Notifications Concerning Treaties Administered by WIPO

Madrid Agreement (Marks)

Accession

LIBERIA

The Government of Liberia deposited, on September 25, 1995, its instrument of accession to the Madrid Agreement Concerning the International Registration of Marks of April 14, 1891, as revised at Stockholm on July 14, 1967, and amended on September 28, 1979.

The said instrument contains also the following declaration: "Pursuant to Article 3*bis*(1) of the Agreement, the Government of the Republic of Liberia declares that protection resulting from international registration shall extend to the Republic of Liberia only at the express request of the proprietor of the mark."

The Madrid Agreement, as revised, will enter into force, with respect to Liberia, on December 25, 1995.

Madrid (Marks) Notification No. 71, of September 25, 1995.

Madrid Protocol (1989)

I. Accession

CHINA

The Government of China deposited, on September 1, 1995, its instrument of accession to the Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989 ("Madrid Protocol (1989)").

The date of entry into force of the said Protocol is the subject of a separate notification (Madrid (Marks) Notification No. 70).

Madrid (Marks) Notification No. 69, of September 6, 1995.

II. Entry Into Force

The Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks, adopted at Madrid on June 27, 1989 ("Madrid Protocol (1989)") will enter into force on

December 1, 1995,

with respect to the following four States: China, Spain, Sweden, United Kingdom.

As stated in Article 14(4)*(a)* of the Madrid Protocol (1989), the said Protocol shall enter into force three months after four instruments of ratification, acceptance, approval or accession have been deposited, provided that at least one of those instruments has been deposited by a country party to the Madrid (Stockholm) Agreement and at least one other of those instruments has been deposited by a State not party to the Madrid (Stockholm) Agreement or by any of the Organizations referred to in Article 14(1)*(b)* of the said Protocol.

Instruments of ratification or accession to the said Protocol were deposited:

- on April 17, 1991, by Spain, a State party to the Madrid (Stockholm) Agreement;
- on December 30, 1994, by Sweden, a State not party to the Madrid (Stockholm) Agreement;
- on April 6, 1995, by the United Kingdom, a State not party to the Madrid (Stockholm) Agreement;
- on September 1, 1995, by China, a State party to the Madrid (Stockholm) Agreement.

The date of December 1, 1995, is three months after the deposit of the fourth of the said instruments of ratification or accession, it being noted that each of the two conditions set forth in the proviso of Article 14(4)*(a)* of the said Protocol has been fulfilled.

The date on which the said Protocol will become operational will be notified in due course.

Madrid (Marks) Notification No. 70, of September 11, 1995.

Notifications Concerning the UPOV Convention

International Convention for the Protection of New Varieties of Plants (UPOV)

Accession

PORTUGAL

The Government of Portugal deposited, on September 14, 1995, its instrument of accession to the International Convention for the Protection of New Varieties of Plants of December 2, 1961, as revised at Geneva on November 10, 1972, and on October 23, 1978.

Portugal has not heretofore been a member of the International Union for the Protection of New Varieties of Plants, founded by the said International Convention.

The said International Convention will enter into force, with respect to Portugal, on October 14, 1995. On that date, Portugal will become a member of UPOV.

For the purpose of determining its share in the total amount of the annual contributions to the budget of UPOV, one-half of one contribution unit is applicable to Portugal.

UPOV Notification No. 47, of September 18, 1995.

Normative Activities of WIPO

Committee of Experts on Well-Known Marks

(Geneva, November 13 to 16, 1995)

PROTECTION OF WELL-KNOWN MARKS: RESULTS OF THE STUDY BY THE INTERNATIONAL BUREAU AND PROSPECTS FOR IMPROVEMENT OF THE EXISTING SITUATION

Memorandum prepared by the International Bureau
(WIPO document WKM/CE/I/2)

I. INTRODUCTION

1. The 1994-95 Program of WIPO (Item 04(3)) (document AB/XXIV/2) provides for the following:

"*Well-Known Marks*

"The International Bureau will prepare, convene and service meetings of consultants to consider the criteria that should be applied to define what a well-known mark is (which, it is recalled, must be protected as provided in Article 6bis of the Paris Convention for the Protection of Industrial Property), and what measures could be taken to make the protection of well-known marks more effective in the world."

2. The draft 1996-97 Program of WIPO (Item 03(5)) (document AB/XXIV/2) provides for the following:

"*Well-Known and Famous Marks*

"The International Bureau will study, with the help of a committee of experts meeting once in each year of the biennium, all questions of relevance to the correct application of Article 6bis of the Paris Convention (e.g., whether that Article applies also where the well-known mark is not actually used in the country in which its protection is claimed). It will also study the conditions and scope of protection, in particular, in respect of famous marks, against dilution and/or undue exploitation of the goodwill acquired by such marks. Moreover, it will study the feasibility of setting up, under the aegis of WIPO, a voluntary international information network for the exchange of information among countries concerning marks that one or more of them considers to be well-known or famous.

"Any proposal for action, beyond the study, will be put before the General Assembly of WIPO."

3. With reference to the program (respectively, draft program) items referred to (and pending a decision on the 1996-97 Program by WIPO's Governing Bodies in its session in September 1995), a committee of experts is convened in order to consider the results so far reached in the study of the International Bureau on the protection of well-known marks[1] and prospects for improvement of the existing situation.

II. RESULTS OF THE STUDY BY THE INTERNATIONAL BUREAU

A. General

4. As mentioned in paragraph 1, above, the International Bureau has been entrusted with the task to study the criteria that should be applied to define what a well-known mark is and what measures could be taken to make the protection of well-known marks more effective in the world. Since international protection of well-known marks traditionally is based on Article 6bis of the Paris Convention for the Protection of Industrial Property (hereinafter referred to as "the Paris Convention"), it is appropriate to first examine the contents and significance of that provision.

B. Contents and Significance of Article 6bis of the Paris Convention

5. Article 6bis of the Paris Convention reads as follows:

"(1) The countries of the Union undertake, *ex officio* if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods. These provisions shall also apply when the essential part of the mark constitutes a reproduction of any such well-known mark or an imitation liable to create confusion therewith.

"(2) A period of at least five years from the date of registration shall be allowed for request-

[1] The expression "mark" covers both marks relating to goods ("trademarks") and marks relating to services ("service marks"). However, Article 6bis of the Paris Convention for the Protection of Industrial Property, which only applies to trademarks, partly uses the term "mark" in the sense of trademark (in those cases, the reason for not using the term "trademark" may be a purely linguistic one, mainly relating to the original French text of the Paris Convention); in any case, when analyzing Article 6bis, this document uses the term "trademark" where only a trademark (and not also a service mark) is meant.

ing the cancellation of such a mark. The countries of the Union may provide for a period within which the prohibition of use must be requested.

"(3) No time limit shall be fixed for requesting the cancellation or the prohibition of the use of marks registered or used in bad faith."

6. Article 6bis is of importance for cases where a trademark in a given country does not–or does not yet–enjoy protection on the basis of a registration in that country or on the basis of an international or regional registration having effect in that country. Instead of registration, Article 6bis takes into account that the trademark is well known in the country.

7. The application of Article 6bis is not excluded if the trademark is registered in the country where protection is sought. However, protection according to Article 6bis does not go beyond what normally is conferred by registration of a trademark, namely, protection against the registration or use of the same or a similar sign for the same or similar goods. Thus, if a trademark is registered in the country, there is normally no need to invoke Article 6bis. An exception only applies if a trademark is registered but not–or not sufficiently–used in the country, and there is no justification for the failure to use; in such a case Article 6bis can be invoked to ensure protection for the trademark, provided it is well known in the country (as regards the question of whether a country may refuse applying Article 6bis if the trademark is not used on its territory, see paragraphs 26 to 28, below).

8. The protection according to Article 6bis may be limited in time under certain circumstances. The first sentence of paragraph (2) of Article 6bis, which fixes a minimum time limit of five years for requesting the cancellation of the registration of the conflicting sign, has the consequence that a time limit may be set for such a request so that the owner of the well-known trademark, once he has tolerated the registration of the conflicting sign for more than five years (or any longer period fixed by the applicable national or regional law), can no longer obtain the cancellation of the registration of that sign. Moreover, regarding prohibition of use, the second sentence of paragraph (2) of Article 6bis allows the applicable national or regional law to limit an action based on Article 6bis (or on the national or regional law provision implementing Article 6bis) by fixing a period within which action must be taken in order to prohibit the use of the conflicting sign. Article 6bis(3) provides for an exception to the fixing of time limits in the case of marks registered or used in bad faith. These provisions of Article 6bis show that relying on the fact that a trademark is well known implies, in addition to the burden of proof for that fact, certain risks for the trademark owner and that he is always well advised to seek protection of his trademark through registration as quickly as possible.

9. Therefore, typically Article 6bis provides relief in the–exceptional–circumstances where the filing or priority date of the application filed by the trademark owner was later than the filing date or–where this is relevant under the applicable national or regional law–the date of commencement of use by the "infringer," in other words, where the trademark owner did not act fast enough in order to secure protection through registration. Another circumstance in which Article 6bis provides for relief is the case where the trademark owner has filed an application but has not yet obtained the requested registration so that, without Article 6bis, he would not yet be able to prohibit the use by an "infringer." Finally, Article 6bis may be of importance where a registration has been obtained but the mark is not–or not sufficiently–used in the country in question (see paragraphs 26 to 28, below).

10. Reference to Article 6bis is frequently made in connection with an entirely different problem of protection of marks, which–regrettably–is not solved by that Article but which typically concerns "well-known" marks, namely, the protection against the use of a well-known mark (or a "famous" mark) by an unauthorized person for dissimilar goods or services. This problem will be considered in a separate chapter of this document (see paragraphs 29 to 35, below).

C. Definition of Well-Known Marks

11. A basic question to be considered is the definition of well-known marks.

12. The trademark laws of many countries as well as the Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter referred to as the "TRIPS Agreement") (in its Article 16.2 and 3, reproduced in the Annex to this document) expressly refer to Article 6bis of the Paris Convention. However, since the Paris Convention itself does not define the conditions under which a trademark is to be considered well known, considerable uncertainty exists as regards the circumstances under which a trademark owner can rely on Article 6bis of the Paris Convention. It is to be noted, however, that Article 16.2 of the TRIPS Agreement requires Members of the World Trade Organization (WTO) (hereinafter referred to as "WTO Members"), when determining whether a trademark is well-known, to take account of the knowledge of the trademark in the relevant sector of the public, including knowledge

in the Member concerned which has been obtained as a result of the promotion of the trademark. [2]

13. The increasing importance of international trade and the need for effective protection of trademarks make it desirable to establish an internationally recognized definition of the term "well-known." Such a definition would be to the benefit of right owners as well as national and regional authorities, which would thus be given guidance for the application of Article 6bis.

14. In establishing a definition of the term "well-known," several approaches appear to be possible.

(a) Quantitative Approach

15. When examining the question of whether a given mark[3] can be considered to be well known or not, an important factor is the extent to which the public in the country in which protection is sought has knowledge of the mark. This would be a quantitative approach. However, since each mark normally is addressed to a specific group of potential customers and traders, it would be necessary to define the relevant sector of the public to which the mark has to be well known. This approach has been chosen, for example, by Article 16.2 of the TRIPS Agreement, which stipulates that "in determining whether a mark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark."

16. In order to apply the quantitative approach, two parameters must be defined: first, the sector of the public which is relevant; second, the portion of that sector to which the mark must be well known. For the first parameter, account must be taken of the nature of the goods or services to which the mark applies. For example, the relevant sector of a mark for luxury goods is different from the relevant sector of a mark for articles of daily use (for example, washing powder). For the second parameter, a criterion must be established concerning the required percentage (e.g., half or three quarters) of the relevant sector. In addition to those parameters, a method of evidence has to be established. Typically, market surveys would serve this purpose.

(b) Qualitative Approach

17. A qualitative approach can be established by taking into account the financial value of a mark.

18. It has always been standard accounting practice not to ascribe any value to marks in the balance sheets of corporations and, if marks are mentioned there at all, such mention typically is with a nil value. Likewise, when a corporation acquires another one, the purchase price usually includes a sum for goodwill and, in the case of companies owning a large number of marks, this sum can be more important than the other assets, although, traditionally, the said sum will be immediately written off once the acquisition is completed.

19. It is only recently that this practice of not valuing intellectual property rights, in particular, marks, has been questioned and that some corporations have given value to marks and put an appropriate sum in the balance sheet. The explanations for doing so have included a desire to provide some additional and visible shareholder value in order to prevent the unwelcome attention of, or a takeover by, other "predator" corporations.

20. The need to give a fair market value to a corporation's marks has given rise to the development of a number of methods for establishing their financial value. At least three different methodologies have proved to be acceptable both to accountants and to businessmen, of which the last, i.e. the income methodology, is probably the one that appears to be preferred in this area.

(aa) The *cost methodology* attempts to measure how much it would cost, over a period of time, to create a product, to market it, and to advertise it if it is to achieve a certain market penetration or recognition. But it is probably true to say that it is far easier to estimate such costs for a new product than for an already established product. Estimating past costs, in particular, over a substantial period of time, cannot be very accurate, and this method, in most cases, can only provide a rather rough check on value.

(bb) The *market methodology* measures what a mark might be worth in the future by

[2] Normally, the question of how to determine whether a mark is well known is not addressed by legislative provisions but is left to the industrial property office and the courts. An exception to this is Section 84 of Decision No. 344 – Common Provisions on Industrial Property – of the Cartagena Agreement (of October 21, 1993), which reads as follows:

"In order to establish whether a mark is well known, due account shall be taken, in particular, of the following criteria:

(a) the extent to which it is known to the consuming public as the distinguishing mark of the goods or services for which it was granted registration;
(b) the scale and scope of the dissemination and advertising or promotion of the mark;
(c) the age of the mark and the constancy of its use;
(d) analysis of the production and marketing of the goods identified by the mark."

[3] The term "mark" is from now on generally used because the considerations that follow also concern service marks.

comparing it to what others have done in the same field already. But this approach requires there to be some precisely comparable properties, and this is not always possible. In any case it is never easy to uncover details of the sales of a competing product.

(cc) The *income methodology* measures the income which a mark can presently generate with an assumption as to how long it will continue to do so and the risks associated therewith. This methodology is probably easier to apply than the others referred to above.

21. The above is only a rough summary, and different methodologies for valuation are likely to suit different products, different markets, and in different circumstances. The important point is to note that methods do exist for valuing marks, and that marks can be given a specific value.

(c) Combination of Approaches

22. It appears that the definition to be established could consist of a combination of several approaches, for example, in the form that a mark is to be considered well known if it fulfills entirely the required quantitative conditions or if it meets the quantitative conditions and the qualitative conditions to a certain extent.

D. More Effective Protection of Well-Known Marks

23. The second question to be studied concerns the possibility of providing more effective protection of well-known marks. In this connection, a distinction is to be made between the case regulated by Article 6bis of the Paris Convention (i.e., protection against use for identical or similar goods) and the case of protection against use for dissimilar goods or services.

