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WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

STANDING COMMITTEE ON COPYRIGHT AND RELATED RIGHTS

First Session

Geneva, November 2 to 10, 1998

AGENDA ITEM 5: PROTECTION OF AUDIOVISUAL PERFORMANCES

SUBMISSIONS RECEIVED FROM MEMBER STATES OF WIPO
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Introductory note

The Committee of Experts on a Protocol concerning Audiovisual Performances, at the end of its second session, which took place in Geneva from June 8 to 12, 1998, drew the conclusions that:

- the further substantial discussions on the Protocol concerning Audiovisual Performances would take place at the first session of the Standing Committee on Copyright and Related Rights (SCCR); and that
- any new proposals or amendments to the proposals already existing, or any other submissions of delegations, should, preferably in treaty language, reach the International Bureau by the end of September 1998.

The Annex of this document contains all submissions received by that date, namely, a proposal from Japan, a report submitted on behalf of Argentina, Brazil, Colombia, Costa Rica, Cuba, Ecuador, Guyana, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela, and a revised proposal, accompanied by a commentary, from the United States of America.

(It is recalled that the proposals existing at the second session of the Committee of Experts are contained in document AP/CE/2/7.)

[Annex follows]

ANNEX

JAPAN

**PROTOCOL TO THE WIPO PERFORMANCES AND PHONOGRAMS TREATY
CONCERNING AUDIOVISUAL PERFORMANCES**

Article 1

Relation to Other Conventions

- (1) This Treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty (hereinafter the “WPPT”).
- (2) Nothing in this Protocol 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 Organization done in Rome, October 26, 1961.
- (3) Protection granted under this Protocol shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Protocol may be interpreted as prejudicing such protection.
- (4) This Protocol shall not prejudice any rights and obligations under any other treaties.

Article 2

Definitions

- (1) Contracting Parties shall apply, *mutatis mutandis*, the definitions set out in paragraphs (a), (f) and (g) of Article 2 of the WPPT in connection with the protection granted under this Protocol.
- (2) For the purposes of this Protocol, “audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sound, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device.

Article 3

Beneficiaries of Protection under this Protocol

Contracting Parties shall accord the protection granted under this Protocol to the performers who are nationals of other Contracting Parties.

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 exclusive rights specifically granted in this Protocol, and to the right to equitable remuneration provided for in Article 10 of this Protocol.

(2) Notwithstanding the provisions of paragraph (1), any Contracting Party may, as regards performers who are nationals of another Contracting Party, limit the protection provided for in Article 10 to the extent to which, and to the term for which, the latter Contracting Party grants protection to performers who are nationals of the former Contracting Party.

Article 5

Formalities

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 20 (Formalities) of the WPPT.

Article 6

Moral Rights of Performers

(There is no proposal at this stage).

Article 7

Economic Rights of Performers in their Unfixed Performances

Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards their unfixed audiovisual performances, whether or not accompanied by sound, the same rights as those provided for in Article 6 (Economic Rights of Performers in their Unfixed Performances) of the WPPT.

Article 8

Economic Rights of Performers in their Performances fixed in Audiovisual Fixations

(1) Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the exploitation of their performances fixed in audiovisual fixations, the same rights as those

provided for in Articles 7 (Right of Reproduction), 8 (Right of Distribution) and 10 (Right of Making Available of Fixed Performances) of the WPPT.

(2) Contracting Parties shall accord to performers 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. A Contracting Party shall be excepted from this obligation unless such rental has led to widespread copying of such performances fixed in audiovisual fixations which is materially impairing the exclusive right of reproduction conferred in that Contracting Party on performers and their successors in title.

Article 9

Contractual Arrangements

(1) A performer who has undertaken to bring contributions to the making of an audiovisual fixation of his performance may not, in the absence of any contrary or special contract, object to the reproduction, distribution, rental and making available of his performance fixed in the audiovisual fixation.

