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WORLD INTELLECTUAL
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WIPO SEMINAR FOR ASIA AND THE PACIFIC REGION ON THE INTERNET AND THE PROTECTION OF INTELLECTUAL PROPERTY RIGHTS

organized by
the World Intellectual Property Organization (WIPO)

in cooperation with
the Ministry of Law,
the Attorney-General's Chambers,
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IV. EXERCISE AND MANAGEMENT OF INTELLECTUAL PROPERTY RIGHTS ON THE INTERNET

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I. INTRODUCTION

A recent study by the International Telecommunications Union (ITU) reports that by the year 2001, 112 million host computers will be connected to the global information system, up from 16.1 million in 1996. That same ITU study predicts that on-line sales will grow to from $314 billion to $357 by 2001. The bulk of these connections are in the developed world, but rapidly growing economies in Latin America, Asia and parts of Africa are also experiencing high rates of expansion. There is also a recent Vanderbilt University survey that finds that there are more than 200,000 commercial websites in operation and finds further that this number is increasing at the rate of 10% per month. Thus, it is clear that electronic commerce is growing rapidly and we need to address important legal issues to guarantee that the potential growth predicted by the ITU study will take place.

As electronic commerce grows, the ease of infringement and the difficulty of detection and enforcement will lead copyright owners increasingly to look to technology, as well as the law, for protection of their works. However, while it is clear that technology can provide significant levels of protection, it is equally clear that technology also can be used to defeat any protection that technology may provide. Legal protection alone will not be adequate to provide incentive to authors to create and to disseminate works to the public. Similarly, technological protection likely will not be effective unless the law also provides some protection for the technological processes and systems used to prevent unauthorized access and to restrict unauthorized uses of copyrighted works.

The most significant development in ensuring adequate and effective protection and enforcement of intellectual property rights in cyberspace are the two new WIPO “Internet” Treaties—the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty. Both of these new Treaties include norms for substantive standards of protection, provisions on technological protection measures and enforcement requirements that will assure appropriate norms for the protection of intellectual property in the digital future.

II. SUBSTANTIVE STANDARDS

(a) WIPO Copyright Treaty

Article 1 specifies that the WIPO Copyright Treaty: (1) is a special agreement within the meaning of Article 20 of the Berne Convention; (2) shall not prejudice any rights and obligations under any other treaties; and (3) shall not derogate from existing obligations that Contracting Parties have to each other under the Berne Convention. It also requires Contracting Parties to comply with Articles 1 to 21 and the Appendix of the Berne Convention.

Article 2 specifies that copyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.

Article 3 requires Contracting Parties to apply the provisions of Articles 2 to 6 of the Berne Convention to the protections afforded by this Treaty. Article 2 of the Berne

Convention defines “literary and artistic works” and specifies the scope of protection afforded to official texts, collections, works of applied art, speeches and news of the day. Paragraph (1) of Article 3 of the Berne Convention includes provisions on the main points of attachment: the nationality of the author and the place of publication of the work. Paragraph 3(2) assimilates habitual residence of an author to nationality. Paragraph 3(3) defines the expression “published works”. Paragraph 3(4) defines simultaneous publication. Article 4 of the Berne Convention extends the protection of the Convention to authors of cinematographic works, works of architecture and certain other artistic works, even where the conditions of Article 3 are not met. Article 5 of the Berne Convention confirms in its paragraph (1) the principle of national treatment and the obligation to grant the rights specially granted in the Convention and in paragraph 5(2) the principles of formality-free or automatic protection and independence of protection. Paragraph 5(3) specifies that national law governs protection in the country of origin. Paragraph (4) lays down the rules that determine the country of origin of a work. In addition, a reference to Article 6 of the Berne Convention is made to provide for the possibility of restricting in certain cases the protection given to works of non-nationals of other Contracting Parties.

Article 4 requires computer programs to be protected as literary works within the meaning of Article 2 of the Berne Convention.

Article 5 requires compilations of data or other material, which by reason of the selection or arrangement of their contents constitute intellectual creations, to be protected as such. This protection does not extend to the data or the material itself and is without prejudice to any copyright subsisting in the data or material contained in the compilation.

Paragraph (1) of Article 6 requires Contracting Parties to grant authors the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. Paragraph (2) of this Article specifies that Contracting Parties are free to determine the conditions, if any, under which the exhaustion of the distribution right occurs after the first sale or other transfer of ownership of the original or a copy of the work.

