the results achieved had not been up to expectations. He thanked the President of the Conference for the promptness and goodwill with which he had taken on such a responsibility, and the Chairman of Committee I for his competence and dedication. The African Group thanked Director General Dr. Kamil Idris. It expressed gratitude to the other regional groups for all their efforts, and pointed out that the African Group looked on the present negotiations as a foretaste of the success of the next Diplomatic Conference on the subject.

100. Mr. HAYASHI (Japan) extended his sincere appreciation to the officers of the Diplomatic Conference, especially to Mr. Lienes, President of Main Committee I. It was regrettable that the Diplomatic Conference could not adopt a new instrument to fulfill the urgent need for improving the protection of audiovisual performers. In the information society, performers' rights needed to be granted. Provisions on moral rights, economic rights, technological measures and rights management information constituted essential elements in the protection of performers, which had been agreed upon. He thought that the remaining issue about the transfer of rights could

be settled with the same wisdom and spirit of compromise that had been shown at the Conference. He welcomed the Recommendation to the Assemblies of Member States that the Conference should be reconvened in due course.

101. Mrs. BELLO DE KEMPER (Dominican Republic) said that the countries of Latin America and the Caribbean profoundly regretted that the great expectations held at the start of the Conference had not yet been fulfilled. She reaffirmed that the countries of the region were ready and willing to resume work whenever the Member States of WIPO considered the conditions to be right for consensus to be achieved on the approval of an international instrument of protection. She welcomed the prospect of the WIPO Assemblies reconvening a Diplomatic Conference on the issues still outstanding.

102. Mr. TROJAN (European Community) paid tribute to the Presidents of the Plenary and the Main Committees. The European Community and its Member States regretted that it had not been possible to conclude the Diplomatic Conference with an agreed Treaty but a provisional agreement had been reached on most of the issues. His Delegation had been confident that it would be feasible to conclude a protocol to the WIPO Performances and Phonograms Treaty of 1996 and to grant new rights to audiovisual performers throughout the world. Due to the underlying differences in concepts of quite a number of parties, the Conference had been unable to resolve one important remaining issue related to the law applicable to the rights of performers. Within the European Community, sound and audiovisual performers were already treated on the same footing. That should also be the case on a world scale. Therefore, the European Community was determined to continue to work actively together with WIPO and all its Members around the world to find adequate solutions for all the issues at stake.

103. Mr. KEPLINGER (United States of America) said that his Delegation would continue in its commitment as it had been at the Diplomatic Conference, in sincerity, good faith, with good will and no hidden agenda, to participate in the process of providing better protection for audiovisual performances. He thanked those who had helped that endeavor, including translators, WIPO staff, the Presidents of the Plenary and Main Committees. Special thanks were also given to Mr. Lienes and Mr. Walden. The development of the Internet would continue. The number of co-productions and international productions of audiovisual works would continue to grow and performers from all countries would be faced with the dangers of violation of their moral rights and infringement of their economic rights. Therefore, providing the protection that performers deserved in a balanced way would remain a challenge.

104. Mr. SHEN (China) thanked the Presidents of the Plenary and Main Committee I for their considerable patience and active role in the Conference. The progress made during the Conference should not be forgotten, and his Delegation would work with other delegations in continuous consultations with a view of achieving consensus, in order to have a new instrument established to protect the rights of the performers and to promote the development of films.

105. Mr. GANTCHEV (Bulgaria) thanked all the countries from Central and Eastern Europe for their efforts and all the colleagues of Main Committee I for their flexibility and their good spirit of compromise. Special thanks was given to Mr. Lienes for his efforts to facilitate the Conference's work. His Group was disappointed because there was no message to give to the performers, but it intended to continue contributing to the protection of performers.

106. Mr. RAJA REZA (Malaysia) said that in spite of the efforts of Mr. Lienes, to whom he gave special thanks, the Treaty had eluded the Conference again. The Diplomatic Conference had proved to be one of the toughest and most difficult negotiations in the history of WIPO. He welcomed the proposal to recommend to the next session of the Assemblies of Member States of WIPO to reconvene another Diplomatic Conference in the near future.

107. Mr. BLIZNETS (Russian Federation) joined the previous speakers in commending the enormous work carried out by the Presidents of the Main Committees and all delegations which had participated in the intense discussions of the Conference. There was sufficient prospect for making progress in the work in the near future in order to elaborate a new modern international legal instrument, which would be beneficial to all WIPO Member States and to those in whose interest the new Treaty would come into effect.

108. Mr. HØBERG-PETERSEN (FIA) said that the hundreds and thousands of performers represented by the affiliates of his Organization of 17 Nations were disappointed that WIPO Member States had failed to finally conclude a Treaty to provide minimum international protection of their rights. The world's performers had demonstrated an exceptional willingness to ensure that the needs of producers, broadcasters and their audiences were accommodated in a compromise solution to allow widespread acceptance of the Treaty by Governments. The Conference had been a historical opportunity to reach that solution in the era of internationalized protection, technological changes and digitization. In that respect, he appreciated the heroic efforts of the President of Main Committee I. He urged governments to ensure the convergence of interests amongst the stakeholders in order to complete a successful outcome as soon as possible. FIA for its part would continue to work with governments to achieve its reasonable and fair goal, which was an international Treaty giving the performers the rights they needed and deserved.

109. Mr. VINCENT (FIM) thanked all those who had worked unceasingly on the question of the protection of performers. He noted that 19 was the number of Articles provisionally adopted by the Diplomatic Conference, and 19 was also the number of the adopted Article that required further consultation. He hoped that all the experts taking part in the present negotiations accepted the idea that performers needed genuine protection and were capable of exercising their rights themselves. The role of WIPO would be decisive for the future of the sector concerned.

110. Mr. MASUYAMA (CRIC) thanked Governments and WIPO staff for the great efforts to conclude the Treaty. He hoped that the international agreement for the protection of performers would be widely ratified in the future, as a greater contribution to promote the protection of the rights of performers.

111. Mr. LIEDES (Finland) said that the Conference had been in many senses a major effort. He expressed his thanks to the interpreters who demonstrated a fantastic tolerance, as far as the working conditions were concerned. He also thanked all the members of the Secretariat, the whole staff of WIPO and its Director General.

112. The PRESIDENT noted that the Diplomatic Conference had come to the end. He thanked all the delegations and paid a tribute to Mr. Lieder's efforts for the success of the Conference. Finally, he thanked all the interpreters, the Secretariat and the Director General.

Closing of the Conference by the President

113. The PRESIDENT declared the Conference closed.

SUMMARY MINUTES OF MAIN COMMITTEE I

prepared by the International Bureau

President: Mr. Jukka LIEDES (Finland)

Secretary: Mr. Jørgen BLOMQVIST (WIPO)

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| First Meeting Thursday, December 7, 2000 Afternoon |
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Work structure

1. The PRESIDENT opened the meeting and expressed thanks for his election as the President of Main Committee I of the Diplomatic Conference. He noted that Main Committee I would deal with the substantive provisions of the treaties to be considered by the Diplomatic Conference. He had drafted a preliminary work program based on the nature of the issues. This would require the division of the substantive items into six work packages. The first would consist of what he considered to be non-controversial issues. This would include the Preamble, Articles 6 to 10, Articles 13 to 18 and Article 20. The second would include Articles 2 and 5. The third would be solely concerned with Article 11. The fourth would include Articles 3, 4 and 19. The fifth would deal with Article 12, while the final package would include the title and Article 1, which was to be coordinated with Main Committee II. The next stage would include a comprehensive discussion on all the issues. If time were to permit, the floor would be opened to the non-governmental organizations in relation to all the substantive issues. He invited the Committee to comment on his suggested work program.
2. Mrs. RETONDO (Argentina) announced that the Group of Latin American and Caribbean Countries (GRULAC) was interested in Article 11 being dealt with before the moral rights, because the definition of moral rights would be worked out on the basis of what was decided regarding Article 11.
3. The PRESIDENT stated that the order could be changed.
4. Mr. AHOKPA (Benin) said that he had not been able to locate Article 19 in the work package devised for the various provisions.
5. The PRESIDENT reiterated that the fourth work package would include the remaining framework provisions, i.e. Articles 3, 4 and 19.

6. Mr. DICKINSON (United States of America) questioned whether it was prudent to leave the difficult issues till the end where there could be a shortness of time.
7. The PRESIDENT stated that the preliminary work plan was subject to change following consultations.
8. Mrs. BELLO DE KEMPER (Dominican Republic) said that GRULAC wished to avoid having Committees I and II working at the same time, as that would present problems for delegations with few members.
9. Mr. SHEN (China) stated that the Basic Proposal provided a good basis for discussion. His Delegation supported the President's proposed work program. He suggested that a time frame be imposed for individual issues to ensure that enough time would be allocated for discussions on the more difficult subjects.
10. The PRESIDENT stated that this would be considered in due course.
11. Mr. SARMA (India) suggested the inclusion of Articles 3 and 5 under the third work package as these were linked to Article 11 and thus, should be jointly discussed.
12. The PRESIDENT adjourned the meeting.

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| Second Meeting Friday, December 8, 2000 Morning |
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13. The PRESIDENT stated that the draft work program had been revised following comments from various delegations. It would be used for the first reading of the text while the second would be based on the written proposals received during the initial reading, possibly included in a consolidated document. Although the objective of the first reading was to establish agreement on elements that could be taken to the final instrument, everything would remain open until the entire text was decided.

14. He opened the floor for discussion on the proposed work program. Noting that no delegation had asked for the floor, he decided to proceed according to the work program.

Preamble

15. The PRESIDENT proposed two modifications to the Preamble. The word "social" should be included after the word "economic" in the second paragraph in parallel with the WIPO Performances and Phonograms Treaty (WPPT) and the WIPO Copyright Treaty (WCT), while

the words “audiovisual performances” in the fifth paragraph should be replaced with the phrase “performances fixed in audiovisual fixations” as the WPPT covered, for instance, the broadcasting and the communication to the public of live audiovisual performances.

16. He opened the floor for discussion on the draft Preamble and noting that no delegation had asked for the floor, he stated that Main Committee I had reached a preliminary understanding on the Preamble on which the basis of the item could be set aside for the time being.

Article 6: Economic Rights of Performers in their Unfixed Performances

17. The PRESIDENT invited the Committee to turn to Article 6 (Economic Rights of Performers in their Unfixed Performances). The provision followed the corresponding provisions of Article 6 of the WPPT. The scope of the right was similar to the right granted to performers under the Rome Convention and the WPPT. It was also proposed by some delegations during the preparatory stages that the right could be incorporated by simply stating that Article 6 of the WPPT applied *mutatis mutandis* to the instrument.

18. Mr. PHUANGRACH (Thailand) stated that his Delegation was of the view that the instrument should be as identical to the WPPT as possible, as they both dealt with the rights of performers and a “sound performer” often engaged in audiovisual performances.

19. Mr. GOVONI (Switzerland) noted that the President had rightly pointed out that the WPPT also covered the audiovisual field as far as unfixed performances were concerned, and proposed that paragraph 5 of the Preamble be amended accordingly. For the sake of consistency, item (ii) of Article 6 should avoid speaking of audiovisual fixation and should rather be based on the wording of Article 6 of the WPPT, which mentioned only fixation.

20. The PRESIDENT proposed that the issue be discussed at a later stage, as it was also relevant to other articles.

21. Mr. GOVONI (Switzerland) pointed out that in Article 7 the words “audiovisual fixation” presented a problem regarding the proposed definition, and suggested replacing the words “audiovisual fixations” in Article 7 with “performances fixed on a medium other than a phonogram,” or alternatively avoiding any definition of audiovisual fixation.

22. The PRESIDENT proposed the deletion of the word “audiovisual” from subsection (ii) in order for the provision to be identical to the corresponding provision in the WPPT.

23. Mr. CRESWELL (Australia) stated that, as the interpretation of Article 6 of the WPPT was subject to the scope of the definition of “fixation” under Article 2 of that Treaty, it remained questionable whether it was appropriate to delete the term “audiovisual” from Article 6 of the proposed instrument. He noted that the differences between the definitions of “broadcasting” and “communication to the public” also called into question whether Article 6 in the proposed Treaty could be considered identical to Article 6 in the WPPT.

24. The PRESIDENT noted that this would not be relevant if the instrument would be linked to the WPPT, but could be applicable if the treaties were to be delinked.

25. Mr. COUCHMAN (Canada) noted that the issue of rights and remedies with respect to the secondary uses of unauthorized audiovisual fixations was not currently addressed within the draft instrument.

26. The PRESIDENT stated that the floor would be opened to non-governmental organizations when all the articles in the first package had been discussed. He suggested putting Article 6 aside for the time being, subject to the issue raised by the Delegation of Australia and the possibility of a proposal from the Delegation of Canada.

Article 7: Right of Reproduction

27. The PRESIDENT invited the Committee to turn to Article 7 (Right of Reproduction). The operative elements of this provision were the same as those in the corresponding article of the WPPT.

28. Mr. CRESWELL (Australia) mentioned the possibility of including an agreed statement in order to clarify that the right of reproduction included the audio recording of only the soundtrack component of a film.

29. The PRESIDENT stated that discussions were based on the understanding that the right of reproduction covered the entire audiovisual fixation, including the sound track. The fact that this understanding would be recorded in the official proceedings should be sufficient, but an agreed statement could be considered if clarification were to be required. The question of agreed statements, in particular, the technique of incorporating statements adopted in 1996 into the instrument, would be considered at a later stage.

30. Mr. GOVONI (Switzerland) proposed deleting subparagraph (c) of Article 2, which defined the audiovisual fixation, as it was not very clearly differentiated from the definition of the phonogram as appearing in the WPPT, which was liable to present problems in the implementation of the two Treaties. He suggested drawing inspiration from the wording adopted in the WPPT and so replacing, in the various Articles concerning the rights accorded after first fixation, the words "audiovisual fixations" with "fixations that are not phonograms," which would obviate the definition of audiovisual fixation.

31. The PRESIDENT suggested that an understanding be fixed on this article and put aside, subject to the issue raised by the Delegation of Switzerland.

Article 8: Right of Distribution

32. The PRESIDENT invited the delegations to turn to Article 8 (Right of Distribution). The operative elements of that Article were identical to the corresponding provisions of the WPPT. As it was considered to be non-controversial, he suggested that an understanding be fixed on this Article before putting it aside.

Article 9: Right of Rental

33. The PRESIDENT submitted Article 9 to the Committee for comments and considerations. He explained that the provisions did not exactly follow Article 9 of the WPPT and that the formula of the second paragraph had been taken from Article 11 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and Article 7(2) of the WCT. Paragraph (2) had been borrowed from that field and not from the field of phonograms which was subject to different considerations. He suggested considering some other forms for the second paragraph, as paragraph (1) belonged to the almost non-controversial elements of the proposal.

34. Mr. REINBOTHE (European Community) agreed with the view that Article 9(1) seemed to be much less controversial. Article 9(2) of the Basic Proposal took a different approach as compared with Article 9 of the WPPT. The European legislation granted rental rights to both sound and audiovisual performers on equal footing with no discrimination. The material impairment test of paragraph (2) took the shape of a condition for the application of the right of rental. It had to be decided whether discussions on rental rights would focus on the group of audiovisual performers as right holders to be protected considering their twin nature and comparing them with sound performers, who enjoyed those rights combined with the material impairment test in the form of a grandfathering clause, which leaves in place remuneration rights, or whether they would rather focus on the audiovisual production as such.

35. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, shared the view expressed by the European Community concerning Article 9 of the Basic Proposal. Paragraph (1) did not raise any concern, but with regard to paragraph (2), the group would rather prefer the same wording *mutatis mutandis* as Article 9(2) of the WPPT. The conditions under which a Contracting Party granted these exclusive rights to the same category of right holders should be the same, or at least of the same nature, notwithstanding whether they were performances fixed in phonograms or audiovisual fixations.

36. Mr. KEPLINGER (United States of America) believed that the reasons expressed in the explanatory notes of the Basic Proposal were logically consistent. The impairment test was part of the test for granting rental rights to cinematographic works. Those were the underlying works in which performances were particularly fixed. If exclusive rental rights were provided with no impairment test to performers, it would have the effect of rewriting the TRIPS Agreement. It would mean granting to performers in respect of cinematographic works higher rights than those granted to authors. The impairment test did not occur in the context of the grandfathering clause. There was a grandfathering clause with respect to rental rights regarding sound

recordings in the TRIPS Agreement, but it was intended only to deal with the situation of a very small number of countries which had already enacted the rights of remuneration with respect to rental rights before the TRIPS Agreement. It had no connection with the impairment test and it concerned sound recordings and not audiovisual works. Therefore, he supported the text as it was drafted.

37. Mr. GOVONI (Switzerland) pointed out that in Swiss law performers in the audio and audiovisual fields enjoyed the same level of protection. As far as rental rights were concerned, the wording of paragraph (2) of Article 9 of the WPPT should be incorporated *mutatis mutandis* in the new Treaty.

38. Mr. ISHINO (Japan) noted that, taking into account the consistency with the provisions of the TRIPS Agreement and the WCT, his Delegation supported the wording of Article 9(2) of the Basic Proposal.

39. Mr. CRESWELL (Australia) drew attention to the fact that there was not an exact correspondence between Article 9(1) in the instrument and Article 9(1) of the WPPT. The latter included the words "as determined in the national law of Contracting Parties" which was a critical phrase. If there was to be an alteration to Article 9(2), which Australia wanted retained in its present form, it would be necessary to consider those words in Article 9(1) of the WPPT that had not been carried across into Article 9(1) of the draft instrument.

40. The PRESIDENT concluded that there were a number of delegations supporting paragraph (1). Paragraph (2) could be left, subject to further considerations and to possible proposals from any delegations.

Article 10: Right of Making Available of Fixed Performances

41. The PRESIDENT submitted the Article for consideration and explained that it was a new right which had been inserted in the WPPT concerning phonograms and performers and also an element in the field of copyright which had been fixed in Article 8 of the WCT as part of the right of communication.

42. Ms. BELLO DE KEMPER (Dominican Republic) reverted to Article 9 and expressed GRULAC's preference for the present wording in the text of the Basic Proposal.

43. Mr. CRESWELL (Australia) proposed that the word "the" before the words "members of the public" be omitted consistently with Article 10 of the WPPT.

44. The PRESIDENT supported to delete the word "the" in order to make it clear that it concerned any members of the public, and noted that with that modification there was an understanding regarding Article 10.

Article 13: Limitations and Exceptions

45. The PRESIDENT observed that the Article followed as closely as possible the corresponding article in the WPPT. The model had been well established in 1996, both in the context of the WCT and the WPPT. He submitted Article 13 for consideration.

46. Mr. CRESWELL (Australia) noted that although Article 16 of the WPPT was headed "limitations and exceptions," in the second line of that Article the phrase was "limitations or exceptions." He stated that if exact correspondence was to be achieved regarding the WPPT, the expression in Article 13(1) of the Basic Proposal should be the same.

47. The PRESIDENT said that it could be taken into consideration to replace the "and" between limitations and exceptions by "or," and noted that there was an understanding on Article 13, with that amendment.

Article 14: Term of Protection

48. Mr. COUCHMAN (Canada) recalled that in November 1998, the Canadian Delegation had put forward a proposal to the Standing Committee on Copyright and Related Rights that the term of protection for performers should be co-extensive with the protection of the audiovisual work itself. The value of the performance lasted for the entire duration of the audiovisual work itself. The proposal of 1998 recognized that if one was to have such a possible amendment, it might be appropriate to allow for certain limitations in the purely audio uses of such a performance after 50 years. A related issue was the potential of a rule of comparison of terms. Even if the Treaty itself had a 50-year term of protection, countries would be reluctant to go beyond that term if they had to give national treatment to all other Contracting Parties which had a shorter term.

49. The PRESIDENT noted that the instrument consisted of provisions establishing minimum rights, and suggested that the Delegation of Canada submit a proposal that compiled the suggestions relating to the term of protection, national treatment and possibly also some aspects of Article 11.

50. Mrs. TOURÉ (Burkina Faso) noted that, in the French version of Article 14, the word "a" should be added after the word "exécution" in the last line, to match paragraph (1) of Article 17 of the WPPT.

51. Mr. HENNEBERG (Croatia) asked whether, in Article 14, the 50-year term of protection applied also to moral rights.

52. The PRESIDENT explained that Article 14 was a proposal which fixed for the whole protection of 50 years counted from a given date and applicable to both economic rights and moral rights. Nothing precluded a longer term of protection for those rights on the national level. With the understanding that there might be a proposal concerning a possible clause on the comparison of terms, there appeared to be an understanding concerning Article 14.

Article 15: Obligations concerning Technological Measures

53. The PRESIDENT noted that the language again followed the corresponding provisions of the WCT and WPPT and the only changes were dictated by the scope of application. The expression “effective technological measures that are used by performers” had to be read, interpreted and construed in such a way that it also referred to those who were acting on behalf of performers, including their representatives, licensees, assignees, producers, service providers and persons who were engaged in communication or broadcasting using performances on the basis of due authorization.

54. Mr. SEUNA (Cameroon) said that Article 15 was a provision that encompassed not only performers but also licensees, and therefore proposed a mention of holders of rights in Article 15. The provision would therefore read “that are used by performers or by right holders.”

55. The PRESIDENT indicated that including the word “right holders” could lead to some questions about the interpretation of the clause. The very purpose of his introductory remark made on the basis of Note 15.03 had been to establish for the records of the Conference an interpretation concerning all those who were acting on behalf of performers.

56. Mr. COUCHMAN (Canada) agreed with the content of Note 15.03. He suggested it might be more transparent to other members of the public if those principles in Note 15.03 were brought forward in an agreed statement.

57. The PRESIDENT concluded that there was an understanding on Article 15 and the clarifications recommended might be reflected in the proceedings of the Conference.

Article 16: Obligations concerning Rights Management Information

58. The PRESIDENT observed that the Article followed very closely the model established in the WCT and the WPPT with one exception. The phrase “or appears in connection with the communication or making available of a fixed performance or a phonogram to the public” was missing in paragraph (2) of draft Article 16, because it was not necessary in the context of audiovisual performances.

59. Mr. CRESWELL (Australia) drew attention to the wording in subparagraph 1(ii) “communicate or make available to the public, without authority, unfixed performances or performances fixed in audiovisual fixations.” The corresponding text in Article 19 of the WPPT said “performances, copies of fixed performances,” so it could raise interpretation implications to have omitted the reference to “copies of” which was also included in Article 12 of the WCT. In relation to paragraph (2) of the draft Article 16, the wording referred to “information which identifies the performer, the performance of the performer, or the owner of any right in the performance.” In the event that Alternative F in Article 12 was favored, a reference would need

to be added in Article 16 to the producer who, under that Alternative, would be entitled to exercise the exclusive rights.

60. The PRESIDENT said the latter question would depend on the solution found regarding Article 12. As to the former remark, he stated that the expression was intended to capture all corresponding cases that were covered in the corresponding clause of the WPPT.

61. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, asked for further explanation of the question raised by the Delegation of Australia with reference to the word “fixed” in Article 19 of the WPPT. In the view of the African Group, it should be *mutatis mutandis* application of the WPPT.