(2) Notwithstanding the provisions of Article 4(1), any Contracting Party may, as regards performers who are nationals of such Contracting Party, establish national legislation which does not contain rules providing for the application of paragraph (1). Such Contracting Party shall notify the Director General of WIPO by means of a written declaration, which will be immediately communicated by him to all the other parties of this Protocol.

Article 10

Right to Remuneration of Performers in their Performances fixed in Audiovisual Fixations

Contracting Parties may establish in their national legislation the right to equitable remuneration of performers for the exploitation of their performances fixed in audiovisual fixations.

Article 11

Limitations and Exceptions

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 16 (Limitations and Exceptions) of the WPPT.

Article 12

Term of Protection

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 17 (Term of Protection) (1) of the WPPT.

Article 13

Obligations concerning Technological Measures

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 18 (Obligations concerning Technological Measures) of the WPPT.

Article 14

Obligations concerning Rights Management Information

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 19 (Obligations concerning Rights Management Information) of the WPPT.

Article 15

Reservations

Subject to the provisions of Article 4(2) and Article 9(2), no reservations to this Protocol shall be permitted.

Article 16

Application in Time

(1) Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 22 (Application in Time) (1) of the WPPT.

(2) The provisions of paragraph (1) do not apply to the right to equitable remuneration of performers provided for in Article 10 of this Protocol.

Article 17

Enforcement of Rights

Contracting Parties shall apply, *mutatis mutandis*, in respect of the protection granted under this Protocol, the provisions of Article 23 (Enforcement of Rights) of the WPPT.

Article 18

Assembly

Contracting Parties shall have an Assembly. This Assembly shall be the same as the one created by the WPPT and its functioning shall be governed, *mutatis mutandis*, by Article 24 of the WPPT.

Article 19

Eligibility for Becoming Party to the Protocol

Any party to the WPPT may become party to this Protocol.

Article 20

Signature of the Protocol

This Protocol shall be open for signature until by any party to the WPPT.

Article 21

Entry into Force of the Protocol

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

Article 22

Final Clauses

The provisions of Article 25 (International Bureau), 27 (Rights and Obligations under the Treaty), 30 (Effective Date of Becoming Party to the Treaty), 31 (Denunciation of the Treaty), 32 (Languages of the Treaty) and 33 (Depositary) of the WPPT shall apply, *mutatis mutandis*.

ARGENTINA, BRAZIL, COLOMBIA, COSTA RICA, CUBA, ECUADOR, GUYANA, JAMAICA, MEXICO, PANAMA, PARAGUAY, PERU, TRINIDAD AND TOBAGO, URUGUAY, VENEZUELA

REPORT ON THE REGIONAL CONSULTATION MEETING FOR LATIN AMERICA AND CARIBBEAN COUNTRIES ON A PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES AND OTHER NEW INTERNATIONAL PROVISIONS CONCERNING THE PROTECTION OF INTELLECTUAL PROPERTY

Geneva, June 12, 1998

A Regional Consultation Meeting of Latin American and Caribbean Countries on a Protocol Concerning Audiovisual Performances and Other New International Provisions on Intellectual Property took place in Geneva, Switzerland, on June 12, 1998. The meeting was presided over by Mr. Franz Hall (Jamaica).

The discussions were based on documents AP/CE/2/2, AP/CE/2/4, AP/CE/2/4 Corr. and AP/CE/2/6, presented by WIPO.

Consensus was reached on the following points:

I. Title

Protocol to the WIPO Performances and Phonograms Treaty Concerning Audiovisual Performances.

II. Preamble

The Contracting Parties,

Wishing to ensure an adequate level of protection for performances in audiovisual works, owing to the fact that the development and convergence of new information and communication technology will bring about a rapid broadening of the range of audiovisual services and also an increase in the opportunities for performers to exploit their 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:

III. Relation to Other Conventions; Relation to Copyright

1. This treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty done in Geneva on December 20, 1996 (hereinafter “the WIPO Treaty”).
2. No provision of this Protocol shall detract from the mutual obligations of Contracting Parties under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, done at Rome on October 26, 1961 (hereinafter “the Rome Convention”).
3. The protection granted under this Protocol shall leave intact and 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. This Protocol shall have no connection with, and shall not prejudice any right or obligation under, any treaty other than the WIPO Treaty.