(a) Protection Against Use With Respect to Identical or Similar Goods or Services

(aa) Well-Known Service Marks

(aaa) Problem

24. A long-standing problem with regard to the interpretation of Article 6bis is that the Paris Convention does not oblige its member States to apply this provision to service marks.

(bbb) Solution

25. This deficiency has been remedied through the conclusion of the TLT, Article 16 of which provides that the Contracting Parties of the TLT have to apply all provisions of the Paris Convention which concern trademarks to service marks. This problem is also solved by Article 16.2 of the TRIPS Agreement (reproduced in the Annex), under which Members of the said Agreement are obliged to apply Article 6bis of the Paris Convention to service marks.

(bb) Use of the Well-known Mark in the Country in Which Protection Is Sought

(aaa) Problem

26. The discussion of the question whether or not use of the mark in the country of protection may be required for the protection provided by Article 6bis is as old as the provision itself. Article 6bis does not contain an express condition to the effect that the use of a mark is not a prerequisite to the application of this provision. Therefore, it has been argued that the countries party to the Paris Convention were free not to protect well-known marks which had not been used on their territory. For this reason, the Lisbon Revision Conference of 1958 attempted to add a sentence to paragraph (1) of Article 6bis in order to clarify that the application of the said provision was independent of the actual use of the mark in a country. However this proposal did not obtain the–then–required unanimity for its adoption.

(bbb) Solution

27. Article 6bis, in contrast to Article 5C(1) of the Paris Convention with regard to registered marks, does not mention any use requirement with respect to well-known marks. According to the principles governing protection against unfair competition, marks are to be protected against confusion (passing off) on the basis of their use and the goodwill established through use. Article 10bis of the Paris Convention establishes the basis for such protection. In order to make Article 6bis meaningful, it should be interpreted to the effect that it does not allow Paris Union member States to require that the mark be actually used in the country in which its protection as a well-known mark is invoked. Otherwise Article 6bis would only repeat an obligation already existing under Article 10bis.

28. Moreover, it would seem to be illogical to allow to require use in the country of protection for well-known marks, whereas registered marks during an initial period (which must be "reasonable" according to Article 5C(1) of the Paris Convention) in a great number of countries enjoy protection without use. A certain parallelism may be seen in the fact that, on the one hand, a registered mark may lose its protection after a certain period of time because of failure to use and, on the other, a well-known mark may lose protection because of time limits which national laws may fix according to Article 6bis of the Paris Convention (see paragraph 8, above). The said time limits are the only limitation provided for in Article 6bis. If use could be required as a condition

of protection, this would have had to be expressly mentioned in the said Article.

(b) Protection Against Use With Respect to Dissimilar Goods or Services

(aa) General

29. Article 6bis does not protect well-known marks against unauthorized use with respect to dissimilar goods or services. Therefore, owners of well-known marks find themselves often without sufficient protection against such unauthorized use.

30. As regards the protection of well-known marks for dissimilar goods or services, two possible approaches can be distinguished, namely, protection on the basis of defining a special category of well-known marks and protection on the basis of special conditions under which the use of a well-known mark (or even a mark which is not well-known but has a certain reputation) with respect to dissimilar goods or services should be prohibited.

(bb) Famous Marks as a Special Category of Well-known Marks

31. It has often been argued that a special category of well-known marks deserve protection against use with respect to dissimilar goods or services, and that such special category would be characterized by a degree of notoriety which is higher than "well-known." Different expressions have been used for the said special category of well-known marks, such as "exceptionally well-known marks" (in the earlier drafts for the TLT) of "famous marks," "marks of high reputation" or "highly renowned marks." Such expressions, of course, require definition. In this respect, the approaches outlined with respect to the definition of well-known marks (see paragraphs 15 to 22, above) may be helpful, provided that the special category requires a degree of notoriety, value or reputation which is higher than in the case of a mark which is merely "well-known."

(cc) Special Conditions Under Which the Use of Well-Known Marks for Dissimilar Goods or Services Should Be Prohibited

32. Under this approach, certain conditions in the presence of which the use of a well-known mark with respect to dissimilar goods or services is to be prohibited would be defined. This solution has been chosen by the TRIPS Agreement, which states in its Article 16.3 that Article 6bis of the Paris Convention shall apply *mutatis mutandis* to the use of the mark with respect to dissimilar goods or services, provided that such use "would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use." It is to be noted that Article 16.3 of the TRIPS Agreement requires registration of the mark, whereas such a requirement is not always applied so that the protection of well-known marks for dissimilar goods or services may in some countries be obtained regardless of whether the mark has been registered or not. [4]

33. The First Council Directive of the European Communities of December 21, 1988, for the harmonization of trademark laws (Article 4(4)(a)) leaves an option to the member States of the European Communities to refuse registration of a mark which is identical with or similar to an earlier mark "which has a reputation" even if the registration is sought for dissimilar goods or services if the use of the later mark "without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute" of the earlier mark. This standard has been adopted, for example, in the new trademark laws of the United Kingdom and Germany. It is also contained in Article 8(5) of the Council Regulation of the European Communities of December 20, 1993, on the Community Trademark. The second condition (detrimental to the distinctive character or the repute) is frequently referred to as a "dilution" of the mark.

34. It is to be noted that the EC Directive and Regulation do not use the criterion of "well-known marks" but rather contain the condition that the mark, in order to enjoy the extended protection, must "have a reputation." On the other hand, Article 16.3 of the TRIPS Agreement requires that the mark be well-known. Moreover, whereas the TRIPS Agreement requires that use of the mark in relation to dissimilar goods or services indicate a connection between those goods or services and the owner of the registered trademark, and that the interests of the owner of the registered trademark be likely to be damaged by such use, the EC Directive and Regulation refer to two cases in which the extended protection is justified, namely, the taking of unfair advantage of the distinctive character or the repute of the earlier mark, and the causing of detriment to the distinctive character or the repute of the earlier mark.

(dd) Desirability of a Harmonized Approach

35. In view of the existing divergencies with respect to the extended protection of marks in cases of unauthorized use for dissimilar goods or services, it appears to be desirable to establish guidelines for the extended protection, which would be compatible

[4] See, for example, Sections 4 and 14(2)3 of the German Trademark Law of October 25, 1994.

with Article 16.3 of the TRIPS Agreement and would help in the interpretation of that provision by clarifying a number of questions. These questions include, in particular, the following:

- Should the extended protection be available only for well-known marks, or should it be available also for marks which, irrespective of whether they are well-known, have a reputation?
- Should registration of the mark be a condition for the extended protection?
- Should the extended protection be available only in the cases where the use of dissimilar goods or services takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the earlier mark, or also in other cases?

III. PROSPECTS FOR IMPROVEMENT OF THE EXISTING SITUATION: INTERNATIONAL REGISTER FOR WELL-KNOWN MARKS

36. National trademark Offices are often confronted with the problem that so-called "trademark pirates" apply for the registration of marks ahead in time of the true owners. This is a typical case of application of Article 6bis of the Paris Convention: the mark is well known, but the identity of its owner is not sufficiently known. When determining whether an application for a given mark originates from the true owner or is an act of piracy, the competent administrations often lacks the necessary information.

37. Some countries seem to endeavor to overcome this problem through the establishment of lists of marks which are considered to be well known. Important questions here are whether the lists indicate *in which country or countries* a particular mark is well known, and what the basis of such information is (a mere claim by the owner or statement by an association or a government agency).

38. In order to increase the availability of information relevant for the protection of well-known marks, it could be considered either to set up an international system administered by WIPO for the exchange of lists of well-known marks communicated to WIPO by governments and covering the situation in one or several countries, or to establish an international register with WIPO containing such information, in which well-known marks would be registered with an indication in which country or countries they are well known on the basis of an application by the government of an "interested" country. A country would be "interested" if the mark is well known on its territory or if the owner of the well-known mark is established on its territory. In addition, it could be considered to allow owners of marks to directly file with WIPO an application for registering a mark as claimed to be well known, and such registration could be effected in a special part of the WIPO register.

39. It should be understood that registration of a well-known mark in such an international register, whatever is its basis, would be without any legal effect. This registration merely would help to establish evidence that a given mark is well known, but any legal effect would depend on proof before the competent authorities of the country in which protection for a well-known mark is requested that the mark in effect is well known there.

40. In this context, the following questions seem to need further consideration:

(a) Should an international registration be effected on the basis of lists of well-known marks established by the government of the country in which the owner of the mark is established or of the country in which the mark is considered as well known, or both? What should be done in the case of conflicting information?
(b) Should an international registration be effected (also) on application by the owner of the mark?
(c) Should the registration indicate the goods or services for which it is made and, in addition, designate the relevant classes of the International (Nice) Classification?
(d) Should the registration indicate the time since when the mark is well known?
(e) In which form, and with which periodicity, should the contents of the International Register be published?

41. The Committee of Experts is invited to express its view as regards the desirability of further studying any of the questions outlined in this memorandum, as well as any additional question concerning the protection of well-known marks.

ANNEX

Article 16 of the TRIPS Agreement

Rights Conferred

1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prej-

udice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.

2. Article 6*bis* of the Paris Convention (1967)[5] shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.

[5] See paragraph 5 of this document, where the text of Article 6bis of the Paris Convention is reproduced.

Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms

Fourth Session
(Geneva, September 4 to 8 and 12, 1995)

QUESTIONS CONCERNING A POSSIBLE INSTRUMENT FOR THE PROTECTION OF THE RIGHTS OF PERFORMERS AND PRODUCERS OF PHONOGRAMS

INTRODUCTION

Memorandum prepared by the International Bureau
(WIPO document INR/CE/IV/2)

1. The current program of WIPO (covering the years 1994-1995) provides that the International Bureau will prepare, convene and service a Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to as "the Committee").

2. This program was adopted by the Assembly of the Berne Union on September 29, 1993 (document AB/XXIV/2, item 03(4), and document AB/XXIV/18, paragraphs 232-234 and 283-284). The program item establishing the Committee was based on a decision of the same body made in 1992 (see document B/A/XIII/2, paragraph 22), modifying the decision of that body made in 1991 concerning the terms of reference of the Committee of Experts on a Possible Protocol to the Berne Convention (see document AB/XXII/2, item 03(2), and document AB/XXII/22, paragraph 197).

3. Before the 1992 decision modifying its terms of reference, the Committee of Experts on a Possible Protocol to the Berne Convention had met twice, once in November 1991 and once in February 1992. When modifying the terms of reference in 1992, the Assembly of the Berne Union decided, *inter alia*, to establish two committees of experts, one to continue the work for the preparation of a possible protocol to the Berne Convention, and another for the preparation of a possible new instrument on the protection of the rights of performers and producers of phonograms. In respect of the latter (that is, the present) committee, it was decided that the agenda would include "all questions concerning the effective international protection of the rights of performers and producers of phonograms" (document B/A/XIII/2, paragraph 22). The Assembly did not specify the nature of the relationship, if any, that should exist between the possible protocol to the Berne Convention and the possible instrument on the protection of the rights of performers and producers of phonograms, on the one hand, and between the said possible instrument and the Rome and Phonograms Conventions, on the other hand. It was felt that those questions should only be considered once the contents of the protocol and the instrument had been more or less determined.

4. So far, the Committee has met three times at the headquarters of WIPO. The first two sessions took place in 1993 (June 28 to July 2 and November 8 to 12) and the third in 1994 (December 12 to 16).

5. The discussions were based on working papers prepared by the International Bureau (document CE/INR/I/2 in the first two sessions and document INR/CE/III/2 in the third session). The reports of the three sessions are contained in documents INR/CE/I/3 (first session), INR/CE/II/1 (second session) and INR/CE/III/3 (third session).

6. At its third session (December 1994), the Committee decided that

– the Director General would invite the Government members of the Committee and the European Commission to send, by June 20, 1995, to the International Bureau proposals to be discussed by the next (the present) session of the Committee;

– the preparatory documents of the next (the present) session of the Committee would consist of the proposals mentioned above and a discussion paper to be prepared by the International Bureau on the questions of the rights of performers in audiovisual fixations.

7. On March 20, 1995, the Director General in the letter of invitation to the present session of the Committee, in keeping with the above-mentioned decision, invited the Government members of the Committee and the European Commission to send, by June 20, 1995, to the International Bureau proposals to be discussed by the present session of the Committee.

8. By the deadline mentioned in the preceding paragraph, the Director General received two sets of proposals, namely, on June 19, 1995, from Mr. Michel de Bonnecorse, Ambassador, Permanent Representative of France at the Office of the United Nations, Representative of the Presidency in exercise of the Council of the European Union, Geneva, and Mr. Jean-Pierre Leng, Ambassador, Head of the Delegation of the Commission of the European Communities, Geneva, proposals on behalf of "the European Community and its Member States," and, on June 20, 1995, from Mr. Bruce A. Lehman, Assistant Secretary of Commerce and Commissioner of Patents and Trademarks, Washington, proposals on behalf of the Government of the United States of America. The full text of these proposals is reproduced in document INR/CE/IV/4.

9. For the sake of facilitating reference and discussion, each paragraph of the proposals and accompanying comments of the European Community and its Member States and of the United States of America reproduced in document INR/CE/IV/4 is identified by a serial number in the left-hand margin of the document.

10. On June 29, 1995, the Director General received a letter from Mr. Chris Creswell, Assistant Secretary, International Trade Law and Intellectual Property Branch, Business Law Division, Attorney-General's Department, Canberra, on behalf of the Government of Australia. That letter contains the following statement in respect of the new instrument: "In regard to the New Instrument, Australia is not in a position to advance any proposals. Australia provides protection to both producers of phonograms and performers in conformity with its obligations under the Rome Convention, and in the case of phonogram producers, in excess of those obligations. Whilst the possible extension of existing performers' protection is currently under consideration in Australia, we are not in a position to propose any particular formulation of rights for performers such as have been proposed by the International Bureau in the New Instrument. Moreover, it is Australia's perception that the current proposals developed by the International Bureau have not achieved a desirable level of consensus in some important areas. A considerable task of building consensus, and also refinement of the coverage of the possible new instrument, particularly in regard to transmission of phonograms via the new telecommunications, remain to be undertaken. It is the view of the Australian Government that the coverage of the New Instrument should also include the right of broadcasters."

11. The list of the topics treated in the two sets of proposals and a comparative table of the same are contained in document INR/CE/IV/5.