62. The PRESIDENT explained that that clause was one of the possible candidates to be taken to the new instrument by using the technique of reference to the WPPT. As to the remark made by the Delegation of Australia concerning paragraph (1)(ii), the expression in the proposed instrument covered all the cases, but if after final analysis it became evident that that was not the case, the paragraph would be reworded. In the present proposal, the expression referred to unfixed performances and performances fixed in audiovisual fixations. Unfixed performances were live performances which were being broadcast, communicated or made available, and performances fixed in audiovisual fixations referred to those cases where performances fixed in audiovisual fixations were being broadcast, communicated or made available, but covering also the case where the performances were fixed in tangible form and were distributed. If several delegations were not to share that interpretation, then the draft article should be reworded.

63. Mr. COUCHMAN (Canada) believed that, in addition to the types of information provided in paragraph (2) such as the identity of the performer or the performances of the performer, it might be useful to include certain other types of purely factual information, such as the nationality of the performer, the place of the habitual residence of the performer or even the place of fixation of the performance as part of the rights management information.

64. The PRESIDENT stated that it was a minimum obligation for the Contracting Parties. He noted that there was an understanding regarding the issue of rights management information, subject to the question concerning the expression “fixed performances” or “performances fixed in audiovisual fixations” in paragraph (1)(ii). He proposed to analyze further whether the last words of Article 19(2) of the WPPT could be omitted without any negative effects.

Article 17: Formalities

65. The PRESIDENT said that there was no need to submit for consideration Article 17 and proposed to have an understanding on it without a debate.

Article 18: Reservations

66. The PRESIDENT stated that Article 18 should be subject to the outcome of those provisions where reservations were possible.

Article 20: Provisions on Enforcement of Rights

67. The PRESIDENT decided not to open a debate on Article 20. There was an understanding of the model, which was the same model as in the WCT and the WPPT.

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| Third Meeting Friday, December 8, 2000 Afternoon |
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68. The PRESIDENT opened the floor for the intergovernmental and non-governmental organizations concerning all provisions discussed in the first work package.

69. Mr. ABADA (UNESCO) expressed surprise at the proposals made that morning regarding the deletion in Article 6 of the reference to the word “audiovisual,” given that the discussion had to do with the international protection precisely of audiovisual performances. He suggested retaining the word “audiovisual” in Articles 6 and 7, and referring at the end of Article 7 to “fixations embodied in an audiovisual medium.”

70. Mr. VINCENT (FIM) pointed out that the fixation concept was crucial. He said that he disagreed with the presentation of the fixation concept given by the President, according to whom the right of fixation in Article 6 should be understood as referring to the copying of a fixation. The view according to which the copying of a fixation was itself a fixation was contradicted by the Rome Convention and also by the proposed Article 6 in the preparatory document. He proposed the following definition of audiovisual fixation: “audiovisual fixation means any fixation other than an exclusively audio fixation,” meaning in other words that audiovisual fixation meant any fixation other than a phonogram. The phonogram concept referred not to a medium but to the essence of the artistic performance that was fixed. He added, on the subject of Article 6 and perhaps also Article 10 that the present proposals did not cover the specific case of a concert or a live performance that was broadcast live on the Internet.

71. The PRESIDENT said that the notion of communication that had been used in Article 6 covered direct transmission via Internet from a live concert. Clearly without problems, it covered cable television, streaming via Internet, and any other transmissions that were not broadcasting. However, when the operation involved the making available according to Article 10, it was another question, which concerned fixed performances. He drew attention to the definitions of phonograms in both the Rome Convention and in the WPPT. Subsequent fixations could take

place after the first fixation allowing the use of the word fixation to signify phonogram. In the Rome Convention, there was a definition of producer which referred to a person who first fixed the sounds of a performance or other sounds.

72. Mr. VINCENT (FIM) said that, as far as he was concerned, the concept of the phonogram referred not to a medium but to the essence of the performance that was fixed. He mentioned that the WIPO Glossary made it clear that the fixation concept had to do with the original embodiment of an unfixated performance. If there were two or more subsequent fixations, that would deprive the concept of reproduction of all meaning.

73. Ms. SAND (FIA) said that the issue of economic rights in the Basic Proposal, apart from the right of broadcasting and communication to the public, was considered uncontroversial by the Conference. She suggested to include the expression "permanent or temporary" in the proposed Article 7 on the reproduction right. In the absence of agreement on that, she proposed the adoption of an agreed statement corresponding to the statement in paragraph 29 of the President's memorandum. Regarding the right of distribution, it was not clear whether that limitation should be upheld in the digital age or whether distribution via the Internet should not in fact be subject to a modern day version of the distribution right to supplement the making available right. The right of rental in the Basic Proposal was framed along the lines of that in the WCT and the TRIPS Agreement rather than that in the WPPT, including the so-called impairment test, which raised concerns about the implications for national treatment. The new right created should not damage or undermine those protections that had already been achieved at national level through bargaining, statutory rights or a combination of the two.

74. Mr. PÉREZ SOLÍS (FILAIE) proposed that the Treaty refer to "audiovisual performance and videograms." With regard to Article 7, on the right of reproduction, he considered that one should add to "the direct or indirect reproduction" the phrase "of all or part," owing to the large number of ways in which audiovisual recordings could be used and exploited. On the subject of Article 8, on the right of distribution, he proposed a wording that avoided the expression "making available," which could give rise to confusion with other rights. As for Article 9, on the right of rental, he considered that such a right should be provided for without the condition of proof of prejudice. With regard to Article 10, on the right of making available, he said that he was in favor of deleting the word "members."

75. The PRESIDENT clarified that there was no interference between the right of distribution and the right of making available. The expression "making available to the public" in Article 8 of the Basic Proposal was also used in the same context in the WCT and the WPPT. The other clarification was concerning the word "members" in Article 10. The public was not always a group of people who were gathered in the same place or a group of people in different places at the same time. Also single members of the public, who at different time in different places had something made available, constituted the public.

76. Mr. BLANC (AEPO) voiced concern regarding the proposed definition of audiovisual performances. The proposal regarded as an audiovisual performance any performance that could be incorporated in an audiovisual fixation, which meant that any performance could be an audiovisual performance, even a purely audio performance. That definition was not necessary in the future protocol. He supported the definition of audiovisual fixation proposed by the FIM.

77. Ms. MARTIN-PRAT (IFPI) stated that the WPPT was clear as regards the definition of phonogram. A sound fixation incorporated in an audiovisual work was not a phonogram. It should be protected as part of that audiovisual work. The definition of the WPPT was broadly reflected in national legislation and in current practices. Music videos, for instance, were widely recognized and exploited as audiovisual works, not as phonograms. This Treaty should protect all performances not protected by the WPPT but should also avoid any overlap in the protection regime. The meaning of the agreed statement on Article 2(b) of the WPPT was that phonograms were protected as phonograms when they existed and were exploited separately from an audiovisual fixation.

78. Mrs. LEPINE-KARNIK (FIAPF) subscribed to the statement made by IFPI, mentioning that the audiovisual work was a single entity made up of a multitude of performances of various kinds, both audio and visual, and that the legal systems of the countries represented had all settled on a unitary conception of the audiovisual work. It should be clear that a purely audio performance incorporated in an audiovisual work would come within the purview of the new Treaty in the same way as other performances.

Article 2: Definitions

79. The PRESIDENT turned to Article 2 and first to Article 2(a) and (c). On the basis of the results of the analysis and debate on Article 2(b) during the regional consultations, the Committee should, as a working hypothesis, delete the definition of "audiovisual performance" in Article 2(b). The purpose of this definition was to function as a technical help, as explained in Note 2.04 of the Basic Proposal, rather than as a real definition. Therefore he would open the floor on Article 2(b) only for those delegations who would like to reintroduce that paragraph. Article 2(a), defining "performers," followed the WPPT, which differed from the Rome Convention in that it added the term "interpret" to the list of types of performances, and "expressions of folklore" to the scope of performances. In Article 2(c), the term "fixation" instead of "work" was used because "audiovisual work" had specific meaning in certain national legislation. Its structure followed the definition of "fixation" in the WPPT. Any tangible copy or object on which a performance was fixed was intended to be included. There were no conditions regarding the requisite permanence or stability of the embodiment. "Fixation" referred to any first fixation and any fixation embodied in a subsequent copy.

80. Mr. GOVONI (Switzerland) proposed deleting subparagraph (c) of Article 2, which defined the audiovisual fixation, as it did not differentiate clearly from the definition of the phonogram appearing in the WPPT. He suggested drawing inspiration from the wording adopted in the WPPT and replacing in the various articles concerning rights conferred after first fixation, the words "audiovisual fixations" with "fixations that are not phonograms," which would make it unnecessary to define what an audiovisual fixation was.

81. Mr. COUCHMAN (Canada) stated that the concept of moving images should be kept. A series of still images, for instance, should not be included in this concept.

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82. The PRESIDENT said that in the digital environment, impression of moving images was not created by a series of still images, but from a flow of small changes in the image. The suggestion made by the Delegation of Switzerland would be analyzed.
83. Mrs. DE MONTLUC (France) expressed interest in the proposal made by the Delegation of Switzerland.
84. Mr. BOSUMPRAH (Ghana) observed that the African Group would be cautious to remove "audiovisual fixation" from the definitions now that "audiovisual performances" had already been deleted.
85. Mr. CRESWELL (Australia) shared the concern expressed by the Delegation of Canada to retain the concept of moving images. If they followed the Swiss proposal, photographs or even sketches of a performance, for instance, might be caught by "fixations other than phonograms." He asked why "representations of" images were not included in the definition of audiovisual fixation. The word "sound" should be put in plural in line with the definition of broadcasting.
86. The PRESIDENT noted that as far as sound was concerned, only a representation of a sound could possibly exist in the memory of a computer, whereas images might be somewhat different. One might say that a copy of the image might reside in the memory of the computer. Use of the word "sounds" in plural would be considered later.
87. Mr. OYONO (Cameroon) proposed amending the definition of the audiovisual fixation appearing in subparagraph (c) of Article 2 by replacing the words "embodiment of moving images" with the words "consisting of a series of interconnected moving images, with or without sound."
88. The PRESIDENT stated that the French version would be studied by the Drafting Committee. He concluded that the definition would be set aside as a possible solution.
89. Mrs. BELLO DE KEMPER (Dominican Republic) said that in the opinion of GRULAC the expression in Article 2(c) of the WPPT should be used, that only "fixation" should be referred to, that it should be defined as "the embodiment of images" and then that the WPPT Article in question be followed.
90. The PRESIDENT asked for clarification whether the Delegation of the Dominican Republic had suggested that the word "audiovisual" should be deleted from Article 2(c).
91. Mrs. BELLO DE KEMPER (Dominican Republic) said that the word "audiovisual" should indeed be deleted from the expression "audiovisual fixation."
92. The PRESIDENT stated that the suggestion made by the Delegation of the Dominican Republic would be added to the working hypothesis.

93. The PRESIDENT turned to Article 2(d) (broadcasting) and Article 2(e) (communication to the public). As to the notion of broadcasting, he referred to the similarity with the definition in the WPPT, with a slight difference. The notion of broadcasting referred to only wireless transmissions for the reception of the public. The language "public reception" was kept as in the WPPT, although it had been identified that "reception by the public" would be accurate. The same additional clarifying elements, which had been taken from the WPPT referring to the satellite broadcasting and transmissions of encrypted signals was also included. The notion of communication to the public in Article 2(e) referred to all transmissions which were not broadcasting, in other words, all practices of transmission which were made by wire, and also communication by wireless means not being broadcast, such as by cell phone technology. The first half of the definition referred to transmissions in circumstances where there was a distance element between the place where the transmission originated and the public. The second half of the definition was parallel to the WPPT. It would extend the notion of communication to the public for the purposes of Article 11 to practices where fixed performances were played from those fixations to the public which was present in the same place where this playing or projection was taking place. For the purposes of Article 6, only the first half of the definition applied. He invited the Spanish-speaking delegations to compare the English and the Spanish versions of the last parts of the provision in order to see whether any change in substance or in expression was needed.

94. Mr. KEPLINGER (United States of America) stated that the definitions put forth in the Basic Proposal were acceptable to his Delegation. The rethinking and reworking of established concepts, in particular those in the WPPT should be avoided in light of the time constraint. The WPPT was still in the process of coming into force. The soundtrack of a motion picture or television production, which formed part of the work, was not a separate phonogram subject to separate remuneration, unlike a commercially published phonogram of the soundtrack or a selection from the soundtrack.

95. Mr. ISHINO (Japan) stated that when aural performances once fixed in a phonogram are incorporated in an audiovisual fixation such aural performances do not fall under the new instrument but fall under the WPPT. On the other hand, aural performances fixed in an audiovisual fixation fall under the new instrument, however, when such aural performances are embodied in a phonogram, such aural performances embodied in a phonogram fall under the WPPT. A definition of "producer" or an agreed statement thereon should be included for the purpose of Article 12 of the Basic Proposal. There were different understandings concerning the meaning of a producer. One could, for example, define a producer as the person or entity who took the initiative and had the responsibility for the audiovisual fixation. That matter should be further considered taking into account the definition of a producer of a phonogram in the WPPT and the Rome Convention.

96. Mr. REINBOTHE (European Community) stated that it would not be appropriate to reopen the WPPT. There were sound recordings that were accompanied by visual elements. That fact made such sound recordings an audiovisual fixation or made them phonograms, depending on how Contracting Parties would deal with these phenomena. The same went for the treatment of music videos. An important objective was that the new instrument would not prejudice the freedom of Contracting Parties to choose the appropriate category as they saw fit for those various phenomena.

97. The PRESIDENT noted that there were definitions on the level of treaties and there were faculties for the Contracting Parties on the national level. Sometimes the Contracting Parties might introduce notions on the level of national legislation that might not be in correspondence with the treaties without being in conflict with the treaties.

98. Mr. COUCHMAN (Canada) stated that there was a reason why in Article 10 the notion of “members of the public” was used rather than simply the “public.” It seemed that those arguments also held true in the first line of the definition of communication to the public. The term to be defined should not be changed to “communication to the members of the public,” but in the second line there might be merit in using the same terminology both in terms of uniformity and comprehension of protection. In the last line of that definition, the “public” probably should remain the way it was because, for example, members of a family were not a public.

99. The PRESIDENT indicated that there was some justification for a difference between the articles concerning the right of making available to the public and those concerning broadcasting and communication to the public. The interactive, individual on-demand practices were not covered by broadcasting and communications to the public, whereas they were covered by the making available right, as was the case of the WPPT.

100. Mr. SARMA (India) supported the suggestion made by the representative from Japan to include a definition of a producer in this new instrument.

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101. The PRESIDENT invited the Committee to consider the proposal by the GRULAC that Article 12 be discussed after work package 1 because of its impact on other issues.

102. The PRESIDENT then opened the floor to the intergovernmental and non-governmental organizations for discussion on Article 2.

103. Mr. ABADA (UNESCO) mentioned the importance of the definitions, which should be retained in the draft Treaty. He proposed specifying in Article 2(b) that the performances of performers were meant, in order to rule out virtual performances, and referring in Article 2(d) to transmission to a particular audience rather than to the public in general.

104. Mr. PÉREZ SOLÍS (FILAIE) felt that the adjective “natural” should be added between the words “other” and “persons” in the definition of “performer,” in order to avoid the inclusion of legal entities in the definition. He also expressed concern at the definition of “audiovisual fixation,” especially in relation to the phonogram, in which rights were not lost when it was incorporated in a cinematographic or audiovisual work. He felt that a definition of “audiovisual

producer” should be included. He felt also that the term “broadcasting” should be distinguished from “communication to the public” by defining the former as “the dissemination or transmission of sounds or of images, carried out by a broadcasting organization or by a broadcaster.”

105. Mr. MASUYAMA (CRIC), speaking on behalf of GEIDANKYO, stated that in the interest of clarity, the term “audiovisual fixation” should be further defined. He supported the proposals made by the Delegations of Switzerland and Japan.

106. Mr. RIVERS (ACT) stated that the words “transmission by wireless means for public reception” in the definition of broadcasting did not mean “transmission by wireless means for reception by the public,” as intended, and should be rectified. The rights included under the WPPT were not applicable to audiovisual fixations, as provided under Article 2(b) of the WPPT and its agreed statement.

107. Mr. IVINS (NAB), speaking on behalf of the regional broadcasting organizations, stated that in the absence of an explicit provision concerning “extras,” the first four sentences of Note 2.03 should be included in an agreed statement to the definition of performers, in order to avoid wide differences in the interpretation of “extras” by individual countries, particularly as this could affect the application of Article 11 and Alternative G of Article 12.

108. Mr. LERENA (AIR) recalled that the definition of “performer” had been the subject of protracted discussions within the Committee of Experts, and that there had been no agreement at government delegation level. He considered that future difficulties of interpretation and implementation of the provision should be avoided by the inclusion of a clarification or an agreed statement regarding the exclusion of extras from protection under the Treaty.

109. Ms. MARTIN-PRAT (IFPI) stated that as the term “phonogram” was defined in Article 2(b) of the WPPT, blurring the distinction between a phonogram and an audiovisual fixation would cause legal uncertainty in the interpretation of national laws and existing international treaties, in particular, Article 12 of the Rome Convention and Article 15 of the WPPT.

110. Mr. PARROT (ARTIS GEIE) observed that, in the case of a performance already fixed on a phonogram being incorporated in an audiovisual work, the phonogram would continue to be protected by the WPPT. The performance might come within the purview of the new instrument if it were fixed in an audiovisual fixation. In that case the music performers would not be entitled to the equitable remuneration for broadcasting of their fixed performances until they were incorporated in an audiovisual fixation. He therefore proposed deleting the definition of audiovisual performance, but supported the definition of the audiovisual fixation.

111. Mr. VINCENT (FIM) considered that the IFPI proposal on the interpretation of the phonogram concept would complicate the calculation of the term of protection of performances fixed on phonograms, as the WPPT and the Rome Convention both had fixation as the starting point of the term of protection.

112. Mr. BLANC (AEPO) expressed surprise at the IFPI statement, as its proposal was liable to cause the removal of the right to equitable remuneration when commercial records were broadcast by television companies. He wished to have a definition of audiovisual performance

that was sufficiently neutral for the WPPT to exist. As far as the definition of fixation was concerned, he favored the proposal made by Switzerland.

113. Mr. THIEC (EUROCOPYA) declared himself in favor of the definitions proposed in Article 2, and more especially those appearing in subparagraphs (b) and (c), which seemed inseparable and complementary. Apart from that, a definition of the producer of the audiovisual work could be introduced, taken *mutatis mutandis* from that of the phonogram producer appearing in Article 2(d) of the WPPT.

114. Mr. CHAUBEAU (FIAPF) said that an audiovisual work was a complex combination of varied inputs. At the present time it was a question not of renegotiating the WPPT, but rather of negotiating a document that related specifically to audiovisual performances. If it had been decided that such a specific instrument was called for, that was because the audiovisual concept possessed a certain complexity owing to the incorporation of various elements. In an audiovisual fixation there was indeed the notion of audio, but that did not prevent from being a visual as well as an audio fixation, which had its own specific nature, an audiovisual work being a whole that transcended and was greater than the sum of its parts.

115. Ms. MARTIN-PRAT (IFPI) stressed that the focus of the current discussions was Article 11, and not the reinterpretation of Article 12 of the Rome Convention and Articles 2(b) and 15 of the WPPT.

116. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported the definition of audiovisual fixations in the Basic Proposal, with the addition of the words "excluding phonograms."

117. The PRESIDENT closed the debate on Article 2.

Work Program

119. The PRESIDENT invited the delegations to comment on the proposal by GRULAC on Article 12 and the work program.

120. Mr. REINBOTHE (European Community) proposed to discuss the framework provisions, including beneficiaries of protection, national treatment, the transfer of rights. In the present agenda the issue of transfer of rights enjoyed already certain preferential treatment because it was the first of the most general points to be discussed. As there was a clear interface between Article 11 and Article 4, he proposed to move up front the discussion of Article 4 and merge it with the discussion in Article 11. Otherwise, the working program proposed by the President should be retained.

121. Mr. GANTCHEV (Bulgaria) speaking on behalf of the Group of Central European and Baltic States thanked GRULAC for its proposal, but expressed a preference for the work program as it stood. Discussions seemed to be moving at a good speed; therefore he suggested covering more ground before coming to the most difficult issues.

122. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, said that the Group agreed with GRULAC's proposal but preferred proceeding with the work program as proposed by the President.

123. Mr. KEPLINGER (United States of America) expressed his appreciation of GRULAC's proposal. There was a certain logic to completing the discussion of all the economic rights, since those were the subject of Article 12. A compromise position might be to reverse the order of package 3 and package 4 by taking up transfer immediately after the discussion of Articles 11 and 4 and before the discussion of moral rights, since the provisions of Article 12 did not deal with moral rights.

124. Mr. GOVONI (Switzerland) considered that there was a certain logic to the President's proposal, and that the rights should be discussed before the matter of their transfer was embarked upon. He endorsed the compromise proposal made by the United States of America.

125. Mr. BLIZNETS (Russian Federation) also proposed to maintain the order that had been agreed on in order to discuss first the less controversial issues and then come to the complicated issues such as the transfer of rights.

126. The PRESIDENT suggested to maintain the original order proposed as many delegations and representatives of the regional groups endorsed that order. However, one delegation had suggested lifting the question of transfer upward in the program, specifically after the debate on all economic rights and national treatment but before moral rights.

127. Mrs. BELLO DE KEMPER (Dominican Republic) said that GRULAC agreed to the compromise solution in order to lend some coherence to the discussion of the items in the Basic Proposal.

128. The PRESIDENT noted there seemed to be consensus on the order of business. The question of transfer changed to package 3 and moral rights changed to package 4.

Article 11: Right of Broadcasting and Communication to the Public

129. The PRESIDENT explained that the main function of Article 11 would be the possibility to internationalize the rights between States and within regions. In Article 11(1), there was an obligation to introduce an exclusive right of authorizing the broadcasting and the communication to the public for performers. According to paragraph (2), the Contracting Parties could establish, instead of the exclusive right of authorization, a right to equitable remuneration and in paragraph (3) the Contracting Parties would get ample freedom to design the rights of remuneration. There were possibilities to limit the right of remuneration by making a reservation. Therefore, Contracting Parties would have the freedom to provide that the right of remuneration would be applicable only for broadcasting, communication or for certain practices of broadcasting, certain groups or certain ways of communicating performances to the public, or then to introduce the rights in such a way that they would cover all practices of broadcasting

and communication to the public. For those who would have great difficulties in introducing any rights of remuneration, the clause in paragraph (3) would make it possible to reduce the right of remuneration to a very low level.

130. Mr. CHOE (Republic of Korea) indicated that the right of remuneration for broadcasting and communication to the public of audio performances existed under the WPPT, in respect of the secondary use of commercial phonograms. He pointed out that, in the Rome Convention, the remuneration right had been granted in order to compensate the economic hardship of performers. The same tradition had been followed by the TRIPS Agreement and the WPPT. In the case of audiovisual performances more time was necessary to evaluate how that right could be adopted in domestic laws.