IV. Definitions

1. The Contracting Parties shall apply, *mutatis mutandis*, the definitions set out in Article 2 (a), (e), (f) and (g) of the WIPO Treaty in connection with the protection granted under this Protocol.
2. For the purposes of this Protocol, “audiovisual fixation” means the embodiment of moving images, whether or not accompanied by sound, or the representations thereof, from which they can be perceived, reproduced or communicated through a device.
3. For the purposes of this Protocol, “performers” means all actors, singers, musicians, dancers or other persons who interpret a role, sing, recite, declaim or in any way perform literary or artistic works or expressions of folklore, with the exception of extras.
4. *The Delegation of Brazil proposes that the audiovisual work should be defined, and will submit a text for the purpose.*

V. Beneficiaries of Protection

The Contracting Parties shall accord the protection provided under this Protocol to performers who are nationals of other Contracting Parties.

VI. National Treatment

Each Contracting Party shall accord to the nationals of other Contracting Parties the same treatment as it accords to its own nationals with respect to the exclusive rights specifically granted in this Protocol.

VII. Formalities

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

VIII. Moral Rights of Performers

1) Independently of the performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live audiovisual performances, with or without sounds, or performances included in audiovisual fixations, 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.

The Delegation of Argentina proposed adding the following:

“The performer may authorize the making of modifications to his performance, but such authorization shall be valid only where it has been given in writing.”

2) The rights granted to the performer in accordance with the foregoing paragraph shall, after his death, be maintained, 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 protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of those 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.

IX. Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right to authorize the following in relation to their unfixed performances:

- i) broadcasting and communication to the public of their unfixed performances, except where the performance constitutes a broadcast performance in itself;
- ii) fixation of their unfixed performances.

The Delegation of Venezuela was of the opinion that, as the present document was itself a Protocol to the above-mentioned Treaty, and as the wording of Article IX was identical to Article 6 of the WPPT, there was no point in repeating it and that it could be removed, but a number of delegations did not share that opinion.

X. Economic Rights of Performers Concerning Audiovisual Fixations

1. Right of reproduction

Performers shall enjoy the exclusive right to authorize the direct or indirect reproduction of their performances fixed in audiovisual works in any manner or form.

2. Right of distribution

- 1) Performers shall enjoy the exclusive right to authorize the making available to the public of the original and copies of their performances fixed in audiovisual works through sale or other transfer of ownership.
- 2) Nothing in this Protocol 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.

3. Right of rental

Performers shall enjoy the exclusive right to authorize the commercial rental to the public of copies of their performances fixed in audiovisual works on the terms laid down in the national law of the Contracting Parties, even after distribution effected with the authorization of the performer.

The Delegations of Argentina, Brazil, Colombia and Uruguay proposed the following wording:

- “1) Performers shall enjoy the exclusive right to authorize the commercial rental to the public of copies of their performances fixed in audiovisual works.*
- “2) Paragraph (1) shall not be applicable in the case of an audiovisual work except where the said commercial rental has given rise to widespread copying of the work which considerably detracts from the performer’s exclusive rights of reproduction.”*

4. Right of making available

Performers shall enjoy the exclusive right to authorize the making available to the public of their performances fixed in audiovisual works, 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.

5. Right of broadcasting and communication to the public

Performers shall enjoy the exclusive right to authorize the broadcasting and the communication to the public of their performances fixed in audiovisual works.

With regard to the broadcasting of audiovisual fixations, the Contracting Parties may apply *mutatis mutandis* the provisions of Article 11bis(2) of the Berne Convention.

