

# WIPO



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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

## **DIPLOMATIC CONFERENCE ON THE PROTECTION OF AUDIOVISUAL PERFORMANCES**

**Geneva, December 7 to 20, 2000**

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

*prepared by the International Bureau*

Observations of the International Bureau

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

Protocol v. Separate Treaty<sup>1</sup>

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

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

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

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

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

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

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

<sup>3</sup> McNair, *The Law of Treaties* 23.

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

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

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

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

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

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

#### Presentation of the Draft Provisions

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

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

Incorporation by Reference of Provisions of the WPPT

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

*Alternative A*

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

*Alternative B*

**Draft  
WIPO Audiovisual Performances Treaty**

**Contents**

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**Notes on Article 100**

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

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

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

**Article 24 of the WPPT  
Assembly**

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

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

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

[continues]

**Article 100**

**Assembly**

*Alternative A*

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

*Alternative B*

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

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

[Article 100 continues]

[Notes on Article 100, continued]

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

**Article 24 of the WPPT**

[continued]

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

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

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

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

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

[continues]



[Article 100, continued]

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

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

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

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

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

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

[Article 100 continues]

[Notes on Article 100, continued]

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

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

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

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

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

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

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

**Article 24 of the WPPT**

[continued]

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

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

*Alternative A*

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

*Alternative B*

[No such provision]

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

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

[End of Article 100]

**Notes on Article 101**

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

**Article 25 of the WPPT  
International Bureau**

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

**Article 101**

**International Bureau**

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

[End of Article 101]

## Notes on Article 102

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

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

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

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

[continues]

**Article 102**

**Eligibility for Becoming Party to the Treaty**

*Alternative A*

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

*Alternative B*

(1) Any Member State of WIPO may become party to this Treaty.

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

[Article 102 continues]

[Notes on Article 102, continued]

**Article 26 of the WPPT**

[continued]

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



[Article 102, continued]

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

[End of Article 102]

**Notes on Article 103**

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

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

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

**Article 103**

**Rights and Obligations under the Treaty**

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

[End of Article 103]

## Notes on Article 104

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

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

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

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

**Article 104**

**Signature of the Treaty**

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

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

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

[End of Article 104]

## Notes on Article 105

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

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

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

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

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

**Article 105**

**Entry into Force of the Treaty**

This Treaty shall enter into force three months after

*Alternative A:* five

*Alternative B:* 30

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

[End of Article 105]

## Notes on Article 106

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

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

This Treaty shall bind

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



**Article 106**

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

This Treaty shall bind

(i) the

*Alternative A:* five

*Alternative B:* 30

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

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

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

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

[End of Article 106]

**Notes on Article 107**

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

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

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

**Article 107**

**Denunciation of the Treaty**

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

[End of Article 107]

## Notes on Article 108

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

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

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

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

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

**Article 108**

**Languages of the Treaty**

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

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

[End of Article 108]

## Notes on Article 109

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

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

### “Functions of depositaries”

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

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

### **Article 33 of the WPPT Depositary**

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

**Article 109**

**Depositary**

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

[End of Article 109]

[End of document]