131. Mr. PHUANGRACH (Thailand) did not think that the structure of Article 11 as it stood would be a good solution. He did not agree with the idea of giving the exclusive right under Article 11(1) as performers were already given the exclusive right of authorizing the fixation of their performances under Article 6(ii). The treaty should give protection to the performers with respect to broadcasting and communication to the public of his performance, but no more and no less than what was given under the WPPT.

132. Mr. ISHINO (Japan) was of the opinion that the Basic Proposal was a good starting point for discussion. He emphasized the importance to secure the material reciprocity in relationship with Article 4 on national treatment when taking into consideration the *à la carte* solution of Article 11.

133. Mr. REINBOTHE (European Community) stated that the right of communication to the public and broadcasting was granted in the Member States of the European Community according to different models. There had been no need to harmonize those various models. Likewise, Article 11 of the Basic Proposal did not harmonize the right of broadcasting and communication to the public at the international level. Article 11 left considerable uncertainty with regard to the effects in the various Contracting Parties concerned, in particular regarding the application of national treatment. Article 11 would have to be mirrored by a provision on national treatment, which would make explicit reference to Article 11(1) and (2) where material reciprocity should also apply. He referred to the proposal submitted to the International Bureau by the European Community and its Member States, which tackled those issues.

134. The PRESIDENT noted that, according to the statement of the Delegation of the European Community, it seemed that the proposal of that Delegation would add further flexibility to the application of Article 11 and to the obligation of national treatment concerning the right of broadcasting and communication to the public.

135. Mr. KEPLINGER (United States of America) believed that the proper solution was to provide an exclusive right of broadcasting and of communication to the public. Such a provision would be in parallel to the communication right provided under the WCT for audiovisual works in which performances were fixed. Broadcasting and communication to the public represented one of the three methods of exploiting audiovisual performances today, therefore it should be recognized that the viability of that right was integrally linked to the optimal resolution of the

alternatives in Article 12. The inclusion of the exclusive right would open the possibility of collective administration.

136. Mr. BLIZNETS (Russian Federation), speaking on behalf of Central Asian, Caucasus and Eastern European Countries, recalled that the Group had approved the constructive proposals contained in paragraphs (1) and (2) of Article 11, but at the same time there was a concern regarding the reservation contained in the last sentence of paragraph (3): "or that it will not apply the provisions of paragraph (1) and (2) at all." That reservation could lead to legal uncertainty and could also deprive performers of their right to obtain their equitable remuneration for broadcasting.

137. Mr. GOVONI (Switzerland) considered that the regulatory system adopted in the new instrument should in principle correspond to that contained in the WPPT. He noted that Article 11 was not consistent with that proposition, as its paragraph (1) conferred an exclusive right on performers whereas Article 15 of the WPPT contained only a right to remuneration. Moreover, the way in which the entitlement to remuneration was arranged in Article 11(2) was different from that contained in Article 15 of the WPPT, which limited the application of the rights to phonograms published for commercial purposes. Article 11 also presented problems in relation to Article 4, and was unsatisfactory as worded at present, because it did not allow for the differences between the markets for phonograms on the one hand and for audiovisual productions on the other.

138. Mr. GANTCHEV (Bulgaria), on behalf of the Central European and Baltic States agreed with the present wording of Article 11 of the Basic Proposal. The Group was of the opinion that such a wide range of options was necessary for Contracting Parties as it was nearly impossible to predict in which direction the market situation for audiovisual fixation would develop in the future. Furthermore, he emphasized the conjunction of Article 11 with the national treatment provisions in Article 4 of the Basic Proposal.

139. Mr. HERMANSEN (Norway) favored the same protection for performers both in the audio and audiovisual areas. The wording of Article 11 should therefore be the same as that of Article 15 of the WPPT. However, since producers of audiovisual productions to a great extent were in direct contractual relation with the users of those productions and as performers were in direct contractual relations with the producers, they could set the conditions for such exploitation if they had an exclusive right of broadcasting and communication to the public. Therefore, he would not object to the option of an exclusive right as proposed in Article 11(1). Regarding the remuneration right in Article 11(2) and in the WPPT, he shared the analysis presented by the European Community. In principle he also supported the European Community's reasoning concerning reciprocity.

140. Mr. BOSUMRAH (Ghana), speaking on behalf of the African Group, said that the proposals in Articles 11(1) and (2) were acceptable to the Group, but the reservation in paragraph (3) was not acceptable. The exclusive right of broadcasting and of communication to the public in paragraph (1) was the highest protection provided to performers. Paragraph (2) took into consideration the interests of users such as broadcasting organizations. Contracting Parties should not be given the option not to apply paragraphs (1) and (2) at all. His Delegation

could further work on paragraphs (1) and (2) in order to strike the balance between the performers' rights and the interests of users. Therefore paragraph (3) should be deleted.

141. Mr. SHEN (China) stated that his Delegation was of the opinion that all performers, whether their performances were sound or audiovisual, should be accorded the same rights. Paragraph (1) of Article 11 provided for an exclusive right, which was not the case under the WPPT. Moreover, Article 15 of the WPPT concerned only phonograms used for commercial purposes, whereas in Article 11 of the Basic Proposal that expression had been deleted. The expression "for commercial purposes" should be added in paragraph (2) after "direct or indirect use of performances fixed in audiovisual fixations."

142. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of GRULAC, said that the Group was impatiently awaiting the written proposal by the European Union, and would reflect on the statements made regarding Article 11 and its various alternatives and implications.

143. Mr. CRESWELL (Australia) observed that, due to the variety of possibilities envisaged by Article 12 of the Rome Convention, it gave rise to the question whether it was worth including such a provision at all, considering it could be the subject of a total reservation. He recalled however that Article 11 with the possibility of total reservation nonetheless had had a quite extensive harmonizing effect. His Delegation shared the view that the activity covered by Article 11 was a very important use of audiovisual fixations of performances and it would seem to be surprising if the new instrument would not have any provision on that subject. He considered the possibility of reducing the exclusive right to a right to remuneration and this justified retaining paragraph (2) of proposed Article 11. His Delegation was not in favor of omitting paragraph (3). Finally, regarding the phrase "published for commercial purposes," the explanation in paragraph 11.06 of the explanatory note on this issue was compelling and justified the omission of that phrase from draft Article 11.

144. Mr. HAMID (Bangladesh) said that the provision put in Article 11(1) should remain as it was, whereas the provision proposed in Article 11(2) might be deleted.

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145. The PRESIDENT announced that Main Committee I would resume its work on Article 1, and invited the delegations to take the floor on Article 11.

146. Mrs. BELLO DE KEMPER (Dominican Republic) expressed GRULAC's interest in the existence of a right of broadcasting and communication to the public, but reserved its final position until a detailed analysis had been made of Articles 4 and 12, but above all until it had had the opportunity to examine the European Union proposal in Spanish translation.

147. The PRESIDENT invited the Delegation of the European Community to repeat their proposal to introduce its proposal to amend Article 4.

148. Mr. REINBOTHE (European Community) pointed out that the amendment suggested to Alternative D of Article 4 was the following: The obligation under paragraph (1) should remain the same. A new paragraph (2) should be inserted in order to allow material reciprocity with respect of Article 11(1) and (2). It should be an enabling clause, and not an obligation. The wording "to the extent to which, and to the term for which" drew upon paragraph (2) of Alternative C. Paragraph (2) in the current Alternative D would become paragraph (3). When a country made a reservation under Article 11(3), while still maintaining one of the models covered by Article 11 under the national law, neither should this Contracting Party lose the possibility to achieve national treatment on these rights, nor should other Contracting Parties have the possibility to acquire national treatment in the Contracting Party which had made the reservation. His Delegation proposed to modify the wording "another Contracting Party" to "a Contracting Party." It also suggested using the term "Agreement" instead of "Treaty" since it continued to be in favor of a protocol. An agreed statement on the notion of material reciprocity in paragraph (2) should be attached. Material reciprocity should be based on the material equivalence of the right in question as effectively applied for the benefit of the performer. His Delegation continuously preferred Alternative D.

149. Mr. ISHINO (Japan) stated that his Delegation attached much importance to secure material reciprocity for the rights under Article 11, and appreciated the proposal made by the Delegation of the European Community. It would consider the proposal in detail once it had been received in writing. His Delegation was in favor of Alternative D, which was a traditional form of national treatment in the field of neighboring rights.

150. Mr. SARMA (India) asked for clarification from the Delegation of the European Community whether it was in favor of Alternative C or D, pointing out that a provision on material reciprocity which was similar to the one proposed by the European Community was found in paragraph (2) of Alternative C.

151. The PRESIDENT said that his understanding was that some elements of paragraph (2) of Alternative C were used in paragraph (2) of Alternative D.

152. Mr. REINBOTHE (European Community) confirmed the statement by the President. He added that there was an important difference between the proposed Article 4(2) on material reciprocity and the clause under Alternative C, because in the latter, material reciprocity applied to all rights, whereas his Delegation proposed to apply material reciprocity only to Article 11.

153. The PRESIDENT added that Alternative C was based on the proposal made by the African Group. The model for Alternative D was found in the WPPT. As far as the wording "to the extent to which, and to the term for which" was concerned, it was also found in Article 16 of the Rome Convention.

154. Mr. GOVONI (Switzerland) said that his country was in favor of adopting Alternative D, which was modeled on the WPPT formula. If Article 11 was to be retained in its present form,

Alternative D would have to be completed with a provision on material reciprocity. He expressed interest in the European Community proposal.

155. Mr. GUIASOLA GONZÁLEZ DEL REY (Spain) said that there was a discrepancy between the English and Spanish versions of the proposal that the European Union had just submitted. In the last paragraph of the agreed statement on Article 4, where it said “aplicada eficazmente,” it should say “efectivamente aplicada.”

156. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltic States, stated that the Group was firmly in favor of Alternative D. One should not depart from the model adopted in the WPPT, which corresponded to the traditional way in which national treatment applied to neighboring rights. This approach was justified by the fact that, in respect of performers’ rights and other related rights, national norm-setting had not brought about the same level of harmonization as had been achieved in the field of copyright. Article 4 should be considered in conjunction with other articles, in particular Article 11.

157. Mr. KEPLINGER (United States of America) expressed his Delegation’s preference for the Berne Convention type of national treatment for performers. This would vary from the national treatment provisions in the WPPT, but audiovisual works were different from phonograms in that they were accorded a broad national treatment under both the Berne Convention and the TRIPS Agreement. His Delegation supported Alternative C. Furthermore, it would be unjustifiable to collect remuneration based on the exploitation of the performances of foreign performers in audiovisual works, if such remuneration was not distributed to those performers. His Delegation had submitted an amendment to Article 4 to embody this principle in treaty language.

158. Mr. BOSUMRAH (Ghana), speaking on behalf of the African Group, confirmed that Alternative C was a proposal of that Group. The European proposal seemed to combine that proposal, Alternative C, and the WPPT model of Alternative D.

159. The PRESIDENT closed the first round of interventions concerning Article 4 and stated that he would open the debate on Articles 11 and 4 the following day to give the government delegations the opportunity to offer further comments on those provisions.

Article 12: Transfer, Entitlement to Exercise Rights, Law Applicable to Transfers and No such Provision

160. The PRESIDENT invited the delegates to discuss the third work package which consisted of Article 12. The alternatives represented in the models of the Basic Proposal had been put forward by delegations or groups of countries during the preparatory stages. Alternative E was based on a rebuttable presumption of transfer. Alternative F was based on the model of Article 14*bis* (2) of the Berne Convention with slight adjustments as described in paragraph 12.11 of the explanatory notes. Alternative G was a model which did not require any clauses on transfer or entitlement in national law, but would bring about an obligation to recognize the transfer of the exclusive rights of authorization by agreement or by operation of

law in other Contracting Parties. That model was based on the principles of private international law and the main operation was based on the well-known concept of the law of the country most closely connected to the subject matter. Paragraph (2) contained a hierarchy of possible criteria to define the country most closely connected. Alternative H, even without text, represented a full proposal indicating that there should be no provision in the new instrument on transfers or other similar operations, based on the assumption that the national solutions would prevail.

161. Mr. RATTANASUWAN (Thailand) expressed his Delegation's preference for Alternative E as it would lead to greater certainty. Performers could protect themselves through contractual arrangements if they had the bargaining power to do so. His Delegation rejected all other alternatives. Under Alternative F it was not clear whether the performer could still exercise the exclusive right, while the producer was also entitled to exercise it. That might lead to different interpretations and practices by the Member States.

162. Mr. GOVONI (Switzerland) wished to be given some explanations by the Delegation of the United States of America regarding its proposal for Article 4. It provided that "No Contracting Party shall allow collection of remuneration." The question of charging remuneration was a matter for the private law of contracts between owners of rights and users, not public law.

163. Mr. KEPLINGER (United States of America) said that in the English language version there was no implication that the Contracting Party was necessarily the collecting agent. The French version might imply that it would be the Contracting Party who did the collection, which could be the source of the concern.

164. Mr. GOVONI (Switzerland) said that the implementation of the provision seemed as difficult in national law as in an international treaty.

165. Mr. KEPLINGER (United States of America) replied that his Delegation would endeavor to furnish practical examples.

166. The PRESIDENT adjourned the meeting.

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| Sixth Meeting Tuesday, December 12, 2000 Morning |
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167. The PRESIDENT opened the floor for a continued debate on the right of broadcasting and communication to the public.

168. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of the GRULAC, expressed interest in the inclusion in the instrument of a right of broadcasting and communication to the public. However, with reference to the European Union proposal and the amendment that the United States had also proposed, she mentioned that there were points

that needed to be cleared up before a decision could be taken, and accordingly certain delegations would take the floor separately, above all in view of the implications of Articles 4 and 12.

169. Mr. CRESWELL (Australia) asked for some clarification with regard to the amendment proposed by the European Community in document IAVP/DC/7 regarding Articles 4 and 11. His Delegation was interested to know more about the change proposed to Article 4 (3) which seemed to consist of replacing the word "another" by the article "a."

170. The PRESIDENT pointed out that the question was to determine whether the expression "a Contracting Party" in paragraph (3) would have a double meaning, meaning the Contracting Party which was making reservations and another Contracting Party.

171. Mr. REINBOTHE (European Community) explained that the modification of Article 4 had been based on Alternative D, trying to maintain the model of Article 4 of the WPPT. Article 11 of the Basic Proposal was based on an *à la carte* solution. Therefore, his Delegation was of the opinion that, in the interface between that article and the national treatment obligation in Article 4, the reference to the reservation in Article 4(3) had to be slightly modified. The expression "another Contracting Party," found in Article 4(2) of the WPPT, by "a Contracting Party" was to make clear that once a Contracting Party had made a reservation as allowed under Article 11(3), then no national treatment obligation would apply. Neither the Contracting Party that had made the reservations would enjoy national treatment with respect to the rights for which it had made the reservation in other Contracting Parties, nor would nationals of other Contracting Parties enjoy national treatment in the Contracting Party that had made the reservation.

172. Mr. GOVONI (Switzerland) had doubts about the accuracy of the French translation of the European Community proposal, as it did not make the distinction that has just been mentioned in the English text. The French version referred to "une autre Partie contractante," and not to "une Partie contractante."

173. Mr. REINBOTHE (European Community) said it was a language mistake. The draft in English showed the substitution of the word "another" by the word "a," whereas in the French version it read "*ne s'applique pas dans la mesure où une autre Partie contractante,*" therefore the word "autre" had to be deleted.

174. Mr. BOSUMPRAH (Ghana), on behalf of the African Group, asked for a clarification regarding the agreed statement to Article 4 in the proposal of the European Community, particularly on the meaning of "material equivalence."

175. Mr. ISHINO (Japan) noted that the Delegation of the European Community had said that when a Contracting Party made use of the reservation permitted by Article 11(3), that Contracting Party had no obligation of national treatment. He asked for clarification whether that meant material reciprocity or a zero national treatment obligation.

176. Mr. REINBOTHE (European Community) clarified that Article 4(2) itself did not use the term "material reciprocity," but introduced material reciprocity through the terms "for which" and "to the extent to which." The wording was proposed in order to clarify the matter by using not

only the notion of material equivalence in the agreed statement but also by using the whole set of criteria which would be used when engaging in a comparison. Only if the comparison resulted in the finding that there was material equivalence of the right in question, and only if that right in question was effectively applied for the benefit of performers, would a national treatment obligation be established. As to the question of the Delegation of Japan regarding the zero national treatment obligation, the answer was that the first layer, in Article 4(1), had a clear-cut national treatment obligation, the second layer, in Article 4(2), established that Contracting Parties had the possibility to apply in certain cases the notion of material reciprocity, and the third layer, in Article 4(3), indicated that whenever a party made use of the possibility to submit a reservation within the context of Article 11(3), the result would be a zero national treatment obligation. That article provided Contracting Parties with the possibility to make a partial, total or tailor-made reservation. In Article 11(3) of the Basic Proposal, the possibility to make a partial reservation only referred to paragraph (2) whereas the possibility to make a total reservation referred to both (1) and (2).

177. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Commonwealth of Independent States, supported Alternative D of Article 4 with the amendments made by the European Union.

178. Mr. BOSUMPRAH (Ghana) stated that the African Group was still considering the proposal of the European Community alongside previous statements on the issue and asked whether it would be possible to replace the word “and” in the second line of Article 11, after “paragraphs (1)” with the word “or.”

179. Mr. REINBOTHE (European Community) considered it an excellent suggestion because it reflected the relation between those two options.

180. Mr. GANTCHEV (Bulgaria) speaking on behalf of the Group of Central European and Baltic States agreed with the proposal of the European Community in relation to Article 11. With regard to Article 4, he also agreed with the basic idea but expressed some concerns relating to the agreed statement which had been added to that article.

181. Mr. SARMA (India) suggested not to have Article 11 at all and to delete the references to Article 11 in Article 4. A proposal to that effect had been submitted by his Delegation.

182. Mr. CRESWELL (Australia) referred to the intervention by the Delegation of Japan and the response by the Delegation of the European Community according to which, when a Contracting Party made a reservation of any sort under Article 11(3), then that resulted in zero-level national treatment obligation. If that was so, then the wording of Article 4(3) of the European Community’s proposal, in particular the phrase “does not apply to the extent that a party makes use of a reservation,” seemed to suggest that the nature and scope of the reservation entered might influence the level of the national treatment obligation. It might be more appropriate to have the phrase read “does not apply if a Contracting Party makes use of the reservations,” substituting the words “to the extent that” by “if.”

183. Mr. REINBOTHE (European Community) said that the proposal presented by his Delegation was designed to facilitate acceptance of the *à la carte* solution along with Article 4. It was the structure of Article 11 that was at the origin of those many questions.

184. Mr. KEPLINGER (United States of America) referred to the question asked by the Delegation of Switzerland about how his Delegation's proposal for an amendment to Article 4 would be implemented. It would depend on how the rights were administered in the particular country involved. In some countries, collecting societies were organized by the private sector with minimal government regulation, without any specific statutory authorization and where the authorization derived from the exclusive rights provided in the law. In other countries collecting societies were entities of the State, and in other countries the situation would be somewhere in between. In the first case, the solution could be to include a provision that if royalties were collected for a performance they must be paid to that performer and to provide for civil action by such a performer who was not paid by the collecting society. In the second case, the solution could lie in the basic statutory provisions which could provide for an administrative enforcement mechanism by the regulatory authority.

185. Mr. GOVONI (Switzerland) noted that an inaccuracy in the French version of the text had caused him to criticize the proposal by the United States of America.

186. The PRESIDENT said that for the moment there was not enough basis to draw any conclusions. He invited the intergovernmental and non-governmental organizations to comment on the issues of the second work package.

187. Mr. ABADA (UNESCO) said that the proposal by the European Community represented a good mix. However, paragraph (3) of Article 4 reduced national treatment to nothing, whereas it would have been preferable to have it merely limited where a State made a reservation regarding the exclusive right provided for in paragraph (1) of Article 11. It was unfortunate that reservations should result in cancellation of the exclusive right and the right to remuneration. It would be fairer if the new instrument conferred at the very least a right to remuneration, even limited, but did not allow non-recognition of the right to remuneration and the exclusive right.

188. Ms. BURNETT (EBU) underscored on behalf of the regional broadcasting unions detailed reasons for their opposition to the retention of draft Article 11. It would disrupt existing contractual relationships between performers and producers and between producers and broadcasters. It would cause serious problems of double claims against the broadcasters for the same performance, which were not addressed by draft Article 12. Since there was no parallel between the broadcasting of audiovisual productions on the one hand and the broadcasting of commercial phonograms and the WPPT system on the other, there was no justification for taking the right in Article 15 of the WPPT as a model. Article 11 did not provide harmonization and would give rise to complications and disputes over national treatment. It would cause uncertainty and disruption to financial structures, leading to huge disadvantages for audiovisual production, performers, national broadcasters and the viewing public. If the main attraction of Article 11 was paragraph (3), deletion of the entire article would be the most appropriate solution.

189. Mr. VINCENT (FIM) quoted the example of a concert broadcast on the Internet that had been fixed. What had been communicated to the public was not a live but a fixed performance. In other words it was an audiovisual fixation, which came within the purview of Article 10.

190. Mr. PÉREZ SOLÍS (FILAIE) subscribed to what the representative of FIM had said. He also mentioned that the problem arose precisely where on the one hand performers were denied remuneration for the use of their rights, while on the other hand the same rights could readily be transferred to other holders of the intellectual property rights, namely the producers. He supported what has been said by the European Union regarding the connection between those rights and national treatment, and maintained that it was acceptable for either partial or general reservations to be made, subject to material reciprocity.

191. Mr. OIRA (URTNA) declared that, in Africa, contractual arrangements between producers and performers on the one hand and producers and broadcasters on the other, made collective bargaining much easier and expeditious in the region. Therefore, his Delegation considered Article 11 of the draft proposal to be a threat not only to the settled principles with respect to the audiovisual industry but also to the dissemination of information which was the cornerstone of the broadcasting industry.

192. Mr. HØBERG-PETERSEN (FIA) stated that the right of broadcasting and communication to the public remained the single most important right to audiovisual performers. Any transfer problems should be regulated in national legislation according to the needs and particular circumstances of each country. No direct parallel could be drawn from Article 15 of the WPPT due to the differences between the audiovisual and the phonogram industries as pointed out in Notes 11.05 and 11.06 of the Basic Proposal. A more relevant source of inspiration would be the rules on protection of authors of cinematographic works in Article 11 *bis* of the Berne Convention and Article 8 of the WCT. His organization renewed its plea for a Treaty proposal which established an exclusive right or at least a remuneration right as the minimum level of protection. Regarding Article 4 about national treatment, his organization continued to favor the *mutatis mutandis* application of Article 4 of the WPPT, extending national treatment to the exclusive rights specifically granted in the instrument as in Alternative D of the Basic Proposal. That alternative would bring full national treatment to the making available right in Article 10 of the Basic Proposal. Considering the importance of that right for the future distribution of audiovisual productions in the digital environment, that in itself would be a remarkable achievement in respect of widening the application of the principle of national treatment of performers' rights in the digital age.