The Delegation of Brazil said that, with respect to point 5, it preferred an agreed statement and would make a submission on the subject prior to the meeting of the Committee of Experts to be held in Geneva from November 2 to 10, 1998.

The Delegation of Uruguay said that, with regard to the same point 5, it was not in a position to pronounce on it, owing to the fact that consultations were still going on with a view to the taking of a position for the purposes of the meeting of the Committee of Experts to be held in Geneva from November 2 to 10, 1998.

The Delegation of Argentina proposed the following text:

“Performers shall enjoy the exclusive right to authorize the broadcasting and the communication to the public of their performances fixed in audiovisual works.

“Consent given for the fixing of the performance in an audiovisual work shall include the authorization of broadcasting and communication to the public by means of subscription systems, unless otherwise agreed.”

The Argentine Delegation was considering the possibility of drawing up an agreed statement in the event of the foregoing text not being accepted.

XI. Limitations and Exceptions

- 1) The Contracting Parties may, in their national legislation, provide for the same kinds of limitation or exception with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of the copyright in literary and artistic works.
- 2) The Contracting Parties shall confine any limitation on or exception to rights provided for in this Protocol to certain special cases that do not conflict with a normal exploitation of the performance fixed in audiovisual works or unreasonably prejudice the legitimate interests of the performer or of the audiovisual producer.

XII. Contractual Arrangements Concerning the Rights of Performers

Where a performer authorizes the inclusion of his performance in an audiovisual fixation, the Contracting Parties shall apply, *mutatis mutandis*, the provisions of Article 14bis(2)(b) of the Berne Convention.

The Delegation of Argentina drew attention, for consideration, to the fact that Article 14bis(2)(b) of the Berne Convention contained no reference to the right of rental.

The Delegation of Brazil said that, with regard to the whole of Title XII, it was not in a position to pronounce on it owing to the fact that consultations were still going on with a view to the taking of a position for the purposes of the meeting of the Committee of Experts to be held in Geneva from November 2 to 10, 1998.

XIII. Term of Protection of the Economic Rights of Performers

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

XIV. Obligations Concerning Technological Measures

1) The Contracting Parties shall provide effective 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 of the rights provided for in this Protocol:

- i) removing or altering any electronic information rights management information without authority;
- ii) distributing, importing for distribution, broadcasting, communicating or otherwise making available to the public, without authority, performances, copies of fixed performances or audiovisual works knowing that electronic rights management information has been removed or altered without authority.

2) As used in this Article, “rights management information” means information that identifies the performer, his performance, the audiovisual producer or the audiovisual work, or information on the terms and conditions governing the use of the performance fixed in an audiovisual work.

XV. 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 Protocol:

- i) removing or altering any electronic rights management information without authority;
- ii) distributing, importing for distribution, broadcasting, communicating or otherwise making available to the public, without authority, performances, copies of fixed

performances or audiovisual works knowing that electronic rights management information has been removed or altered without authority.

2) As used in this Article, “rights management information” means information that identifies the performer, his performance, the audiovisual producer or the audiovisual work, or information about the terms and conditions governing the use of the performance of the audiovisual work, and any numbers or codes that represent such information, when any of those items of information is attached to a copy of a fixed performance or to an audiovisual work or appears in connection with the communication or making available to the public of a performance fixed in an audiovisual work.

XVI. Reservations

No reservations to this Protocol shall be permitted.

The Delegations of Brazil and Argentina undertook to confirm whether they wished to include a reservation, in which case they would provide the appropriate text.

XVII. Application in Time

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

2) This Protocol shall not detract from the rights acquired in any Contracting Party prior to the date of entry into force of this Protocol in that Party.

The Delegation of Argentina proposed the substitution of the following text for the above point 1:

“The provisions of this Protocol shall not apply to performances given or audiovisual fixations made prior to the entry into force of this Protocol.”

XVIII. Provisions on Enforcement of Rights

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

2) The 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 Protocol, including expeditious remedies to prevent infringement and remedies that constitute a deterrent to further infringements.

