

WIPO



AP/CE/2/2

ORIGINAL: English/French/Spanish

DATE: February 27, 1998

WORLD INTELLECTUAL PROPERTY ORGANIZATION
GENEVA

**COMMITTEE OF EXPERTS
ON A PROTOCOL
CONCERNING AUDIOVISUAL PERFORMANCES**

**Second Session
Geneva, June 8 to 12, 1998**

PROPOSALS AND OTHER SUBMISSIONS RECEIVED FROM WIPO MEMBER
STATES AND THE EUROPEAN COMMUNITY

Memorandum prepared by the International Bureau

1. The Committee of Experts on a Protocol concerning Audiovisual Performances, during its first session, on September 19, 1997, adopted the following recommendation:

“(i) the second session of the Committee should take place in the period of May-June 1998, but not later than during the week starting June 8, 1998; it is recommended that the Governing Bodies of WIPO take a decision about the dates of the second session during their September-October 1997 series of meetings;

(ii) the International Bureau should invite the Governments of WIPO Member States and the European Community to submit by January 15, 1998, proposals, preferably in treaty language, concerning a protocol to the WIPO Performances and Phonograms Treaty on audiovisual performances;

(iii) the International Bureau should distribute the proposals, together with comparative tables, if appropriate, by the end of February 1998, to those invited to the second session of the Committee who should be the same as those invited to the first session...” (see document AP/CE/I/4, paragraph 12).

The WIPO General Assembly approved this recommendation during its twenty-first session (see document WO/GA/XXI/13, paragraph 205).

2. On October 24, 1997, the International Bureau sent a circular letter to WIPO Member States and the European Community inviting them to submit proposals as indicated in item (ii) of the above-quoted decision.

3. This memorandum contains, in Annex I, the texts of the proposals that the International Bureau has received by January 15, 1998, namely from Argentina, Colombia, the European Community and its Member States, and Ghana, as well as information received from Australia and suggestions for discussion received from Japan, in alphabetical order.

4. In Annex II of the memorandum, a comparative table of the four above-mentioned proposals is contained. Footnotes in Annex II refer to related suggestions for discussion made by Japan.

[Annex I follows]

ANNEX I

TEXTS OF THE PROPOSALS AND OTHER SUBMISSIONS RECEIVED FROM WIPO
MEMBER STATES AND THE EUROPEAN COMMUNITY

ARGENTINA

PROTOCOL CONCERNING AUDIOVISUAL PERFORMANCES

Art. 1

1. Nothing in this Treaty shall derogate from the 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 on October 26, 1961 (hereinafter “the Rome Convention”).
2. Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.
3. This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any another treaties.

Art. 2: Definitions

For the purposes of this Treaty:

- a) “performers” are actors, singers, musicians, dancers and other persons who act, sing, deliver, play in, interpret or otherwise perform literary or artistic works or expressions of folklore;
- b) “audiovisual fixation” means the incorporation of sounds and images, or a representation thereof, from which they may be perceived, reproduced or communicated by means of a device;
- c) “publication” means the offering to the public of copies of a performance fixed in an audiovisual work with the consent of the owners of the rights therein, provided that such copies are offered to the public in sufficient quantity;

d) “broadcasting” means the transmission by wireless means, for public reception, of sounds or of images and sounds, or representations thereof; such transmission by satellite is also “broadcasting;” the transmission of encrypted signals is “broadcasting” where the means of decrypting the signals are made available to the public by the broadcasting organization or with its consent;

e) “communication to the public” means the transmission to the public, by any means other than broadcasting, of the sounds and images of a performance.

Art. 3: Beneficiaries of protection under this Treaty

1. Contracting Parties shall accord the protection provided for in this Treaty to performers who are nationals of other Contracting Parties.

2. Nationals of other Contracting Parties shall be understood to be those performers who would meet the criteria of eligibility for protection provided for in the Rome Convention if all the Contracting Parties to this Treaty were Contracting States of the said Convention. With respect to those eligibility criteria, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

Any Contracting Party availing itself, *mutatis mutandis*, of the possibilities provided for in Article 5(3) of the Berne Convention or, for the purposes of Article 5 of the same Convention, Article 17 thereof shall make a notification as provided in those provisions to the Director General of the World Intellectual Property Organization (WIPO).

Art. 4: National treatment

Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment that it accords to its own nationals with regard to the exclusive rights specifically granted in this Treaty.

Art. 5: Moral rights

The performer shall have the following rights in relation to his performances in audiovisual works:

1. to be identified by the mention of his name or pseudonym, except where its omission is dictated by the manner in which the performance is to be used;
2. to object to any distortion of his performance that would be prejudicial to his professional standing.

The performer may authorize the making of changes to his performance. Such authorization shall only be valid when it is given in writing.