193. Mr. LERENA (AIR) said that the protection envisaged in the Basic Proposal comfortably exceeded the protection that authors had at present in relation to audiovisual works. He believed that any introduction or grant of performers' rights should be subject to the limitations on scope specified in Article 14 *bis* of the Berne Convention. Similarly, the performers in audio or phonographic productions had no exclusive right to authorize as was being advocated for performers in audiovisual productions, so that whatever protection was introduced would likewise exceed the protection accorded to performers in phonographic productions, and yet it was constantly being said that the aim was give both types of performer equal status. Moreover, as far as audiovisual performers were concerned, he did not regard them as qualifying for a right to remuneration, as they were not involved in the secondary use that would

qualify them for remuneration where performances were broadcast using a commercial phonogram. He said that if an exclusive right to authorize or a right to remuneration were indeed introduced, it would then be essential to retain the paragraph of the proposal that referred to the possibility of States making reservations.

194. Mrs. GRECO (ARTIS GEIE) supported the statement made by the FIA, and said that the proposal submitted by the European Union regarding Articles 4 and 11 was a good basis for reflection. The concept of material reciprocity applied to national treatment could not be allowed to mean that a right to remuneration existing in one Contracting State would be considered equivalent to an exclusive right accorded in another Contracting State. National treatment should be limited, in the present instrument, to exclusive rights.

195. Mrs. REDLER (NABA) commented on the proposal of the Delegation of the European Community on the possibility to submit the right of broadcasting and communication to the public to material reciprocity rather than national treatment. Broadcasters did not think that applying material reciprocity to Article 11 would solve any of its fundamental flaws and believed that it would create new layers of confusion and potential grounds for interminable disputes, and would not further the objective of the Treaty for harmonization. The fact that material reciprocity was being suggested seemed to be a concession that the broadcasting right is incapable of harmonization. The new material reciprocity option would add another level of complexity and therefore broadcasters maintained that the best course of action, as suggested by the Delegation of India, was deletion of Article 11 from the Treaty.

196. Mr. SHAPIRO (IVF) mentioned that proposal of the Delegation of the United States of America on Article 4 had not been the subject of much discussion by the Member States, although several of the non-governmental organizations had mentioned it. Perhaps it meant there was an agreement on that point.

197. Mr. BLANC (AEPO) considered that exclusive rights had to be exercised by the actual performer or by the organization representing him, and should not be transferred to the producer under an initial contract or by virtue of a presumption of assignment. Recognition of a right to remuneration did not necessarily constitute an alternative to exclusive rights, but it could represent a guarantee, even in connection with the exercise of exclusive rights. A right to remuneration had to be placed under collective management. It was not desirable for reservations to be possible in relation to exclusive rights and the right to remuneration. He was concerned about the scope of national treatment, and was not in favor of the proposal put forward by the United States of America.

198. Mrs. LA BOUVERIE (EUROCOPYA) considered that Article 11 did not effect any harmonization, and should not appear in the new instrument. The right to remuneration was going to upset established practices in audiovisual markets completely, and was liable to cause serious distortions between catalogues of work subject to the remuneration and those exempted from it.

199. Mrs. LEPINE-KARNIK (FIAPF) found it disturbing that Article 11, as worded at present in the Basic Proposal according to the so-called "à la carte" formula, did not allow any international harmonization of broadcasting and communication to the public. FIAPF considered that Article

11 should be deleted; its present wording would present more problems of implementation than it would solve, and the fact of not achieving consensus at the international level would not deprive Member States of the possibility of granting performers an exclusive right of broadcasting at the national level.

200. Mrs. MANALASTAS (ABU) referred to the chaotic situation which broadcasters in developing countries would be addressing if Article 11 were adopted. The present actual trade practice in the broadcasting industry in acquiring foreign programs had been established through the payment to the producers or distributors of the agreed fees, which relieved broadcasters from any further payments. The inclusion of Article 11 would engender double claims of payment, now from the performers in those programs and collecting societies that would increase the costs of operations and affect directly the public broadcasters and the general public. With the retention of Article 11, broadcasters from the developing countries would be in a very difficult situation.

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| Seventh Meeting Tuesday, December 12, 2000 Afternoon |
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Article 12: Transfer, Entitlement to Exercise Rights and Law Applicable to Transfers

201. The PRESIDENT invited the delegations to discuss draft Article 12.

202. Mr. IBRAHIM HASSAN (Sudan) said that the translation of the Arabic version was not entirely compatible and consistent with the English text.

203. Mr. ISHINO (Japan) asked for clarifications of the term "particular fixation" in Alternatives E to G, because of the wider scope of Article 19 of the Rome Convention. Questions remained regarding, for example, transfer to different formats and use of excerpts of films in television. With respect to Alternative E, it was desirable to clarify that the presumption of transfer should not apply to moral rights and to rights of remuneration. In Alternative F, the entitlement to exercise rights was a new concept that required clarification, for instance, regarding whether performers could exploit that particular fixation by themselves, claim injunctions or compensation for unauthorized uses by third parties, register their rights or assign their rights to third parties. As to Alternative G, paragraph (1) defined a principle well established in private international law that transfers should be governed by the law of the country most closely connected with a particular audiovisual fixation, but it was necessary to consider for each point of attachment whether it was acceptable. Alternative G defined the applicable law with respect to the rules on transfer, but not with respect to the substantive provisions on the rights. The purpose of Alternative H was to leave it to the Contracting Parties whether to provide provisions on transfer, but it was necessary to consider the impact on current business practices. Subject to such clarifications, his Delegation favored Alternatives E and F, but it would not exclude other alternatives for discussion.

204. Mr. KEPLINGER (United States of America) stated that in the interest of certainty and clarity, it was necessary to include a provision on the producer's ability to exercise the exclusive rights of authorization. This would not only facilitate the effective exploitation of an audiovisual work in a global environment, it would also encourage wider ratification of the proposed Treaty which was important for the protection of the rights of performers, particularly as the Internet would soon become a primary channel for the exploitation of audiovisual works. In this context, although his Delegation continued to favor Alternative E, they were prepared to discuss other possible options in the search for a satisfactory solution.

205. Mr. GOVONI (Switzerland) pointed out that national legislation contained contractual provisions concerning the rights of very different performers, which would be difficult to harmonize at the international level. The Berne Convention aimed in its Article 14*bis* to safeguard producers from the claims of certain authors who did not actually possess the status of author when their contracts were concluded. It was difficult to compare Alternative F of the basic document with Article 14*bis*, and in fact it would have the same practical effects as Alternative E. If the exclusive rights of performers were subject to a collective management regime, under Alternatives F and E they would be assigned to the producer. In his country the legislator had preferred not to intervene in that area. Consequently he was in favor of Alternative H, but in a spirit of compromise was prepared to consider Alternative G.

206. Mr. REINBOTHE (European Community) stated that his Delegation believed that Alternative H was the most appropriate. The co-existence of different models within the European Community had not led to any difficulties. Alternative E was not acceptable, as this would require in many countries a revision of their existing transfer schemes and, in some countries, even of the constitution. He agreed that there were important differences between Alternative F and Article 14*bis* of the Berne Convention.

207. Mr. BLIZNETS (Russian Federation) stated that his Delegation was not in favor of Alternatives E and G and considered the solution in Alternative H more appropriate.

208. Mr. HERMANSEN (Norway) supported Alternative H. His Delegation was not in a position to support Alternatives E and F, and it was not convinced by Alternative G as the existing principles of private international law dealt adequately with this issue.

209. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that the Group remained open to any compromise solution.

210. Mr. CRESWELL (Australia) stated that his Delegation favored the inclusion of a provision regarding Article 12. This was justified even though such a provision was not included in the WPPT. The film and television industry was different from the sound recording industry in that regard. He understood that there were fears that the inclusion of Article 12 would threaten performers' rights under the WPPT because of possible overlap of the proposed instrument. However, there were safeguards against overlap in relevant provisions of the WPPT on definitions and agreed statements, and in Article 1 of the proposed instrument.

211. Mr. PHUANGRACH (Thailand) stated that his Delegation could not accept Alternative G.

Article 5: Moral Rights

212. The PRESIDENT stated that Article 5 (Moral Rights) was modeled on the corresponding provisions of the WPPT, with the exception that a clarifying clause on “normal exploitation” had been added at the end of Article 5(1)(ii). It was his impression that an understanding on Articles 5(2) and (3) already existed.

213. Mr. REINBOTHE (European Community) referred to the proposal submitted by his Delegation (document IAVP/DC/9). Article 5(1)(ii) could have a spillover effect on the interpretation of Article 6*bis* of the Berne Convention and Article 5 of the WPPT. The term “normal exploitation” could also cause confusion as it was also used within the context of the “three-step test.” Normal exploitation was also difficult to define, particularly because business practices varied across the world.

214. Mr. ISHINO (Japan) stated that further clarification was required regarding the term “normal exploitation.” The first three sentences of Note 5.07 should be included in an agreed statement.

215. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, proposed the deletion of the last sentence of Article 5(1)(ii) but was willing to consider its inclusion in an agreed statement.

216. Mr. KEPLINGER (United States of America) stated that his Delegation would propose an amendment to the Basic Proposal aiming at replacing the words “normal exploitation” by “customary practices” and adding an agreed statement.

217. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported the deletion of the last sentence of Article 5(1)(ii).

218. Mr. SHEN (China) supported the inclusion of the last sentence of Article 5(1)(ii).

219. Mrs. BELLO DE KEMPER (Dominican Republic) announced that the Latin American and Caribbean region was attaching great importance to Article 5 and the issue of moral rights.

220. Mr. CRESWELL (Australia) agreed with the second sentence of Article 5(1)(ii), and reserved his Delegation’s position on the amendment proposed by the Delegation of the United States of America. The WPPT “safeguard” clause in Article 1(2) would avoid spillover from Article 5(1)(ii) to the interpretation of Article 5 of the WPPT.

Article 3: Beneficiaries of Protection

221. The PRESIDENT recalled that, during the preparatory stage, some countries had suggested extensive points of attachment while other countries had taken the approach that the nationality of the performer should be the only one.

222. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central and Baltic States, proposed that paragraph (2) be deleted. His Group did not agree with Note 3.04 of the Basic Proposal. The inclusion of the criterion of habitual residence would not function as an incentive for joining the new instrument.

223. The PRESIDENT observed that the criterion of nationality, including assimilation of habitual residence to nationality, was as motivating or demotivating as were the criteria included in the Berne Convention.

224. Mrs. RETONDO (Argentina) accepted the Basic Proposal as worded at present, and felt that Note 3.04 gave a very good explanation. Habitual residence had also to be a criterion to be heeded, and should not be a cause for the Treaty not being ratified.

225. Mr. ISHINO (Japan) supported Article 3 of the Basic Proposal.

226. Mr. REINBOTHE (European Community) believed that the criterion of nationality as mentioned in Article 3(1) was appropriate, and questioned the necessity of paragraph (2). Article 3(1) as the only criterion would be a better incentive for joining the Protocol. Article 3(2) might open the door to protection despite the fact that the country of origin did not wish to adhere to the protocol. The concept of habitual residence was mentioned in the Berne Convention, but in the context of authors' protection. Regarding an audiovisual fixation there was presumably a greater number of performers than authors, and applying the criterion of habitual residence to performers would lead to a different effect than applying it to authors.

227. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, supported Article 3(1).

228. Mr. KEPLINGER (United States of America) stated that broad points of attachment were desirable in order to ensure protection for the widest possible range of performers. Restrictive points of attachment would decrease the number of persons eligible for protection. Therefore his Delegation supported the draft text.

229. Mrs. BELLO DE KEMPER (Dominican Republic), speaking in the name of her country alone, supported Article 3 of the Basic Proposal, and was in favor of granting protection to those resident in the country, as that was provided in her national law.

230. Mr. UGARTECHE VILLACORTA (Peru) said that, on the understanding that what was being looked for was the provision of greater protection for a greater number of performers, like Argentina and the United States of America, he supported Article 3 of the Basic Proposal.

231. Mr. MAHINGILA (United Republic of Tanzania) expressed his Delegation's support for the text of the Basic Proposal.

232. The PRESIDENT noted that all delegations seemed to accept the criterion of nationality in paragraph (1), but paragraph (2) would need further discussion.

Article 19: Application in Time

233. The PRESIDENT stated that the Basic Proposal differed from the WPPT model. The first paragraph reproduced the main principle of Article 18 of the Berne Convention, which should be applied taking into account the provisions on the term of protection. No performance which existed at the moment of entry into force which was older than 50 years, or whatever would be the term of protection, would be protected. Paragraph (2) accommodated the contractual arrangements that could be disrupted in different legal systems due to the new rights, and provided for the Contracting Parties the option that protection could be confined to performances that occurred after the entry into force of the new rules. Paragraph (2) would make it possible for Contracting Parties to exclude the retrospective application of economic rights, but not moral rights. Paragraph (2) should refer to Articles 7 to 11, but not Article 6. Paragraph (2) would enable countries that provided for retrospective protection to apply reciprocity in relation to countries that did not offer such protection. Paragraph (3) provided that those rules should be without prejudice to any acts of exploitation committed before the entry into force of the new rules. Paragraph (4) contained a clause according to which transitional provisions were explicitly allowed. The first half of the explanatory Note 19.05 clarified that transitional arrangements might be provided for a limited period or they might be permanent.

234. Mr. CRESWELL (Australia) introduced the proposal of his Delegation in document IAVP/DC/11. In paragraph (2) the possibility to provide only prospective application of rights should be extended to moral rights as well. Article 22(2) of the WPPT allowed Contracting Parties to limit the application of moral rights to future performances, because these rights could not be expected to be applied retrospectively in light of their novelty. The same applied to moral rights for audiovisual performers. Moreover, the words "for that Contracting Party" should be added at the very end of paragraph (2) in line with paragraph (1). In case this proposal was not supported, at least Article 19(4) should be amended to allow transitional arrangements with respect to moral rights.

235. Mr. REINBOTHE (European Community) noted that Article 18 of the Berne Convention had been applied *mutatis mutandis* for the WPPT and the TRIPS Agreement in the field of neighboring rights. This model should be followed. The possibility of prospective application of economic rights protection and retroactive application in respect of moral rights contained in Article 19(2) overturned the concept of Article 22 of the WPPT. Mere prospective application of economic rights protection was not justified and would exclude vast parts of the market. The implications of the national treatment principle in Article 19(2) were not clear. Paragraphs (1) and (2) should be replaced by Article 22(1) and (2) of the WPPT, and paragraphs (3) and (4) were not necessary because sufficient flexibility was provided by Article 18 of the Berne Convention.

236. Mr. ISHINO (Japan) underscored the importance his Delegation attached to paragraph (2), because the proposed instrument would introduce new rights.

237. Ms. SAVELIEVA (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, stated that paragraph (1) caused legal uncertainty in the definition of the protected fixed performances and suggested that it should read: "Protection under this Treaty shall be granted to those fixed performances for which the term of protection provided under Article 14 of this Treaty has not expired." Paragraph (2) could be even more flexible. Contracting Parties might choose not to apply the provisions of Articles 7 to 11 as a whole or each of those articles individually. And since the proposed Article 19(2) would allow for exceptions to the obligations under the instrument, an additional provision could be introduced, establishing the procedure for depositing notifications.

238. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that the established principles of the WPPT and the TRIPS Agreement should be followed. Article 18 of the Berne Convention excluded neither the application of the general principles set out in paragraph (3) nor the transitional arrangements under paragraph (4). The proposed paragraphs (1) and (2) were a reversed version of the WPPT and of the TRIPS Agreement. Article 19 should be replaced by a text along the lines of Article 22 of the WPPT.

239. Mr. KEPLINGER (United States of America) stated that moral rights in currently existing fixations should be protected as proposed in paragraph (1). Paragraph (2) struck the right balance by providing for prospective application of economic rights. As audiovisual works were subject to extensive contractual arrangements, this provision resulted in a greater certainty for both performers and producers. The principles expressed in paragraphs (3) and (4) in respect of acquired rights and the transitional provisions were also essential. Therefore, his Delegation supported the text of the Basic Proposal.

240. Mr. BOSUMRAH (Ghana), speaking on behalf of the African Group, stated that it was not opposed to Article 19, as included in the Basic Proposal.

241. Mr. COUCHMAN (Canada) supported Article 19, particularly paragraph (2). It would be difficult for countries that had not previously protected audiovisual performances to provide retrospective protection to audiovisual fixations.

242. Mr. SHEN (China) stated that his Delegation could in principle accept Article 19, with minor changes in paragraph (1), which should be replaced by the wording of Article 22(1) of the WPPT.

Article 1: Relation to Other Conventions and Treaties

243. The PRESIDENT explained that the Alternatives in the Title and Article 1 related to the administrative and final clauses of the new instrument. The main issue was whether the

proposed instrument should be self-standing, or closely linked to the WPPT. This choice did not dictate the Title. There could, for example, be a joint assembly, even under Alternative B. Adherence to the WPPT could also be a condition for adherence to the new instrument, under both Alternatives. Paragraph (2) of Alternative A was a safeguarding clause for the WPPT and the Rome Convention. Paragraph (3) of Alternative A was based mainly on the Rome Convention.

244. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that his Group opted for Alternative A.

245. Mr. REINBOTHE (European Community) stated that his Delegation preferred the title "Protocol." However, the content and the structure of the instrument were more important than its title. His Delegation supported a strong link with the WPPT and was in favor of Alternative A to be applied throughout the agreement. The new instrument and the WPPT should share one assembly. Membership in the WPPT should be a condition for adherence. The number of instruments of ratification or accession that would be required for the entry into force could be lower than that required for the WPPT.

246. Mr. KEPLINGER (United States of America) expressed his Delegation's preference for a new treaty taking into account the importance of audiovisual fixations. The content was the important matter. The provisional title given to a proposed instrument during the preparatory stage was not determinative. The necessity of linkage with the WPPT was not evident. If substantive linkages were needed, linkage with the WCT should also be considered since it dealt with audiovisual works in which those performances were fixed. The administrative procedure could be simplified by having only one assembly. The number of countries party to the Treaty required for its entry into force should not be as high as for the WPPT to allow both instruments to enter into force as soon as possible.

247. Mrs. RETONDO (Argentina) said that she was leaning towards Alternative B. She pointed out that there would in any event be linkages, regardless of whether a Treaty or a Protocol to the WPPT was adopted. Nevertheless, she announced that her Delegation reserved the right to decide at the time of the final provisions whether there should be a requirement to belong to the WPPT for ratification of the Treaty, or whether mere membership of WIPO would be sufficient.

248. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that audiovisual performances should be treated on the same basis as aural performances under the WPPT, and opted for a protocol and Alternative A. However the substance was more important. His Delegation showed flexibility as long as the new instrument was linked to the WPPT.

249. Mr. HERMANSEN (Norway) expressed the preference of his Delegation for a protocol to the WPPT under Alternative A.

250. Mr. HAMID (Bangladesh) approved Alternative A.

251. Mr. SHEN (China) said that the new instrument should be a protocol to the WPPT, although more importance should be attached to the substance. The purpose of the new instrument was to resolve a question which should have been resolved in 1996 by the WPPT.

252. Mr. COUCHMAN (Canada) expressed his Delegation's preference for Alternative B. Membership in the WPPT should not be a pre-condition for adherence.

253. Mr. GOVONI (Switzerland) was in favor of Alternative A, even though the adoption of a Protocol or of a Treaty was not a question of prime importance. He suggested entitling the new instrument "Protocol relating to the WIPO Performances and Phonograms Treaty." Provision should be made for linkages with the WPPT.

254. Mr. SARMA (India) expressed the preference of his Delegation for Alternative B. Adherence to the WPPT should not be a pre-condition for joining the new instrument. A single assembly for both treaties was acceptable. The number of members required for the entry into force could be lower than that required for the WPPT.

255. Mr. AFONSO DOS SANTOS (Brazil) supported Alternative B. Membership in the WPPT or the WCT should not be a pre-condition for adherence.

256. Mr. SIMANJUNTAK (Indonesia) expressed the preference of his Delegation for a Treaty, which would enable a greater number of countries to join.

257. Mr. CRESWELL (Australia) expressed the preference of his Delegation for a Treaty, though it was open to considering linkage with the WPPT. With reference to the earlier intervention by the Delegation of Switzerland, the new instrument could not be designated simply as a protocol to the WPPT, because WPPT was a Treaty covering phonograms, and the subject matter of the new instrument was audiovisual performances.

258. Mr. REDKO (Ukraine) thought the instrument should be a separate Treaty. He supported Alternative B.

259. The PRESIDENT confirmed that many delegations had stressed the substantive matters and links between the new instrument and the WPPT. As far as the different linking elements were concerned, there were important differences in opinion. He opened the floor for comments on the fifth and sixth work package from intergovernmental and non-governmental organizations.

260. Mr. BLANC (AEPO) said that, as far as performers were concerned, there was no difference between Alternative E and Alternative F of Article 12, as both had to do with the possible expropriation of the rights of performers; Alternative G was far too complex. Alternative H was the only acceptable solution. As far as moral rights were concerned, a text similar to the one in the WPPT should be adopted.

261. Mr. UEHARA (NAB Japan) proposed, regarding Article 12(1), that the word “particular fixation” be clarified. Although the Basic Proposal stated that “the inclusion of the same fixed performance in another audiovisual production is subject to the authorization of the performer,” it does not necessarily mean that the use of that particular audiovisual fixation in part is always subject to the authorization of the performer. If not, that would be very inconvenient not only for broadcasters and movie industries, but also for the audience. If “particular audiovisual fixation” means only the deemed authorization of the use of the entire “audiovisual fixation” of that particular audiovisual fixation, broadcasting organizations could not accept the Alternatives E, F, G and H. The words “particular fixation” had to be clarified, for example, in the form of an agreed statement. As for Article 5, he strongly hoped that the agreed statement would be established just as the Delegation of Japan had stated before.

262. Mr. HØBERG-PETERSEN (FIA) strongly opposed any Treaty rule prescribing a mandatory presumption of transfer of the performers’ exclusive rights to the producer of the audiovisual fixation as proposed in Alternative E. A rule of that nature would be unfair to performers and would force a number of States which joined the instrument to lower the level of the protection of audiovisual performers currently existing at national level. That would inevitably disrupt the well-established bargaining frameworks and contract patterns in those countries to the grave detriment of performers. Alternative F did not represent any real improvement but only a slight variation of Alternative E with no real parallel to Article 14*bis* of the Berne Convention. Alternative G was best suited to provide common ground for a compromise, but paragraph (2) of Alternative G should be deleted. Regarding Articles 5 and 19, the retroactive application of moral rights should be retained.

263. Mr. PÉREZ SOLÍS (FILAIE) referred to Article 12 and stated his preference for Alternative H. He also asked the Chair for some clarification of the expression “that would be prejudicial to his reputation.” If that requirement were applied in the case of distortion, mutilation and modification of performances, the number of the verb “*causar*” in Spanish should be plural, with the clause reading “que causen perjuicio a su reputación”; on moral rights and their application in time, he felt that the fifty years counted from the date of fixation or publication should in fact be counted from the date of disclosure; on the beneficiaries of protection, he said that he favored both the criterion of nationality and that of habitual residence; on application in time, he preferred a provision similar to Article 18 of the Berne Convention in conjunction with Article 22 of the WPPT. As far as the title was concerned, he was in favor of a Protocol to the WPPT.