QUESTIONS OF THE RIGHTS OF PERFORMERS IN AUDIOVISUAL FIXATIONS OF THEIR PERFORMANCES

Discussion paper prepared by the International Bureau of WIPO (WIPO document INR/CE/IV/3)

INTRODUCTION AND BACKGROUND

1. At the conclusion of the third session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (hereafter "the Committee") (Geneva, December 12 to 16, 1994), the Committee decided that the preparatory documents for the next session of the Committee (that is, the one for which the present paper has been prepared) will consist of, *inter alia*, a discussion paper to be prepared by the International Bureau on the questions of the rights of performers in audiovisual fixations of their performances (document INR/CE/III/3, paragraph 93(iv)). For an appropriate presentation of the context and the background of the Committee's decision, it seems necessary to review the relevant aspects of the work, within both this Committee and the Committee of Experts on a Possible Protocol to the Berne Convention.

2. The Committee of Experts on the Protocol was set up in keeping with the program of WIPO adopted by the Assembly of the Berne Union for the 1990-91 biennium (see documents AB/XX/2, Annex A, item PRG.02(2) and AB/XX/20, paragraphs 152 and 199). The program item establishing the terms of reference of the Committee on the Protocol stated that "the Protocol would be mainly destined to clarify the existing, or establish new, international norms where, under the present text of the Berne Convention, doubts may exist as to the extent to which that Convention applies" (document AB/XX/2, Annex A, item PRG.02(2)).

3. In the memorandum prepared for the first session of the Committee of Experts on the Protocol (document BCP/CE/I/2, paragraphs 56 to 70), it was proposed that provisions on the rights of producers of phonograms be included in the Protocol. While there was broad support for improvements in the level of protection of the rights of such producers, most delegations and observers took the view that phonograms were not appropriate subject matter for a Protocol to the Berne Convention (document BCP/CE/I/4, paragraph 110). It was also recognized that improvements in the rights of producers of phonograms could not be effectively discussed or achieved without also discussing the rights of performers whose performances are included in phonograms. Consequently, the terms of reference mentioned in the preceding paragraph were modified by the Assembly of the Berne Union in September 1992; the Assembly decided that a separate committee of experts should be established to prepare a possible new instrument on the protection of the rights of performers and producers of phonograms (hereafter referred to as the "New Instrument"), and, in establishing the terms of reference, that the said Committee would "discuss all questions concerning the effective international protection of the rights of performers and producers of phonograms" (document B/A/XIII/2, paragraph 22).

4. Concerning the inclusion of the rights of performers in the terms of reference, the International Bureau noted, in its memorandum for the first session of the Committee, that there were two possible interpretations of the terms of reference of the Committee. The first possible interpretation was that the rights of performers should only be discussed in respect of the fixation of their performances in phonograms, excluding from consideration the rights of performers in respect of audiovisual fixations of their performances (given that the reason for including the rights of performers in the terms of reference in the first place was that the Committee of Experts on the Protocol opposed inclusion of phonograms in the Protocol). The second possible interpretation was that the rights of performers were mentioned without any restriction or qualification in the terms of reference of the new Committee, which meant that it had the competence to examine all questions concerning the rights of performers, including in respect of audiovisual fixations (document INR/CE/I/2, paragraphs 8 and 9).

5. At the conclusion of the general debate during the first session of the Committee, which took place in Geneva in June-July 1993, the Chairman stated that there was consensus in favor of the second of the afore-mentioned interpretations, that is, that "nothing in the terms of reference precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions..." (document INR/CE/3, paragraph 63). Whereupon, the Director General of WIPO stated that the International Bureau would prepare, in due time, a document on audiovisual fixations (*ibid.*, paragraph 64).

6. The second session of the Committee, which took place from November 8 to 12, 1993, was dedicated to completing an examination of the International Bureau's proposals in the memorandum prepared for the first session, and thus the question of audiovisual fixations was not discussed. In the memorandum prepared for the third session of the Committee,

which took place from December 12 to 16, 1994, the International Bureau indicated that it was in the process of collecting information on national laws and practices for preparation of the aforementioned document, that discussions on various questions concerning the protection of audiovisual fixations of performances were taking place among certain governments at that time, that time should be allowed for such discussions to be completed, and that, accordingly, questions concerning the rights of performers in audiovisual fixations would not be included in the said memorandum (document INR/CE/III/1, paragraph 10). During the third session of the Committee, the Chairman noted that many delegations and observers expressed support for inclusion of the rights of performers in audiovisual fixations in the new instrument (document INR/CE/III/3, paragraph 31). Accordingly, as noted in paragraph 1 above, the Committee decided, at the end of the session, that the present discussion paper should be prepared for consideration during its next session.

7. It may be useful to describe the arguments that were put forward, during the previous sessions of the Committee, concerning inclusion of the rights of performers in audiovisual fixations in the New Instrument. The arguments in favor of such inclusion were as follows: If the New Instrument is to be considered a special agreement under Article 22 of the Rome Convention–which seems to be the case–it must produce improvements in the protection established in the Convention, and the recognition, in the New Instrument, of the status of all performers as creators of sounds and images is a necessary element of such improvements. The question of the rights of performers in audiovisual fixations no longer concerns only film actors; due to the technological and commercial developments since the Rome Convention was concluded, the performances of musicians, opera and ballet performers are frequently made available on video recordings, and the traditional distinction between audio and audiovisual fixations of performances, particularly in light of Article 19 of the Convention, which cuts off the rights of performers once they consent to inclusion of their performances in audiovisual fixations, is no longer realistic. Performances and fixations of performances–both audio and in audiovisual fixations–are ever more frequently communicated to the public by broadcasting or by cable distribution; thus, it is not sufficient to grant performers only copy-related rights. Performers' rights in audiovisual fixations have been included in some national laws for a number of years, and are now part of the Council Directive of the European Union on rental and lending. Moreover, experience has shown that substantially all practical problems concerning exercise of rights in audiovisual fixations can be resolved by means of collective administration. The means of exploitation of audiovisual fixations has changed dramatically through the development of new technologies such as satellite and cable services, video-cassettes, pay television and digital delivery, and it is appropriate that performers have the right to negotiate appropriate payment for all uses of their performances, preferably on the basis of exclusive rights. It is true that rights to payment for performers are included in collective or individual agreements in numerous countries, but such agreements are no substitute for statutory rights, because their effectiveness in protecting the interests of performers depends on the negotiating strength of the representative organizations; further, provisions in collective or individual agreements which restrict the uses to be made of fixations are only enforceable against a contracting party, not against third parties.

8. The arguments put forward against the inclusion of the rights of performers in audiovisual fixations in the new instrument were as follows: As a general principle, the rights of performers should not be superior to, or interfere with the protection of, the rights of authors. The distinction between the rights of performers in respect of audio and audiovisual recordings should be maintained, because the legal, economic and social conditions of the two industries involved were not the same; different financing, production and exploitation models applied. Likewise, the status and conditions of employment of performers working within the audio field was completely different from the status and work conditions of performers in the audiovisual field, and any attempt to assimilate the two types of performers would weaken the audiovisual industry, where control over the exploitation of rights was already difficult because some national laws deem that audiovisual fixations lack the requisite originality to be considered works protected under the Berne Convention. Any assimilation of the rights of audio and audiovisual performers would concern the relations between employers and employees, which is not a proper subject for an international instrument dealing with intellectual property rights.

9. It is to be emphasized that the purpose of the present discussion paper is to provide a frame of reference for the Committee's discussions (hence its title, which is different from those of the previous documents prepared for the Committee: "discussion paper"). Nothing in the paper is to be construed as a "proposal" either in favor of, or opposing, the inclusion of provisions on the protection of the rights of performers in audiovisual fixations in the New Instrument. The paper provides information on provisions on the protection of performers' rights under the Rome Convention and under the Agreement on the Trade-Related Aspects of Intellectual Property

Rights (TRIPS), where relevant. It reviews the protection of performers' rights under national laws and other legally-binding instruments, such as the directives of the European Union, and it also outlines, based on the information available to the International Bureau, relevant contractual practice.

The Rights of Performers in Respect of The Act of Audiovisual Fixation of Their Unfixed (Live) Performances

10. It should be emphasized that the subject matter of the present paper is the rights of performers *in* audiovisual fixations of their performances, that is, what rights, if any, performers should have concerning acts carried out in respect of such fixations. The question of what rights, if any, performers should have in respect of the *act* of audiovisual fixation of their unfixed performances is not directly covered by the subject matter of the present paper. Nevertheless, for an appropriate presentation of the context in which the questions concerning performers' rights in audiovisual fixations of their performances emerge, it seems necessary to also discuss briefly what control performers may have at the moment when their unfixed performances are included in audiovisual fixations.

The Rome Convention

11. Article 7(1)(b) of the Rome Convention provides that "[t]he protection provided for performers by this Convention shall include the possibility of preventing: ...the fixation, without their consent, of their unfixed performance." It is clear that this provision extends to both audio and audiovisual fixations.

12. The records of the diplomatic conference which created the Rome Convention reveal that performers were granted the "possibility of preventing" the enumerated acts, rather than exclusive rights to authorize or prohibit, in order that countries which protected performers by means of legislation other than copyright and neighboring rights, such as under criminal statutes or unfair competition laws (for example, the United Kingdom at that time), might continue to provide such protection rather than being required to amend their laws to provide exclusive rights. The application of compulsory licenses was excluded, however, since performers would not have the "possibility of preventing" the enumerated acts.

The TRIPS Agreement

13. The TRIPS Agreement also contains provisions on the rights of performers in respect of the fixation of their unfixed performances; but the scope of the rights granted under those provisions is narrower than under the provisions of Article 7 of the Rome Convention. Article 14(1) of the TRIPS Agreement provides as follows: "In respect of a fixation of their performance *on a phonogram*, performers shall have the possibility of preventing the fixation of their unfixed performance..." (emphasis added). This means that, under the TRIPS Agreement, performers have no protection against the unauthorized audiovisual fixation of their unfixed performances (if only the sounds of their performances are fixed, they enjoy protection; if, in addition to the sounds, also the images of their performances are fixed, they enjoy no protection under the provisions of the TRIPS Agreement on neighboring ("related") rights).

National laws and regional instruments

14. Notwithstanding that Article 7 of the Rome Convention only requires countries party to it to provide performers with the *"possibility of preventing"* certain acts, numerous countries grant an *exclusive right to authorize* fixation of unfixed (live) performances irrespective of whether the fixation is audio or audiovisual fixation. Such a right to authorize or "possibility of preventing" is granted also in many countries not party to the Rome Convention, since the unauthorized fixation of live performances ("bootlegging") is considered an act of piracy. In practice, the exercise of performers' rights in respect of unfixed (live) performances is linked to the exercise of rights in respect of the use of fixations in the context of negotiations for collective contracts between organizations representing performers and organizations representing film producers and other users of fixed performances.

15. Provisions on the rights of performers concerning their unfixed performances are included in legal instruments of certain regional bodies composed of States. Council Directive 92/100/EEC of 19 November 1992 of the *European Union* on rental right and lending right and on certain rights related to copyright in the field of intellectual property provides an exclusive right for performers to authorize, *inter alia*, the fixation of their live performances (irrespective of whether the fixation is audio or audiovisual fixation).

16. Under Decision 351–Common Provisions on Copyright and Neighboring Rights of December 17, 1993–of the *Cartagena Agreement*, the Member Countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) must provide performers with rights to authorize, *inter alia*, the fixation of live performances (irrespective of whether the fixation is audiovisual or audiovisual fixation).

The Rights of Performers in the Audiovisual Fixations of Their Performances

The Rome Convention

17. The Rome Convention regulates the rights of performers in the fixations of their performances as follows. As far as reproduction is concerned, performers have the right "to prevent" the reproduction of a fixation of their performances (i) if the original fixation was made without their consent (Article 7(1)(c)); (ii) if the reproduction is made for purposes different from those for which the performers gave their consent; (iii) if the original fixation was made in accordance with the provisions of Article 15 (on exceptions and limitations), and the reproduction is made for purposes different from those referred to in those provisions. If performers have consented to broadcasting, it is a matter for national legislation of the member States to regulate the protection against the reproduction of a fixation for broadcasting purposes (Article 7(2)(1)). Likewise, Article 7(2)(2) provides that the terms and conditions governing the use of fixations made for broadcasting purposes are to be determined in accordance with the national legislation of the member States. Article 12–with broad possibility of reservations under Article 16–also provides a right to remuneration for broadcasting and communication to the public but this right only covers phonograms, that is, audio fixations (which may be granted to the performers and/or the producers of phonograms). Thus, this right is irrelevant from the viewpoint of the subject matter of the present paper.

18. The Convention contains other exceptions to and limitations on the rights of performers in respect of uses of fixed performances. Performers have no right to authorize broadcasting or communication to the public of performances which are made from fixations (Article 7(1)(a)). Further, limitations on the rights of performers are permitted under Article 15 of the Convention, as regards (i) private use; (ii) use of short excerpts in connection with the reporting of current events; (iii) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts; (iv) use solely for the purposes of teaching or scientific research. Under Article 15(2), member States may provide for the same kind of limitations with regard to the protection of performers as the domestic laws and regulations provide in connection with the protection of copyright in literary and artistic works, including the possibility of non-voluntary licenses.

19. From the standpoint of the rights of performers in audiovisual fixations, it is Article 19 that provides the most significant limitation on the right to authorize reproduction of fixations of performances; it provides that "[n]otwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audiovisual fixation, Article 7 shall have no further application." The result of Article 19 is that performers lose all protection in audiovisual fixations, except those made clandestinely or otherwise without their consent. It is worth noting, however, that Article 19 does not affect performers' freedom of contract in connection with the making of audiovisual fixations.

The TRIPS Agreement

20. Article 14(1) of the TRIPS Agreement provides that performers shall have the possibility of preventing the reproduction of their fixed performances, but only in respect of performances fixed on phonograms. No rights are provided if an audiovisual fixation is involved.

National laws and regional instruments

21. The national laws which provide economic rights of performers in respect of uses of fixed performances provide varying combinations of rights. The following economic rights of performers have been identified under various national laws in respect of uses of fixed performances: reproduction of the fixation, broadcasting of the fixation, communication to the public of the fixation, distribution by cable of the fixation, remuneration for private copying of the fixation, and rental of the fixation. In most countries where such rights are effectively exercised, they are administered collectively either on the basis of a transfer of exclusive rights or on the basis of a right to remuneration. In the case of performances included in audiovisual fixations, however, the rule of Article 19 of the Rome Convention is often applied, that is, once a performer agrees to the inclusion of a performance in an audiovisual fixation, the performer ceases to enjoy (is deemed to have transferred) his economic rights in the fixation. What follows is a description of certain typical systems applied in certain regions and countries concerning the use of performances in audiovisual fixations in terms of statutory rights, contractual practices including collective bargaining and collective management of rights.