The rights accorded to the performer in the foregoing paragraphs shall be maintained, after his death, at least until the expiry of his economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party in which protection is claimed.

Art. 6: Economic rights

1. Economic rights of performers in their unfixed performances

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

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

2. Economic rights of performers in their performances fixed in audiovisual works

Performers shall have the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

- a) **Reproduction:**
the direct or indirect reproduction of their performances in any manner or form;
- b) **Distribution:**
the making available to the public of copies of their performances by sale or other transfer of ownership.

Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions under which exhaustion of the right under subparagraph (b) applies after the first sale or other transfer of ownership of the original or a copy of the performance fixed with the performer's authorization.

- c) **Rental:**
the commercial rental to the public of copies of their performances as provided in the national legislation of Contracting Parties, even after distribution effected by the performer or with his authorization.

d) Broadcasting and communication to the public:

the broadcasting and communication to the public of their performances.

Unless otherwise agreed, consent given for the fixing of the performance in an audiovisual work shall constitute authorization of broadcasting and communication to the public by means of subscription systems.

e) Interactive services:

the making available to the public of their 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.

In the absence of specific provisions in individual contracts, the economic rights provided for in this Article shall apply.

Art. 7: Limitations and exceptions

1. Contracting Parties may provide the same kinds of limitation on or exception to the protection of performers as they provide at present in connection with the protection of copyright in literary and artistic works.
2. The Contracting Parties shall confine any limitation of or exceptions to the rights provided for in this Treaty to certain special cases that do not conflict with the normal exploitation of the performance fixed in audiovisual works or unreasonably prejudice the legitimate interests of the performer.
3. The term of protection to be granted to performers under this Treaty shall be at least 50 years, calculated from the end of the year in which the performance was fixed.
4. 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.
5. This Treaty shall not prejudice any rights acquired in any Contracting Party prior to the date of its entry into force for that Party.

A Contracting Party shall not be obliged to apply the provisions of this Treaty to performances given or audiovisual fixations made prior to its entry into force for that Party.

Art. 8: Obligations concerning technological measures

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

Art. 9: Obligations concerning rights management information

1. Contracting Parties shall provide adequate and effective legal remedies against any person who deliberately commits 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) removes or alters any rights management information without authority;
- ii) distributes, imports for distribution, broadcasts, communicates or makes available to the public, without authority, performances or copies thereof 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 or the audiovisual producer, or information on the terms and conditions of use of the performance fixed in an audiovisual work.

Art. 10: Formalities

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

Art. 11: 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, and in addition prevent further infringements from being committed.

AUSTRALIA

The Australian Government is currently determining its position on a Protocol to the WPPT on Audiovisual Performances, and on the issue of providing for greater performers' rights in sound recordings, modeled on those in the WPPT. Consequently, the Government is not able to submit a proposal to the International Bureau by January 15, 1998, as invited.

The Australian Government is committed to giving careful consideration to the issue of audiovisual performances, in addition to greater rights for performers in sound recordings based on the WPPT. As part of determining our position on these issues, I am pleased to note that the Australian Government has recently released a discussion paper, "Performers' Intellectual Property Rights," to solicit the views of domestic interests. That discussion paper is available at <http://law.gov.au/publications/performers.htm>.

Australia looks forward to participating in the next session of the Committee of Experts on a Protocol concerning Audiovisual Performances. By that time, we hope that views received and consultations carried out, following on from the release of the discussion paper, will enable us to contribute substantively to the Committee's discussions.

COLOMBIA

PROTOCOL TO THE WIPO PERFORMANCES AND PHONOGRAMS TREATY CONCERNING AUDIOVISUAL PERFORMANCES

Safeguarding of copyright

Protection provided for in this Protocol shall leave intact and in no way affect the protection of copyright in literary and artistic works. Consequently, none of the provisions of this Protocol shall be interpreted as prejudicing such protection.

Definitions

- Performer
- Audiovisual work
- Fixation
- Publication
- Rental
- Broadcasting
- Communication to the public

(This proposal refers to the concepts to be defined, but does not define them).

Moral rights of performers

The performer shall have the following rights in relation to his audiovisual performances:

- a) to demand that his name appear in connection with or be associated with every performance that takes place;
- b) to object to any distortion, mutilation or other violation of his performance that might damage his standing or reputation.

Term of moral rights

The rights accorded to the performer under the foregoing Article shall be maintained, after his death, at least until the expiry of his economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party in which protection is claimed.

Economic rights of performers in their unfixed performances

Performers shall enjoy the exclusive right to authorize:

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

Right of reproduction

Performers shall enjoy the exclusive right to authorize the direct or indirect, permanent or temporary reproduction, in any manner or form, of their performances fixed in any medium.