Article 7 requires Contracting Parties to provide exclusive rental rights with respect to computer programs, cinematographic works, and works embodied in phonograms, (as determined in the national law of Contracting Parties). Contracting Parties need not provide rental rights in the case of computer programs, where the program itself is not the essential object of the rental; and in the case of cinematographic works, unless rental has led to widespread copying materially impairing the author’s right of reproduction.

Article 8 requires Contracting Parties to grant authors the exclusive right of authorizing any communication to the public of their works, by wire or wireless means. This right must include the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

Article 9 requires Contracting Parties to grant a term of protection for photographic works that is the same as the term of protection for other artistic works.

Article 10 permits Contracting Parties to provide for limitations of or exceptions to the rights granted to this Treaty and the Berne Convention in certain special cases that do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

Article 11 requires Contracting Parties to provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

Article 13 requires Contracting Parties to apply retroactive protection in accordance with Article 18 of the Berne Convention to all protection provided for in this Treaty.

Article 14 requires that Contracting Parties (1) adopt measures necessary to ensure application of this Treaty and (2) ensure that enforcement procedures are available in a manner that permits 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.

(b) WIPO Performances and Phonograms Treaty

Article 1 paragraph 1, specifies that this Treaty does not derogate from existing obligations that Contracting Parties have to each other under the Rome Convention. Paragraph 2 specifies that the protection granted under this Treaty in no way affects the protection of copyright in literary and artistic works, and that no provision of this Treaty may be interpreted as prejudicing such protection. Paragraph 3 specifies that this Treaty has no connection with, and does not prejudice any rights and obligations under, any other treaties.

Article 2 establishes definitions for the purposes of this Treaty: Paragraph (a) defines "performers" as "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." Paragraph (b) defines a "phonogram" as "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." Paragraph (c) defines "fixation" as "the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device." Paragraph (d) defines "producer of a phonogram" as "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." Paragraph (e) defines "publication of a fixed performance or a phonogram" as "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." Paragraph (f) defines "broadcasting" as "the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof." It also includes "transmission by satellite" and the "transmission of encrypted signals" as "broadcasting" where the broadcaster provides the public with the means for decrypting the transmission. Paragraph (g) defines "communication to the public of a performance or a phonogram" as "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."

Article 3 establishes the points of attachment for protection under the Treaty. They include the criterion of nationality of the performers and producers of phonograms under paragraph 1, and in paragraph 2, those nationals of another Contracting Party who would meet the criteria for eligibility for protection provided under the Rome Convention. Paragraph 3 requires a Contracting Party that takes the reservation provided for in Article 5(3) or Article 17 of the Rome Convention to notify the Director General of the World Intellectual Property Organization (WIPO).

Article 4 requires Contracting Parties to grant 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 to the right to equitable remuneration provided for in Article 15. Paragraph 2 provides that the national treatment obligation does not apply to the extent that another Contracting Party makes a reservation to the right of remuneration permitted by Article 15(3) of this Treaty.

Article 5 obligates Parties to provide protection for the moral rights of performers in respect of their performances fixed in phonograms. The scope of these rights is modeled on but is lesser in scope than the protection for the moral rights of authors as defined in Article 6*bis* of the Berne Convention. Paragraph 1 provides for the right of paternity and paragraph 2 for a more limited right of integrity. Paragraph 3 provides that the means for protecting these rights is left to the country implementing this protection.

Article 6 grants performers the exclusive right to authorize (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 grants performers the exclusive right of authorizing the direct or indirect reproduction of their performances fixed in phonograms, in any manner or form.

Article 8 grants performers the exclusive right of the public distribution of the original and copies of their performances fixed in phonograms. Paragraph 2 provides that this Treaty does not address the issue of exhaustion of this right.

Article 9 grants performers the exclusive right of authorizing the post first sale commercial rental of the original and copies of their performances fixed in phonograms. Paragraph 2 provides that a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive right of reproduction of performers.

Article 10 provides that performers have the exclusive right of authorizing the making available to the public of their performances fixed in phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 11 provides that producers of phonograms have the exclusive right to authorize the direct or indirect reproduction of their phonograms, in any manner or form.

Article 12 provides that producers of phonograms have the exclusive right to authorize the public distribution of the original and copies of their phonograms. Paragraph 2 provides that this Treaty does not address the issue of exhaustion of these rights.

This Article grants producers of phonograms the exclusive right to authorize the post first sale commercial rental of the original and copies of their phonograms. Paragraph 2 provides that a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers for the rental of copies of their 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 producers.