22. In the *European Union*, Council Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property establishes rights of performers that exceed the minima contained in the Rome Convention. The Directive provides that performers shall have the exclusive right to authorize direct or indirect reproduction, the exclusive right to make available copies by sale or

otherwise (right of distribution) and the exclusive right to authorize rental and lending of copies of fixations of their performances. It also provides that these rights may be transferred, assigned or subject to the grant of contractual licenses. The Directive provides that the signing of a contract between performers and producers concerning film production creates a presumption of transfer of the right of rental, and that Member States of the Union may also provide that the signing of such a contract has the effect of authorizing rental, provided that the contract provides for payment of equitable remuneration to performers. These provisions are, however, subject to Article 4 of the Directive under which the right to obtain equitable remuneration for rental cannot be waived. Member States may also regulate whether and to what extent administration by collecting societies of the right to obtain such remuneration may be imposed. As far as public lending is concerned, the Member States may derogate from the above-mentioned exclusive right, and, in the case of neighboring ("related") rights, this derogation may go as far as completely denying such a right.

23. Council Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission provides that Member States shall ensure that, when broadcast programs from other Member States are retransmitted by cable in their territory, the applicable copyright and related rights are observed and that such retransmission takes place on the basis of individual or collective contractual agreements between owners of rights and cable operators. (Notwithstanding this, Member States may retain until December 31, 1997, statutory license systems which were in operation or expressly provided for by national law on July 31, 1991). Member States must ensure that the right of, *inter alia*, owners of neighboring ("related") rights to grant or refuse authorization to a cable operator for a cable retransmission may be exercised only through a "collecting society." The Directive provides for a mediation process if no agreement is concluded regarding the authorization of cable retransmission, and it also contains provisions concerning the prevention of the abuse of negotiating positions.

24. Under Decision 351–Common Provisions on Copyright and Neighboring Rights of December 17, 1993–of the *Cartagena Agreement*, performers are granted the right to authorize the reproduction of the fixations of their performances. The Decision provides that the Member States may establish exceptions to the rights provided to the extent permitted by the Rome Convention; it also contains a chapter governing the operations of organizations for the collective management of copyright and neighboring rights, including supervision by competent national authorities.

25. In *Argentina*, performers have the moral right to oppose use of performances which "produce serious or unjust prejudice to ... artistic interests," and the right to receive remuneration for the reproduction, broadcasting and retransmission of fixations of performances. Collective agreements are in place concerning the initial and secondary use of fixed performances in the making of cinema films (agreement between the *Asociación Argentina de Actores* (AAA) and associations of film producers) and television programs (agreement between AAA and associations of public and private broadcasters). Performers are remunerated through AAA for initial exhibition of cinema films, including their performances in cinema halls. In respect of performances included in television programs, a recent collective agreement provides that remuneration for initial use covers a single broadcast covering the area of Buenos Aires. In respect of secondary use, remuneration for repeat broadcasts covering the area of Buenos Aires, and simultaneous transmissions of initial broadcasts to areas outside Buenos Aires, give rise to a payment based on a percentage of the original fee, depending on the length of the program and the number of repeat broadcasts, up to a ceiling. Repeat broadcasts to areas outside Buenos Aires give rise to a payment of 50 percent of the original fee, up to a ceiling; the payment is made at the same time as the original fee. In terms of foreign television broadcasts, the agreement entitles Argentine performers to a payment of 25 percent of the original fee for broadcasts in Uruguay and any two other countries; for additional countries, the additional payment is 18 percent of the original fee.

26. In *Australia*, performers' rights were introduced into the copyright law in 1989. Under the legislation, performers have exclusive rights to, *inter alia*, authorize use of a recorded performance, if the original recording was unauthorized. A system of remuneration for private copying is expected to be introduced soon, but it will only apply to audio recording. Several collective agreements have been concluded between representatives of performers (such as the Media Entertainment and Arts Alliance (MEAA) and users). For example, a recent version of the Actors Feature Film Award contains provisions relating to the secondary uses of actors' recorded performances. In the so-called "work in one product" clause, the producer agrees that the actor's performance will only be used in relation to the film that is the subject of the agreement. An "editing and segmenting clause" obliges the producer not to edit the film or use segments of it in any other way without the actor's consent, for example, by using portions of the actor's performance in a "music video." The

producer either buys up all exploitation rights at the time of the initial agreement or purchases the rights as needed. Most producers buy up world cinema distribution rights, world video rights, and Australian television rights at the outset, while waiting to buy such rights as foreign television rights.

27. Three agreements apply to performances included in television programs, the Actors Television Program Award, which is the basic agreement concerning the appearance of actors in television films, the Australian Television and Residuals Agreement (ATRA), which gives actors a right to residual payments for rebroadcast and reuse of the programs which include their performances, and the Actors Etc. (Television) Award, which covers performers in documentaries, training videos, and commercials.

28. In respect of musical performances, several federal agreements (awards) cover musicians working in film, documentaries and television, but these agreements bind only a few employers. Consequently, most musicians work under state-level awards; of these, only one, the Music (Opera and Ballet) Orchestral Award, provides musicians with additional remuneration for the making and exploitation of recordings of their performances.

29. Under the copyright law of *China*, performers have moral rights. Furthermore, producers of both sound and video recordings are required to pay remuneration to performers in respect of the reproduction and distribution of such recordings, and civil liability attaches to anyone who reproduces or publishes a sound or video recording of a performance without the consent of the performer.

30. In *Colombia*, the legislation provides performers with moral rights and exclusive rights to authorize reproduction, communication to the public and transmission of their performances. Once performers have consented to the inclusion of their performance in a visual or audiovisual fixation, these rights cease to apply, but performers have the right to agree by contract to more favorable terms.

31. In *France*, the rights of performers include moral rights, the exclusive right to authorize reproduction of fixations of performances and the exclusive right to authorize "any separate use of the sounds or the images of the performance, where the latter has been fixed as regards both sounds and the images." Rights to equitable remuneration are provided for private copying of both phonograms and videograms. In the case of audiovisual works, the signing of a contract "between a performer and a producer for the making of an audiovisual work shall imply the authorization to fix, reproduce and communicate to the public the performance of the performer." Such a contract "shall lay down separate remuneration for each mode of exploitation of the work." The legislation also refers to the status of performing artists as salaried employees under the Labor Code.

32. The French legislation makes no apparent distinction between French and foreign performers in terms of exclusive rights. However, it also contains the following provision: "Subject to the international conventions, the right to remuneration (for broadcasting and communication to the public of phonograms and for private copying) shall be shared among the authors, performers, producers of phonograms and videograms in respect of phonograms and videograms fixed for the first time in France."

33. An agreement was concluded in 1990 between three organizations representing film producers and the *Syndicat Français des Artistes Interprètes* (SFA) concerning remuneration to performers involved in the making of cinematographic works. The agreement includes a minimum salary, divided into three parts (one for cinematographic exploitation in theaters or other halls open to the public; one for exploitation by telediffusion; and one for exploitation in the form of videograms for private use by the public). In addition to the salary, the film producer pays to the collecting society ADAMI *(Société pour l'administration des droits des artistes et musiciens interprètes)* a sum fixed at two percent of net receipts from exploitation of the work, after amortization of the costs of the film. ADAMI prorates the distribution among performers based on their initial salary, up to a daily limit corresponding to seven times the minimum salary. The agreement is valid for five years, and observance of its provisions was made compulsory by a Ministerial Decree shortly after it was concluded.

34. Collective agreements also exist which cover the inclusion of musical performances in audiovisual fixations. For example, an agreement between the *Orchestre de Paris* (ODP) and the *Syndicat National des Musiciens* (SNAM), the *Syndicat des Artistes-Musiciens Professionnels de la Région Parisienne* (SAMUP), and the *Société de perception et de distribution des droits des artistes interprètes de la musique et de la danse* (SPEDIDAM), establishes the remuneration for ODP musicians in respect of inclusion of their performances in cinema films, television programs, and videograms, including foreign and domestic use. Other agreements apply to use of musical performances in commercial videograms. including music videos; ADAMI and SPEDIDAM collect and distribute remuneration to performers arising out of these uses.

35. In respect of equitable remuneration for private copying, the payment obligation is imposed on manufacturers and importers of blank audio and video recording media, but not on recording equipment. The amount of the payment is set by a Commission established by a ministerial decree; for audiovisual private copying, the levy on blank videotapes is currently FF 2.25 per hour (FF 0.0375 per minute). The remuneration is payable according to the following shares in the case of copying from videograms: one-third to authors, one-third to performers, and one-third to producers. The legislation requires that the remuneration for private copying be administered by collecting societies established as civil law companies, subject to the general oversight of the Minister of Culture. In the case of remuneration for private copying of audiovisual fixations, the rights are collected and distributed by the *Société pour la rémunération de la copie privée audiovisuelle (Copie France)*, a society formed jointly by the societies representing authors, performers and producers. In the case of performers, the remuneration is distributed by ADAMI (which represents featured performers) and SPEDIDAM (which represents non-featured performers). The legislation provides that 25 percent of the amounts collected for private copying shall be used for activities to promote creation, live entertainment and training for performers.

36. In *Germany*, the rights of performing artists include moral rights and the right to authorize reproduction of fixations of performances. Rights to equitable remuneration are provided for broadcasting of performances fixed on audio and audiovisual supports which have been published (commercialized), and for communication to the public of fixed performances. Performers have the right to a share in equitable remuneration for private copying on both audio and video recording media. These rights are limited in the case of performers "who participate in the production of a cinematographic work or whose performances are lawfully used in the production of a cinematographic work;" in such cases, the performer–in addition to the right to authorize fixation of his unfixed performance–is only entitled to the right of equitable remuneration for private copying. Nonetheless, the principle of contractual freedom applies: performers and film producers may agree by contract that some or all performers' rights may be maintained.

37. There are no provisions in German legislation concerning the remuneration to performers resulting from the transfer of rights; this is left generally to collective agreements between performers and employers. In the field of television, for example, the contract of employment for performers engaged by the broadcasting organization NDR involves transfer of the rights of reproduction, broadcasting (including by satellite and cable) and communication of the fixation of the performance, but the performer retains the right to equitable remuneration for broadcasting and communication to the public; NDR is authorized to transfer these rights totally or in part to third parties. The performer is paid at the outset for the transfer of rights, but any modification of the contract requires his authorization. In the case of acts of rebroadcasting or new acts of communication to the public other than those specified in the contract, the performer is entitled to remuneration as follows: for acts taking place within 10 years of the first broadcast or communication to the public, the initial payment is increased by 35 percent; for acts taking place thereafter, the increase is 10 percent of the initial payment, paid every five years.

38. In the case of equitable remuneration for broadcasting and communication to the public of fixed audio and audiovisual performances (including by satellite and cable), the level of remuneration is set in collective contracts between broadcasting organizations and organizations representing performers. For example, in the case of broadcasting, the agreement between the State broadcasting organization ARD and the collecting society GVL provides that ARD pays an annual remuneration of 4.52 percent of its advertising revenue for radio broadcasts, and 0.1 percent of advertising revenue for television; in the case of private broadcasters, the remuneration is 4.5 percent of advertising revenue for radio and 0.275 percent for television. One half of the remuneration distributed is paid to the representatives of performers.

39. In the case of equitable remuneration for private copying, the payment obligation falls on manufacturers and importers of recording equipment and blank recording media; for video recording equipment, the levy is presently DM 8.00; for video recording media, the levy is presently DM 0.17 per hour of recording time. The royalties are collected and distributed by a single society, the ZPU, formed jointly by the societies representing the various owners of rights concerned. In the case of private copying in the audiovisual sphere, 21 percent of the amount distributed is paid to the representatives of performers, 50 percent goes to the representatives of film producers, 21 percent goes to the representatives of composers, lyricists and music publishers, and 8 percent is paid to the representatives of authors and publishers of literary works.

40. In *India*, recent legislation provides rights to performers for the first time. The rights provided include the exclusive right to authorize reproduction of a sound or visual recording of the performance, if the original recording was made without the

performer's consent or was made for purposes different from those for which the performer gave his consent. However, once a performer has consented to the incorporation of his performance in a cinematograph film, he no longer has the aforementioned rights.

41. In *Japan*, the legislation provides performers with exclusive rights to authorize reproduction, broadcasting and cable transmission of their performances; these rights do not apply, however, in the case of performances included, with the performer's consent, in cinematographic works. A right of rental is granted in a way that it only extends to performances included in phonograms. Under recent legislation, performers have the right to a share in remuneration collected to compensate for private copying of sound and audiovisual recordings on digital recording equipment. The payment obligation is imposed on manufacturers and importers of such equipment, and may only be collected and distributed by collective administration organizations representing authors and other copyright owners, performers and producers of phonograms. The performers' share is administered by the Japan Council of Performers' Organizations (GEIDANKYO). Prior to distribution, 20 percent of the amounts collected are to be used for activities "contributing to the protection of copyright and neighboring rights as well as to the promotion of the creation and dissemination of works." Collective agreements exist for the use of performances, for example, an agreement between the National Broadcasting Station (NHK), five commercial broadcasting organizations, and the Musicians' Union of Japan establishes the right of musicians to payment for broadcasting and rebroadcasting of their performances, as well as use in other media such as videograms.

42. In *Norway*, the rights of performers include the moral right to be recognized as the performer and the exclusive right to authorize reproduction of a fixed performance. As in some other Scandinavian countries, the Norwegian legislation contains no provision stating that performers are deemed to transfer all economic rights when they consent to inclusion of their performance in an audiovisual fixation. A levy is also collected on blank audio and video tapes, but the proceeds go into a fund which provides grants to performers and other artists; there is no individual distribution to performers. Collective agreements are in place concerning the initial and secondary use of fixed performances in the making of cinema films (agreement between Norsk Ballettforbund (NBF), a trade union representing actors, and the association of film producers), television programs (agreement between trade unions NBF and Norsk Skuespillerforbund (NSF) and the Norwegian Broadcasting Corporation (NRK)) and commercials (agreement between NSF and the Commercials Bureau Association). In the case of cinema films, for example, each actor is entitled to a buyout of seven percent of initial compensation for use of their fixed performances in television broadcasts; for inclusion in videograms, a fixed sum is paid to the collecting society NORWACO at the time of cinema release of the film, and for gross income from video distribution in excess of NOK 500,000, performers are entitled to 12.5 percent of the producer's gross income.

43. In the recent legislation of the *Russian Federation*, the rights of performers include moral rights of integrity and paternity, the exclusive right to authorize reproduction of a fixed performance, if the original fixation was not authorized, or was made for purposes different than those to which the performer consented, or was made in reliance on an explicit limitation on the rights of the performer. Performers are entitled to equitable remuneration for rebroadcasting, recording for broadcasting purposes, and the reproduction of the recording by broadcasting and cable distribution organizations. The legislation provides that the conclusion of a contract for the making of an audiovisual work shall constitute licensing by the performer of his economic rights in respect of use of the audiovisual work; unless provided in the contract, any separate use of the sounds or images included in the work is subject to separate consent by the performer. Performers are also entitled to remuneration for private copying of sound recordings and audiovisual works, which is 30 percent of the sum collected from manufacturers and importers of recording equipment and blank recording media; the remuneration is to be collected and distributed by a collecting society.