Right of distribution

Performers shall enjoy the exclusive right to authorize the making available to the public, by sale or other transfer of ownership, of the original and copies of their performances fixed in any medium.

Nothing in this Protocol shall affect the right of Contracting Parties to determine the conditions, if any, on which the exhaustion of rights applies after the first sale or other transfer of ownership of the original or a copy of a performance fixed in any medium.

Right of rental

Performers shall enjoy the exclusive right to authorize the rental of the original and copies of their performances fixed in any medium, even after distribution thereof by the performer or with his authorization.

Right of making available of fixed performances

Performers shall enjoy the exclusive right to authorize the making available of their performances fixed in any medium, 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.

Limitations and exceptions

Contracting Parties may, in their national legislation, provide the same kinds of limitation on or exception to the protection of performers as they provide at present in connection with the protection of copyright in literary and artistic works.

Contracting Parties shall confine any limitation of or exceptions to rights provided for in this Protocol to certain special cases that do not conflict with the normal exploitation of the performance or unreasonably prejudice the legitimate interests of the performer.

Term of protection of economic rights

The economic rights accorded to performers shall have a term of 50 years following the date of audiovisual fixation.

Obligations concerning technological measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers in connection with the exercise of their rights under this Protocol.

Obligations concerning rights management information

Contracting Parties shall provide adequate and effective legal remedies against any person who deliberately commits 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:

- removes or alters any electronic rights management information without authority;
- distributes, imports for distribution, broadcasts, communicates or makes available to the public, without authority, performances or copies of fixed performances knowing that the electronic rights management information has been removed or altered without authority.

– “Rights management information” means information that identifies the performer, his performance, the fixation of the performance and the owner of any right in the performance or fixation, or information on the terms and conditions of use of the performance or fixation, and any numbers or codes representing that information where any of those items of information is attached to a copy of a fixed performance or appears in connection with the communication or making available to the public of a fixed performance.

Formalities and independence of protection

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

Such enjoyment and exercise shall be independent of the existence of protection in the country of origin of the performance.

Reservations

No reservations to this Protocol shall be permitted.

Application in time

Contracting Parties shall not apply the provisions of this Protocol to performances that have taken place prior to the date of its entry into force.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

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

Preamble

The Contracting Parties

Wishing to ensure an adequate level of protection for audiovisual performances, especially in the digital environment;

Noting that the WIPO Performances and Phonograms Treaty does not cover the rights of performers in the audiovisual fixation of their unfixed performances, nor the exploitation of their audiovisually fixed 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:

CHAPTER I GENERAL PROVISIONS

Article 1

Relation to Other Conventions

- (1) This Treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty done in Geneva, 20 December 1996 (hereinafter the “WIPO Treaty”).
- (2) Nothing in this Protocol shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Treaty.
- (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 provisions of this protocol may be interpreted as prejudicing such protection.

Article 2

Definitions

(1) The Contracting Parties shall apply, *mutatis mutandis*, the definitions set out in Article 2 paragraphs (a), (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.

Article 3

Beneficiaries of protection under this protocol

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

CHAPTER II RIGHTS OF PERFORMERS IN THEIR AUDIOVISUAL PERFORMANCES

Article 4

Rights of performers in their unfixed audiovisual performances

The 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 granted under the WIPO Treaty to performers as regards their live aural performances, namely the rights provided under Article 5 (Moral Rights)¹ and Article 6 (Economic rights of Performers in their unfixed performances).

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles 5 (Moral Rights),¹ 7 (Right of Reproduction), 8 (Right of Distribution), 9 (Right of Rental) and 10 (Right of Making Available of Fixed Performances) of the WIPO Treaty.

¹ (Footnote contained in the proposal:) The scope and manner of the application of moral rights protection to audiovisual performers requires further consideration.

Article 6

Application of certain substantive provisions of the WIPO Treaty

The Contracting Parties shall apply, *mutatis mutandis*, in respect of protection granted under this Protocol, the provisions of Articles 4 (National Treatment), 16 (Limitations and Exceptions), 17 (Term of Protection), 18 (Obligations concerning Technological Measures), 19 (Obligations concerning Rights Management Information), 20 (Formalities), 22 (Application in Time) and 23 (Provisions on Enforcement of Rights) of the WIPO Treaty.

Article 7

Reservations

No reservations to this Protocol shall be permitted.

CHAPTER III ADMINISTRATIVE AND FINAL CLAUSES

Article 8

Application of certain administrative provisions

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

Article 9

Eligibility for becoming party to the Treaty

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

Article 10

Signature of the Protocol

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

Article 11

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

Article 12

Final clauses

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

GHANA

PROTOCOL TO THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT) FOR THE PROTECTION OF AUDIOVISUAL PERFORMANCES AND PRODUCERS

I. RIGHTS OF PRODUCERS OF AUDIOVISUAL WORKS

1. Right of reproduction

Producers shall enjoy the exclusive right to authorize the direct or indirect reproduction of their works in any manner or form.