XIX. Administrative Provisions and Final Clauses

1. The Assembly

The Contracting Parties shall have an Assembly. That Assembly shall be the same as the one created by the WIPO Treaty.

2. Eligibility for Becoming Party to the Protocol

Any party to the WIPO Treaty may become party to this Protocol.

3. Signature of the Protocol

This Protocol shall be open for signature until by any Member State of WIPO and by the European Community.

4. Entry into Force of the Protocol

This Protocol shall enter into force, following the date of entry into force of the WIPO Treaty, three months after 20 instruments of ratification or accession by States have been deposited with the Director General of WIPO.

5. Final Clauses

The provisions of Articles 25 (International Bureau), 27 (Rights and Obligations under the Treaty), 30 (Effective Date of Becoming Party to the Treaty), 31 (Denunciation of the Treaty), 32 (Languages of the Treaty) and 33 (Depositary) of the WIPO Treaty shall apply *mutatis mutandis*.

UNITED STATES OF AMERICA

**SUBSTANTIVE PROVISIONS OF A TREATY FOR THE PROTECTION OF
PERFORMERS IN AUDIOVISUAL WORKS**

Preamble

The Contracting Parties,

Noting that the development and convergence of new information and communication technologies will allow for a rapid growth of audiovisual services and that this will increase the opportunities for performing artists to exploit their performances;

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;

Recognizing that the WIPO Performances and Phonograms Treaty (WPPT) does not cover the rights of performers in the audiovisual fixations of their performances, but that many provisions of the WPPT can be used or adapted as the basis for a new treaty protecting performers with respect to their audiovisual performances;

Have agreed as follows:

**CHAPTER I
GENERAL PROVISIONS**

Article 1

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.
- (2) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
- (3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under any other treaties.

Article 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, but not including ancillary performers considered such by professional practice;

(b) “fixation” means the embodiment of images, or of images and sounds, or of the representations thereof, from which they can be perceived, reproduced, or communicated through a device;

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

(d) “communication to the public” means the transmission to the public by any medium, otherwise than by broadcasting, of the images, or the sounds and images, or the representations thereof, comprised in an unfixed performance or in a fixed performance;

(e) an “audiovisual work” is a work consisting of a series of related images that impart an impression of motion and are intended to be shown by the use of a device, together with any accompanying sounds.

Article 3

Beneficiaries of Protection

(1) Contracting Parties shall accord the protection provided under this Treaty to performers of other Contracting Parties as defined in paragraph (2) of this Article.

(2) Performers of other Contracting Parties shall be understood to be performers who meet any of the following conditions:

(a) those performers who are nationals of another Contracting Party and whose performance is unfixed or is fixed in an audiovisual work;

(b) those performers whose unfixed performance takes place on the territory of another Contracting Party;

(c) those performers whose performance is first fixed in an audiovisual work on the territory of another Contracting Party.

(3) 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

With respect to performances for which they are protected under this Treaty as provided in Article 3, performers shall enjoy, in other Contracting Parties, the treatment that the laws of such parties do now or may hereafter grant to their own nationals, as well as the rights specifically granted by this Treaty.

CHAPTER II RIGHTS OF PERFORMERS

Article 5

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 or her live performances or performances fixed in an audiovisual fixation, have the right to claim to be identified as the performer of such 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 or her performance that would be seriously prejudicial to the performer's reputation. Modifications consistent with the normal exploitation of an audiovisual work undertaken by 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.

(2) The rights granted to a performer in accordance with paragraph (1) shall, after the said performer's death, be maintained, at least until the expiry of the rights of authorization set forth in Articles 6 through 10, 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 the performer's 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.

(4) The “normal exploitation of an audiovisual work” shall include the use of new or changed technology, media, formats and/or methods of distribution, dissemination, making available or communication to the public. A performer shall give reasonable consideration to the interests of the other performers in the work, the writers of scenarios, dialogues or musical works created for the work, and the principal director of the work when seeking to exercise the above described rights with respect to such work.