44. In the *United States of America*, there is no federal legislation which provides intellectual property rights for performers whose performances are included in audiovisual fixations. One reason that performers are not provided specific federal statutory rights is because, under jurisprudence dating from the 1930s, the contributions of performers, at least in respect of sound recordings, are considered intellectual creations subject to protection under copyright.

45. Notwithstanding the lack of direct legislation protecting performers' rights, a number of collective agreements exist guaranteeing performers remuneration in the form of "residuals" (payments arising out of uses of their fixed performances following the initial use, which is compensated usually through a salary-type payment for services rendered). In respect of the rights of performers whose performances are included in cinematographic films, the Codified Basic Agreement between the Alliance of Motion Picture and Television Producers and two organizations representing performers, the American

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PROPOSALS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES AND PROPOSALS OF THE UNITED STATES OF AMERICA

Text of the Proposals
(WIPO document INR/CE/IV/4)

PROPOSALS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES

(1) At the fourth session of the Committee of Experts on a Possible Protocol to the Berne Convention as well as at the third session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, it was agreed that the Government members of the Committee and the Commission of the European Communities would be invited to send, by June 20, 1995, proposals to be discussed at the next sessions of the Committees of Experts.

(2) In response to that invitation, we have the honor to transmit to you, on behalf of the European Community and its Member States:

....

[Text omitted because mainly relevant for the Committee of Experts on a Possible Protocol to the Berne Convention. It is reproduced in document BCP/CE/V/3.]

(3) – proposals for the fourth session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (Geneva, September 4 to 8 and 12, 1995).

Submission to WIPO in view of the Fourth Session of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (Geneva, September 4 to 8 and 12, 1995)

(4) The present submission of the European Community and its Member States is being made in connection with the work of the Committee of Experts of the World Intellectual Property Organisation on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms.

(5) At the last session of the Committee of Experts (December 12 to 16, 1994), it was agreed that the Government members of the Committee and the Commission of the European Communities would be invited to send proposals in relation to the items on the agenda of the possible New Instrument to the International Bureau and that these proposals would be discussed at the next session of the Committee of Experts (September 4 to 8 and 12, 1995).

(6) In this context, the European Community and its Member States submit the following proposals in connection with economic rights of Performers and Producers of Phonograms:

1. Economic Rights of Performers in their live performances (Annex 1);
2. Economic Rights of Performers in their fixed performances (Annex 2);
3. Economic Rights of Producers of Phonograms in their Phonograms (Annex 3).

(7) These proposals will be further elaborated upon at the Fourth Session of the Committee of Experts.

(8) In line with the views put forward by the Commission of the European Communities on previous occasions (see, in particular, the letter of 22 February 1994 from Mr. J.F. Mogg, Director General, Directorate-General Internal Market and Financial Services, Commission of the European Communities, to Dr. A. Bogsch, Director General of WIPO), the economic rights being proposed for performers cover all performances and fixations (unless otherwise indicated), whether of an audio, visual or audiovisual character.

(9) In addition, it is proposed that on all other points of the Agenda of the Committee of Experts on which no specific submissions are being made herewith, future discussions take place on the basis of the agreement reached at previous meetings of the Committee of Experts and on the relevant paragraphs in the memoranda prepared by the International Bureau.

(10) All these proposals are without prejudice to the final views the European Community and its Member States might adopt in the future in light of further developments of the discussions within the two Committees of Experts.

(11) No proposal is submitted as regards an importation right (paragraphs 63(c), 64(c), 67(c) and 68(c) of the Memorandum of the International Bureau, document INR/CE/III/2). The European Community and its Member States consider that detailed study should be made of the economic effects and the legal nature of an importation right.

(12) No proposal is submitted as regards a right to remuneration for private copying for performers and phonogram producers (paragraphs 65, 66, 69 and 70 of the Memorandum of the International Bureau, document INR/CE/III/2). Private copying has, so far, not been the object of legislative harmonisation within the European Community and, at this stage, it reserves its position with regard to the possible substance of provisions in relation to this matter. In any event, if provisions on private copying were considered to be appropriate, a parallel treatment of the subject in the Berne Protocol and the New Instrument would be required. Moreover, the draft contained in the WIPO memorandum is considered unsatisfactory as it fails to guarantee equal treatment to all countries which would become parties to the Instrument.

(13) As regards the protection to be given to performers and phonogram producers in case of acts of digital transmission "on-demand" (paragraphs 64(f) and 68(f) of the Memorandum of the International Bureau, document INR/CE/III/2), the European Community and its Member States are not making any specific proposal at this stage. It is considered that this matter is part of a wider debate taking place with regard to authors' rights and neighbouring rights and new technologies. As already indicated (see, in particular, the letter of September 22, 1994 from Mr. J.F. Mogg, Director General, Directorate-General Internal Market and Financial Services, Commission of the European Communities, to Dr. A. Bogsch, Director General of WIPO), it is appropriate that these issues are examined in WIPO and the current discussions taking place in the Committee of Experts provide an adequate basis for doing so. Therefore, without denying the need to consider the rights to be granted to performers and phonogram producers in digital transmissions on-demand, it is preferred to examine this issue globally. Furthermore, the results of the consultative process that will follow the publication of the Commission's Green Paper on "Authors' Rights and Neighbouring Rights in the Information Society" should constitute a valuable contribution to this debate and to the achievement of satisfactory solutions.

(14) Finally, the European Community and its Member States would like to support the inclusion of specific provisions for the enforcement of the rights of performers and producers of phonograms in the New Instrument. These provisions should be similar to those proposed for the enforcement of authors' rights in the context of the possible Berne Protocol, in relation to which the European Community and its Member States have submitted a proposal based on the enforcement provisions of the TRIPS Agreement (Articles 41 to 61 of the Agreement).

Annex 1
Economic Rights of Performers in Their Live Performances

(15) It is proposed that the instrument provide for the exclusive right of performers to authorise:

(a) the broadcasting of their live performances;

(b) the communication to the public of their live performances; and

(c) the fixation of their live performances.

Annex 2
Economic Rights of Performers in Their Fixed Performances

(16) 1. It is proposed that the instrument, subject to the provisions proposed in paragraph 2 below, provide for any performer in respect of his fixed performance the exclusive right to authorise the following acts:

(a) the direct or indirect reproduction of the fixation of their performance;

(b) the making available to the public (distribution) of the original and copies of the fixation of the performance through sale or other transfer of ownership;[1]

(c) the rental of the original and copies of the fixation of the performance;

(d) the adaptation of the fixation of the performances;[2]

(e) the broadcasting of their performance fixed in a phonogram;

(f) the communication to the public of their performance fixed in a phonogram.[3]

[1] The wording of this subparagraph is subject to the definition of "distribution" in the chapter on definitions in the New Instrument.

[2] The granting of an adaptation right to performers requires further study, in particular in the light of the reproduction right.

[3] The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, and Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property consider the concept of public performance to be covered by the concept of communication to the public in the case of rights of performers and phonogram producers. There seems to be no need to introduce a separate public performance right in the framework of the New Instrument.

(17) 2. It is proposed that the instrument provide that

(a) the right mentioned in item (b) of the preceding paragraph shall not be exhausted within a country–or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation–except where the distribution of the original or any copy of the fixation is made for the first time, in the country or in any of the countries of the regional economic integration organisation, by or pursuant to an authorisation of the performer concerned;

(b) exhaustion as provided under item (a) does not apply in the case of the rental of the original or copies of fixations of performances;

(c) it is a matter for national legislation in the countries party to the instrument to provide for the limitation of the rights mentioned in items (e) and (f) of the preceding paragraph to a right to equitable remuneration;

(d) it is a matter for national legislation in the countries party to the instrument to require that the rights in items (e) and (f) of the preceding paragraph be administered by collective administration organisations;

(e) it is also a matter for national legislation in the countries party to the instrument to provide for the same kinds of limitations with regard to the protection of performers as those which they provide for in connection with the protection of copyright in the literary and artistic works, with the exception of non-voluntary licenses which may be provided for only to the extent to which they are compatible with the instrument.[4]

Annex 3
Economic Rights of Producers of Phonograms in Their Phonograms

(18) 1. It is proposed that the instrument, subject to the provisions proposed in paragraph 2 below, provide for any producer of phonograms in respect of his or its phonogram the exclusive right to authorise the following acts:

(a) the direct or indirect reproduction of the phonogram;

(b) the making available to the public (distribution) of the original and copies of the phonogram through sale or other transfer of ownership;[5]

(c) the rental of the original and copies of the phonogram;

(d) the broadcasting of the phonogram;

(e) the communication to the public of the phonogram.[6]

(19) 2. It is proposed that the instrument provide that:

(a) the right mentioned in item (b) of the preceding paragraph shall not be exhausted within a country–or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation–except where the distribution of the original or any copy of the phonogram is made for the first time, in the country or in any of the countries of the regional economic integration organisation, by or pursuant to an authorisation of the producer of phonograms concerned;

(b) exhaustion as provided under item (a) does not apply in the case of the rental of the original or copies of phonograms;

(c) it is a matter for national legislation in the countries party to the instrument to provide for the limitation of the rights mentioned in items (d) and (e) of the preceding paragraph to a right to equitable remuneration;

(d) it is a matter for national legislation in the countries party to the instrument to require that the rights in items (d) and (e) of the preceding paragraph be administered by collective administration organisations;

(e) it is also a matter for national legislation in the countries party to the instrument to provide for the same kinds of limitations with regard to the protection of producers of phonograms as those which they provide for in connection with the

[4] The issue of the limitations to the rights that the countries who are party to the instrument can provide for should be examined at a later stage once the contents of such rights have been agreed upon.

[5] The wording of this subparagraph is subject to the definition of "distribution" in the chapter on definitions in the New Instrument.

[6] The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations, and Council Directive 92/100/EEC on rental right and lending right and on certain rights related to copyright in the field of intellectual property consider the concept of public performance to be covered by the concept of communication to the public in the case of rights of performers and phonogram producers. There seems to be no need to introduce a separate public performance right in the framework of the New Instrument.

protection of copyright in the literary and artistic works with the exception of non-voluntary licenses which may be provided for only to the extent to which they are compatible with the instrument.[7]

PROPOSALS OF THE UNITED STATES OF AMERICA

(1) I am sending you the United States views on the issues that are ripe for discussion at the Meeting of the Committees of Experts on the Protocol to the Berne Convention and the New Instrument on the Protection of Performers and Producers of Phonograms, scheduled for September 4 through 12.

(2) The United States Government believes that governments must find ways to provide strong and coherent copyright and neighboring rights protection at present and in the coming era of the Global Information Infrastructure. Moreover, the February 25-26, 1995, Brussels G-7 Meeting called for governments to develop measures "through national, bilateral, regional and international efforts, including in the World Intellectual Property Organization, which will ensure that the framework for intellectual property and technical protection guarantees that the right holders enjoy the technical and legal means to control the use of their property over the Global Information Infrastructure."

(3) The following comments reflect US domestic developments and our studies on intellectual property and the National and Global Information Infrastructures. We are firmly convinced that consideration of one or more international agreements as outlined in the attached paper will provide a meaningful contribution to the work of the Committees in September.

General Observations

(4) The United States is committed to working in WIPO to improve international protection for works protected by copyright and authors rights and the subject matter of neighboring rights. This is essential, because strong protection for intellectual property must be ensured in the rapidly growing Global Information Infrastructure (GII) or Information Society. As confirmed by the G-7 Ministers at the Halifax Summit, the transition to a world-wide information society demands a resolution of these issues and the expansion of our work in WIPO to encompass fully the intellectual property issues raised by the information society.

(5) In the world-spanning digital distribution systems and multimedia works of the GII, distinctions among the rights of authors, producers and performers that are the basis for the separation of copyright and neighboring rights are rapidly becoming irrelevant. This new information society can mean economic growth, jobs, and exports for all economies. This will benefit every country's authors, producers and performers. To guarantee this benefit, governments must provide appropriate policies that will ensure the development of the GII through the effective protection of intellectual property. Our work in WIPO must be relevant to, and primarily focused on, the needs of the rapidly emerging digital world of the GII.

Matters Common to the Protocol and the New Instrument

(6) National Treatment. The United States continues to believe that national treatment must be the basis for protection in intellectual property agreements. National treatment must apply to the obligations established in any agreement in WIPO. The author or rights holder should be able to realize fully the economic benefits flowing from the free exercise of his or her rights in any country party to the Protocol or New Instrument. In respect of any work, this is required by Article 5 of the Berne Convention. To do otherwise in either a Berne Protocol or another agreement on copyright protection would be contrary to Article 20 because it would be a derogation of rights existing under Berne and not be an Agreement to "grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention" as provided for under Article 20. To the extent that we have agreed that the principles of the New Instrument should follow those of the Berne Convention, to do otherwise in respect of related rights, would be contrary to the letter and the spirit of the Convention.

(7) Enforcement Provisions. Before the Uruguay Round Agreement on the Trade Related Aspects of Intellectual Property (TRIPS) in

[7] The issue of the limitations to the rights that the countries who are party to the instrument can provide for should be examined at a later stage once the contents of such rights have been agreed upon.

December 1993, we supported the inclusion of enforcement provisions in any new WIPO agreements. We believed that if TRIPS, with its strong enforcement provisions, was not adopted then other multilateral agreements should establish enforcement norms. Since TRIPS has been adopted and successfully establishes broadly applicable enforcement disciplines, such provision should no longer be included in the Protocol and New Instrument texts. Rather than be helpful, inclusion of the TRIPS enforcement provisions in these texts would be redundant and create the possibility of conflicting norms. If the enforcement language differed from that in TRIPS, the relative obligations in the two sets of texts would be unclear; even if the enforcement language in the texts were identical to that in TRIPS, there would still be the strong possibility of confusion through different interpretation of the texts in different fora. As a result, the United States believes that the TRIPS enforcement provisions should be removed from the Protocol and New Instrument unless they apply only to intellectual property standards not included in the TRIPS Agreement. In other words, to the extent that enforcement provisions are included, they should apply only to the new, "TRIPS plus" elements of the Protocol and New Instrument, such as provisions on the protection of rights management information, the use of technical security measures and the prohibition of devices and services that may be used to defeat technical security measures.

(8) Reproduction by Transmission. We believe that the Committees of Experts should consider the recognition of a digital "transmission" right for both the Berne Protocol and the New Instrument because of its serious implications for the continued effectiveness of the reproduction right ensured in Article 9 of the Berne Convention. While this is an issue that needs further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GII.

(9) Distribution Right. The Protocol and New Instrument should include express provisions for the important issue of distribution rights. These provisions should secure the right of first public distribution on a territorial basis in all of the countries party to either Agreement. Such provisions should also provide for the possibility of limited exceptions to the right of distribution and the right of importation. It could include a general provision based on Article 9(2) of the Berne Convention that permits limited exceptions, as long as their grant does not unreasonably prejudice the interests of the rights owner in the normal exploitation of the work or sound recording.

