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FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS
(BERNE UNION)

ASSEMBLY

Sixteenth Session (5th Extraordinary)
Geneva, September 26 to October 4, 1994

MATTERS CONCERNING A POSSIBLE PROTOCOL
TO THE BERNE CONVENTION AND
A POSSIBLE INSTRUMENT FOR THE PROTECTION
OF THE RIGHTS OF PERFORMERS
AND PRODUCERS OF PHONOGRAMS

Memorandum prepared by the Director General

1. The current program of WIPO (covering the years 1994 and 1995) provides that the International Bureau prepare, convene and service (i) the Committee of Experts on a Possible Protocol to the Berne Convention (hereinafter referred to as "the Committee on the Berne protocol") and (ii) the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to as "the Committee on the new instrument"). As to the contents, this program provides

that (i) "[t]he protocol is mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies"; and (ii) "[t]he new instrument is destined to provide for a protection more effective than what is provided for in the Rome Convention of 1961, in respect of performers and producers of phonograms" (document AB/XXIV/2, item 03(3) and (4)).

2. This program was adopted by the Assembly and the Conference of Representatives of the Berne Union on September 29, 1993 (see document AB/XXIV/18, paragraphs 224 to 231 and 283 and 284). In respect of the Berne protocol, a similar decision was taken in 1989 and 1991 by the same bodies (see documents AB/XX/2, item PRG 02(2); AB/XX/20, paragraphs 152 and 199; AB/XXII/2, item 03(2); and AB/XXII/22, paragraph 197), and, in 1992, the same bodies determined an exclusive list of subjects to be covered by the Committee on the Berne protocol (see document B/A/XIII/2, paragraph 22). In respect of the new instrument, a similar decision was taken in 1992 (see document B/A/XIII/2, paragraph 22).

3. The Committee on the Berne protocol has met three times. The first session was held in 1991 (November 4 to 8), the second in 1992 (February 10 to 17) and the third in 1993 (June 21 to 25). The Committee on the new instrument has met twice. Both sessions were held in 1993 (June 28 to July 2 and November 8 to 12). All these meetings were held at the headquarters of WIPO.

4. At its fifteenth session (4th extraordinary), held on April 28 and 29, 1994, the Assembly of the Berne Union took the following decisions:

"(i) by May 10, 1994, two memoranda prepared by the International Bureau on the basis of the two committees' discussions of June and November 1993, respectively, should, together with an invitation for comments, be sent as provisional drafts, to the governments of the countries member of the Berne Union and the European Commission; the said invitation should state that comments should reach the International Bureau by September 1, 1994;

"(ii) the International Bureau should make available to the extraordinary session of the Assembly of the Berne Union (September 26 to October 4, 1994) the texts of all comments received;

"(iii) in the light of those comments, the Assembly should decide whether the comments should be taken into account in preparing the definitive version of the two memoranda or to decide that the provisional drafts should, without any change, be issued as definitive public documents, the comments being simply attached to them;

"(iv) the documents referred to in the preceding paragraph should be mailed by the International Bureau to all entities invited to the committees (governments, intergovernmental and non-governmental organizations) by November 1, 1994;

"(v) the two committees should be convened and meet on the following dates: the Committee of Experts on a Possible Protocol to the Berne Convention, from December 5 to 9, 1994, and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, from December 12 to 16, 1994, both at the headquarters of WIPO." (document B/A/XV/1, paragraph 25)

5. In keeping with the decisions quoted above, on May 6, 1994, the Director General of WIPO sent the provisional documents mentioned in item (i) of the preceding paragraph to the governments of the countries members of the Berne Union and to the European Commission (further copies of the provisional documents are available upon request) inviting them to comment on the provisional documents, as mentioned in the said item.

6. The International Bureau did not receive any comments on the provisional documents by the deadline of September 1, 1994, indicated in item (i) of the decisions quoted in paragraph 4, above. However, on September 6, 1994, the International Bureau received a note verbale from the Permanent Mission of the Republic of South Africa, Geneva, on September 19, 1994, it received a letter from the United States Department of Commerce, Patent and Trademark Office, Washington, D.C., and, finally, on September 22, 1994, it received a letter from the European Commission, Brussels, with comments on the provisional documents. The substantive parts of those letters are reproduced in the Annex.

7. The Assembly of the Berne Union is invited to decide of what the preparatory documents for the December 1994 sessions of the Committees of Experts should consist of.

[Annex follows]

ANNEX

Comments received on the provisional documents

I.

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

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

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

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

"Protocol to the Berne Convention

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"General

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

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

II.

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

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

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

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

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

"General observations

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

of our focus on specific issues in the cases of the Berne Protocol and the New Instrument, and the expansion to encompass the digital world in both areas.

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

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

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

"Matters common to the Protocol and the New Instrument

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

"We believe that the Committees of Experts should consider the recognition of a digital "transmission" right for both the Berne Protocol and the New Instrument perhaps as a separate right, as an aspect of a

distribution right, as part of a right of communication to the public, or an aspect of the reproduction right. While this is an issue that needs much further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GII.

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

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

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

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

"The United States continues to believe that national treatment must be the basis for protection in any intellectual property agreement. At an absolute minimum, national treatment must apply to the minimum obligations established in any agreement in WIPO. The author or rights holder should be able to realize fully the economic benefits flowing from the free exercise of his or her rights in any country party to the Protocol or New Instrument. We continue to believe that, in respect of any work, this is required by Article 5 of the Berne Convention. To do otherwise in either a Berne Protocol or another agreement on copyright protection would be contrary to Article 20 because it would be a derogation of rights existing under Berne and not be an Agreement to

"grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention" as provided for under Article 20.¹ To the extent that we have agreed that the principles of the New Instrument should follow those of the Berne Convention, to do otherwise in respect of related rights, would be contrary to the letter and the spirit of the Convention.

"Berne Protocol issues

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

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

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

"For the United States, following our Supreme Court Decision in the Feist case², there is increasing concern that many valuable, factually-oriented data bases may be denied copyright protection, or that courts may determine infringement in ways that severely limit the scope of copyright protection for data bases. We believe that it is worthwhile to consider how a right, such as the unfair extraction right proposed in the EU database directive, could protect such data bases.

"There is continuing interest in the Committee of Experts for the elimination of the mechanical license--the compulsory license for the use of musical works in sound recordings. The United States is prepared to continue discussions on this matter. However, any possible elimination

¹ Article 20 states: The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable.

² Feist Publications, Inc. v. Rural Tele. Serv. Co., 499 U.S. 340, 345 (1991)

of the mechanical license would have to be evaluated considering the entirety of the provisions contained in both the Protocol and New Instrument. This would be a major concession for the United States, since elimination of the mechanical license is supported by neither the music nor the recording industry.

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

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

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

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

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

"New Instrument issues

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

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

"Definitions

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

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

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

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

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

"Distinctions among rights of communication to the public, public performance and distribution are becoming increasingly irrelevant in the face of technological change. Digital, or more properly non-analog, storage, retrieval and communication technologies are forcing us to rethink how rights are defined and allocated in the world of information superhighways and national information infrastructures. Exclusive rights of communication to the public by any means are extremely important in this context. Our Congress is considering legislation to extend a limited public communication right to sound recordings in the realm of digital communication. Consequently, the United States is not able to take any final position on these definitions at this time, and believes that considerable further discussions on these issues are required.

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

"Rights

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

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

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

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

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

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

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

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

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

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

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

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

"Term of protection

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

"Formalities

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

"National_treatment

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

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

III

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

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

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

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

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

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

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

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

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and of document]