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 fixed performances 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 fixed performances 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 Making Available

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

Article 10

Right of Broadcasting and Communication to the Public

Except for conditions on the exercise of the right that would be permissible for audiovisual works under Article 11*bis* of the Berne Convention for the Protection of Literary and Artistic Works, performers shall enjoy the exclusive right of authorizing, as regards their performances fixed in audiovisual works, the broadcasting and communication to the public of such performances, except where such a performance is already a broadcast performance.

CHAPTER III ADDITIONAL PROVISIONS

Article 11

Transfer of Rights

Once a performer has consented to the fixation of his or her performance in an audiovisual work, he or she shall be deemed to have transferred all exclusive rights of authorization granted under this Treaty with respect to that particular audiovisual work to the producer of that work and its successors in interest, subject to written contractual clauses to the contrary. The foregoing sentence shall not apply to any rights of remuneration a performer may have under the law of any Contracting Party, nor shall it require a Contracting Party to establish any such rights of remuneration.

Article 12

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.

Article 13

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 from the end of the year in which the performance was fixed.

Article 14

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 their transferees in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances, that are not authorized by the performers or that are not permitted by law.

Article 15

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 fixed performances knowing that electronic rights management information has been removed or altered without authority.

(2) As used in this Article, “rights management information” means information that 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 copy of a fixed performance or appears in connection with the broadcast, public communication, or making available to the public of a fixed performance.

Article 16

Formalities

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

Article 17

Reservations

No reservations to this Treaty shall be permitted.

Article 18

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 Treaty.

(2) Notwithstanding paragraph (1), a Contracting Party may limit the application of Article 5 of this Treaty to performances that occurred after the entry into force of this Treaty for that Party.

Article 19

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 infringement and remedies which constitute a deterrent to further infringements.

COMMENTARY ON THE REVISED U.S. PROPOSAL FOR A TREATY FOR THE PROTECTION OF PERFORMERS IN AUDIOVISUAL WORKS

Introduction

At the closing session of the Committee of Experts on June 12, 1998, the Chair asked that new recommendations or revisions with respect to the proposed WIPO Audiovisual Performers Treaty be sent to the Secretariat before the end of September. Based on the discussions at that meeting, the United States has concluded that the U.S. proposal of May 18, 1998 (AP/CE/2/4, May 18, 1998 and AP/CE/2/4 Corr., May 27, 1998, hereinafter the “May 18 U.S. Proposal”) could be improved by: (i) certain revisions prompted by suggestions or questions raised at the June 1998 Committee of Experts meeting, and (ii) other clarifications or simplifications in language. These revisions and clarifications do not alter the principles upon which the May 18 U.S. Proposal was based. These changes are explained below:

Article 2

Definitions

1. Article 2(a): “performers”

The May 18 U.S. Proposal excluded “extra performers and background performers” from the definition of performers. We now propose that this language be replaced by the exclusion of “ancillary performers, considered such by professional practice.” In response to the concerns raised at the June meeting about the scope of “extra performers” and “background performers,” the revised language, which comes directly from the WIPO English translation of the French copyright statute, seeks to provide greater clarity. Further, it is sufficient to cover the basic concept while providing flexibility for national interpretation.

2. Article 2(e): “audiovisual work”

At the June meeting a number of delegates urged that the concept of motion be added to the definition of audiovisual work. In view of this concern, we have revised the language accordingly to read:

“...a work consisting of a series of related images that impart an impression of motion and are intended to be shown by the use of a device, together with any accompanying sounds.”

Article 3

Beneficiaries of Protection

During the June meeting, it was suggested that the points of attachment under the proposed treaty be enlarged to include domicile or habitual residence. This would expand, to some extent, the body of performers (including stateless persons) eligible for the benefits of

the proposed treaty and is consistent with the philosophy of broad protection underlying Article 3 of the May 18 U.S. Proposal.