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

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

(12) The prohibition of devices, products, components and services that defeat technological methods of preventing unauthorized use of works in digital form or communicated through the GII is in the public interest. Consumers of copyrighted works and sound recordings pay for the acts of infringers through higher prices for copyrighted works and sound recordings to compensate right owners for infringement losses. The public will also

have access to more works and sound recordings if rights owners can more effectively protect their property from infringement.

(13) Therefore, the United States believes that the Berne Protocol and the New Instrument should include provisions to prohibit the importation, manufacture and distribution of devices, as well as the provision of services, that defeat hardware or software based anti-copying systems.

(14) Rights Management Information. In the future, the rights management information associated with a work or sound recording–such as the name of the copyright owner or producer and the terms and conditions for uses of the work or sound recording–may be critical to the efficient operation and success of the GII. The public should be protected from fraud in the creation or alteration of such information. Therefore, the Protocol and the New Instrument should include a prohibition of the fraudulent inclusion of such management information and the fraudulent removal or alteration of such information.

[Text relevant exclusively for the Committee of Experts on a Possible Protocol to the Berne Convention follows, which is not reproduced here.]

New Instrument Issues

(15) The situation in the United States in respect of important issues to be dealt with in the New Instrument remains uncertain at this time. However, because the New Instrument issues are so important to the rational development of the GII, we should try to focus efforts on resolution of issues where possible. The New Instrument must serve the function of "bridging" the New Instrument with the Berne Convention and the Protocol. To the extent possible, the New Instrument rights covered should be as nearly identical to those in the Berne Protocol as possible. Otherwise, differences in phrasing could lead to differences in interpretation.

(16) Performers Rights. The United States believes that the New Instrument should include provisions to protect the rights of performers in respect of their unfixed performances. We suggest that these provisions be based on those included in the TRIPS Agreement quoted below.

> In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

(17) Moral Rights. The United States can accept the moral right of paternity and integrity for performers in sound recordings. As we have explained in the past, for us, performers are joint authors of sound recordings, and as such, they enjoy the same moral rights as do other authors. While we continue to doubt whether inclusion of a provision on moral rights is essential for the New Instrument, we could accept a provision tailored to follow Berne Article 6*bis*. For us, the critical issue is that any moral rights must be at least waivable as part of a fairly negotiated contract between the parties.

(18) We adopt this position for several reasons; first, matters such as credits can be properly dealt with by contract provisions, and do not require moral rights. Also, concerning the right of integrity, the United States has a strong tradition of parody and burlesque. If a song artist had a right to object to any distortions, he or she might object to legitimate parodies of his or her song styling. We might see the Supreme Court declare such moral rights provision unconstitutional because of its conflict with free speech.

(19) Reproduction Rights. Digital technology has greatly facilitated the ease of making and the quality of reproductions. Unlike analog recordings, digital recordings can be reproduced without degradation of sound quality. The tenth serially reproduced copy of a digital recording is indistinguishable from the original. Equally, the technology has provided new means to adapt, modify and transform phonograms or parts of phonograms. This highlights the importance of the basic reproduction right, and also emphasizes the importance of carefully considering how the adaptation right can apply for phonograms.

(20) Rental Rights. Digital audio technology has also seriously changed the impact of private copying. As discussed in the items of general concern, the United States generally supports technical means to limit unauthorized copying such as the Serial Copy Management System (SCMS) employed in the

United States and Japan. The United States also supports statutory royalty payment systems for digital audio equipment and blank digital media to compensate rights owners for the copying that will inevitably take place in a digital environment.

(21) As we have noted, we would prefer not to duplicate TRIPS obligations in the Protocol and New Instrument. If explicit rental rights are included, they should be exclusive rights, not limited to a right of remuneration. However, we could agree to allow countries that, at the time of the adoption of the New Instrument, recognize an exclusive right for only one year followed by a right of remuneration for the remainder of the term of protection, to temporarily continue a regime of remuneration.

(22) Performance Rights In Sound Recordings. We believe that it is essential that the New Instrument include provisions to mandate exclusivity for interactive communications of sound recordings in digital systems. This is important because of the previously discussed impact that the ease and quality of digital copying has on the reproduction right. Our Congress is considering legislation to extend a limited public communication right to sound recordings in the realm of digital communication. Consequently, the United States believes that considerable further discussions on these issues are required.

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

(24) Term of Protection. The United States supports a term of protection of 50 years for producers of phonograms and performers and would be willing to consider a term of protection commensurate with that provided for copyrighted works.

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

LIST OF TOPICS AND COMPARATIVE TABLE

Memorandum prepared by the International Bureau
(WIPO document INR/CE/IV/5)

1. The list of topics below refers to the relevant paragraphs of the proposals and comments. The abbreviations EC or USA in front of the paragraph numbers indicate whether reference is made to the proposals of the European Community and its Member States or the United States of America.

2. The two sets of proposals and the relating comments cover the following topics and are shown in the comparative table in the following order:

A. Moral rights of performers:
EC 9
USA 17 and 18

B. Economic rights of performers in respect of their live performances:
EC 15
USA 16

C. Economic rights of performers in respect of their fixed performances:

C.1. reproduction:
EC 16(a)
USA 19

C.2. private copying:
EC 12
USA 20

C.3. distribution:
EC 16(b) and 17(a) and (b)
USA 9 and 10

C.4. importation:
EC 11 and 17(a)
USA 9 and 10

C.5. rental:
EC 16(c) and 17(b)
USA 21

C.6. adaptation:
EC 16(d)
USA 19

C.7. broadcasting:
EC 16(e) and 17(c) and (d)
USA 22

C.8. communication to the public:
EC 16(f) and 17(c) and (d)
USA 22

C.9. "digital transmission 'on-demand'"; "reproduction by transmission":
EC 13
USA 8

C.10. exceptions and limitations:
EC 17(e)
USA 23

D. Rights of producers of phonograms:

D.1. reproduction:
EC 18(a)
USA 19

D.2. private copying:
EC 12
USA 20

D.3. distribution:
EC 18(b) and 19(a) and (b)
USA 9 and 10

D.4. importation:
EC 11 and 19(a)
USA 9 and 10

D.5. rental:
EC 18(c) and 19(b)
USA 21

D.6. adaptation:
USA 19

D.7. broadcasting:
EC 18(d) and 19(c) and (d)
USA 22

D.8. communication to the public:
EC 18(e) and 19(c) and (d)
USA 22

D.9. "digital transmission 'on-demand'"; "reproduction by transmission":
EC 13
USA 8

D.10. exceptions and limitations:
EC 19(e)
USA 23

E. Term of protection:
EC 9
USA 24

F. Formalities:
EC 9
USA 25

G. Enforcement of rights:
EC 14
USA 7

H. Technological measures:
USA 11 to 13

I. Rights management information:
USA 14

J. National treatment:
EC 9
USA 6

A. Moral Rights of Performers

European Community and its Member States

No specific proposal has been made. However, EC 9 contains the following general remarks: "In addition, it is proposed that on all other points of the Agenda of the Committee of Experts on which no specific submissions are being made herewith, future discussions take place on the basis of the agreement reached at previous meetings of the Committee of Experts and on the relevant paragraphs in the memoranda prepared by the International Bureau." Moral rights of performers is one of such points on the agenda of the Committee. Concerning "the agreement reached at previous meetings of the Committee" in this respect, see document INR/CE/III/3, paragraphs 80 to 92, and, concerning "the relevant paragraphs in the memoranda, prepared by the International Bureau," see document INR/CE/III/2, paragraphs 30 to 36.

United States of America

"While we continue to doubt whether inclusion of a provision on moral rights is essential for the New Instrument, we could accept a provision tailored to follow Berne Article 6*bis*. For us, the critical issue is that any moral rights must be at least waivable as part of a fairly negotiated contract between the parties" (see USA 17 and the comments to it in USA 18).

B. Economic Rights of Performers in Respect of Their Live Performances

European Community and its Member States

"It is proposed that the instrument provide for the exclusive right of performers to authorise:

(a) the broadcasting of their live performances;
(b) the communication to the public of their live performances; and
(c) the fixation of their live performances" (see EC 15).

United States of America

Treaty-language proposal:

"In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance" (see USA 16).

C.1. Economic Rights of Performers in Respect of Their Fixed Performances: Reproduction

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the direct or indirect reproduction of the fixation of [his] performance" (see EC 16(a)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 19 mentioned under D.1., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

C.2. Economic Rights of Performers in Respect of Their Fixed Performances: Private Copying

European Community and its Member States

"No proposal is submitted as regards a right to remuneration for private copying for performers and phonogram producers (paragraphs 65, 66, 69 and 70 of the Memorandum of the International Bureau, document INR/CE/III/2). Private copying has, so far, not been the object of a legislative harmonisation within the European Community and, at this stage, it reserves its position with regard to the possible substance of provisions in relation to this matter. In any event, if provisions on private copying were considered to be appropriate, a parallel treatment of the subject in the Berne Protocol and the New Instrument would be required" (see EC 12).

United States of America

See the proposals and comments in USA 20 mentioned under D.2., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the making available to the public (distribution) of the original and copies of the fixation of the performances through sale or other transfer of ownership" (see EC 16(b)). It is also proposed that the instrument provide that this right "shall not be exhausted within a country–or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation–except where the distribution of the original or any copy of the fixation is made, for the first time, in the country or in any of the countries of the regional economic integration organisation, by or pursuant to an authorisation of the performer concerned," and that even such an exhaustion "does not apply in the case of rental of the original or copies of fixations of performances" (see EC 17(a) and (b)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 9 and 10 mentioned under D.3., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

European Community and its Member States

"No proposal is submitted as regards an importation right (paragraphs 63(c), 64(c), 67(c) and 68(c) of the Memorandum of the International Bureau, document INR/CE/III/2). The European Community and its Member States consider that detailed study should be made of the economic effects and the legal nature of an importation right"(see EC 11). See, however, also the proposals on the right of distribution mentioned under C.3., above, and particularly the proposal in EC 17(a), according to which the right of distribution "shall not be exhausted within a country–or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation–except where the distribution of the original or any copy of the fixation is made, for the first time, in the country or in any of the countries of the rcgional economic integration organisation, by or pursuant to an authorisation of the performer concerned."

United States of America

See the relevant elements of the proposals and comments in USA 9 and 10 mentioned under D.3., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the rental of the original and copies of the fixation of the performance" (see EC 16(c)). It is proposed that any exhaustion of the right of distribution does not apply to this right (see EC 17(b)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 21 mentioned under D.5., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

C.6. Economic Rights of Performers in Respect of Their Fixed Performances: Adaptation

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the adaptation of the fixation of the performances" (see EC 16(d)). However, "[t]he granting of an adaptation right to performers requires further study, in particular in the light of the reproduction right" (see the footnote to EC 16(d)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 19 mentioned under D.6., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

C.7. Economic Rights of Performers in Respect of Their Fixed Performances: Broadcasting

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the broadcasting of their performance fixed in a phonogram" (see EC 16(e)). It is also proposed that the instrument provide that it is a matter for national legislation (i) to provide for the limitation of this right to a right to equitable remuneration; (ii) to require that this right be administered by collective administration organisations (see EC 17(c) and (d)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 22 mentioned under D.7., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any performer in respect of his fixed performance, the exclusive right to authorise ... the communication to the public of their performance fixed in a phonogram" (see EC 16(f)). It is also proposed that the instrument provide that it is a matter for national legislation (i) to provide for the limitation of this right to a right to equitable remuneration; (ii) to require that this right be administered by collective administration organisations (see EC 17(c) and (d)). The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under C.10., below, may be applicable also to this right.

United States of America

See the proposals and comments in USA 22 mentioned under D.8., below. Those proposals and comments seem to only relate to the rights of producers of phonograms, but may have some indirect relevance for the rights of performers in respect of their fixed performances (because, as USA 17 states, "performers are joint authors of sound recordings").

European Community and its Member States

"As regards the protection to be given to performers and phonogram producers in case of acts of digital transmission "on-demand"(paragraphs 64(f) and 68(f) of the Memorandum of the International Bureau, document INR/CE/III/2), the European Community and its Member States are not making any specific proposal at this stage. It is considered that this matter is part of a wider debate taking place with regard to authors' rights and neighbouring rights and new technologies. As already indicated ..., it is appropriate that these issues are examined in WIPO and the current discussions taking place in the Committee of Experts provide an adequate basis for doing so. Therefore, without denying the need to consider the rights to be granted to performers and phonogram producers in digital transmissions on-demand, it is preferred to examine this issue globally. Furthermore, the results of the consultative process that will follow the publication of the Commission's Green Paper on 'Authors' Rights and Neighbouring Rights in the Information Society' should constitute a valuable contribution to this debate and to the achievement of satisfactory solutions" (see EC 13).

United States of America

"We believe that the Committee of Experts should consider the recognition of a digital transmission right for both the Berne Protocol and the New Instrument because of its serious implications for the continued effectiveness of the reproduction right ensured in Article 9 of the Berne Convention. While this is an issue that needs further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GII" (see USA 8).

C.10. Economic Rights of Performers in Respect of Their Fixed Performances: Exceptions and Limitations

European Community and its Member States

"It is proposed that the instrument provide that 'it is also a matter for national legislation in the countries party to the instrument to provide for the same kinds of limitations with regard to the protection of performers as those which they provide for in connection with the protection of copyright in the literary and artistic works with the exception of non-voluntary licenses which may be provided for only to the extent to which they are compatible with the instrument'" (see EC 17(e)). A footnote to this proposal reads as follows: "The issue of the limitations to the rights that the countries who are party to the instrument can provide for should be examined at a later stage once the contents of such rights have been agreed upon."

United States of America

"The Instrument must provide for the possibility of limited exceptions to rights. In that regard, the New Instrument should include a general limitation that permits limited exceptions to the public performance right, as long as their grant does not unreasonably prejudice the interests of the rights owner in the normal exploitation of the sound recording. Such a provision could be based on Article 9(2) of the Berne Convention" (see USA 23).

D.1. Rights of Producers of Phonograms: Reproduction

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any producer of phonograms, in respect of his or its phonogram, the exclusive right to authorise ... the direct or indirect reproduction of the phonogram" (see EC 18(a)). The provisions concerning exceptions and limitations proposed in EC 19(e) and mentioned under D.10., below, may be applicable also to this right.

United States of America

"Digital technology has greatly facilitated the ease of making and the quality of reproductions. Unlike analog recordings, digital recordings can be reproduced without degradation of sound quality. The tenth serially reproduced copy of a digital recording is indistinguishable from the original ... This highlights the importance of the basic reproduction right" (see USA 19).

D.2. Rights of Producers of Phonograms: Private Copying

European Community and its Member States

"No proposal is submitted as regards a right to remuneration for private copying for performers and phonogram producers (paragraphs 65, 66, 69 and 70 of the Memorandum of the International Bureau, document INR/CE/III/2). Private copying has, so far, not been the object of a legislative harmonisation within the European Community and, at this stage, it reserves its position with regard to the possible substance of provisions in relation to this matter. In any event, if provisions on private copying were considered to be appropriate, a parallel treatment of the subject in the Berne Protocol and the New Instrument would be required" (see EC 12).