Article 14 provides that producers of phonograms have the exclusive right to authorize the public distribution of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

Article 15(1) requires that performers and producers of phonograms have the right to be compensated by a single equitable remuneration for the broadcasting of their phonograms. Paragraph 2 provides that national legislation may provide that the single equitable remuneration may be claimed by the performer or by the producer of a phonogram or by both. In the absence of an agreement between the performer and the producer of a phonogram, national legislation may set the terms by which performers and producers share the single equitable remuneration.

Under paragraph 3, a Contracting Party takes a reservation that it limit the application of paragraph (1) to only certain uses, or that it will not apply these provisions at all. Paragraph 4 provides that for the purposes of this Article, phonograms that have been distributed to the public by means of transmission shall be considered as published.

Article 16(1) allows Contracting Parties to provide for the same kinds of limitations or exceptions to the rights of performers and producers of phonograms that they provide in their national legislation in connection with the protection of copyright in literary and artistic works. Paragraph 2 obligates Contracting Parties to apply a fair use test to limitations and exceptions to the rights under this Treaty.

Article 17 establishes a minimum 50 year term of protection for phonograms.

Article 20 prohibits conditioning the enjoyment and exercise of the rights in this Treaty on compliance with any formality such as copyright registration or notice.

Article 21 only allows the reservation in respect of the broadcasting of sound recordings provided for in article 15, other reservations to the Treaty are not permitted.

Article 22 makes the provisions concerning the protection of existing works in Article 18 of the Berne Convention applicable to the rights under this Treaty.

Article 23 requires Contracting Parties to provide effective means of enforcement of the rights under this Treaty.

III. ANTICIRCUMVENTION AND RIGHTS MANAGEMENT

Both of the new WIPO Treaties include technological protection measures in their respective Articles 11 and 18 (commonly referred to as the "black box" or "anti-circumvention" provisions). These provisions require "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

The system mandated by the anti-circumvention provisions is intended to assist copyright owners in the protection of their works. Copyright owners may wish to use such systems to prevent the unauthorized access to or reproduction of their works. They may also wish to allow some users to deactivate the systems. Furthermore, certain uses of copyrighted works may not be unlawful under the Treaties or domestic legislation. Therefore, the anti-circumvention provisions of the Treaties prohibit only those circumventions that are not authorized by the authors or permitted by law. That authority may be granted by the copyright owner or by limitations on the copyright owner's rights under law.

Neither do the Treaties require copyright or neighboring right owners to use technological protection, or, if they do, to employ any particular type. Copyright owners should be free to determine what level or type of technological protection (if any) is appropriate for their works, taking into consideration cost and security needs, and different consumer and market preferences. Moreover, there is no evidence that one technological protection system could—or should—take care of all types of works.

Both of the new WIPO Treaties also include provisions on copyright management information. These provisions require the protection of copyright management information, defined under the Treaties as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

In the future, the copyright management information associated with a work, such as the name of the right owner and the terms and conditions for uses of the work, may be critical to the efficient operation and success of electronic commerce. Rights management information will serve as a kind of license plate for a work on the information superhighway, from which a user may obtain important information about the work. The accuracy of such information will be crucial to the ability of consumers to find and make authorized uses of protected works. Reliable information will also facilitate efficient licensing and reduce transaction costs for licensable uses, both fee-based and royalty-free, of copyrighted works and phonograms. The

public also should be protected from false information about who created a protected work or phonogram, who owns rights in it, and what uses may be authorized by the right owner.

While the Treaties do not require copyright owners to provide copyright management information, they do require that when such information is included, it be accurate. Such provisions will encourage right owners to include the information needed to enable consumers to more easily find and make authorized uses of copyrighted works and phonograms. The provisions prohibit the falsification, alteration or removal of any copyright management information—not just that which is included in or linked to the copyrighted work or phonogram. Many users may obtain such information from public registers, where the integrity of such information will be no less important.

(a) Anti-circumvention Provisions

The effective implementation of the anti-circumvention provisions of the Treaties requires careful implementation in domestic law. We believe that a two level approach to its implementation is essential for the protection to be effective as required by the treaties. First, there should be a provision that applies when a person has not obtained lawful access to a work for which the copyright owner has put in place a technological measure that effectively controls access to copies of that work. It must establish a general prohibition against circumventing a technological protection measure that effectively controls access to a copyrighted work. The act of circumventing a technological protection measure put in place by a copyright owner to control access to a copyrighted work is the electronic equivalent of stealing a copy of a book from an author who has secured that copy. Circumventing such a technological protection measure includes descrambling a scrambled work, decrypting an encrypted work, or otherwise avoiding, bypassing, removing, deactivating or impairing a technological protection measure. In order to prevent the provision from being too extensive in its operation, there could be several requirements to be met to be in violation of this prohibition: (1) the technological protection measure must be one that, in the ordinary course of its operation, requires the application of information, or a process or a treatment, with the authority of the copyright owner, to gain access to the work; (2) the work to which access is controlled by the technological protection measure must be a work protected by copyright or neighboring rights (i.e., not a work that is in the public domain); and (3) the act of circumvention must have been done without the copyright owner's authority.