Therefore, we propose adding a new paragraph (3) to Article 3, adapted from Article 3(2) of the Berne Convention, as follows:

“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 5

Moral Rights

The changes proposed in this article are not designed to expand or narrow the intended scope of the provision as put forward by the United States in its May 18 Proposal. Rather, these revisions are meant to make the language more precise and to answer some justifiable criticisms of the earlier drafting.

a. In the opening of paragraph (1) the phrase “as regards his or her live performances or performances fixed in an audiovisual work” would be changed to read “as regards his or her live performances or performances fixed in an audiovisual fixation...” The purpose of this revision is to make clear that a performer’s moral rights extend not only to violations with respect to a performance as integrated into the final version of an audiovisual work, but also to violations with respect to any audiovisual fixation of the performance. This revision does not provide that performers have a moral right with respect to the editing (i.e. the selection and order of fixed performances) of an audiovisual work by the director or producer, or subsequent editing consistent with the normal exploitation of the audiovisual work.

b. A number of interventions at the June meeting suggested that the language of the May 18 U.S. Proposal was being read to mean that any modification made in the context of –“as part of”– the normal exploitation of an audiovisual work would be exempt from the performer’s moral right, no matter how prejudicial. This was not the intention of the May 18 U.S. Proposal. Rather, the United States recognizes that commercial exploitation of an audiovisual work necessitates certain changes or modifications for different methods of distribution and to meet market realities. Such changes, when made pursuant to the authorized exercise of economic rights, are not considered to be distortions or mutilations that seriously prejudice the reputation of performers. Hence the end of Paragraph 1 has been revised to read as follows:

“Modifications consistent with the normal exploitation of an audiovisual work undertaken by 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.”

c. Several delegations at the June meeting raised questions about the meaning of the phrase “creative authors” in Article 5(4). This language, which sought to identify the body of

other individual contributors whose rights must be considered by performers when seeking to assert moral rights in audiovisual works, should be clarified. The proposed revision adapts language from Article 14*bis*(3) of the Berne Convention: “other performers in the work, the writers of scenarios, dialogues or musical works created for the work, and the principal director of the work.”

Articles 6 and 10

Economic Rights of Broadcasting and Public Communication

The May 18 U.S. Proposal for Article 6 (unfixed performances) represented an effort to clarify the language taken from Article 6 of the WIPO Performances and Phonograms Treaty (“WPPT”): “The broadcasting or communication to the public of their unfixed performances except where the performance is already a broadcast performance.” The May 18 U.S. Proposal added “or a publicly communicated performance,” and made the same change in Article 10. As was pointed out at the meeting, these additions are not only unclear but also could have unintended consequences. Hence, the previously added language in both articles has been dropped, leaving the treaty proposal consistent with the WPPT.

Article 10

Right of Broadcasting and Communication to the Public

In the May 18 U.S. Proposal, Article 10(2) provided that Contracting Parties could provide a right of remuneration rather than an exclusive right. However, Article 10(1) of that Proposal incorporates the standards of Article 11*bis* of the Berne Convention by reference, which allows Contracting Parties to limit the right to a right of remuneration. Hence, as was made clear at the June meeting, Article 10(2) is redundant and confusing. It is therefore deleted.

Article 14

Implementation

This article, which was based on the U.S. proposal concerning audiovisual performers made at the 1996 Diplomatic Conference (CRNR/DC/34, December 11, 1996) raised a number of concerns at the Committee of Experts meeting. It is not necessary in the context of the present draft and therefore is deleted.

Article 18

Reservations (now Article 17)

The May 18 U.S. Proposal would have made the prohibition against reservations subject to Article 10(2). Since the revised proposal deletes Article 10(2), the prohibition against reservations should be stated without qualification.

Article 19

Application in Time (now Article 18)

The United States takes serious note of the Chair's recommendation for further consideration and study of this provision. We are continuing to study this provision and may come forward with recommended changes at a future date.

[End of Annex and of document]