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264. Mr. ABADA (UNESCO) felt that the proposal by the European Community on moral rights was a good basis for agreement, and could be completed with a joint statement that picked up on the ideas contained in the proposal by the United States of America. As far as Article 12 was concerned, performers needed the new instrument to improve their rights substantially, yet Alternatives E and F of Article 12 seemed biased to their disadvantage. The draft instrument should leave it to the performers and producers to settle the procedure for the assignment of rights according to the particular characteristics of the various audiovisual works and the specifics of the national law involved. Alternative H seemed more likely to provide more fairly for the interests involved, whereas Alternative G would be particularly awkward to apply.

265. Ms. HAGEN (ILO) stated that ILO had been involved in the issue of the protection of performers since the 1920's. It had been one of three organizations behind the Rome Convention, along with WIPO and UNESCO. Article 19(8) of the Constitution of the ILO included a principle that might be of relevance to Article 12 of the proposed instrument: that the adoption of any international labor standard should in no case be deemed to affect any law, award, custom or agreement which ensured more favorable conditions to the workers in any particular country concerned than those provided in the international labor standard. This is why ILO had called for flexibility between the various positions expressed on the issue of the transfer of rights or the exercise of exclusive rights. This flexibility was requested in order to encourage the search for consensus and to minimize risks for performers, producers, broadcasters and others in the context of bargaining and collective management of rights. Performers' rights as such should not be diminished as they pertained to the performers themselves. The concern expressed by UNESCO about Alternative G lay largely in paragraph (2). Paragraph (1) of Alternative G would serve as an example of the kind of approach which would be a basis for integrating into the final document this concern for the protection of rights and the assurance of the respect for the rights established in each particular country. Regulating the transfer of rights accordingly might be problematic in terms of the complexities of paragraph (2).

266. Mr. VINCENT (FIM) observed that Alternative E of Article 12 would result in a level of protection lower than that available within the legal framework established by the Rome Convention in 1961. Apart from that, his organization supported the European Community proposal on application in time, which corresponded to the solution adopted in Article 22 of the WPPT.

267. Mrs. LA BOUVERIE (EUROCOPYA) considered that only machinery for the transfer of rights made it possible for works to be exploited, rights to be exercised and consequently performers to be rewarded. However, in order to respect national legislative practice, her organization supported the adoption of Alternative G, which respected existing laws and agreements, and also Article 19 of the Basic Proposal.

268. Mrs. LEPINE-KARNIK (FIAPF) said that Alternative G of Article 12 was an interesting compromise, as it lent legal security to the international circulation of works. Her organization was concerned that the proposal put forward by the European Community on Alternative G was liable to create uncertainties as to the transfer of rights regime.

269. Mr. LERENA (AIR) referred to Article 5, and specifically to the right of integrity, saying that it was essential that the Treaty include a clause providing for certain normal practices in the exploitation of the work. With that in mind he supported the present wording of the Proposal, even though the proposal by the United States of America that an agreed statement should be included was also acceptable. With regard to Article 19, he considered that the new Treaty should apply to new performances, namely those that were given or took place after the entry into force of the new Treaty, as that would afford both legal and economic security. He did wish to acknowledge that the formula written into the proposal had been an interesting attempt to reconcile the various interests at stake, but in any case he was firmly opposed to the inclusion in the Treaty of the criteria established in Article 18 of the Berne Convention.

270. Mr. GRIMAU MUÑOZ (CSAI) said that his organization was in agreement with the position taken by the European Community regarding Articles 1, 3, 5, 12 and 19 of the Basic Proposal. He added that the future instrument would have to allow for all forms of exploitation of audiovisual performances, including the communication to the public and broadcasting provided for in Article 11. Indeed he said that the right of broadcasting and communication to the public constituted the very essence of the future instrument, and that as a result he considered that the absence of that right would be bound to cause the Diplomatic Conference to be described as a resounding failure. The solution offered by the Delegation of the European Community for Articles 4 and 11 seemed to him sufficiently intelligent to be adopted by States. Finally he believed that the future instrument should improve the protection of the performer in the audiovisual medium, but without that in any way entailing any inconvenient revision of the content of other instruments already in force that protected other holders of rights or other creative subject matter.

271. Mr. IVINS (NAB), speaking on behalf of his organization as well as its sister associations NABA, ABU, ACT and EBU, stated with respect to Article 5 that there was a concern in many countries that the moral rights of performers might be used for economic reasons in the audiovisual area and could unreasonably prejudice the interest of other performers and of the producer of an audiovisual fixation. The last sentence of draft Article 5(1)(ii) was intended to clarify that usual professional practices of the producer in the framework of an exploitation authorized by the performer did not raise moral rights issues. The organizations strongly supported the inclusion of such a phrase or an equivalent such as the proposal made by the Delegation of the United States of America. They also supported the Delegations of the United States of America and Japan with respect to their proposed agreed statements. More important, draft Article 5(1)(ii) itself should specify that only serious distortions or mutilations resulting in grave prejudice to reputation should be considered a violation of the performer's moral rights and that each performer should take the interest of the other performers, the producer and the authors into account when exercising the rights. It would be desirable that it be expressly recognized and included in an agreed statement that performers might waive moral rights. His organization supported the Delegation of the United States of America regarding Article 12.

272. Mrs. GRECO (ARTIS GEIE) felt that there was no reason for applying any limitation to moral rights other than those provided for in Article 5 of the WPPT. As for Article 12, it was advisable to keep to Alternative H. In Article 3, the so-called "habitual residence" criterion seemed particularly imprecise, and it would be preferable to rely on the one given in Article 3(1). The limitation specified in Article 19 for fixations prior to the entry into force of the instrument made for discrimination in time and also between performers, depending on whether they were governed by one Treaty or the other. Her organization favored a protocol to the WPPT.

273. Mr. PÉREZ SOLÍS (FILAIE) referred to the statement that he made the previous day, which had to do with the interpretation of Article 5 in the Spanish version of the Basic Proposal. He also pressed for the calculation of the term of protection to be determined not by publication but by disclosure. As for the proposal on moral rights, he was not in agreement with the inclusion of the expression "modifications consistent with normal exploitation," as it introduced a concept of a commercial nature in a moral concept, which could not be allowed.

274. Mr. SHAPIRO (IVF) stated that Article 5 on moral rights was an issue of vital importance to the video sector. His organization appreciated the clarity that the Japanese Delegation had sought by incorporating the Explanatory Note 5.07 in the agreed statement as well as the proposal made by the United States of America on customary practices. With respect to Article 12, his organization supported Alternative E, although it could also support a solution based on Alternative G. It had always been a question of respecting agreements between producers and performers. It could not support the proposal submitted by the European Community on Article 12. With respect to the application in time, it supported the Basic Proposal. It was in favor of an independent Treaty. Finally, as to Article 2(c), it adhered strongly to the definition contained in the Basic Proposal.

275. Ms. REDLER (NABA), speaking on behalf of various broadcasters' unions, stated that the limitation to the application in time under proposed Article 19(2) should be extended to moral rights in order to guarantee smooth introduction of those rights without necessitating new negotiations between producers and performers concerning old productions. Her organization supported the proposal made in this respect by the Delegation of Australia.

276. Mr. RIVERS (ACT) referred to Article 12 and described the ways in which broadcasters could acquire the necessary rights: by entering into a direct relationship with the producer; by entering into a direct relationship with a program licensor who had acquired the rights from third parties; and by acquiring a blanket license from, for instance, a music collecting society. However, a worldwide system like that of the music collecting societies was yet to be established for performers. Regarding Article 12, ACT preferred a solution modeled on Alternative G, but paragraph (2) of that alternative did not serve a useful purpose and should be deleted. The country most closely connected with the production should be determined by applying the established rules of private international law, which specified a number of criteria. In paragraph (1), it had to be made clear that the court of the protecting country should apply the proper law of the contract, which would be in general the law specified by the parties.

Conclusion of the first reading of the draft text

277. The PRESIDENT invited the Committee to conclude the first reading of the draft text of the substantive provisions by confirming an understanding on each article to the extent possible, following the order of the work packages.

Article 6: Economic Rights of Performers in Their Unfixed Performances

278. The PRESIDENT recalled that it had been suggested that the word “audiovisual” be deleted from paragraph (ii) of Article 6. This might result in an overlap with the WPPT, the Rome Convention and the TRIPS Agreement but it did not cause any harm and could remain as an understanding. One delegation had referred to the possible addition of a clause on the subsequent uses of unlawfully made fixations. That suggestion might be kept in mind although no proposal had been made to this effect.

Article 7: Right of Reproduction

279. The PRESIDENT stated that an agreed statement similar to those adopted in the context of Article 1(4) of the WCT and Article 7 of the WPPT regarding the application of the reproduction right in the digital environment would be drafted.

Articles 8: Right of Distribution

280. The PRESIDENT noted that there was an understanding that the text itself would be retained. An agreed statement to the WPPT provided that the expressions “copies” and “original and copies” being subject to the rights of distribution and rental referred exclusively to fixed copies that could be put into circulation as tangible objects. A similar agreed statement could be considered concerning both Articles 8 and 9 of the proposed instrument. In the case of the WPPT, the statement was adopted with reference to the definition of “publications” in Article 2(e) as well, which did not exist in the proposed instrument. A draft text of such an agreed statement following very closely the one of the WPPT would be prepared in the context of both the right of distribution and the right of rental. The statement would only refer to the expression “original and copies,” and not “copies.”

Article 9: Right of Rental

281. The PRESIDENT indicated that the text of Article 9(1) in the Basic Proposal would be maintained. An agreed statement referring to the expression “original and copies” as in the context of Article 8 would be attached. Paragraph (2) provided for the “material impairment” test

which corresponded to the provisions concerning the authors' right of rental in respect of cinematographic works in the TRIPS Agreement and the WCT. It had been suggested that this wording be replaced by that of the corresponding provision of the WPPT with respect to the rental right in phonograms which was used only in the context of the so-called "grandfathering clause." That model would lead to higher protection than the present proposal which was based on a general material impairment test.

282. Mr. SHEN (China) recalled the suggestion made by the Delegation of Switzerland concerning Article 9(1) that the expression "as determined in the national law of Contracting Parties" should be added after the words "audiovisual fixations."

283. Mr. CRESWELL (Australia) supported Article 9(2). His Delegation referred again to the lack of complete correspondence between Article 9(1) in the WPPT and draft Article 9(1).

284. Mr. SARMA (India) requested some clarification on the status of the proposal made by the Delegation of Switzerland concerning the definition of "fixation," since Article 9(1) referred to "audiovisual fixations." The adoption of the Swiss proposal could clarify the situation. Some delegates had sought for clarification on what was meant by "particular audiovisual fixation" in Article 12. The President was asked to confirm that these aspects would be covered to the extent possible and agreeable in an agreed statement.

285. The PRESIDENT replied that the agreed statements adopted at the Diplomatic Conference in 1996 had an important guiding effect on the interpretation of the clauses in the WCT and the WPPT. The proposed instrument should have clauses similar to these Treaties. If the proposal made by the Delegation of Switzerland concerning the definition in Article 2(c) was adopted, it would have an impact on the language in several provisions. Therefore the exact wording of these clauses was not dealt with at this moment, but would be discussed in conjunction with Article 2(c).

286. Mr. GOVONI (Switzerland) felt that paragraph (2) of Article 9 should be drafted in the same terms as in the WPPT, as the new instrument should stay as close as possible to that Treaty.

287. The PRESIDENT confirmed that the proposal made by the Delegation of Switzerland was still valid, and would be negotiated later.

288. Mr. SHEN (China) supported the addition of the words "as determined in the national law of Contracting Parties" in proposed Article 9(1).

289. Mr. OMOROV (Kyrgyzstan) supported the extension of the wording of Article 9(1) along the lines of the WPPT and the proposal made by the Delegation of Switzerland as contained in the document IAVP/DC/14 to use the words "their fixed performances" instead of "their performances fixed in audiovisual fixations."

290. The PRESIDENT confirmed that those proposals would be considered.

Article 10: Right of Making Available of Fixed Performances

291. The PRESIDENT noted that as to Article 10, the preliminary understanding was, as far as the English version was concerned, that the word “the” before the words “members of the public” be omitted in order to make it clear that it concerned any members of the public.

Article 13: Limitations and Exceptions

292. The PRESIDENT explained that in paragraph (1) the expression “limitations and exceptions” should be replaced by “limitations or exceptions.” Additionally, an agreed statement in line with those adopted in relation to the corresponding provisions in the WPPT and the WCT would be produced, with the necessary changes arising from the difference in the scope of protection.

Article 14: Term of Protection

293. The PRESIDENT noted that a correction should be made in the French version of Article 14 on the basis of a suggestion made by the Delegation of Burkina Faso. One delegation suggested the possibility of introducing the principle of comparison of terms for those countries which provided for longer terms of protection than that prescribed in this article. Subject to technical changes concerning the basic notions in Article 2, it was understood that the substantive content of Article 14 was confirmed.

Article 15: Obligations Concerning Technological Measures

294. The PRESIDENT stated that the expression “technological measures used by performers” in Article 15 should be construed broadly, referring also to those acting on behalf of performers, including their representatives and others, as stated in Note 15.03 of the Basic Proposal. This corresponded to the established understanding of the corresponding articles in the WCT and the WPPT. One delegation had suggested that the guideline should be included in an agreed statement. The drafted statement could also refer back to the WCT and the WPPT. It was understood that the text of Article 15 itself was confirmed.

Article 16: Obligations Concerning Rights Management Information

295. The PRESIDENT noted that in paragraph (1)(ii), the expression “unfixed performances or performances fixed in audiovisual fixations” should be changed to “performances or copies of performances fixed in audiovisual fixations.” This was intended to make the text clearer and followed more closely the language in the WPPT without changing the coverage of the scope of application. Article 19 was also subject to the possible changes in Article 2. The elements at the last one and a half line of Article 19(2) in the WPPT did not appear in the proposed Article 16. This was because it was not necessary in light of technological development. It would not imply any change to the scope of obligation under Article 16. The operations listed in the end of Article 19 in the WPPT would be covered by the language of Article 16.

296. Mr. CRESWELL (Australia) indicated that his Delegation was considering proposing that the words “a copy of” be inserted after “attached to” in the last line of draft Article 16(2) in order to bring the text closer to the language of the WPPT.

297. The PRESIDENT explained that if the word “a copy of” was added, the rest of the ending of Article 19(2) of the WPPT would have to be added. The objective of the change from the text of the WPPT was to avoid this technology-specific listing of operations so that the rights management information would be protected in relation to any use of the performance, whether it was distributed attached to a copy, or appeared in connection with a communication to the public. It had also been suggested that reference to a lawful user should be added, in case Article 12 Alternative F would be adopted. Another delegation had also pointed out that in addition to the types of information provided in paragraph (2), it might be useful to include certain other types of information, such as the nationality of the performer, the place of habitual residence of the performer, or the place of fixation of the performance. In relation to the corresponding Article 19 of the WPPT, the first part of an agreed statement provided that the reference to infringement of any right covered by the instrument included both exclusive rights and rights of remuneration. The second half stated that Contracting Parties should not rely on that article to devise or implement rights management systems that would have the effect of imposing formalities which were not permitted. Both parts were relevant to the proposed Article 16. Subject to the pending issue in regard to paragraph (2), the understanding on the text of Article 16 was confirmed.

Article 17: Formalities

298. The PRESIDENT indicated that the text would be retained.

Article 18: Reservations

299. The PRESIDENT indicated that the article would be kept open until it became clear which reservations would be allowed under the operative articles.

Article 20: Provisions on Enforcement of Rights

300. The PRESIDENT indicated that it was understood that the text would be retained.

Article 2: Definitions

301. The PRESIDENT indicated that with respect to Article 2(a) on the definition of performer, the proposal contained in IAVP/DC/16 made by the Delegation of the United States of America referred to an agreed statement on “extras,” “ancillary performers” and “ancillary participants.” The question had been well identified during the preparatory stages and had been dealt with in Note 2.03 to the Basic Proposal.

302. Mr. KEPLINGER (United States of America) stated that it was an element of earlier proposals made by his Delegation. The objective was to clarify the scope of coverage of the article. There would be some value to retaining it as an agreed statement although his Delegation acknowledged that it had been removed from the Basic Proposal.

303. Mr. SARMA (India) supported the agreed statement proposed by the Delegation of the United States of America.

304. The PRESIDENT noted that the body of the proposed agreed statement followed the language of explanatory Note 2.03.

305. Ms. PERALTA (Philippines) stated that her Delegation had no objection to the inclusion of an agreed statement according to the proposal stated in Explanatory Note 2.03. Additionally, there should be a statement regarding the determination of the threshold in national legislation as well as industry practices existing in the Contracting States.

306. Mr. REINBOTHE (European Community) stated that at this stage his Delegation reserved its position on this issue. In Note 2.03 it was pointed out that Contracting Parties might determine in their national legislation the threshold according to which a person was to be

considered a performer entitled to protection. It would be wiser to leave that to national or regional legislation.

307. The PRESIDENT commented that the explanatory note would simply serve as a guideline on this matter whereas an agreed statement would be more explicit and have more interpretative power.

308. Mr. GOVONI (Switzerland) recognized that, while a joint statement on the subject was not without its usefulness, the matter should, in the event of a dispute, be settled by a court on the basis of national legislation.

309. The PRESIDENT recalled that the expression “extras” had been used in the meetings of the Standing Committee on Copyright and Related Rights in a qualified manner by delegations and NGOs based on professional practices. The use of the expression “ancillary performer” would not be harmful. The quotation marks clarified that the word “performers” in this context was not used in the sense of performers being protected in this instrument.

310. Mr. FICSOR (Hungary), speaking on behalf of the Group of Central European and Baltic States, indicated that so far that Group had not been able to reach a common position on the proposal made by the Delegation of the United States of America to amend Article 2 by adding an agreed statement.

311. Mrs. RETONDO (Argentina) said that her Delegation was looking at the Article in question very closely, and believed that a solution could be found if the following wording were retained: “It is understood that, in general, ‘extras,’ ‘ancillary performers’ or ‘ancillary participants’ do not qualify for protection under this Instrument because they do not, in the strict sense, perform literary or artistic works or expressions of folklore.” In that way ancillary performers would not actually be considered performers, but specifically extras or secondary participants who did not meet the necessary requirements for protection, thereby avoiding any kind of confusion.

312. The PRESIDENT suggested that an understanding be fixed on this item and invited the delegations to turn to the definition of audiovisual performances and suggested that this be deleted from the text as it would have no effect on the interpretation of the substantive provisions of the Basic Proposal. He invited the Committee to turn to the definition of audiovisual fixation. The word “sound” should be replaced with “sounds” for similarity with the corresponding provision of the WPPT.

313. Mr. GOVONI (Switzerland) said that the purpose of his proposal was to simplify the basic text and provide a clear demarcation of the scope of the WPPT and of the new instrument. The definition of the audiovisual fixation proposed in Article 2(c) was intended to distinguish it from the definition of the phonogram contained in Article 2(b) of the WPPT. That definition made it possible to lighten the text of the Basic Proposal inasmuch as, in Articles 7, 8, 10, 11, 12, 14, 16 and 19, instead of mentioning “their performances fixed in audiovisual fixations,” it would be sufficient to say “their fixed performances.”

The PRESIDENT noted that during the preparatory stages, numerous alternatives had been examined before deciding on the term “audiovisual fixation.” This expression was included in

the Basic Proposal from Article 7 onwards in all operative provisions on rights within the phrase “performances fixed in audiovisual fixations” to correspond with the use of the expression “performances fixed in phonograms” in the WPPT. The use of an alternative term in Article 2 could have consequences for the substantive provisions of the draft proposal and would have to be examined.

314. Mr. KEPLINGER (United States of America) supported the draft text, in particular if it were to be read in conjunction with Notes 2.05 and 2.11. His Delegation was strongly opposed to any changes as this would create ambiguity and uncertainty.

315. Mr. BOSUMPRAH (Ghana) speaking on behalf of the African Group, requested clarification as to whether the term “audiovisual fixation” was still to be defined as his Delegation had made a proposal on this issue.

316. Mr. REINBOTHE (European Community) supported the text of Article 2(c) which drew the line with the WPPT. Explanatory Note 2.11 was an important point of reference.

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317. The PRESIDENT stated that a Swiss proposal relating to the definition of audiovisual fixation in Article 2 had been submitted with a view to simplifying the conceptual basis, and he recalled the proposal presented by the GRULAC and the remarks made by the African Group.

318. Mr. CRESWELL (Australia) expressed his opposition to the amendments and supported Article 2(c) of the Basic Proposal. Although his Delegation shared the view that a line of demarcation should be established between the WPPT and the proposed Treaty, the amendment would lead into the undefined territory of non-phonogram fixations, such as still photographs or even drawings. The focus of the Treaty in discussion was the rights of performers in the already well-recognized form of fixation, namely an audiovisual fixation. According to the definition in Article 2(b) of the WPPT, once a phonogram was incorporated in an audiovisual work, in that new context it ceased to be a phonogram, but the phonogram in the original format continued to enjoy its status and protection. Thus, if it was broadcast, Article 15 of the WPPT would continue to apply notwithstanding that it had been incorporated in the audiovisual fixation. However, if the audiovisual work incorporating the phonogram was used in a broadcast, the phonogram incorporated in it was not being broadcast for the purposes of Article 15. The WPPT supplemented by the agreed statement established its own limits and it was neither necessary nor appropriate to change that. There also seemed to be some drafting difficulties with the proposal, for instance with the proposed amendments to Articles 2(d), 11, 12, 14, 16 and 19.

319. Mr. ISHINO (Japan) stated that the definition of audiovisual fixation in Article 2(c) of the Basic Proposal should be the starting point for the discussion.

320. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, referred to the Swiss proposal and stated that the Group wanted neither to reopen any discussion on definitions that had been agreed nor to reopen any possibilities for new interpretations. His Group was not in a position to support the Swiss proposal.

321. Ms. DALEY (Jamaica) recalled that the Rome Convention contained a specific mention of variety and circus artists. Article 9 of that Convention allowed countries to extend the protection to performers that did not perform literary or artistic works. Clarification was required as to whether the definition of performers in the Basic Proposal would preclude countries from extending protection to performers who did not perform literary or artistic works or expressions of folklore.

322. The PRESIDENT stated that Article 9 of the Rome Convention was a permissive clause, which stated that the Contracting States might in their domestic law and regulations extend protection to such artists. The current negotiations were aiming at establishing minimum rights. Contracting Parties would have the freedom to introduce more extensive rights and to establish wider definitions of performers and criteria for the points of attachment.

323. Mr. SHEN (China) proposed to use the definitions in Article 2 of the Basic Proposal, but to cut out paragraph (b). There was no conflict between the Basic Proposal, the WPPT and the Rome Convention.