United States of America

"Digital audio technology has also seriously changed the impact of private copying. As discussed in the items of general concern, the United States generally supports technical means to limit unauthorized copying such as the Serial Copy Management System (SCMS) employed in the United States and Japan. The United States also supports statutory royalty payment systems for digital audio equipment and blank digital media to compensate rights owners for the copying that will inevitably take place in a digital environment" (see USA 20).

D.3. Rights of Producers of Phonograms: Distribution

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any producer of phonograms, in respect of his or its phonogram, the exclusive right to authorise ... the making available to the public (distribution) of the original and copies of the phonogram through sale or other transfer of ownership" (see EC 18(b)). It is also proposed that the instrument provide that this right "shall not be exhausted within a country—or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation—except where the distribution of the original or any copy of the phonogram is made for the first time, in the country or in any of the countries of the regional economic integration organisation, by or pursuant to an authorisation of the producer of phonograms concerned" (see EC 19(a)), and that even such an exhaustion "does not apply in the case of the rental of the original or copies of phonograms" (see EC 19(b)). The provisions concerning exceptions and limitations proposed in EC 19(e) and mentioned under D.10., below, may be applicable also to this right.

United States of America

"The Protocol and New Instrument should include express provisions for the important issue of distribution rights. These provisions should secure the right of first public distribution on a territorial basis in all of the countries party to either Agreement. Such provisions should also provide for the possibility of limited exceptions to the right of distribution and the right of importation. It could include a general provision based on Article 9(2) of the Berne Convention that permits limited exceptions, as long as their grant does not unreasonably prejudice the interests of the rights owner in the normal exploitation of the work or sound recording" (see USA 9). These provisions are considered also to be a basis for the recognition of a right of importation (in respect of which, arguments are included in USA 10).

D.4. Rights of Producers of Phonograms: Importation

European Community and its Member States

"No proposal is submitted as regards an importation right (paragraphs 63(c), 64(c), 67(c) and 68(c) of the Memorandum of the International Bureau, document INR/CE/III/2). The European Community and its Member States consider that detailed study should be made of the economic effects and the legal nature of an importation right" (see EC 11). See, however, also the proposals on the right of distribution mentioned under D.3., above, and particularly the proposal in EC 19(a), according to which the right of distribution "shall not be exhausted within a country–or where two or more countries have formed a regional economic integration organisation, within the regional economic integration organisation–except where the distribution of the original or any copy of the phonogram is made for the first time, in the country or in any of the countries of the regional economic integration organisation, by or pursuant to an authorisation of the producer of phonograms concerned."

United States of America

See the relevant elements of the remarks under D.3., above.

D.5. Rights of Producers of Phonograms: Rental

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any producer of phonograms, in respect of his or its phonogram, the exclusive right to authorise ... the rental of the original and copies of the phonogram" (see EC 18(c)). It is proposed that any exhaustion of the right of distribution does not apply to this right (see EC 19(b)). The provisions concerning exceptions and limitations proposed in EC 19(e) and mentioned under D.10., below, may be applicable.

United States of America

"As we have noted, we would prefer not to duplicate TRIPS obligations in the Protocol and New Instrument. If explicit rental rights are included, they should be exclusive rights, not limited to a right of remuneration. However, we could agree to allow countries that, at the time of the adoption of the New Instrument, recognize an exclusive right for only one year followed by a right of remuneration for the remainder of the term of protection, to temporarily continue a regime of remuneration" (see USA 21).

D.6. Rights of Producers of Phonograms: Adaptation

European Community and its Member States

United States of America

"[T]he technology has provided new means to adapt, modify and transform phonograms and parts of phonograms. This ... also emphasizes the importance of carefully considering how the adaptation right can apply for phonograms" (see USA 19).

D.7. Rights of Producers of Phonograms: Broadcasting

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any producer of phonograms, in respect of his or its phonogram, the exclusive right to authorise ... the broadcasting of the phonogram" (see EC 18(d)). It is also proposed that the instrument provide that it is a matter for national legislation (i) to provide for the limitation of this right to a right to equitable remuneration; (ii) to require that this right be administered by collective administration organisations (see EC 19(c) and (d)) The provisions concerning exceptions and limitations proposed in EC 19(e) and mentioned under D.10., below, may be applicable also to this right.

United States of America

"We believe that it is essential that the New Instrument include provisions to mandate exclusivity for interactive communications of sound recordings in digital systems. This is important because of the previously discussed impact that the ease and quality of digital copying has on the reproduction right. Our Congress is considering legislation to extend a limited public communication right to sound recordings in the realm of digital communication. Consequently, the United States believes that considerable further discussions on these issues are required" (see USA 22). These proposals and comments appear under the title of "Performance Rights in Sound Recordings." Although the expression "performance rights" may be understood to also cover broadcasting rights, it seems that the proposals and comments only relate to the right of communication to the public other than broadcasting ("public communication right") (see D.8., below).

D.8. Rights of Producers of Phonograms: Communication to the Public

European Community and its Member States

"It is proposed that the instrument, subject to the provisions [mentioned below], provide for any producer of phonograms, in respect of his or its phonogram, the exclusive right to authorise ... the communication to the public of the phonogram" (see EC 18(e)). It is also proposed that the instrument provide that it is a matter for national legislation (i) to provide for the limitation of this right to a right to equitable remuneration; (ii) to require that this right be administered by collective administration organisations (see EC 19(c) and (d)) The provisions concerning exceptions and limitations proposed in EC 17(e) and mentioned under D.10., below, may be applicable also to this right

United States of America

"We believe that it is essential that the New Instrument include provisions to mandate exclusivity for interactive communications of sound recordings in digital systems. This is important because of the previously discussed impact that the ease and quality of digital copying has on the reproduction right. Our Congress is considering legislation to extend a limited public communication right to sound recordings in the realm of digital communication. Consequently, the United States believes that considerable further discussions on these issues are required" (see USA 22).

D.9. Rights of Producers of Phonograms: "Digital Transmission 'On-demand'"; "Reproduction by Transmission"

European Community and its Member States

"As regards the protection to be given to performers and phonogram producers in case of acts of digital transmission 'on-demand' (paragraphs 64(f) and 68(f) of the Memorandum of the International Bureau, document INR/CE/III/2), the European Community and its Member States are not making any specific proposal at this stage. It is considered that this matter is part of a wider debate taking place with regard to authors' rights and neighbouring rights and new technologies. As already indicated ..., it is appropriate that these issues are examined in WIPO and the current discussions taking place in the Committee of Experts provide an adequate basis for doing so. Therefore, without denying the need to consider the rights to be granted to performers and phonogram producers in digital transmissions on-demand, it is preferred to examine this issue globally. Furthermore, the results of the consultative process that will follow the publication of the Commission's Green Paper on 'Authors' Rights and Neighbouring Rights in the Information Society' should constitute a valuable contribution to this debate and to the achievement of satisfactory solutions" (see EC 13).

United States of America

"We believe that the Committee of Experts should consider the recognition of a digital 'transmission' right for both the Berne Protocol and the New Instrument because of its serious implications for the continued effectiveness of the reproduction right ensured in Article 9 of the Berne Convention. While this is an issue that needs further discussion, the United States believes that such a right is an important part of the Berne Protocol and New Instrument which would be aimed at meeting the needs of the emerging GII" (see USA 8).

European Community and its Member States

It is proposed that the instrument provide that "it is also a matter for national legislation in the countries party to the instrument to provide for the same kinds of limitations with regard to the protection of producers of phonograms as those which they provide for in connection with the protection of copyright in the literary and artistic works with the exception of non-voluntary licenses which may be provided for only to the extent to which they are compatible with the instrument" (see EC 19(e)). A footnote to this proposal reads as follows: "The issue of the limitations to the rights that the countries who are party to the instrument can provide for should be examined at a later stage once the contents of such rights have been agreed upon."

United States of America

"The Instrument must provide for the possibility of limited exceptions to rights. In that regard, the New Instrument should include a general limitation that permits limited exceptions to the public performance right, as long as their grant does not unreasonably prejudice the interests of the rights owner in the normal exploitation of the sound recording. Such a provision could be based on Article 9(2) of the Berne Convention" (see USA 23).

E. TERM OF PROTECTION

European Community and its Member States

No specific proposal has been made. However, EC 9 contains the following general remarks: "In addition, it is proposed that on all other points of the agenda of the Committee of Experts on which no specific submissions are being made herewith, future discussions take place on the basis of the agreement reached at previous meetings of the Committee of Experts and on the relevant paragraphs in the memoranda prepared by the International Bureau." The term of protection is one of such points on the agenda of the Committee. Concerning "the agreement reached at previous meetings of the Committee," in this respect, see document INR/CE/II/1, paragraph 79, and, concerning "the relevant paragraphs in the memoranda prepared by the International Bureau," see document INR/CE/III/2, paragraphs 74 to 80.

United States of America

"The United States supports a term of protection of 50 years for producers of phonograms and performers and would be willing to consider a term of protection commensurate with that provided for copyrighted works" (see USA 24).

F. Formalities

European Community and its Member States

No specific proposal has been made. However, EC 9 contains the following general remarks: "In addition, it is proposed that on all other points of the agenda of the Committee of Experts on which no specific submissions are being made herewith, future discussions take place on the basis of the agreement reached at previous meetings of the Committee of Experts and on the relevant paragraphs in the memoranda prepared by the International Bureau." Formalities is one of such points on the agenda of the Committee. Concerning "the agreement reached at previous meetings of the Committee," in this respect, see document INR/CE/II/1, paragraph 79, and, concerning "the relevant paragraphs in the memoranda prepared by the International Bureau," see document INR/CE/III/2, paragraphs 88 to 92.

United States of America

"The United States believes that no formalities for the existence, protection, exercise or enjoyment of rights should be permitted under the New Instrument. There should also be an explicit prohibition against the requirement of conditioning rights on the formality of 'first fixation'" (see USA 25).

G. Enforcement of Rights

European Community and its Member States

"[T]he European Community and its Member States would like to support the inclusion of specific provisions for the enforcement of the rights of performers and producers of phonograms in the New Instrument. These provisions should be similar to those proposed for the enforcement of authors' rights in the context of the possible Berne Protocol, in relation to which the European Community and its Member States have submitted a proposal based on the enforcement provisions of the TRIPS Agreement (Articles 41 to 61 of the Agreement)" (see EC 14 and BCP/CE/V/3).

United States of America

"[T]he TRIPS enforcement provisions should be removed from ... the New Instrument unless they apply only to intellectual property standards not included in the TRIPS Agreement" (see USA 7).
"[W]e can accept proposals that reiterate the TRIPS obligations with only those changes necessary to adapt them to a purely intellectual property agreement" (see USA 16 in document BCP/CE/V/3).

European Community and its Member States

United States of America

"Provisions to prohibit decoders and anti-copying prevention devices and services should be considered for inclusion. Such provisions could prohibit the making available to the public goods or services the primary purpose of which is to defeat technical security measures" (see USA 11, and the comments made there and in USA 12). "[T]he Berne Protocol and the New Instrument should include provisions to prohibit the importation, manufacture and distribution of devices, as well as the provision of services that defeat hardware or software based anti-copying systems" (see USA 13).

I. RIGHTS MANAGEMENT INFORMATION

European Community and its Member States

United States of America

"In the future, the rights management information associated with a work or sound recording–such as the name of the copyright owner or producer and the terms and conditions for uses of the work or sound recording–may be critical to the efficient operation and success of the GII. The public should be protected from fraud in the creation or alteration of such information. Therefore, the Protocol and the New Instrument should include a prohibition of the fraudulent inclusion of such management information and the fraudulent removal or alteration of such information" (see USA 14).

European Community and its Member States

No specific proposal has been made. However, EC 9 contains the following general remarks: "In addition, it is proposed that on all other points of the agenda of the Committee of Experts on which no specific submissions are being made herewith, future discussions take place on the basis of the agreement reached at previous meetings of the Committee of Experts and on the relevant paragraphs in the memoranda prepared by the International Bureau." National treatment is one of such points on the agenda of the Committee. Concerning the "agreement reached at previous meetings of the Committee," in this respect, and, concerning "the relevant paragraphs of the memoranda prepared by the International Bureau," see document INR/CE/III/2, paragraphs 101 to 106.

United States of America

The proposals and comments of the United States of America in USA 6 state: "The United States continues to believe that national treatment must be the basis for protection in intellectual property agreements. National treatment must apply to the obligations established in any agreement in WIPO. The author or rights holder should be able to realize fully the economic benefits flowing from the free exercise of his or her rights in any country party to the Protocol or New Instrument. In respect of any work, this is required by Article 5 of the Berne Convention. To do otherwise in either a Berne Protocol or another agreement on copyright protection would be contrary to Article 20 because it would be a derogation of rights existing under Berne and not be an Agreement to "grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention" as provided for under Article 20. To the extent that we have agreed that the principles of the New Instrument should follow those of the Berne Convention, to do otherwise in respect of related rights, would be contrary to the letter and the spirit of the Convention" (see USA 6).

Rome Convention

Intergovernmental Committee

Fifteenth Ordinary Session[1]
(Geneva, July 3 to 5, 1995)

The following 10 member States of the Committee were represented: Argentina, Chile, Colombia, Finland, France, Germany, Japan, Mexico, Sweden, United Kingdom. Three States party to the Convention but not members of the Committee (Australia, Czech Republic, Spain), two States not party to the Convention (Botswana, Croatia) and the European Commission (EC) were represented as observers. One representative of the EC and representatives of the following six non-governmental organizations participated in an observer capacity: Association of European Performers' Organizations (AEPO), European Broadcasting Union (EBU), International Confederation of Societies of Authors and Composers (CISAC), Intemational Federation of Actors (IFA), International Federation of Musicians (IFM), International Federation of the Phonographic Industry (IFPI).

The Secretariat of the Rome Convention consists of the World Intellectual Property Organization (WIPO), the Intemational Labour Office (ILO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), which administrates the Intergovemmental Committee (the "Committee") of this Convention. The Committee meets once every two years, and was hosted this year by the ILO in Geneva. New elections to the Committee are held in even-numbered years (Rule 28(1) of the Rules of Procedure), so there were no new Members elected at this session. The meeting was chaired by the Representative of the Government of Argentina, Ms. María Cristina Tosonotti. Mr. Matthieu Benoît (France) and Mr. Hiroshi Takahashi (Japan) were elected Vice-chairmen.

The meeting emphasized the need to accede to, and apply, the Rome Convention by as many countries as possible, and to protect the rights of the beneficiaries of the Convention in an efficient manner, as well as to continue the various training courses, publications and different educational activities which WIPO, the ILO and Unesco have undertaken so far. The future of the Rome Convention was examined and questioned, in view of the forthcoming session at WIPO (September 4 to 8 and 12, 1995) of the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms.