2. Right of distribution

Producers shall enjoy the exclusive right to authorize the availability of the original and copies of their works to the public through sale or other transfer of ownership.

3. Right of rental

Producers shall enjoy the exclusive right to authorize commercial rental of the original and copies of their works to the public, except, if such commercial rental has led to widespread copying of the works which materially impairs the exclusive right of reproduction.

4. Right of communication to the public of audiovisual productions

(1) Producers shall enjoy the exclusive right to authorize the availability of their works by wire or wireless means, to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) Nothing in this Treaty shall exclude Contracting Parties from authorizing the exercise of the rights in paragraph 4(1) by a system of Collective Administration for and on behalf of the Contracting Parties.

II. RIGHTS IN AUDIOVISUAL PERFORMANCES

1. Right of reproduction

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

2. Right of distribution

Performers shall enjoy the exclusive right to authorize the availability of the original and copies of their works to the public through sale or other transfer of ownership.

3. Right of rental

Performers shall enjoy the exclusive right to authorize the commercial rental of the original and copies of performances to the public, except, if the commercial rental has led to widespread copying of the works which materially impairs the exclusive right of reproduction.

Notwithstanding the above provisions:

a) Both parties i.e. the producers and performers of audiovisual works may by contract determine the extent to which the rights granted to the performers if any are to be exercised in a particular performance.

b) In order to ensure that the exploitation of the work is not unnecessarily stifled, the producer may exercise the rights of reproduction, distribution and rental granted to the performer on such conditions as the producer and performer may agree upon.

4. Right of communication to the public of audiovisual productions

(1) Performers shall enjoy the exclusive right to authorize the availability of their works to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) But nothing in this Treaty shall exclude Contracting Parties from authorizing the exercise of the rights in paragraph 4(1) by a system of Collective Administration for and on behalf of the Contracting Parties.

JAPAN

With a view to exploring an appropriate national system concerning audiovisual performances which could encourage creation of performances as well as use of such performances in the age of new media, the Government of Japan has established an *ad hoc* Committee comprised of interested circles, lawyers and scholars in November 1997. While the discussions of this Committee on possible new rights and measures for use, which would be reflected in Japan's position for a Protocol concerning Audiovisual Performances, still continue, the Government of Japan would like at this stage to suggest with background explanation the following three issues to be discussed for the Protocol. Such suggestions are not exhaustive and Japan reserves the right to make further suggestions reflecting the discussions of the Committee in the future.

1. Right of Making Available of Unfixed Performances

<explanation>

Wire/wireless transmission of works, performances, etc., to the public can be categorized by the following two types of acts:

(1) wire/wireless broadcasting (in which members of the public *cannot* control the act of transmission);

(2) wire/wireless interactive transmission (in which members of the public *can* control the act of transmission by their “access” from a place and at a time individually chosen by them).

The most typical example of type (2) is transmission to the public through the Internet.

Although the majority of “home pages” in web site are still composed of non-moving images and/or texts, fixed/unfixed moving images are increasing in interactive transmissions.

If *unfixed* performances are transmitted through the Internet (to only those who have accessed it), this act is not covered by the right of wire/wireless broadcasting as provided for in Article 6(i) of the WPPT, because transmission through the Internet belongs to type (2) rather than (1).

Therefore, with a view to adequately coping with the expanding use of live performances through the Internet, the right of making available through type (2) transmission for unfixed performances should be discussed.

2. Right of Fixation of Unfixed Performances

<explanation>

Japan's understanding is that during the discussions at the Diplomatic Conference, the term "musical" was deleted from Article 6 of the basic proposal for the WPPT which enabled Article 6(ii) to be interpreted to cover an act of fixing their unfixed audiovisual performances.

Although there seems to be another interpretation which excludes audiovisual performances from the scope of Article 6(ii) in the light of Article 2(c) which defines the term "fixation" as embodiment of sounds, or of the representation thereof as is taken by the International Bureau, it should be noted that the term "fixation" in Article 6(ii) means an "act," and therefore, the scope of Article 6(ii) seems to have nothing to do with Article 2(c) which defines the "fixation" clearly as a "thing" rather than an "act."

Therefore, a provision should be discussed to declare that performers enjoy the exclusive right to authorize fixing their unfixed performances.

3. Non-retroactivity

<explanation>

The retroactive protection of all audiovisual performances already fixed in the past would be extremely difficult and cause trouble to smooth transaction unless effective right clearance systems are established by relevant performers' organizations.