To effectively protect and enforce the copyright owner's right to determine who may have access to the copyrighted work, such a provision would also prohibit manufacturing, importing, offering to the public, providing or otherwise trafficking in any technology, product, service, device, component or part thereof that can be used to circumvent a technological protection measure that effectively controls access to a copyrighted work. Again, to preclude an overly broad implementation, violation of such a prohibition could require that certain conditions are met. The technology, product, service, device, component or part thereof could be limited to: (1) be primarily designed or produced for the purpose of circumventing a technological protection measure that effectively controls access to a copyrighted work; or (2) have only limited commercially significant purpose or use other than to circumvent a technological protection measure that effectively controls access to a copyrighted work; or (3) be marketed by the manufacturer, importer, person who offers it to the public, provides it, or otherwise traffics in it, or by another person acting in concert with him or her, for use in

circumventing a technological protection measure that effectively controls access to a protected work.

When a person has obtained lawful access to a copy of a copyrighted work or phonogram, but the copyright owner has put in place technological measures that effectively protect his or her right to control or limit further use of the copyrighted work or phonogram, manufacturing, importing, offering to the public, providing or otherwise trafficking in any technology, product, service, device, component or part thereof that can be used to circumvent such protection of a right under the Treaties or the Berne Convention afforded by a technological protection measure should be prohibited. Circumventing in this sense includes avoiding, bypassing, removing, disabling or otherwise impairing a technological protection measure. Under this approach, the technological protection measure must be one that, in the ordinary course of its operation, prevents, restricts, or otherwise limits the exercise of a copyright or neighboring right owner's right. A violation would occur only when one of three conditions are met: the technology, product, service, device, component, or part thereof must: (1) be primarily designed or produced for the purpose of circumventing technological protection measure that effectively protects a right; (2) have only limited commercially significant purpose or use other than to circumvent protection afforded by such a technological protection measure; or (3) be marketed by the person who manufactures it, imports it, offers it to the public, provides it, or otherwise traffics in it, or by another person acting in concert with that person, for use in circumventing protection afforded by such a technological protection measure.

As well, the importation, sale for importation or sale after importation by the owner, importer or consignee of any such technology, product, service, device, component or part thereof should be prohibited. Such provisions should also make it clear that such provisions shall not have any effect on the rights, remedies, limitations or defenses to copyright infringement including uses which could be permitted under the Treaties or the Berne Convention.

(b) Integrity of Copyright Management Information

An effective regime for protection of rights management information should generally prohibit knowingly providing false rights management information (RMI) or distributing or importing for distribution false RMI with the intent to induce, enable, facilitate or conceal a copyright infringement.

It should also include a general prohibition against removing or altering RMI and against distributing or importing for distribution altered RMI or works in which RMI has been removed. The Treaties prohibit three specific acts if they are committed without the authority of the copyright owner or the law, and if they are done knowing, or with respect to civil remedies, having reasonable grounds to know, that they will induce, enable, facilitate or conceal a copyright infringement: (1) intentionally removing or altering RMI; (2) distributing or importing for distribution RMI knowing that it has been altered without the authority of the copyright owner or the law; or (3) distributing, importing for distribution, or publicly performing works, copies of works, or phonograms knowing that RMI has been removed or altered without the authority of the right owner or the law.

RMI includes (1) the title of a work or other information that identifies the work; (2) the author's name or other information that identifies the author; (3) the copyright owner's name or other information that identifies the copyright owner; and (4) terms and conditions for use of a work. Numbers and symbols which refer to or represent the above information and links, such as embedded pointers and hyperlinks, to the above information are also included within the definition of RMI. As noted above, both Treaties require that numbers and symbols be included within the definition of RMI because removing or altering a link to the information will have the same adverse effect as removing or altering the information itself. To protect the privacy of users of copyrighted works, RMI should not include information concerning individual uses of copyrighted works.