324. The PRESIDENT referred to the definition of broadcasting, and pointed out that three technical changes could be made aiming at making the definition of broadcasting technically closer to the definition of broadcasting in WPPT. It should read “broadcasting means the transmission by wireless means for public reception of sounds or of images, or of images and sounds, or of the representations of sounds.” An understanding on the definition of broadcasting could be reached, if the delegations agreed with that wording. As to the definition of communication to the public, the only proposal that referred to the definition was probably the proposal of the Delegation of Switzerland. He referred to a proposal presented by the Delegation of Japan (document IAVP/DC/18) concerning a new definition of “producer.”

325. Mr. ISHINO (Japan) said that Article 12, if adopted, would require a clarification regarding the notion of “producer.” The definition had been proposed taking into account the notion of the maker of a cinematographic work and the definitions of producer of phonogram in the WPPT and the Rome Convention. As to the definition of “audiovisual fixation” in the Basic Proposal, it also included any fixation embodied in a substantive copy. An agreed statement had to be incorporated in order to avoid any confusion in that respect.

326. Mr. KEPLINGER (United States of America) said that while his Delegation appreciated the efforts of the Delegation of Japan to introduce the definition of producer, the discussion on that issue had to be deferred until the completion of discussions on Article 12. If the word “producer” ended up not being used in Article 12, there would be no need for such a definition.

327. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, agreed with the statement of the Delegation of the United States of America. He pointed out

that the proposal of the Delegation of Japan was very close to the formulation which was contained in Article 2(d) of the WPPT.

328. Mr. SHEN (China) said that during the Asian Regional Consultation meeting, his Delegation had asked the Japanese Delegation whether there was a difference between producer and cinematographer and the answer had been that in most cases the producer meant the producer of cinematography. He proposed to exclude that definition from the instrument.

329. The PRESIDENT suggested deferring deliberations on the proposal of the Delegation of Japan till after deliberations concerning Article 12. Regarding Article 11, he referred to the proposal of the European Community and its Member States (document IAVP/DC/7) and the proposals of the Delegations of India and Thailand (documents IAVP/DC/20 and 21).

330. Mr. PHUANGRACH (Thailand) said that his Delegation had proposed the deletion of Article 11, because if that article was adopted, it would give Member States much flexibility in respect of the right of broadcasting and communication to the public. Some undesirable effects could arise from such provisions and it would make the application of the national treatment principle more complicated.

331. Mr. SARMA (India) proposed the deletion of Article 11 because, first, if the exclusive right of broadcasting and communication to the public had not been considered necessary in the context of the WPPT, then it could not become essential in the context of the new instrument. Second, the option of remuneration rights was very premature bearing in mind the needs of economic and social development of his country. Third, those nations which did not wish to provide for such rights could evoke Article 11(3).

332. Mr. REINBOTHE (European Community) stated that the right of broadcasting and communication to the public was a very important right for audiovisual performers, but at the same time Article 11 did not provide any meaningful harmonization of that right. The adoption of the so-called *à la carte* solution would have two consequences: First, Article 11(3) should be adjusted in such a way that there was a possibility of making a partial reservation also to Article 11(1) and, second, Article 11 would have important implications relating to national treatment under Article 4 of the Agreement.

333. The PRESIDENT recalled the suggestion by the African Group combining the references to paragraphs (1) and (2). He proposed to defer any further conclusions concerning Article 11 to a later stage.

334. Mr. ISHINO (Japan) stated that the rights of broadcasting and communication to the public, as the most important uses of audiovisual fixations, had to be considered in the new instrument. Article 11 of the Basic Proposal constituted an adequate solution which allowed Contracting Parties to choose according to their own particular situation. Therefore, his Delegation was of the strong view that Article 11 should be retained taking into consideration the national treatment implications.

335. Mr. NGUYEN (Viet Nam) explained that despite the fact that the *à la carte* solution was reasonable; his Delegation had favored originally the deletion of Article 11, in particular if the adoption of that article would lead to an obligatory remuneration.

336. The PRESIDENT mentioned that two proposals had been submitted regarding Article 4, one from the European Community and its Member States (document IAVP/DC/7) and one from the Delegation of the United States of America (document IAVP/DC/8).

337. Mr. KEPLINGER (United States of America) said that the proposal in document IAVP/DC/8 was consistent with earlier proposals made by his Delegation concerning what was a principle of fundamental fairness, implying that if performers were not paid, the collection related to their performances should not be permitted, as mentioned in the explanatory Note 4.06 of the Basic Proposal. It was an important part of the recognition of the performers' rights.

338. Mr. REINBOTHE (European Community) referred to the proposal submitted by his Delegation (document IAVP/DC/7) and suggested a new Article 4(2) which would give Contracting Parties the possibility to apply the principle of material reciprocity to the rights covered by Article 11. Since some interpretative guidance was needed on the concept of material equivalence, it would be useful to add to Article 4(2) an agreed statement about the comparison of the material equivalence in different countries' systems of protection. The drafting of the new Article 4(2) was based largely on Article 4(2) under Alternative C which itself already contained the notion of material reciprocity.

339. Mr. GOVONI (Switzerland) felt that the proposal by the United States of America to amend Alternatives C and D by inserting a new paragraph in Article 4 was unnecessary: in that case the charging of remuneration would have no underlying legal justification, and therefore would be improper and legally baseless. Such a new paragraph would be superfluous.

340. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, drew the Committee's attention to the fact that the Group was considering a proposal on Article 2(c). Article 11 was so important to audiovisual performers that deleting it would be unacceptable. His Group preferred a right which maintained the balance between the users and the performers by means of an easily administrable equitable remuneration. Article 4, Alternative C, was more or less an original proposal, and Alternative D was related to the WPPT. The new proposal submitted by the European Community was a kind of combination of Alternatives C and D.

341. Mr. GANTCHEV (Bulgaria), on behalf of the Group of Central European and Baltic States, supported the European Community's proposal on Article 4. The three proposed articles reflected to a great extent the position of his Group. Paragraph (3) of that article could be more precise by replacing "a" with "another." The agreed statement was not clear enough.

342. The PRESIDENT said that Article 4 could be deferred to further deliberations at a later stage.

343. Mr. KEPLINGER (United States of America) supported the right of broadcasting because it was an important right for performers in the digital era. Some delegations had suggested the

introduction of material reciprocity in the partial reservation in respect of Article 11 in an effort to resolve certain concerns with respect to their rights. His Delegation was seriously looking at the possibility that Article 11 remained in its present form and the possibility of extending the reservation to paragraph (1). His Delegation had some concern with the proposal related to material reciprocity as it could weaken the broadcasting and communication to the public rights. It was necessary to understand the whole package of the final Treaty including what rights and what kinds of national treatment were granted therein, before making a final decision on the availability of a material reciprocity provision.

344. The PRESIDENT took note of the additional position expressed by the Delegation of Ghana concerning Article 11 in the context of Article 4. He invited the Committee to tackle Article 12. He recalled that there were two proposals concerning Article 12, proposal IAVP/DC/12 submitted by the Delegation of the European Community and proposal IAVP/DC/22 submitted by the Delegation of the United States of America.

345. Mr. REINBOTHE (European Community) said that his Delegation continued to favor Alternative H. Document IAVP/DC/12 contained a provision clarifying that Contracting Parties were free to provide for transfer of the economic rights provided by the instrument. Countries that had models of transfer in place, could maintain those rules in the absence of any provision on transfer. His Delegation's proposal on Article 12 was designed to accommodate the concerns of those that believed that the protocol should contain a provision on transfer. The proposal also included an agreed statement concerning the law applicable to a transfer by agreement, which drew upon Alternative G of the Basic Proposal. If the issue of applicable law was not taken into account carefully, it could affect existing obligations which were in place at national and international levels. The middle part of the agreed statement established a general rule: private parties to an agreement were free to choose the law applicable to a transfer clause contained in the agreement. Where no such choice of law had been made in the agreement, the agreed statement would confirm that the law of the country most closely connected with the private agreement should apply. Those two general rules which were reflected in the agreed statement were combined with two conditions: the possibility to choose the law and the application of the law of the country most closely connected with the private agreement. The latter condition was mentioned in the last phrase of the agreed statement that read "without prejudice to any mandatory rules." A country could choose to let such mandatory rules override private agreements, and that choice had to be respected.

346. Mr. KEPLINGER (United States of America) stated that, like the European Community, his Delegation was also looking for a solution to the matter of Article 12, and it believed that the preferable solution was Alternative E. Its proposal (document IAVP/DC/22), however, had drawn elements from Alternatives F and G to come up with elements that could be acceptable to a very broad number of parties. In that respect, some support had been expressed for the principle embodied in Alternative F, the principle underlying Article 14*bis* of the Berne Convention as well as for the African proposal reflected in Alternative G. Therefore, the new proposal referred to the entitlement to exercise any of the exclusive rights of authorization that should, in the absence of an agreement to the contrary by the performer regarding applicable law, be governed by the law of the country which was most closely connected with the particular audiovisual fixation. His Delegation had some concerns about the need for some particular guidance with respect to the applicable criteria. Rather than being mandatory, they should be

illustrative and provide guidelines that judges might consider in determining the country most closely connected to the contract. In addition, the proposal included an agreed statement which clarified that the provisions would not affect the exercise of moral rights and rights of equitable remuneration.

347. Mr. STOCKFISH (Canada) was concerned about the accuracy of the French version of the proposal by the United States of America, where paragraph (2) read “*sur le territoire de laquelle a lieu l’essentiel de la prise de vue.*” According to him, the phrase “*la plus grande partie des prises de vue*” was a better rendering of “most of the photography.”

Tenth Meeting
Friday, December 15, 2000
Morning

348. The PRESIDENT opened the floor for discussion on the work of Main Committee I and stated that it had been suggested that a sub-group be established to make progress in the negotiations. Each group would be represented by its coordinator and four other delegations appointed by the group. However, only one person would speak on behalf of the group. Group meetings could also be held to facilitate consultation with the other members of the respective groups. The results of the discussions of the sub-group would be presented to Main Committee I.

349. Mr. COUCHMAN (Canada) informed the President that interventions had so far been made by three members of his Delegation and he requested that they be allowed to continue to do so if they were included in the sub-group.

350. Mr. GOVONI (Switzerland) expressed reservations as to the desirability of setting up sub-groups. Any introduction of new structures was liable to present organizational problems and delay work.

351. The PRESIDENT stated that the proposed structure should be put in place and evaluated before deciding on whether or not it should be revised.

352. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, supported the proposed work structure in order to accelerate the discussions in Main Committee I.

353. Mr. CRESWELL (Australia) wondered if the participation of observers could be allowed if the number of interested delegations were to exceed the number of places allocated to a group.

354. The PRESIDENT stated that to increase the efficiency, the proposed work structure should be adopted for the time being and its results evaluated before deciding whether or not to revert to informal consultations with the participation of all government delegations.

355. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of the GRULAC, said that the Group endorsed the proposal that had been made in a spirit of cooperation so that the work might progress. She did however wish to make it clear that it was a procedure that was not provided for in the rules, and one that carried a great deal of risk, including lack of transparency. She asked for that to be the possibility of holding regional consultations while the activities of the sub-group of the Main Committee were going on.

356. Mrs. ABDOU (Madagascar), speaking on behalf of the African Group, was in favor of the proposal and designated Algeria, Benin, Burkina Faso and Ghana as its members within the working group.

357. Mr. GOVONI (Switzerland) wondered whether the proposal to set up a sub-group was supported by the rules of procedure, and suggested continuing to hold informal meetings with all delegations until the procedural point had been clarified.

358. The PRESIDENT explained that according to Rule 12.3 of the Rules of Procedure, a Main Committee could create its own working groups. The working group's tasks should be specified by the Main Committee, which was also required to decide on the size of the working group and elect its members from among the member delegations. The Secretariat could be consulted if further clarification was required on the Rules of Procedure.

359. Mrs. WEIL-GUTHMANN (France), speaking as Coordinator of Group B, announced that her Group would meet to examine the Director General's proposal.

360. Mrs. RETONDO (Argentina) fully supported what had been said by the Coordinator of the GRULAC regarding the concerns over working methods. She also agreed with what had been said by Australia to the effect that the setting up of an ad hoc group would restrict work. The question had to be asked whether in fact, after the findings of the group were submitted to the Plenary, the eventual results would also be achieved more rapidly, or whether on the other hand just another negotiation process would start. She accepted the idea that the working group should be open, so that those delegations wishing to do so could follow the discussions as observers, thereby avoiding a negation of the meaning of a Diplomatic Conference, at which precisely every country participates according to its sovereign rights. She also expressly reserved her opinion on the eventual findings of the working group.

361. Mr. RAJA REZA (Malaysia) speaking on behalf of the Asian Group, expressed support for the setting up of a smaller group in order to advance the work of Main Committee I. He also emphasized the need for transparency.

362. Mr. GOVONI (Switzerland) said that the terms of reference of the working group should be laid down.

363. Mr. RASHID SIDDIK (Egypt) stated that although his Delegation was ready to join the consensus for the establishment of a working group, it supported the interventions of the Delegations of Australia and Argentina that observers be allowed to participate in the working group.

364. The PRESIDENT stated that, in order to make progress in the discussions of Main Committee I, the working group should be established. Progress would be assessed and evaluated after one or two sessions before deciding on whether or not the proposed work procedure should be revised.

365. Mr. SHEN (China) stated that in the interest of transparency, observers should be allowed to take part in the working group.

366. The PRESIDENT suggested that the proposed structure be adopted for the moment. The working group was not a decision-making body. Its proposals would be submitted to Main Committee I. Provisions would also be made for consultations within each group.

367. Mr. RASHID SIDDIK (Egypt) stated that unless observers were allowed to participate, his Delegation would not be able to accept the setting up of the working group, as a small group of delegations should not be allowed to decide on the fate of the proposed instrument. The admission of observers to the working group was a minimum requirement.

368. The PRESIDENT reiterated that the working group would not have any decision-making power.

369. Mr. RASHID SIDDIK (Egypt) stated that the group would be engaged in the drafting of the text and, as such, it was essential that observers be allowed to attend.

370. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, stated that some delegations were overestimating the terms of reference of the working group, while also underestimating its transparency. The working group was only responsible for preparing proposals and finding solutions to certain difficult issues and was not empowered to make any decisions. No country would be excluded from the process as the members of the working group would represent their respective groups and work would be conducted at the expert level. Solutions would be presented to the regional groups for consideration and to Main Committee I for approval.

371. Mr. CRESWELL (Australia) noted that the issue of observers could be resolved through an amendment to the Rules of Procedure. Group B should be given an opportunity to consult before embarking on any further discussions.

372. The PRESIDENT reiterated that the proposed procedure should be established, tested and evaluated before contemplating any changes to the proposed work structure.

373. Mr. STOCKFISH (Canada) supported the creation of the working group and associated his Delegation with the intervention of the Delegation of the Russian Federation. The tasks of

the working group could be confined to the articles that required most attention. It was also clear that it would report to Main Committee I.

374. Mr. GOVONI (Switzerland) repeated that the terms of reference of the working group should be laid down.

375. The PRESIDENT noted that there was an understanding in Main Committee I to establish a working group, the mandate of which was to examine the remaining open questions and suggest solutions to the Main Committee.

Preamble

376. The PRESIDENT opened the floor for discussion on the Preamble. He recalled that there had been no objections concerning his proposed amendments and suggested that an understanding be established.

377. Mr. ISHINO (Japan) suggested that the word "the" be inserted in the first line of the Preamble before the phrase "rights of performers" to correspond with the wording of the preamble to the WPPT.

378. The PRESIDENT agreed that this should be incorporated in an understanding. Noting that no further delegation asked for the floor, he confirmed that an understanding on the Preamble had been reached.

Article 3: Beneficiaries of Protection

379. The PRESIDENT recalled that there were three proposals regarding Article 3. As most delegations would be willing to accept the text of the Basic Proposal, he asked the Delegations of the United States of America and of the European Community to reconsider their proposals on the issue.

380. Mr. REINBOTHE (European Community) stated that although his Delegation continued to have concerns over Article 3(2), it could accept the text contained in the Basic Proposal if it would pave the way for an overall compromise. However, the agreement of his Delegation on this Article depended upon the final outcome.

381. Mr. KEPLINGER (United States of America) stated that although his Delegation continued to believe that the points of attachment should be expanded in order to extend the application of the instrument to as many performers as possible, it would be willing to accept the text contained in the Basic Proposal as it reflected the minimum requirements on the points of attachment.

382. The PRESIDENT reiterated that all understandings were based on the premise that everything would remain open until the entire text was adopted and presented to the Diplomatic Conference. He noted that an understanding had been reached on Article 3.

Article 9: Right of Rental

383. The PRESIDENT recalled that during the first reading, there had been an understanding that a draft agreed statement would be proposed in relation to Articles 8 and 9. It would follow the form and contents of the agreed statement to the corresponding articles of the WPPT. Most delegations were ready to have an understanding based on the text contained in the Basic Proposal, and he asked whether it would be possible to have an understanding on Article 9.

384. Mr. SHEN (China) reiterated that during the first reading, his Delegation had agreed with the Delegation of Switzerland that the phrase “as determined in the national law of Contracting Parties” should be included in Article 9(1) after the term “audiovisual fixations.”

385. The PRESIDENT clarified that an understanding had been fixed on Article 9(1) with the inclusion of the phrase just referred to by the Delegation of China. An understanding had not been reached on Article 9(2), as some delegations had raised concerns regarding the application of the material impairment test included under that provision.

386. Mr. REINBOTHE (European Community) said that his Delegation continued to believe that the material impairment test should parallel the corresponding provision in the WPPT. The similarity between Article 9(2) of the Basic Proposal and Article 11 of the TRIPS Agreement was also dangerous in view of its implications on national treatment. Concerns had also been raised by some other delegations in relation to the text contained in the Basic Proposal. His Delegation could, however, reconsider its concerns.

387. The PRESIDENT noted that the Delegations of Bulgaria, the United States of America, Switzerland, Japan and Australia had also taken the floor on this issue during the first reading of Article 9. Some had supported the Basic Proposal while a few had expressed concerns.

388. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that his Group had raised certain concerns in relation to Article 9(2). Although it preferred the text corresponding to the wording contained in the WPPT, it was willing to reconsider its position.

389. Mr. GOVONI (Switzerland) said that he would prefer to have paragraph (2) drafted in exactly the same way as paragraph (2) of Article 9 of the WPPT. He was however willing to show some flexibility in that respect.

390. The PRESIDENT took note of the indications of flexibility and suggested that Article 9 be left open for the moment.

391. Article 2: Definitions

392. The PRESIDENT recalled that there was an understanding on the definition of performers, subject to a proposed agreed statement from the Delegation of the United States of America. There was also an understanding on the definition of broadcasting and one on the definition of audiovisual performances that would be deleted. The only definitions that remained open were those concerning audiovisual fixation and communication to the public. The definition of communication to the public was left open as it was dependent on the definition of audiovisual fixation or fixation.

393. Mr. GOVONI (Switzerland) said that his proposal regarding Article 2(c) was intended to settle the question of the scope of the WPPT and of the new instrument. In a spirit of compromise, his Delegation withdrew its proposal and subscribed to that of the European Community, whose proposed joint statement sought to achieve the same objective.

394. Mr. REINBOTHE (European Community) reiterated that the scope of application of the WPPT should be respected, and as such its definitions should not be called into question. His Delegation believed that the definition of audiovisual fixation in the Basic Proposal provided a very useful basis for further discussion. It should not prejudice Article 2(b) of the WPPT and its agreed statement on the definition of a phonogram. His Delegation had proposed an agreed statement to this effect. It was preferable that some clarification be provided without any modification to the text of the Basic Proposal. The proposed statement was identical to the agreed statement included in relation to the mentioned provision of the WPPT.

395. Mr. KEPLINGER (United States of America) stated that his Delegation continued to believe that no further clarification was required in relation to the text contained in the Basic Proposal. However, as some delegations were of the view that further clarification was necessary, he expressed support for the proposal submitted by the European Community and its Member States.

396. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, associated his Delegation with the intervention of the Delegation of the United States of America. The text of the Basic Proposal and the proposed agreed statement by the European Community provided a clear definition of audiovisual fixation.

397. Mr. ISHINO (Japan) supported the proposal submitted by the European Community and its Member States.

398. The PRESIDENT stated that there appeared to be broad support for the proposal by the European Community and noted that laws were increasingly based on the expression "moving images" instead of a more detailed expression. This was done in order to extend the coverage to the digital environment where the impression of movement was caused not by a series of images but rather by constant changing small parts of the image.

399. The PRESIDENT adjourned the meeting.

Eleventh Meeting
Sunday, December 17, 2000
Afternoon

400. The PRESIDENT provided a summary of the discussions which had taken place in the working group. Although it had been decided that the issue of national treatment and the link between Articles 4 and 11 would be discussed at a later stage, a conditional understanding had been reached on the contents of Article 11 based on the proposal submitted by the European Community and its Member States. Language had also been developed on Article 5 and its proposed agreed statement. Also Article 19 had been thoroughly examined and the model of the Basic Proposal and that of the WPPT had been considered. Main Committee II had also discussed Article 1 following its decision in favor of the proposed common Assembly for the WPPT and the instrument. The working group would submit a proposal to Main Committee I on Article 1 at a later stage. Although the issue of whether membership should be linked to membership in the WPPT would be discussed in Main Committee II, the working group had agreed to propose to Main Committee I that the new instrument be named the WIPO Audiovisual Performances Treaty. Article 12 had also been discussed and some progress had been made on the drafting of an enabling clause. The ideas contained in Alternative G on applicable law and the recognition of contractual arrangements had been taken to the draft article as a second paragraph. This included a statement that parties had the freedom to choose the applicable law to a contract. If the applicable law were not determined by the parties then the law of the country most closely connected with the agreement would be applicable. There was also an understanding that mention would be made that the contractual arrangements referred to in Article 12 would only apply to the exclusive rights of authorization and not to moral rights and the right of equitable remuneration.

401. Mr. REINBOTHE (European Community) stated that Article 12 involved private international law. Rules on private international law were not found in other copyright treaties because they were of a horizontal character to be applied across the board. As such, the Diplomatic Conference should refrain from introducing new rules in this area. For this reason his Delegation preferred Alternative H of the Basic Proposal but considerable efforts had been made to accommodate the requests from other delegations to have something stated in the instrument. An enabling clause had been suggested which stated that Contracting Parties would be free to provide for models relating to the transfer or exercise of rights. It might also be useful to include, in an agreed statement, that the parties to a contract may determine the law applicable to the transfer. To the extent that the law applicable to the contract was not chosen by the parties, the law of the country most closely connected to the contract would apply. His Delegation could not join a consensus going beyond such a confirmation. He referred to the working paper prepared by the President and stated that, while this would be discussed further in the working group, its contents appeared to go beyond the limits required by his Delegation.

402. Mr. KEPLINGER (United States of America) stated that the issue was not as complex as spelled out by the European Community. The proposal relating to private international law had been around for several months prior to the preparation of the Basic Proposal and it was an

issue within the scope and expertise of the Diplomatic Conference, as it was to be applied only to the requirements of the proposed Treaty. The solution proposed by the President as a possible compromise was a simple straightforward solution and could form a basis for an agreement that would satisfy his Delegation's requirements without doing any harm to the concepts of international law. To arrive at a compromise, his Delegation had moved considerably from its original preference for Alternative E but for his Government to ratify the proposed Treaty there would have to be meaningful provisions on the transfer of the exclusive rights of authorization.