[End of Annex I, Annex II follows]

ANNEX II

page i

COMPARATIVE TABLE OF THE PROPOSALS RECEIVED FROM WIPO MEMBER STATES AND THE EUROPEAN COMMUNITY

CONTENTS

	<u>page</u>
I. Title	1
II. Preamble	1
III. Relation to other conventions and treaties; relation to copyright	2
IV. Definitions	3
V. Beneficiaries of protection	4
VI. National treatment	5
VII. Formalities; independence from protection in country of origin	5
VIII. Moral rights of performers	6
IX. Rights of performers in their unfixed performances	8
X. Rights of performers in audiovisual fixations	9
1. Right of reproduction	9
2. Right of distribution	10
3. Right of rental	11
4. Right of making available	12
5. Right of broadcasting and communication to the public	13
XI. Rights of producers of audiovisual works	14
XII. Limitations and exceptions	15

XIII. Contractual arrangements concerning rights of performers	16
XIV. Duration of economic rights of performers	16
XV. Obligations concerning technological measures	17
XVI. Obligations concerning rights management information	18
XVII. Reservations	19
XVIII. Application in time	20
XIX. Provisions on enforcement of rights	21
XX. Administrative and final clauses	21

I. Title

ARGENTINA

Protocol concerning audiovisual performances.

COLOMBIA

Protocol to the WIPO performances and phonograms treaty concerning audiovisual performance.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Protocol to the WIPO Performances and Phonograms Treaty, concerning audiovisual performances.

GHANA

Protocol to the WIPO Performances and Phonograms Treaty (WPPT) for the protection of audiovisual performances and producers.

II. Preamble

EUROPEAN COMMUNITY

The Contracting Parties

Wishing to ensure an adequate level of protection for audiovisual performances, especially in the digital environment;

Noting that the WIPO Performances and Phonograms Treaty does not cover the rights of performers in the audiovisual fixation of their unfixed performances, nor the exploitation of their audiovisually fixed 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 and treaties; relation to copyright

ARGENTINA

Art. 1

1. No provision of this Treaty 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 referred to as “the Rome Convention”).
2. The protection granted under this Treaty shall leave intact and in no way affect the protection of the copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted to the detriment of that protection.
3. This Treaty shall have no connection with and shall not prejudice any right or obligation under another Treaty.

COLOMBIA

Safeguarding of copyright

The protection provided for in this Protocol shall leave intact and in no way affect the protection of the copyright in literary and artistic works. Consequently, none of the provisions of this Protocol may be interpreted in a manner detrimental to that protection.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 1

Relation to Other Conventions

- (1) This Treaty constitutes a Protocol to the WIPO Performances and Phonograms Treaty done in Geneva, 20 December 1996 (hereinafter the “WIPO Treaty”).
- (2) Nothing in this Protocol shall derogate from existing obligations that Contracting Parties have to each other under the WIPO Treaty.
- (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 provisions of this protocol may be interpreted as prejudicing such protection.

IV. Definitions

ARGENTINA

Art. 2: Definitions

For the purposes of this Treaty:

a) “Performers” means all actors, singers, musicians, dancers or other persons who act a part, sing, recite, declaim or in any way perform literary or artistic works or expressions of folklore.

b) “Audiovisual fixation” means the incorporation of sounds and images, or a representation thereof, from which they may be perceived, reproduced or communicated with an appropriate device.

c) “Publication” is the offering to the public of copies of a performance fixed in an audiovisual work with the consent of the owners of the rights concerned, provided that the said copies are offered to the public in sufficient quantity.

d) “Broadcasting” means the wireless transmission of sounds or images and sounds, or representations thereof, for reception by the public; such transmission by satellite is also “broadcasting;” the transmission of coded signals shall be “broadcasting” where the means of decoding the signals are offered to the public by the broadcasting organization or with its consent.

e) “Communication to the public” is the transmission to the public by any medium other than broadcasting of the sounds and images of a performance.

COLOMBIA

Definitions

- Performer
- Audiovisual work
- Fixation
- Publication
- Rental
- Broadcasting
- Communication to the public

(This proposal refers to concepts to be defined, but does not define them).

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 2

Definitions

(1) The Contracting Parties shall apply, *mutatis mutandis*, the definitions set out in Article 2 paragraphs (a), (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.

V. Beneficiaries of protection

ARGENTINA

Art. 3: Beneficiaries of protection under this Treaty

1. The Contracting Parties shall grant the protection provided for under this Treaty to performers who are nationals of other Contracting Parties.

2. Nationals of other Contracting Parties means those performers who meet the criteria of eligibility for protection provided for under the Rome Convention where all the Contracting Parties to this Treaty are Contracting States of the said Convention. The Contracting Parties shall apply to those eligibility criteria the relevant definitions contained in Article 2 of this Treaty.