Implementation of RMI Protection must not mandate the use of CMI. Such provisions must protect the integrity of RMI if a party chooses to use it in connection with a protected work or phonogram. It also should be noted that rights management information should not encompass tracking or usage information relating to the identity of users of the works or the uses made of such works. RMI encompasses only that information associated with a work, such as the author's, performer's or producer's name, the right owner's name, and title of the work.

(c) U.S. Activities

In my own country, we are moving to promptly adhere to both new Treaties. As you may know, President Clinton submitted these Treaties to the United States Senate on July 28, 1997, for its advice and consent. Furthermore, the necessary implementing legislation, H.R. 2281 and S.1121, has been introduced in both Houses of Congress, and has moved through the legislative process with hearings.

As for the issue of OSP/ISP liability, the Congress has been working to forge a solution that could be embraced by all of the parties—both content and service providers. Both in the Senate and the House, particularly Senator Hatch and Congressman Goodlatte have been holding continuing negotiating sessions to reach agreement on this issue.

The House Judiciary Subcommittee on Courts and Intellectual Property approved and reported to the full committee an amended version of H.R. 2281 on February 26, 1998.

The bill was approved by the full Judiciary Committee on April 1, 1998, after an amendment to add the revised provisions of H.R. 3209 regarding on-line service provider liability as Chapter II. It is our understanding that these provisions reflect a partial agreement on liability issues reached on March 31, 1998, between copyright owners and service providers. The full agreement is expected to be reflected in a manager's amendment to be offered during House floor consideration of H.R. 2281 soon after the spring recess.

On April 2, 1998, Chairman Hatch of the Senate Judiciary Committee revealed a draft bill captioned the "Digital Millennium Copyright Act of 1998." The bill is intended to reflect the full agreement between copyright owners and service providers on liability issues and serve as the Senate counterpart to H.R. 2281. Judiciary Committee markup of the bill is likely soon after the Senate returns from its spring recess (April 4 to 19).

To develop the U.S. proposal for Treaty implementation legislation, the USPTO and the General Counsel of the Department of Commerce consulted widely with representatives of the various groups interested in the implementation of the Treaties. These groups included copyright owners and authors, computer and consumer equipment manufacturers, service providers and representative users of copyrighted works such as educators and librarians. All of these groups contributed suggestions, orally and in writing, particularly in regard to the provisions for the implementation of the anticircumvention provisions of the Treaties. The provision on anticircumvention which was finally adopted as the Administration's proposal and which was ultimately incorporated into H.R. 2281 is intended to protect the rights of copyright owners while encouraging the continued advancement of technology in a balanced manner that takes into account the needs and concerns of all interested parties and the importance of promoting the continuing growth of electronic commerce with its benefits for all members of society.

In particular, in order to provide meaningful protection against unauthorized circumvention of technological protection measures, H.R. 2281 includes restrictions on the manufacture and distribution of devices and other technological means of circumventing such protection measures. These provisions have been drafted narrowly and carefully, however, to enable the continued development and use of technology for legitimate purposes. This is not the first time that legislators have been called on to strike a difficult but important balance between prohibiting the manufacture and distribution of devices and technologies that facilitate prohibited acts and ensuring that development and use of technologies and devices for legitimate purposes is not hindered. Such carefully drawn restrictions can be found in U.S. law in the prohibitions on circumvention of the Serial Copy Management System in 17 U.S.C. § 1002, including a prohibition on devices that enable circumvention, and in the prohibition in 47 U.S.C. § 605 on the manufacture, assembly, importation, sale or distribution of devices primarily of use in the unauthorized decryption of satellite programming.

Additionally, legislation has been introduced to deal with the complex issue of the extent of liability of Internet service providers and on-line service providers for copyright infringement in cyberspace. While the Administration believes that treaty ratification and liability are separate issues, and that nothing in the two new Treaties requires Congress to specifically address the issue of liability, we are pleased to see our Congress address these two issues simultaneously so long as the consideration of the liability issue does not impair prompt consideration and passage of the implementing legislation. While we are hoping for prompt

enactment of legislation to implement these Treaties, it unlikely that implementing legislation will be enacted before Congress adjourns its First Session this Fall.

While we are seeking enactment in the United States during the Second Session of the 105th Congress, we encourage speedy adherence and implementation by other countries. I note that one country in Asia—Indonesia—has become the first to ratify the WIPO Copyright Treaty while Moldova has become the second country to ratify the Copyright Treaty and the first to ratify the Performances and Phonograms Treaty. Others have taken steps to bring their laws into line with the Treaty obligations. I am sure that most of you remember that adherence by thirty countries is necessary for the Treaties to enter into force. The sooner the Treaties enter into force the better for all of us.

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