403. The PRESIDENT stated that these interventions demonstrated both the political difficulties and the legal complexities surrounding Article 12.

404. Mr. MURPHY (United Kingdom) stated that it was important for all delegations to work towards finding an acceptable solution. He referred to the President's working paper and stated that it raised more questions than it answered. Although there was a reference to contractual arrangements in paragraph (1), that same paragraph also referred to the transfer of rights, which seemed to involve statutory rather than contractual arrangements, while the subsequent reference to the consent by the performer involved the realm of contract. That paragraph created a real risk of cross currents between the areas of statutory and contractual provisions. There was a need for clarity that Contracting Parties were free to choose the provision they wanted to include in their national laws on the transfer of rights and the proposals from the European Community (document IAVP/ DC 12) and China (document IAVP/DC 31) were appropriate in this regard. There was also a need to avoid inconsistencies with private international law.

405. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, referred to Alternative G in the Basic Proposal, originally proposed by that Group, which was based on Article 5(4) of the Berne Convention. He believed that there would have been more headway if Alternative G had been used as the basis for the discussions on this issue. Additional proposals had been made but these appeared to create more problems than they would solve. His Delegation continued to believe that the proposal of the African Group would form a good basis for finding a solution to this difficult issue.

406. Mr. GUIASOLA GONZÁLEZ DEL REY (Spain), referring to the proposal that had been put forward as a working document on Article 12, to which a number of delegations had also referred, said that he shared the concern shown by other delegations such as those of the European Community and the United Kingdom, which had voiced some misgivings regarding its contents. The assignment of performers' rights was an important question which was settled differently in different laws and according to different national traditions, and ultimately it was precisely in that national environment that it should be dealt with. If it partly sacrificed its initial assumptions for the sake of achieving some results that could satisfy all parties involved in the negotiation, his Delegation could appreciate the possible usefulness of having a rule in the future instrument, like the one submitted by the European Community and its Member States, which allowed States to legislate at the national level on whether or not the rights of performers could be assigned subject to respect for prevailing legal traditions. The document submitted by the Chair did not meet those conditions, and indeed on the contrary could seriously affect the

operation of the current system, as it had the effect of introducing new rules on the legislation applicable to contracts.

407. Mr. SØNNELAND (Norway) favored Alternative H, but could support the proposal submitted by the European Community and its Member States as it had the merit of flexibility and precision in its enabling clause. The proposed agreed statement confirmed that a transfer by agreement was without prejudice to international obligations and that the mandatory rules in the law of the country where protection was sought would be respected. His Delegation hoped that the proposal would form the basis for further work, and in this context, he associated his Delegation with the interventions by the Delegations of the European Community and the United Kingdom.

408. Mr. PHUANGRACH (Thailand) associated his Delegation with the intervention of the European Community.

409. Mr. GOVONI (Switzerland) expressed concern regarding Article 12. He considered that the Treaty should be silent on the subject, as the relations between producers and performers had to be governed by contract, with the national legislator being allowed to lay down specific rules in that area. As for the implementation of contracts at the international level, there were established rules in private and international law that allowed contracting parties to choose the law applicable. According to him, a compromise solution should not go beyond what was proposed in documents IAVP/DC/12 and IAVP/DC/31.

410. Mr. CRESWELL (Australia) congratulated the President on his work. He stated that his Delegation would like to engage in further discussion before formulating its position on that difficult issue. The concerns raised by the Delegation of the United Kingdom in relation to paragraph (1) of the working paper were important and should be discussed. A transfer provision was necessary. Some delegations had insisted that there should be no interference with the principles of private international law, but these principles often included imprecise concepts. He referred to Article 5(3) of the Basic Proposal on the applicable law in disputes relating to moral rights. His Delegation felt that there was room for compromise.

411. Mr. SARMA (India) reiterated that although his Delegation had initially preferred Alternative E it was necessary to compromise and as such, it had carefully examined all the proposals that were on the table and it was currently in the process of examining the working paper prepared by the President. The “permissive clause” included under that proposal appeared to be an *à la carte* provision in the sense that it provided the Contracting Parties with a choice, and as such, it provided a good basis for further discussion. His Delegation also wondered if the language relating to the law applicable to contracts could be further refined to remove the concerns of some delegations.

412. The PRESIDENT concluded by stating that each and every element of the current proposals would be explored in the search for an acceptable solution but all delegations had to show flexibility in the efforts to reach a consensus.

Twelfth Meeting
Wednesday, December 20, 2000
Morning

413. The PRESIDENT suggested that progress be made without opening the floor for substantive discussions. Noting that this was accepted by the Committee, he invited the Committee to adopt all articles indicated in bold type in document IAVP/DC/33 with two corrections. First, Article 3(2) should be in bold type and second, the agreed statement concerning Article 2(c) as contained in document IAVP/DC/25 should be included. At the same time, he invited the Committee to adopt all articles in document IAVP/DC/34, except Articles 4, 5(1) and 12. The President noticed that the Delegation of Mexico had a point of order.

414. Mr. HERNÁNDEZ BASAVE (Mexico) proposed revising the Spanish version of the text, in view of the fact that there were some errors in relation to the English version. He suggested working on the matters that were pending in the negotiations, while the Secretariat drew up a more orderly version of the document in all languages. He said that his Delegation would then be in a position to give its formal endorsement, in Committee, to the understandings reached by the group.

415. The PRESIDENT suggested that the Committee adopt in substance the 17 articles, subject to proper correction in the Drafting Committee of the different language versions. If any further steps would be taken at the Diplomatic Conference, fully corrected texts in all languages should be presented to the Plenary for adoption. Noting that that solution satisfied the Delegation of Mexico, the President stated that he would interpret any request for the floor to mean that there was no consensus. The adoption covered, however, only the text contained in the said documents and it did not preclude later adoption of additional elements or text. Furthermore, drafting errors in all languages could be corrected in the Drafting Committee.

416. *Main Committee I adopted, by consensus, the Preamble and Articles 2, 3, 5(2) and (3), 6, 7, 8, 9(1), 10, 13, 15, 16, 17 and 20, as contained in document IAVP/DC/33, with the corrections indicated by the President of the Committee and the Title and Articles 1, 9(2), 11, 14, 18 and 19, as contained in document IAVP/DC/34 with the corresponding agreed statements.*

417. The PRESIDENT suggested that Main Committee I adopt without further discussion Article 5(1) on moral rights and the agreed statement concerning that article.

418. Mr. KEPLINGER (United States of America) requested for clarification which version of Article 5 was being considered.

419. The PRESIDENT replied that the version contained in document IAVP/DC/34 was being considered.

420. Mr. HERNÁNDEZ BASAVE (Mexico) wished to have it made clear whether or not Article 14 was adopted, as it appeared in bold type in document IAVP/DC/33 and also figured in document IAVP/DC/34.

421. The PRESIDENT clarified that the text in document IAVP/DC/34 prevailed over the text in IAVP/DC/33. The differences in the two documents were due to the fact that the working group had suggested changes to the earlier understanding of Main Committee I.

422. *Main Committee I adopted, by consensus, Article 5(1) and the agreed statement concerning Article 5, as contained in document IAVP/DC/34.*

423. The PRESIDENT congratulated the Committee on the introduction of moral rights for performers in the audiovisual field. He invited the Committee to consider Article 4 on national treatment, underlining that any delegation had the possibility to stop the process at any moment. The President made the following declaration: “during the work of Main Committee I, a proposal was made to include in the Treaty a provision stating that no Contracting Party should allow collection of remuneration in respect of performances of nationals of another Contracting Party, unless distribution of such remuneration is made to those nationals. Such rules have not been taken to the text of the Treaty. It is understood that there is no legal basis for collection of remuneration in a Contracting Party in respect of nationals of another Contracting Party for rights that it does not accord to those nationals. Collections in such circumstances would be inappropriate and without legal authority. Therefore all those from whom such remuneration is claimed should have legal remedies against the payment. Where remuneration is collected, on the basis of proper mandates, in a Contracting Party for rights that it accords to the nationals of another Contracting Party, but not distributed to them, those nationals should have legal means to ensure that they received the remuneration collected on their behalf.” The President asked the Committee whether Article 4 could be adopted with the understanding that the declaration he had just made would be taken to the Records of the Diplomatic Conference¹.

424. *Main Committee I adopted, by consensus, Article 4, as contained in document IAVP/DC/34.*

425. The PRESIDENT recalled the statement of the Director General of WIPO in the Plenary that one possibility was to report what had been achieved so far at the Conference to the General Assembly of WIPO. Another possibility was to proceed to the adoption of the Treaty in this exceptional situation with little time available. A slight technical possibility existed in this respect if the Committee could proceed further without debates, because any debates would immediately consume all the time that would be needed for the remaining steps of the process.

426. Mr. ARGUDO CARPIO (Ecuador) said that, with a view to making satisfactory progress enhanced by input from all delegations, there should at least be a paper copy available of the statement read out by the President.

427. The PRESIDENT suspended the meeting for informal consultations.

¹ See Declaration on Article 4 by the European Community (Document IAVP/DC/39).

Thirteenth Meeting
Wednesday, December 20, 2000
Afternoon

428. The PRESIDENT invited the Committee to consider Article 12. The procedure applied to other articles would not be used and the floor was open for a debate. Much effort and thought had been put into the analysis and consultations with respect to Article 12. The question was whether any delegation had a solution.

429. Ms. DALEY (Jamaica) proposed in a spirit of compromise that Article 12(2) should read as follows: "without prejudice to international obligations and to public or private international law, a transfer by agreement of exclusive rights of authorization granted under this Treaty, or the right to exercise such rights with the agreement of the performer to the fixation, shall be governed by the law of the country chosen by the parties or, to the extent that the law applicable to the agreement between the performer and the producer has not been chosen, by the law of the country with which the agreement is most closely connected."

430. Mr. UGARTECHE VILLACORTA (Peru) remarked that the proposal by the Delegation of Jamaica was very similar to that made in the course of the working meeting two mornings previously, so that his Delegation had no objection to supporting it.

431. Mr. SARMA (India) asked for clarification of the difference between the texts in the document IAVP/DC/34 and the proposal put forward by the Delegation of Jamaica. It was not clear as to whose right to exercise was in question.

432. Ms. DALEY (Jamaica) clarified that it meant the right of the producer, because in the rest of the paragraph, the agreement between the performer and the producer was referred to.

433. Mr. SARMA (India) expressed his understanding that the Treaty was for the rights of performers, and it was confusing to see a right of producers being introduced at that stage.

434. Mr. GOVONI (Switzerland) asked for further clarification of the difference between the proposal made by the Delegation of Jamaica and the text in paragraph (2) in document IAVP/DC/34, with the second square brackets.

435. Mr. UGARTECHE VILLACORTA (Peru) sought clarification on the definition of the most closely connected country, regarding it as an element essential to the future application of the provisions by the judiciary.

436. The PRESIDENT answered that the question had been discussed in the working group. The notion was quite established in the area of private international law and therefore no further criteria were included in the proposal.

437. Mr. UGARTECHE VILLACORTA (Peru) explained that he merely wished to know the President's opinion on the manner in which the requested definition was interpreted. It would normally have been easier for the courts to understand the criterion of connection according to the country in which the protection was sought.

438. Mr. GOVONI (Switzerland) recalled his question regarding the proposal made by the Delegation of Jamaica. The difference between the second Alternative in document IAVP/DC/34 and the proposal of the Delegation of Jamaica was not clear to him.

439. The PRESIDENT invited the Delegation of Jamaica to offer an analysis of the difference between its proposal and the text in the second square brackets of paragraph (2).

440. Ms. DALEY (Jamaica) replied that in her opinion the right to exercise rights could derive from an agreement, a contract or another legally binding agreement. Therefore the "right" to exercise such rights by agreement was not as strong as the word "entitlement" to exercise such rights.

441. Mr. CRESWELL (Australia) agreed with the Delegation of Jamaica that the proposal of that Delegation referred to the right of the producer to exercise the performer's rights. The words "with the agreement of the performer" underlined that, in that the performer would not need an agreement to exercise his or her own rights. Therefore the focus was on the producer's right to exercise the rights of the performer.

442. Mr. TROJAN (European Community) warned against entering a territory beyond the call of the Treaty, which was the rights of performers. The last few days' discussions of the possibility to find a solution on the issue of transfer of rights had shown that delegations had very different or even quite opposite concepts on that issue. Efforts had been made to gap the differences, but the issue was too serious to be solved by mixing different texts on matters entering the territory of international private law, particularly that related to applicable law, without clear understanding of the matters being discussed. He suggested deleting paragraph (2) of Article 12 in document IAVP/DC/34 and retaining paragraph (1). Substantial progress had been made with the rest of the Treaty, and he complimented the President and the Director General of WIPO for their endeavors. At this stage it depended on the presidency of the Conference and Main Committee I and the Director General of WIPO to decide the ways and means to safeguard the substantial progress made.

443. The PRESIDENT invited the Committee to explore the prevailing opinions regarding the proposals on the table, namely the alternatives in paragraph (2) as contained in document IAVP/DC/34 and the proposals put forward by the Delegations of Jamaica and the European Community.

444. Mr. KEPLINGER (United States of America) stated that his Delegation had consistently underlined the importance of ensuring that transfers of the rights of performers under national laws were not put in jeopardy. To address the issue, it had originally proposed a presumption of transfer in each jurisdiction and, as other ideas had been put on the table, it had been prepared to support proposals based on any one of the options laid out in the Basic Proposal with the only exception of Alternative H. It had also carefully considered the further compromise-

oriented proposals of the African Group, China, Peru and Switzerland and most recently the significant contribution offered by Jamaica. It could not abandon the basic principle that all countries, whatever their legal system, should respect the legal relationship established by the performers and the producers when they first made their films or television shows. His Delegation expressed its thanks to Australia, African countries, Bulgaria, Canada, Eastern European countries, Guatemala, Jamaica, Japan, Peru, Switzerland, and all the others who had struggled to find a solution to this problem. He urged delegates to consider the compromise proposal put forward by the Delegation of Jamaica.

445. Mr. GOVONI (Switzerland) agreed with the Delegation of the United States of America that contracts must be respected. This concept was completely fulfilled by paragraph (2) in the first alternative as put forward in document IAVP/DC/34, and his Delegation could support that alternative.

446. The PRESIDENT asked the Delegation of Jamaica whether those delegations which could not agree with the Jamaican proposal could take a closer look at the text and possibly suggest some amendments.

447. Ms. DALEY (Jamaica) replied that her Delegation had put forward a proposal in an effort to facilitate an agreement and a consensus. If it were not acceptable to some, the Delegation would not insist on the proposal.

448. The PRESIDENT asked the Delegation of the European Community whether it could take a closer look at the proposal of the Delegation of Jamaica and possibly consider any amendments that would make it acceptable for it.

449. Mr. TROJAN (European Community) stated that from the outset his Delegation did not wish to include any provision on transfer of rights in the Treaty, but after discussion it had accepted Article 12(1). His Delegation had made a number of proposals to include some language in the Preamble or in an agreed statement, in order to accommodate those delegations who would have difficulties in not having any Article 12 at all. He was not sure if it was worthwhile to start collective drafting of Article 12(2), and therefore reiterated his suggestion to delete paragraph (2) but maintain paragraph (1). His Delegation was still prepared to work on the language as a way to safeguard the considerable work that had been done in the Diplomatic Conference.

450. Mr. ISHINO (Japan) noted the considerable efforts that had been made in order to establish new international rules for the protection of audiovisual performances. In the course of the discussions many delegations had made concessions in order to get the new rules in place, which were awaited by all interested parties. The Conference should not lose the opportunity to reach a consensus based on the proposal of the Delegation of Jamaica.

451. Mr. BOSUMRAH (Ghana), speaking on behalf of the African Group, stated that his Group consented to Article 12(1) as contained in document IAVP/DC/34. Concerning paragraph (2), the group wished that everybody would be open to further discussion and necessary compromise. It raised the possibility of taking Article 12(2) into a protocol to the proposed Treaty.

452. The PRESIDENT suggested spending some time for consultations between the delegations to see whether a consensus could be reached. He suspended the meeting.

[Suspension]

453. The PRESIDENT summarized the proposals made so far.

454. Mr. BOSUMPRAH (Ghana) clarified that the African Group consented to paragraph (1) of Article 12. Concerning paragraph (2), the Group was open to further discussions and necessary compromise.

455. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that these countries found merit in the African proposal the way it had been put forward before the break. The Conference had reached agreement on 99% of the Treaty, and it would be regrettable to leave the room without anything. Accepting all articles but Article 12(2) could be some success, but as the group had always recognized the importance of the issues that were dealt with in that paragraph, they should be tackled in an appropriate manner. Although a consensus had not been reached at the moment, the Group could commit itself to reach an agreement on those issues through the adoption of an additional optional protocol when the necessary process had taken place and a solution was ready.

456. The PRESIDENT noted that the proposal of the African Group was convergent with that of the European Community, and observed that no consensus seemed to emerge.

457. Mr. CRESWELL (Australia) noted that the working group had reached consensus on most of Article 12(2). There was a lot of merit and attraction in the alternative suggested by the Delegation of Jamaica and his Delegation was prepared to support it. As another alternative, he suggested the following text to begin Article 12(2): "Without prejudice to international obligations and to public or private international law, the transfer by agreement of exclusive rights of authorization granted under this treaty, or the exercise of such rights pursuant to the agreement with the performer to the fixation, shall be governed..."

458. The PRESIDENT noted that six proposals were on the table and there seemed to be no consensus. He noted that the proposal by the European Community and the proposal by Ghana, on behalf of the African Group, converged in that they both suggested to retain paragraph (1) but the African Group also declared itself open for further discussion and compromise regarding paragraph (2).

459. Ms. ABOULNAGA (Egypt) agreed with the Delegation of Bulgaria that it would be more than sad if the Conference would conclude without an agreement. Her Delegation proposed to adopt Article 12(1) and delete paragraph (2). Then a President's statement would refer to the fact that those unresolved issues would be subject of further consideration. That proposal would safeguard the very significant progress that had been achieved so far.

460. Mr. TROJAN (European Community) seconded the proposal submitted by the Delegation of Egypt.

461. Mr. KEPLINGER (United States of America) said that the proposal of the Delegation of Egypt raised a number of issues. An answer was not simply to delete paragraph (2). As stated by the Delegation of India, his country was a major producer of motion pictures, television productions and other audiovisual works. His Delegation wanted to achieve a balanced treaty that improved in a significant way the rights of performers, and did not harm the ability of producers of motion pictures to exploit them to the benefit of everyone involved. Without paragraph (2), that balance would be removed.

462. The PRESIDENT noted that there were seven proposals which he would repeat chronologically to see if any of them could be adopted by consensus, using the same procedure as earlier, meaning that any request for the floor would indicate lack of consensus. The proposal of the Delegation of Jamaica to amend the text in document IAVP/DC/34 had been supported by the Delegations of Peru, the United States of America and Japan. Noting that there were clearly diverging opinions, he stated that it could not become the consensus proposal. The proposal submitted by the Delegation of the European Community to retain paragraph (1) and drop paragraph (2), he noted, could not become a decision by consensus. The proposal submitted by the Delegation of Switzerland referred to document IAVP/DC/34 and suggested that the text be adopted with the first square brackets, could not become basis for a consensus either. The proposal submitted by the Delegation of Ghana on behalf of the African Group, to retain paragraph (1) and to remain open to further discussion and necessary compromise implied that the African Group could consider different solutions where paragraph (1) was maintained.

463. Mr. TROJAN (European Community) asked for clarification whether the Delegation of Egypt, on behalf of the African Group, had clarified the position of the Group and suggested to retain paragraph (1) and to delete paragraph (2).

464. The PRESIDENT clarified that his understanding was that the proposal submitted by the Delegation of Egypt was a proposal of that Delegation. The African proposal should be understood in the context of the other proposals. The proposal of the Delegation of Bulgaria was to adopt an additional optional protocol to the Treaty based on Article 12(2).

465. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, clarified that his proposal was to adopt Article 12 only with paragraph (1), and to adopt a resolution of the Diplomatic Conference that would commit itself to adopt an additional optional protocol related to the issues that were addressed in paragraph (2) of the article.

466. Mr. UGARTECHE VILLACORTA (Peru) explained that he had mentioned that the proposal by the Delegation of Jamaica resembled that formulated by his own Delegation in the working group, but he added that he was seriously concerned about the last paragraph but one, concerning the law of the country with which the agreement was most closely connected, as to be more feasible it should refer rather to the law of the country in which protection was sought.

467. The PRESIDENT asked whether the proposal of the Delegation of Bulgaria would not meet the requirements to become the basis for consensus.

468. Mr. PESSANHA CANNABRAVA (Brazil) sought clarification as to the legal scope of the proposal by the Delegation of Bulgaria. Its proposal was to adopt the text in Article 12(1) and a resolution to negotiate an optional protocol.

469. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, confirmed that the proposal was to agree for the time being on a Treaty including Article 12(1) and a resolution committing the governments to adopting an additional protocol to the Treaty which would deal with the unresolved issues.

470. Mr. PESSANHA CANNABRAVA (Brazil) stated that it was his understanding that the proposal submitted by the Delegation of Bulgaria was not a facultative protocol but an additional protocol.

471. Mr. SARMA (India) reminded the Conference that, at the adoption of the Resolution relating to audiovisual fixations in 1996, the WPPT by itself was well balanced. Without a consensus on paragraph (2), there would be no balance between producers and performers. Hence, he considered it very difficult to agree to the proposal submitted by the Delegation of Bulgaria.

472. The PRESIDENT asked the Delegation of India whether the position just put forward was a formal opposition against the suggestion made by Bulgaria.

473. Mr. SARMA (India) confirmed that that was the case. He would prefer if the Conference could meet again in the future and resolve the matter.

474. The PRESIDENT noted that no consensus could be built on the proposal of the Delegation of Bulgaria. He turned to the proposal submitted by the Delegation of Australia and noted from the reactions in the Committee that no consensus could be built on it. After summarizing the proposal made by the Delegation of Egypt, he noted that one or several delegations would not join the consensus concerning that proposal. Since no single proposal could serve as basis for consensus building, he suggested that the Conference consider whether there would be other ways to go ahead.

475. Mr. HERNÁNDEZ BASAVE (Mexico) said that he had exercised his right to veto, not his right to vote, and that the atmosphere did not seem right for a vote on such an important subject. The delegations wanted a Treaty by consensus that would open the door wide to a large number of ratifications. Apart from that it seemed clear that there was no chance of achieving a consensus and a number of delegations had indicated that time was running out. The considerable effort that had been made should not be wasted, however, as it represented moral progress towards the protection of performers' rights. He called for the submission of a report to the next Assemblies so that they could make a ruling. His Delegation would support such a proposal on condition that all the paragraphs of all approved articles were themselves approved, so that thereafter work might resume exclusively on paragraph (2) of Article 12.