Any Contracting Party may have recourse, *mutatis mutandis*, to the options provided for in Article 5(3) or, for the purposes of the provisions of Article 5, to Article 17, all of them of the Rome Convention, and shall give notice thereof to the Director General of the World Intellectual Property Organization (WIPO) as provided in those provisions.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 3

Beneficiaries of protection under this protocol

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

VI. National treatment

ARGENTINA

Art. 4: National treatment

Every Contracting Party shall grant to the nationals of other Contracting Parties, as defined in Article 3(2), the treatment that it grants to its own nationals with respect to the exclusive rights accorded specifically in this Treaty.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

The Contracting Parties shall apply, *mutatis mutandis*, in respect of protection granted under this Protocol, the provisions of Articles 4 (National Treatment) ... of the WIPO Treaty.

VII. Formalities; independence from protection in country of origin

ARGENTINA

Art. 10: Formalities

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

COLOMBIA

Formalities and independence of protection

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

The said enjoyment and exercise shall be independent of the existence of protection in the country of origin of the performance.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

The Contracting Parties shall apply, *mutatis mutandis*, in respect of protection granted under this Protocol, the provisions of Articles... 20 (Formalities)... of the WIPO Treaty.

VIII. Moral rights of performers

ARGENTINA

Art. 5: Moral rights

The performer shall have the following rights in his performances in audiovisual works:

1. to be identified by the mention of his name or pseudonym, except where the omission thereof is dictated by the manner in which the performance is used;
2. to object to any distortion of his performance that would prejudice his professional standing.

The performer may authorize the making of changes to his performance. Such authorization shall be valid only if it is given in writing.

The rights accorded to the performer in the foregoing paragraphs shall remain valid after his death at least until the expiration of his economic rights, and shall be exercised by the persons or institutions authorized by the legislation of the Contracting Party in which protection is claimed.

COLOMBIA

Moral rights of performers

The performer shall have the following rights in relation to his audiovisual performances:

- a) to demand that his name appears in connection with or is associated with every performance that takes place;
- b) to object to any distortion, mutilation or any other violation of his performance that might damage his standing or reputation.

Term of moral rights

The rights accorded to the performer under the foregoing Article shall be maintained, after his death, at least until the expiry of his economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party in which protection is claimed.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 4

Rights of performers in their unfixed audiovisual performances

The 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 granted under the WIPO Treaty to performers as regards their live aural performances, namely the rights provided under Article 5 (Moral Rights)¹...

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles 5 (Moral Rights),¹... of the WIPO Treaty.

¹ (Footnote contained in the proposal:) The scope and manner of the application of moral rights protection to audiovisual performers requires further consideration.

IX. Rights of performers in their unfixed performances²

ARGENTINA

Art. 6: Economic rights

1. Economic rights of performers in their unfixed performances.

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

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

COLOMBIA

Economic rights of performers in their unfixed performances

Performers shall enjoy the exclusive right to authorize

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

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 4

Rights of performers in their unfixed audiovisual performances

The 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 granted under the WIPO Treaty to performers as regards their live aural performances, namely the rights provided under Article... 6 (Economic rights of Performers in their unfixed performances).

² See also explanations No. 1 and 2 in the submission by Japan (Annex I).

X. Rights of performers in audiovisual fixations

1. Right of reproduction

ARGENTINA

Art 6.2: Performers shall have the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

a) **Reproduction:**

direct or indirect reproduction of their performances by any process or in any form.

COLOMBIA

Right of reproduction

Performers shall enjoy the exclusive right to authorize the direct or indirect, permanent or temporary reproduction, by any process or in any form, of their performances fixed in any medium.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles...7 (Right of Reproduction)... of the WIPO Treaty.

GHANA

1. Right of reproduction

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

2. Right of distribution

ARGENTINA

Art. 6.2: Performers shall have the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

.....

b) Distribution:

the making available to the public of the copies of their performances by sale or other transfer of ownership.

Nothing in this Treaty shall affect the right of the Contracting Parties to determine the conditions of application of the exhaustion of the right under paragraph (b) after the first sale or other transfer of ownership of the original or a copy of the performance fixed with the performer's consent.

COLOMBIA

Right of distribution

Performers shall enjoy the exclusive right to authorize the making available to the public of the original and copies of their performances fixed in any medium by means of sale or other transfer of ownership.

Nothing in this Protocol shall affect the right of Contracting Parties to determine the conditions of application, if any, of the exhaustion of rights after first sale or other transfer for ownership of the original or a copy of the performance fixed in any medium.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles... 8 (Right of Distribution)... of the WIPO Treaty.

GHANA

2. Right of distribution

Performers shall enjoy the exclusive right to authorize the availability of the original and copies of their works to the public through sale or other transfer of ownership.

3. Right of rental

ARGENTINA

Art. 6.2: Performers shall have the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

.....

c) Rental:

the commercial rental to the public of the copies of their performances, as provided in the national legislation of Contracting Parties, including after distribution effected by the performer or with his consent.

COLOMBIA

Right of rental

Performers shall enjoy the exclusive right to authorize the rental of the original and copies of their performances fixed in any medium, including after distribution effected by the performer or with his consent.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles... 9 (Right of Rental)... of the WIPO Treaty.

GHANA

3. Right of rental

Performers shall enjoy the exclusive right to authorize the commercial rental of the original and copies of performances to the public, except, if the commercial rental has led to widespread copying of the works which materially impairs the exclusive right of reproduction.

4. Right of making available

ARGENTINA

Art. 6.2: Performers shall enjoy the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

.....

e) Interactive Services:

the making available to the public of their performances, by either wire or wireless means, in such a way that the members of the public may have access to them from a place and at a time of their choosing.

COLOMBIA

Right to make fixed performances available

Performers shall enjoy the exclusive right to authorize the making available of their performances fixed in any medium, whether by wire or wireless means, in such a way that the members of the public may have access to them from a place and at a time of their choosing.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 5

Rights of performers in audiovisual fixations of their performances

The Contracting Parties shall accord, *mutatis mutandis*, to performers, as regards the use of audiovisual fixations of their performances, the same rights as those granted under the WIPO Treaty to performers as regards the use of their performances fixed in phonograms, namely the rights provided under Articles... 10 (Right of Making Available of Fixed Performances)... of the WIPO Treaty.

GHANA

4. Right of communication to the public of audiovisual productions

(1) Performers shall enjoy the exclusive right to authorize the availability of their works to the public by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) But nothing in this Treaty shall exclude Contracting Parties from authorizing the exercise of the rights in paragraph 4(1) by a system of Collective Administration for and on behalf of the Contracting Parties.

5. Right of broadcasting and communication to the public

ARGENTINA

Art. 6.2: Performers shall have the exclusive right to authorize the following in relation to their performances fixed in audiovisual works:

.....

d) Broadcasting and communication to the public:

the broadcasting and communication to the public of their performances.

Unless otherwise agreed, consent given for the fixing of the performance in an audiovisual work constitutes authorization of broadcasting and communication to the public by means of subscription systems.

XI. Rights of producers of audiovisual works

GHANA

1. Right of reproduction

Producers shall enjoy the exclusive right to authorize the direct or indirect reproduction of their works in any manner or form.

2. Right of distribution

Producers shall enjoy the exclusive right to authorize the availability of the original and copies of their works to the public through sale or other transfer of ownership.

3. Right of rental

Producers shall enjoy the exclusive right to authorize commercial rental of the original and copies of their works to the public, except, if such commercial rental has led to widespread copying of the works which materially impairs the exclusive right of reproduction.

4. Right of communication to the public of audiovisual productions

(1) Producers shall enjoy the exclusive right to authorize the availability of their works by wire or wireless means, to the public in such a way that members of the public may access them from a place and at a time individually chosen by them.

(2) Nothing in this Treaty shall exclude Contracting Parties from authorizing the exercise of the rights in paragraph 4(1) by a system of Collective Administration for and on behalf of the Contracting Parties.

XII. Limitations and exceptions

ARGENTINA

Art. 7: Limitations and exceptions

1. The Contracting Parties may provide in their national legislation for the same types of limitations and exceptions for the protection of performers as it contains at present with respect to the protection of the copyright in literary and artistic works.
2. The Contracting Parties shall confine any limitation or exception imposed on the rights provided for in this Treaty to certain special cases that do not adversely affect the normal exploitation of the performance fixed in audiovisual works, or unjustifiably prejudice the legitimate interests of the performer.

COLOMBIA

Limitations and exceptions

The Contracting Parties may provide in their national legislation for the same types of limitation or exception imposed on protection of performers as it contains at present with respect to the protection of the copyright in literary and artistic works.

The Contracting Parties shall confine any limitation or exception imposed on the rights provided for in this Protocol to certain special cases that do not adversely affect the normal exploitation of the performance or unjustifiably prejudice the legitimate interests of the performer.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

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

XIII. Contractual arrangements concerning rights of performers

ARGENTINA

Art. 6, last sentence: In the absence of specific provisions on particular contracts, the economic rights laid down in this Article shall apply.

GHANA

Notwithstanding the above provisions:³

a) Both parties i.e. the producers and performers of audiovisual works may by contract determine the extent to which the rights granted to the performers if any are to be exercised in a particular performance.

b) In order to ensure that the exploitation of the work is not unnecessarily stifled, the producer may exercise the rights of reproduction, distribution and rental granted to the performer on such conditions as the producer and performer may agree upon.