476. The PRESIDENT suspended the session for informal consultations.

[Suspension]

477. The PRESIDENT concluded the debate on Article 12 of the draft Treaty and proposed to Main Committee I that it submit a proposal to the Diplomatic Conference meeting in Plenary, taking into account the proposal made by the Delegation of Mexico. Such a proposal would read as follows:

“The Diplomatic Conference

“(i) notes that a provisional agreement has been achieved on 19 Articles;

“(ii) recommends to the Assemblies of Member States of WIPO, in their September 2001 session, that they reconvene the Diplomatic Conference for the purpose of reaching agreement on outstanding issues.”

478. *Main Committee I adopted by consensus the President’s proposal.*

479. Mr. RAJA REZA (Malaysia) said that a possible solution might have been overlooked. It would not be an additional protocol nor a President’s statement but an agreed statement along the lines of the agreed statement concerning Article 15 of the WPPT. It would read as follows: “It is understood that Article 12 does not represent a complete solution on transfer and exercise of exclusive rights of authorization. Delegations were unable to achieve consensus on different proposals on transfer and exercise of exclusive rights of authorization and have left the issue to future resolution.”

480. The PRESIDENT asked the Delegation of Malaysia whether it could join the consensus regarding his proposal.

481. Mr. RAJA REZA (Malaysia) expressed sadness because the Conference had failed to come up with a successful conclusion. He had hoped to solve the problem by having a Treaty without any additional protocol or President’s statement.

482. The PRESIDENT said the proposal by the Delegation of Malaysia was very positive and constructive, but some delegations' signs indicated that it would not gather consensus. He noted that it had been decided by consensus to present to the Plenary of the Diplomatic Conference the proposal that he had read a few minutes ago. He thanked the Committee for their decision, their confidence, their endurance, their cooperation and for the good atmosphere during the Conference and declared the session closed.

SUMMARY MINUTES OF MAIN COMMITTEE II

prepared by the International Bureau

President: Mr. Kambhampati Subramanya SARMA (India)

Secretary: Mr. Francis GURRY (WIPO)

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| First Meeting Wednesday, December 13, 2000 Afternoon |
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1. The PRESIDENT expressed thanks for his election as President of Main Committee II and noted that the Committee was responsible for the administrative and final clauses of the proposed instrument. Work should proceed on an article-by-article basis. He invited the Secretariat to provide an overview of the provisions in the Basic Proposal.

Article 100: Assembly

2. Mr. GURRY (WIPO Secretariat) stated that Article 100 was similar to corresponding provisions in other WIPO treaties, with the exception of subparagraph (1)(a) of Alternative A, which provided for a common assembly for Contracting Parties to the WIPO Performances and Phonograms Treaty (WPPT) and Contracting Parties to the proposed instrument. Alternative B provided for a separate and independent assembly for the proposed instrument. The choice between Alternatives A and B would have a consequence in paragraph (4) which dealt with the possibility of restricting the voting rights of a Contracting Party that was a member of the assembly. That paragraph provided that a Contracting Party may not vote in the assembly on any question relating exclusively to a Treaty for which the assembly is competent and by which the Contracting Party is not bound. The provision would not be necessary if Alternative B were adopted.

3. The PRESIDENT opened the floor for discussion on Article 100.

4. Mr. PHUANGRACH (Thailand) supported Alternative B throughout the Basic Proposal because his Delegation viewed the instrument as a separate Treaty with its own identity.

5. Mr. CRESWELL (Australia) indicated that although his Delegation had indicated in Main Committee I that it preferred the proposed instrument to be characterized as an independent Treaty rather than a Protocol, it was also interested in possible linkages between the proposed Treaty and the WPPT such as through the sharing of an assembly. In this context, his

Delegation requested the advice of the Secretariat on the effect of Alternative A on the provisions of subparagraphs (1)(a) and (2)(a) of Article 24 of the WPPT, insofar as these provisions seemed to restrict membership of the Assembly under Article 24 of the WPPT to Contracting Parties to that Treaty and the mandate of the assembly to matters concerning that Treaty.

6. Mr. GURRY (WIPO Secretariat) stated that Alternative A would not be inconsistent with subparagraphs (1)(a) and (2)(a) of Article 24 of the WPPT as these provisions were of a general nature. There could be a problem in connection with voting rights and that was why it was necessary to consider paragraph (4) of Article 100 which provided that a Contracting Party might not vote in the assembly on any question relating exclusively to a Treaty for which the assembly is competent and by which the Contracting Party would not be bound.

7. Mrs. BELLO DE KEMPER (Dominican Republic), speaking on behalf of the Group of Latin American and Caribbean Countries (GRULAC), said on the subject of Article 100 that the majority of the countries of GRULAC region wanted the instrument to be an independent Treaty, as the same importance was attached to it as to the WPPT. Nevertheless, in spite of it being an independent Treaty, she felt that an Assembly shared with the WPPT could be contemplated. As for Article 102, she said that the majority of the countries of the Group were in favor of Alternative B.

8. Mr. OMOROV (Kyrgyzstan) stated that although his Delegation preferred the proposed instrument to be a separate Treaty, it supported the intervention by the Delegation of Australia on the issue of a shared Assembly.

9. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that his Delegation was of the view that the instrument should be characterized as a protocol to the WPPT. As such, it should share an Assembly, and where possible, the same administrative arrangements as the WPPT.

10. Mr. REINBOTHE (European Community) stated that the instrument should be linked to the WPPT. Its structure and many of its provisions, including the final and administrative clauses, were based on the WPPT. The Diplomatic Conference should benefit from the consensus achieved in 1996 in structuring the protocol. Moreover, the 1996 Resolution called for a protocol to the WPPT. For these reasons, his Delegation believed that the two instruments should be linked both in terms of content and structure. In this context, he expressed support for Alternative A in Articles 100 and 102. His Delegation preferred Alternative A in Article 105 as it was a reflection of a WIPO tradition and was in favor of Alternative A throughout the Basic Proposal on the final and administrative clauses. Although his Delegation preferred the term protocol, it would not be opposed to a different title as long as the instrument was linked to the WPPT.

11. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltic States, supported Alternative A in Article 100 as the linkage between the instrument and the WPPT was of crucial importance to his Group. The name of the instrument was of less importance as it was the contents that mattered.

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12. Mr. SHEN (China) supported Alternative A. The reasons for this had already been stated by his Delegation in Main Committee I and at the meetings of the Standing Committee.
13. Mr. KEPLINGER (United States of America) supported Alternative B, in the interest of efficiency, although joint meetings should be encouraged if this was administratively possible.
14. Mr. HERMANSEN (Norway) recalled that his Delegation had already stated in Main Committee I that they viewed the instrument as unfinished business from 1996. For this reason, the instrument should be viewed as a protocol to the WPPT. His Delegation supported Alternative A in Articles 100 and 102 and favored Alternative A in Articles 105 and 106.
15. Mrs. METTRAUX (Switzerland) supported the position taken by the European Community, and declared herself in favor of Alternative A.
16. Mr. ISHINO (Japan) stated that his Delegation was in favor of a common Assembly as it would streamline the management of the treaties within WIPO and contribute to the development of substantive discussions. The possibility of adopting Alternative A in Article 105 could result in the instrument entering into force before the WPPT and, thus, there could be a need for a provision concerning the timing of the entry into force of the two treaties.
17. Mr. WARR (Malta) supported Alternative A throughout the Basic Proposal as his Delegation favored a link between the instrument and the WPPT. Although his Delegation favored the name protocol, the title was of less importance as long as the link was reflected within the contents of the new instrument.
18. Mr. REDKO (Ukraine) supported Alternative B throughout the Basic Proposal as his Delegation preferred the instrument to be an independent Treaty.
19. Mr. SIMANJUNTAK (Indonesia) supported Alternative B in Articles 100 and 102 because, as previously mentioned, his Delegation viewed the Treaty as being independent from the WPPT.

Articles 101 and 102: International Bureau and Eligibility for Becoming Party to the Treaty

20. The PRESIDENT opened the floor for discussion on Article 101 and Article 102. Some delegations had already commented on these articles in the discussion on Article 100.
21. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltic States, supported Alternative A.
22. Mr. KEPLINGER (United States of America) supported Alternative B as his Delegation preferred a separate and distinct Treaty. If Alternative A were to be adopted, it would still be necessary to attach subparagraphs (2) and (3) of Alternative B to Alternative A as the subject matter of the instrument was not exactly identical to that of the WPPT.

23. Mr. CRESWELL (Australia) noted that Alternative A in Article 102 referred to a party to the WPPT whereas in Article 104, Alternative A referred to a State that has acceded to or ratified the WPPT, and wondered if this was intentional. His Delegation favored Alternative B.

24. Mr. GURRY (WIPO Secretariat) stated that under the Vienna Convention on the Law of Treaties, a party was defined as a party to a Treaty which was in force. Thus, a country that had ratified or acceded to the WPPT could become a party to the proposed instrument.

25. Mrs. BELLO DE KEMPER (Dominican Republic), on behalf of the Group of Latin American and Caribbean Countries, repeated what she had said earlier in connection with Article 100, namely that the majority of the countries preferred Alternative B, which they regarded as a means of avoiding any restriction on the possibility of becoming party to the new instrument, inasmuch as it would not be dependent on the WPPT.

26. Mr. COUCHMAN (Canada) supported Alternative B for several reasons, the most important being that this would allow a larger number of countries to join the Treaty.

27. Mr. OMOROV (Kyrgyzstan) supported Alternative B as the treaty should not be restricted to the members of the WPPT.

28. Ms. SANTIAGO (Philippines) indicated that her Delegation was flexible as far as the title of the instrument was concerned, as what mattered were its contents. Her Delegation favored a common Assembly for the instrument and the WPPT but supported Alternative B in Article 102, as the Treaty should not be restricted to the members of the WPPT.

Articles 103, 104 and 105: Rights and Obligations under the Treaty, Signature of the Treaty and Entry into Force of the Treaty

29. The PRESIDENT opened the floor for discussion on Articles 103, 104 and 105.

30. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Group of Central European and Baltic States, stated that although his Delegation would not like to indicate a clear preference for Alternative A, it would certainly prefer having less than 30 ratifications.

31. Mr. JO (Democratic People's Republic of Korea) stated that his Delegation was flexible as far as the title of the instrument was concerned and emphasized that the number of ratifications required for the Treaty to enter into force should be between five and 30.

32. Mr. KEPLINGER (United States of America) stated, without expressing a numerical preference, that a lower number of ratifications should be required in order to accelerate the entry into force of the Treaty.

33. Mrs. BELLO DE KEMPER (Dominican Republic) suggested in the name of the Group of Latin American and Caribbean Countries that the number of countries necessary for the entry into force of the Treaty could be set at 30. The Group would have difficulty in accepting the number of five countries as a requirement.

34. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, stated that although his Delegation preferred Alternative A, the number of ratifications required for the Treaty to enter into force should be between five and 30.

35. Mr. OMOROV (Kyrgyzstan) stated that although his Delegation could go along with Alternative A, it shared the concern expressed by the Delegation of Japan on the possibility that the Treaty could enter into force before the WPPT. For that reason, a higher figure such as 10 or 15 was perhaps more appropriate, particularly as it had taken four years for 18 countries to ratify the WPPT.

36. Mr. SIMANJUNTAK (Indonesia) supported Alternative B, as his Delegation felt that this would avoid a situation whereby the Treaty would only be applied in a certain region. It would also give the Treaty global recognition and a higher degree of credibility.

37. Ms. SANTIAGO (Philippines) associated her Delegation with the intervention of the Delegation of Kyrgyzstan. The number of ratifications required for the Treaty to enter into force should approximate the number of countries which had ratified or acceded to the WPPT. Her Delegation feared that it would be difficult to achieve 30 ratifications based on the experience with the WPPT.

38. Mr. REINBOTHE (European Community) stated that his Delegation had already stated its preference for Alternative A throughout the Basic Proposal, and Article 105 was not an exception. The need for five instruments of ratification for the Treaty to enter into force was appropriate. There was, however, the risk mentioned by some delegations that this might lead to a situation where the instrument would enter into force before the WPPT.

39. Mr. GURRY (WIPO Secretariat) stated that despite the theoretical possibility, previous experience indicated that it was unlikely that there would be any ratifications or accessions to the proposed instrument within the next 12 months. So far, 18 States had ratified or acceded to the WPPT, 30 were required and the Secretariat was optimistic that this would be achieved in the course of the next 12 months. This would allow the WPPT to enter into force before the new instrument.

40. Mr. SHEN (China) stated that his Delegation was not in favor of either alternative and favored 15 to 20 ratifications to bring the Treaty into force.

Articles 106, 107, 108 and 109: Effective Date of Becoming Party to the Treaty, Denunciation of the Treaty, Languages of the Treaty and Depositary

41. The PRESIDENT opened the floor for discussion on Articles 106, 107, 108 and 109. Noting that no delegation had asked for the floor, he set aside the Articles for discussion at a later stage and adjourned the meeting.

Second Meeting
Sunday, December 17, 2000
Morning

42. The PRESIDENT recalled that during the last session different views had been expressed on three main issues, namely those related to the assembly, the eligibility for becoming party to the instrument and its entry into force, Articles 100, 102 and 105 of the Basic Proposal for Administrative and Final Provisions, respectively. As there was a general agreement on Articles 101, 103, 104, 106, 107, 108 and 109, he submitted Article 100 for consideration by the Committee. He recalled that there had been an understanding to have a common assembly, and suggested to reserve an understanding on Article 100(4) until the question of the nature of the instrument had been decided.

43. Ms. LOURIE (United States of America) expressed support for Alternative B in Article 100. If the instrument would become a separate Treaty, her Delegation preferred to maintain a structure parallel to the one existing in the WIPO Copyright Treaty (WCT) and the WPPT, where each of those treaties had its own Assembly. However, in light of the general move towards efficiency at WIPO, she proposed that the assemblies could meet at the same time.

44. Mr. CRESWELL (Australia) referred to Article 24 of the WPPT and asked for clarification whether the provisions on page 9 of the Basic Proposal for Administrative and Final Provisions were related to Alternative B or to Alternative A.

45. Mr. GURRY (WIPO Secretariat) answered that if the joint assembly under Alternative A was to be retained, in so far as the Treaty was concerned, the assembly's competence would be defined by paragraph (2).

46. Mr. COUCHMAN (Canada) accepted the comments made by the Delegation of the United States of America in terms of having two separate assemblies that would meet together. However, if there would be one assembly, as had been stated at the previous session of the Committee, there should be restrictions on the voting rights so that Members who belonged only to one Treaty could not deliberate on issues related exclusively to the other Treaty.

47. Mr. REINBOTHE (European Community) favored one joint assembly for the WPPT and the new instrument. That preference was based not only on the question of efficiency, but also on the natural link between the two instruments. Once there was a joint assembly it would be necessary to take into account the issue of exercise of voting rights.

48. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, recalled his preference for Alternative A because both the WPPT and the new instrument were basically protecting the interests and common needs of performers.

49. Mr. SHEN (China) stated that the issue depended on the results achieved by Main Committee I, in other words, whether the instrument was to be a protocol or a separate Treaty. His Delegation was in favor of Alternative A.

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50. Mrs. BELLO DE KEMPER (Dominican Republic) reaffirmed the interest of the majority of the members of the Group of Latin American and Caribbean Countries in there being a single Assembly for reasons of administrative economy.
51. Mr. HERMANSEN (Norway) favored the alternative of having one common assembly, that was, Alternative A in the relevant articles.
52. Mr. GOVONI (Switzerland) strongly favored a joint assembly for economic reasons and for reasons of efficiency, more than for reasons of principle.
53. Mr. AFONSO DOS SANTOS (Brazil) recalled that Article 11 could have different implications depending on decisions that still had not been taken. He thought that the assembly should be a single assembly, but other aspects also had to be taken into account, namely those relating to eligibility to become party to the Treaty as well as the question of voting.
54. Mr. OLŠOVSKÝ (Slovakia), speaking on behalf of the Group of Central European and Baltic States, favored Alternative A throughout the entire Basic Proposal for Administrative and Final Provisions.
55. Mr. BLIZNETS (Russian Federation), speaking on behalf of the Group of Central Asian, Caucasus and Eastern European Countries, supported Alternative A for reasons of efficiency and economy.
56. Mr. ISHINO (Japan) was, regardless of the denomination of the new instrument, in favor of a common assembly, for reasons of economy and also because it would contribute to the further development of substantive discussions on the protection of performances.
57. Ms. LOURIE (United States of America) recognized, in the spirit of flexibility, that there was a significant interest in the Committee to maintain a common assembly. If there was to be linkage with the Assembly of the WPPT, she proposed to create also a linkage with the WCT Assembly, taking into account that the latter Treaty included provisions about cinematographic works.
58. Mr. OMOROV (Kyrgyzstan) favored Alternative A providing for a common assembly due to economic reasons.
59. Mr. REDKO (Ukraine) said that WPPT did not protect performers when performances were fixed on audiovisual fixations. Therefore, he supported Alternative B in order to avoid any collision of voting rights.
60. Mr. IMANOV (Azerbaijan) supported the position expressed by the Russian Federation to have a common assembly as this would be the most pragmatic solution.
61. Mrs. ORNELAS (Mexico) said that when considering the subject one should not lose sight of the fact that efforts had been going on within WIPO for two years with a view to rationalizing the work that the Organization accomplished. The only position that was consistent with what States had decided previously was the adoption of Alternative A, by means

of which the work of the Assembly would be streamlined and made more efficient. The proliferation of governing bodies would also be avoided. She therefore stated that she supported the statement made earlier by the Delegation of the Dominican Republic to the effect that there should be a single Assembly for both Treaties.

62. The PRESIDENT suggested not to make any comment about the linkage with WCT, and concluded that the vast majority seemed to be in favor of a common assembly.

63. Mr. COUCHMAN (Canada) said his preference was for two assemblies but if it was decided to have one assembly, his concern would be on voting rights in the sense that members could only vote on matters related to the particular Treaty to which they belonged.

64. The PRESIDENT said that since Article 102 was linked to Article 1 of the Basic Proposal being dealt with by Main Committee I, and taking into account the positions expressed by the delegates during the last session of Main Committee II, he decided to postpone the discussion on that Article and also on Article 105. He adjourned the meeting.

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| Third Meeting Tuesday, December 19, 2000 Morning |
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65. The PRESIDENT invited the Committee to fix understandings on certain issues, in particular on Articles 100, 102 and 105. Some understandings might have been formed through the proceedings of the working group of Main Committee I.

66. Mr. LIEDES (Finland) reported on the work of the working group of Main Committee I, which had reached a set of conditional understandings. These understandings included the designation of the instrument as the WIPO Audiovisual Performances Treaty. The proposed Article 1(3) recognized the link which would be established between the Treaty and the WPPT. The working group had been aware of the conclusion by Main Committee II that the two instruments should share a joint assembly. The main question was whether membership in the WPPT should be the pre-condition for adherence to the new instrument.

67. Ms. LOURIE (United States of America) stated that her Delegation had maintained its position to support Alternative B of draft Article 100 in the preceding meetings. However, in the spirit of flexibility and compromise, it had decided to support the appearing consensus on Alternative A.

68. The PRESIDENT noted that there was an understanding in the Committee on Alternative A of Article 100. Paragraph (4), however, would be reserved until the issue under Article 102 was resolved. He requested the President of the working group of Main Committee I to clarify the outcome of the discussions regarding eligibility for membership of the proposed instrument.

69. Mr. LIEDES (Finland) responded that there had been support for providing that membership of the WPPT should be a pre-condition to adhere to the proposed instrument.

However, it was understood to be a matter which should be dealt with by Main Committee II, and no conclusion had been reached.

70. Mr. AFONSO DOS SANTOS (Brazil) expressed his Delegation's preference for Alternative B which would facilitate participation in the proposed instrument.
71. Mr. COUCHMAN (Canada) supported Alternative B in order for a larger number of countries to join the instrument. Some countries which might have difficulty joining the WPPT would probably be able to adhere to the proposed instrument.
72. Mr. RAJA REZA (Malaysia), speaking on behalf of the Asian Group, supported Alternative B to ensure wider participation.
73. Mr. SEE (Singapore) joined the Delegations of Malaysia, Brazil and Canada in supporting Alternative B.
74. Mr. BOSUMPRAH (Ghana), speaking on behalf of the African Group, reiterated the Group's preference for the strongest possible linkage between the new instrument and the WPPT, and therefore opted for Alternative A.
75. Mr. REINBOTHE (European Community) reiterated his Delegation's support for Alternative A throughout the instrument and with respect to Article 102 as well.
76. Ms. LOURIE (United States of America) reiterated her Delegation's preference for Alternative B.
77. Mr. GANTCHEV (Bulgaria), speaking on behalf of the Central European and Baltic States, reiterated the Group's support for Alternative A.
78. Mr. SØNNELAND (Norway) recapitulated his Delegation's previous position to support Alternative A.
79. Mr. CRESWELL (Australia) supported Alternative B to ensure the widest possible opportunity for membership of the proposed instrument, in particular in respect of countries which might have difficulties joining the WPPT.
80. Mr. SHAH (Pakistan) supported the Asian Group for Alternative B.
81. Mr. GOVONI (Switzerland) expressed his support for Alternative A.
82. Mr. MOSCOSO (Chile) agreed with those who had mentioned that there was no need for a link with the WPPT, such a thing being an unnecessary requirement that would only inhibit ratification of the Treaty.
83. Mr. JO (Democratic People's Republic of Korea) supported Alternative B.

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84. Mrs. ORNELAS (Mexico) supported Alternative B and said that she knew of no precedent where adherence to one treaty was a requirement for adherence to another, independent treaty.
85. Mr. ARGUDO CARPIO (Ecuador) subscribed to the idea of adopting Alternative B for the Article in question.
86. Mr. ISHINO (Japan) supported Alternative B in order to obtain the widest participation possible in the instrument.
87. Ms. DALEY (Jamaica) supported the Latin American and Caribbean Countries in favor of Alternative B.
88. Ms. PERALTA (Philippines) joined the Asian Group in supporting Alternative B.
89. The PRESIDENT was inclined to believe that the majority seemed to opt for Alternative B.
90. Mr. REINBOTHE (European Community) reminded the Committee that in spite of its preference for a protocol to the WPPT, his Delegation had accepted to designate the instrument as a treaty. As far as the membership condition was concerned, it remained in favor of Alternative A.
91. The PRESIDENT urged all delegations to consider concessions to reach an understanding in view of the time constraint. The issue also had a bearing on Article 100(4) and Article 105.
92. Mr. BOSUMPRAH (Ghana) requested a suspension of the meeting in order for the African Group to consult on the matter.
93. The PRESIDENT, noting that no other delegation asked for the floor, adjourned the meeting.

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prepared by the Secretariat

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NOTE CONCERNING THE USE OF THE INDEXES

These *Records* contain four indexes. The first index refers to the contents of the Provisional Agreement on a WIPO Audiovisual Performances Treaty, plus Article 12 concerning Rights of Performers, under the number and title of each of the Articles of the Provisional Agreement.

The other three indexes refer to the following categories of participants in the Diplomatic Conference: (1) the Delegates to the Conference, (2) the Member States, (3) the Special Delegation, Delegations of Observer States, and Intergovernmental Organizations.

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