XIV. Duration of economic rights of performers⁴

ARGENTINA

Art. 7.3: The duration of the protection granted to performers under this Treaty may not be less than 50 years, calculated as from the end of the year in which the performance was fixed.

COLOMBIA

Duration of the protection of economic rights

The economic rights accorded to performers shall have a duration of fifty (50) years as from the date of audiovisual fixation.

³ See chapter II No. 1 to 3 of the proposal by Ghana (Annex I), namely right of reproduction, right of distribution and right of rental.

⁴ For duration of moral rights, see part VIII of this table.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

The Contracting Parties shall apply, *mutatis mutandis*, in respect of protection granted under this Protocol, the provisions of Articles... 17 (Term of Protection)... of the WIPO Treaty.

XV. Obligations concerning technological measures

ARGENTINA

Art. 8: Obligations concerning technological measures

The Contracting Parties shall provide adequate legal protection and effective legal remedies against any action to circumvent effective technological measures that are used by performers in connection with the exercise of their rights under this Treaty and which restrict acts in relation to their performances fixed in audiovisual works that are not authorized by the performers concerned or permitted by the law.

COLOMBIA

Obligations concerning technological measures

The Contracting Parties shall provide adequate legal protection and effective legal remedies against action to circumvent effective technological measures that are used by performers in connection with the exercise of their rights under this Protocol.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

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

XVI. Obligations concerning rights management information

ARGENTINA

Art. 9: Obligations concerning rights management information

1. The Contracting Parties shall provide adequate and effective legal remedies against any person who deliberately engages in any of the following acts in the knowledge or, with respect to civil remedies, having reasonable grounds to know that it causes, permits, facilitates or conceals an infringement of any of the rights provided for in this Treaty:

- i) without authorization deletes or alters any electronic information on rights management;
- ii) without authorization distributes, imports for distribution or broadcasts performances or copies thereof or communicates them or makes them available to the public, in the knowledge that the electronic rights management information has been deleted or altered without authorization.

2. For the purposes of this Article, “rights management information” means the information identifying the performer, his performance and the audiovisual producer, or information on the clauses and conditions governing the use of the performance fixed in audiovisual work.

COLOMBIA

Obligations concerning rights management information

The Contracting Parties shall provide adequate and effective legal remedies against any person who deliberately engages in any of the following acts in the knowledge or, with respect to civil remedies, having reasonable grounds to know that it causes, permits, facilitates or conceals an infringement of any of the rights provided for in this Protocol:

- without authorization removes or alters any electronic rights management information;
- without authorization distributes, imports for distribution or broadcasts performances or copies of fixed performances, or communicates them or makes them available to the public, in the knowledge that the electronic information on rights management has been removed or altered without authorization.

– “Rights management information” means the information identifying the performer, his performance, the fixation of the performance and the owner of any right in the performance or fixation, or information on the clauses and conditions governing the use of the performance or fixation, and any number or code representing that information, where any of those information elements is affixed to a copy of a fixed performance or appears in connection with the communication or making available to the public of a fixed performance.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

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

XVII. Reservations

COLOMBIA

Reservations

No reservations to this Protocol shall be permitted.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 7

Reservations

No reservations to this Protocol shall be permitted.

XVIII. Application in Time⁵

ARGENTINA

Art. 7:

4. 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 Treaty.

5. This Treaty shall not detract from the rights acquired in any Contracting Party prior to the date of entry into force of this Treaty in that party.

A Contracting Party shall not be obliged to apply the provisions of this Treaty to performances given or to audiovisual fixations made prior to its entry into force in that party.

COLOMBIA

Application in time

The Contracting Parties shall not apply the provisions of this Protocol to performances that have taken place prior to the date of entry into force of this Protocol.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

The Contracting Parties shall apply, *mutatis mutandis*, in respect of protection granted under this Protocol, the provisions of Articles... 22 (Application in Time)... of the WIPO Treaty.

⁵ See also explanation No. 3 of the submission by Japan (Annex I).

XIX. Provisions on enforcement of rights

ARGENTINA

Art. 11: 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 Treaty.
2. The Contracting Parties shall ensure that such procedures for the enforcement of rights are introduced in their legislation as will permit the institution of effective measures against any action infringing the rights referred to in this Treaty, and in addition that the commission of new infringements is prevented.

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 6

Application of certain substantive provisions of the WIPO Treaty

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

XX. Administrative and final clauses

EUROPEAN COMMUNITY AND ITS MEMBER STATES

Article 8

Application of certain administrative provisions

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

Article 9

Eligibility for becoming party to the Treaty

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

Article 10

Signature of the Protocol

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

Article 11

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

Article 12

Final clause

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

[End of Annex II and of document]