The rights provided under the Rome Convention have taken on new importance in the past year, since only some of the rights of performers under the Rome Convention were incorporated into the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), making it, in the words of one delegate, "sub-Rome" as far as performers were concemed.

The meeting also discussed the impact of the digital revolution and technological advancements on copyright and neighboring rights, as well as on performers' rights, new forms of delivery and distribution of copyright works and objects of neighboring rights, and the current trend towards globalization of digital networks.

At the conclusion of the meeting, the Committee requested the Secretariat to include on the agenda of the next meeting of the Committee (which will be hosted by Unesco in 1997) the question of the impact of digital technology on neighboring rights under the Rome Convention, including on the employment and conditions of work of performers. A study on the said question should be prepared by the Secretariat.

[1] For a note on the preceding session, see *Copyright*, 1993, p. 256.

Registration Systems Administered by WIPO

Patent Cooperation Treaty (PCT)

Training and Promotion Meetings With PCT Users

The former Yugoslav Republic of Macedonia. In July 1995, two government officials received training in receiving Office procedures under the PCT at the headquarters of WIPO.

United States of America. In July 1995, a WIPO consultant gave a presentation on the PCT, organized by a private industrial company in Boca Raton (Florida). It was attended by 15 participants, mainly patent attorneys and patent administrators.

Also in July 1995, two WIPO officials and a WIPO consultant conducted three advanced PCT seminars and one basic PCT seminar. The first advanced PCT seminar was organized by Intellectual Property International (IPI) in San Francisco (California), and was attended by about 40 officials from the United States Patent and Trademark Office (USPTO) and representatives of law firms and corporations. The second one, organized by a private enterprise in Denver (Colorado), was attended by about 40 participants, mainly patent attorneys and patent administrators. The third one, as well as the basic PCT seminar, were organized by a private enterprise in Maui (Hawaii) and were attended, respectively, by about 20 and 15 participants, mainly patent attorneys and patent administrators from Japan, the Republic of Korea and the United States of America.

Also in July 1995, a WIPO official gave an address on the PCT to the Colorado Bar Association, in Denver, which was attended by about 50 participants.

Madrid Union

Computerization Activities

Switzerland. In July 1995, three government officials were briefed by WIPO officials in Geneva on the development of the MAPS (*M*adrid *A*greement and *P*rotocol *S*ystem) project and, in particular, on the possible exchange of data by electronic means between the Swiss Federal Intellectual Property Office and WIPO.

Activities of WIPO Specially Designed for Developing Countries

Africa

Training Courses, Seminars and Meetings

WIPO/Portugal Subregional Planning Meeting for Portuguese-Speaking Countries of Africa (Portugal). From July 24 to 26, 1995, that Meeting was organized in Lisbon by WIPO and the National Institute of Industrial Property (INPI) of Portugal. It brought together 10 government officials in charge of the administration of industrial property in their countries, namely Angola, Cape Verde, Guinea-Bissau, Mozambique and Sao Tome and Principe, Portuguese government officials, two WIPO officials and the European Patent Office (EPO) Liaison Officer in Portugal. The opening and closing ceremonies of the Meeting were presided over by Mr. Luís Alves Monteiro, Secretary of State of Industry of Portugal. Discussions were held on a new program of cooperation among the Portuguese-speaking countries of Africa, Portugal, WIPO and the EPO in the years 1996-2000. Presentations were also made on the activities of INPI and on the current status of industrial property in each country represented.

WIPO National Seminar on Industrial Property (Guinea). From July 17 to 19, 1995, WIPO organized that Seminar in Conakry, in cooperation with the Government of Guinea. It was attended by some 60 participants from government institutions, the private sector (including entrepreneurs, tradesmen, managers of medium-sized businesses), inventors and researchers. Thirty of these participants came from nine other cities in Guinea. Presentations were made by a WIPO consultant from France and a WIPO official.

Ghana. In July 1995, a WIPO consultant from Switzerland participated in, and presented a paper at, a National Workshop on Copyright which was organized in Accra by the Government.

Assistance With Training, Legislation and Modernization of Administration

Ghana. In July 1995, a WIPO consultant from Switzerland undertook a mission to Accra to evaluate the needs of the Copyright Office of Ghana and to provide training to government officials on practical aspects of the collective administration of copyright.

Guinea. In July 1995, a WIPO official and a WIPO consultant from France held discussions with government leaders and officials in Conakry on cooperation between Guinea and WIPO, particularly in the fields of training and promotion of invention and innovation.

Lesotho. In July 1995, the International Bureau sent to the government authorities, at their request, comments on the proposed amendments to the Industrial Property Order, 1989, with regard to marks.

Malawi. In July 1995, two WIPO consultants from Burkina Faso and Switzerland undertook a mission to Lilongwe to evaluate the needs of the Copyright Society of Malawi (COSOMA) and to provide training to government officials on practical aspects of the collective administration of copyright.

Nigeria. In July 1995, a WIPO consultant from Switzerland undertook a mission to Lagos to evaluate the needs of the Nigerian Copyright Council (NCC) and to provide training to government officials on practical aspects of the collective administration of copyright.

African Intellectual Property Organization (OAPI). In July 1995, a WIPO official attended the 32nd session of the OAPI Council of Ministers, in Brazzaville. The OAPI Council decided the prolongation of the mandate of Mr. Albert Makita-Mbamba, *Administrateur délégué*, for a period of two years. It also adopted a motion of thanks to the Director General of WIPO for his continued assistance to OAPI.

Arab Countries

Assistance With Training, Legislation and Modernization of Administration

Egypt. In July 1995, Mr. Saad Alfarargi, Assistant Minister for Foreign Affairs, visited WIPO in Geneva and held discussions with WIPO officials on cooperation between Egypt and WIPO.

Also in July 1995, two WIPO officials undertook a mission to Cairo to discuss with officials from the Regional Information Technology and Software Engineering Center (RITSEC) and government officials organizational and financial arrangements for the holding in Cairo, in October 1995, of a symposium on intellectual property for Arab countries.

Also in July 1995, two WIPO officials undertook a mission to Cairo to provide advice to government leaders and officials on examination techniques and procedures under the Madrid Agreement Concerning the International Registration of Marks, as well as to give information on the Protocol Relating to the said Agreement. They also made presentations at a government-organized National Seminar on Intellectual Property, held in Cairo and attended by some 140 participants.

Also in July 1995, the International Bureau prepared and sent to the government authorities, at their request, comments on the draft Law on Patents and Utility Models, an updated draft Law, with commentary, on Patents and Utility Models, and a draft Law for the Protection of Pharmaceutical and Chemical Substances.

Jordan. In July 1995, a government official held discussions with WIPO officials in Geneva on matters of mutual cooperation.

Lebanon. In July 1995, a WIPO official undertook a mission to Beirut to install a CD-ROM workstation offered by WIPO to the Intellectual Property Protection Office, to train its staff in the use of CD-ROMs, and to hand over and discuss with government leaders and officials a draft Industrial Property Law and a draft technical assistance project.

Libya. In July 1995, WIPO organized a study visit for a government official to the Moroccan Industrial Property Office in Casablanca (Morocco).

Qatar. In July 1995, Mr. Abdallah Al-Thani, Under-Secretary, Ministry of Industry, and another government official discussed with WIPO officials in Geneva assistance to Qatar in the modernization of its industrial property legislation and Qatar's possible accession to the Paris Convention for the Protection of Industrial Property and the Berne Convention for the Protection of Literary and Artistic Works.

Asia and the Pacific

Training Courses, Seminars and Meetings

WIPO Regional Training Course on Intellectual Property for the Developing Countries of Asia and the Pacific (Sri Lanka). From July 24 to August 4, 1995, WIPO organized that Course in Colombo, in cooperation with the Government of Sri Lanka and the Sri Lanka Foundation and with the assistance of the United Nations Development Programme (UNDP). The Course was attended by 20 government officials from Bangladesh, Bhutan, Cambodia, the Democratic People's Republic of Korea, Fiji, India, Indonesia, Iran (Islamic Republic of), Laos, Mongolia, Myanmar, Nepal, Pakistan, the Philippines, the Republic of Korea, Thailand and Viet Nam. There were also 21 participants from government and business circles in Sri Lanka. Papers were presented by seven WIPO consultants from Australia, Germany, India, the United Kingdom and the United States of America, as well as by an official from Sri Lanka. Three WIPO officials participated, two of whom presented papers.

WIPO/Association of South East Asian Nations (ASEAN) Regional Symposium on Teaching and Training of Intellectual Property (Malaysia). From July 6 to 8, 1995, WIPO organized that Symposium in Kuala Lumpur, in cooperation with the Government of Malaysia and the EPO. The Symposium was attended by 31 participants from Brunei Darussalam, Indonesia, the Philippines, Singapore and Thailand, and 120 participants from government, university and private sector circles of Malaysia. Presentations were made by four WIPO consultants from Germany, the Philippines, the Republic of Korea and the United States of America and a WIPO official, as well as by two EPO-financed speakers from

France and the United Kingdom and two local speakers invited by the Govemment of Malaysia.

WIPO National Roving Workshops on Trademark Enforcement (Indonesia). From July 3 to 14, 1995, WIPO organized these Roving Workshops, under the UNDP-financed country project, in cooperation with the Directorate General of Copyrights, Patents and Trademarks (DGCPT) of Indonesia, in Bengkulu, Pontianak, Manado and Mataram. In total, there were some 200 participants from various local government offices, the judiciary (high and ordinary district courts), the legal profession and university and local business circles. Papers were presented by two WIPO consultants from Australia, a WIPO official and two officials from Indonesia.

*WIPO/EC-ASEAN National Seminar on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its Implications for Business Enterprises (Malaysia).*On July 27 and 28, 1995, WIPO organized that Seminar in Petaling Jaya, in cooperation with the University of Malaya and with the assistance of the Commission of the European Communities (CEC). The Seminar was attended by some 90 participants from government and university circles, as well as from the business community. Presentations were made by three WIPO consultants from Germany, Sweden and the CEC, a WIPO official and three speakers from Malaysia.

WIPO/EC-ASEAN National Seminar on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its Implications for Business Enterprises (Philippines). On July 20 and 21, 1995, WIPO organized that Seminar in Manila, in cooperation with the Bureau of Patents, Trademarks and Technology Transfer (BPTTT) and the Licensing Executives Society (LES) and with the assistance of the CEC. The Seminar was attended by some 80 participants from government circles, the legal profession and industrial enterprises. Three WIPO consultants from Germany, Sweden and the CEC, a WIPO official and four speakers from the Philippines made presentations.

WIPO/EC-ASEAN National Seminar on the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and its Implications for Business Enterprises (Thailand). On July 24 and 25, 1995, WIPO organized that Seminar in Bangkok, in cooperation with the Government of Thailand and with the assistance of the CEC. The Seminar was attended by some 120 participants from government circles, law firms and industry. Presentations were made by three WIPO consultants from Germany, Sweden and the CEC, a WIPO official and two speakers from Thailand.

WIPO National Colloquium on the Judiciary and the Intellectual Property System (Sri Lanka). On July 29, 1995, WIPO organized that Colloquium in Colombo, in cooperation with the Judges' Institute of Sri Lanka. The Colloquium was attended by some 20 senior judges. Papers were presented by four WIPO consultants from India, the United Kingdom and the United States of America.

Assistance With Training, Legislation and Modernization of Administration

China. In July 1995, five government officials from the Yunan Province visited WIPO in Geneva and held discussions with WIPO officials on matters of mutual cooperation. The visit was financed by the Government of China.

India. In July 1995, the International Bureau sent to the government authorities, at their request, a draft industrial designs act, with a commentary.

Malaysia. In July 1995, a WIPO official undertook a mission, under the UNDP-financed country project, to the Intellectual Property Division in Kuala Lumpur, to train 38 government officials on the use of the Vienna International Classification of the Figurative Elements of Marks.

Also in July 1995, under the same project, a WIPO consultant from the United Kingdom undertook a mission to Kuala Lumpur to advise the Intellectual Property Division on the conduct of trademark opposition hearings.

Philippines. In July 1995, a government official had discussions with WIPO officials in Geneva on possible cooperation activities between the Philippines and WIPO in the field of copyright and neighboring rights.

Also in July 1995, the UNDP Resident Representative in the Philippines discussed with WIPO officials in Geneva possible further assistance to the Philippines in the field of intellectual property.

Republic of Korea. In July 1995, two government officials held discussions with WIPO officials in Geneva on the possible accession of the Republic of Korea to the Berne Convention.

Vanuatu. In July 1995, Mr. Serge Vohor, Minister for Economic Affairs and Tourism, accompanied by a government official, held discussions with WIPO officials in Geneva on Vanuatu's possible accession to the Convention Establishing the World Intellectual Property Organization and on future cooperation between Vanuatu and WIPO.

Association of South East Asian Nations (ASEAN). In July 1995, WIPO prepared and sent to the ASEAN Secretariat, at its request, a paper entitled "Implications of Intellectual Property on the ASEAN Free Trade Area (AFTA)–A Preliminary Study."

Latin America and the Caribbean

Training Courses, Seminars and Meetings

WIPO Workshop on the Harmonization of Criteria for the Registration of Trademarks in the Andean Countries (Venezuela). From July 3 to 6, 1995, WIPO organized that Workshop in Caracas, in cooperation with the Industrial Property Registry of Venezuela, with a view to examining a draft trademark manual for the Andean countries prepared by WIPO. The Workshop was attended by 13 government officials from the five Andean countries, namely Bolivia, Colombia, Ecuador, Peru and Venezuela. Presentations were made by two WIPO officials and a WIPO consultant from Venezuela. The Workshop recommended the adoption of the said manual by the industrial property offices of the five Andean countries.

WIPO Workshop on the Coordination of Computerized Systems of Industrial Property Offices of the Andean Countries (Venezuela). From July 4 to 6, 1995, WIPO organized that Workshop in Caracas, in cooperation with the Industrial Property Registry of Venezuela. It examined the possible transfer, by electronic means, of information on trademark and patent applications among the five industrial property offices of the subregion. The Workshop was attended by government officials from the five Andean countries, namely, Bolivia, Colombia, Ecuador, Peru and Venezuela, and was conducted by a WIPO consultant from Chile. The Workshop made a number of proposals addressed to the heads of the industrial property offices of those countries.

WIPO National Seminar on Intellectual Property for Judges and Public Prosecutors (Bolivia). From July 24 to 27, 1995, WIPO organized that Seminar in Sucre, in cooperation with the National Secretariat of Culture of Bolivia and the Supreme Court of Justice. The Seminar was attended by 130 judges, public prosecutors, writers, composers, authors and members of artists' societies and the Book Chamber, as well as by lawyers. Papers were presented by six WIPO consultants from Argentina, Mexico, Spain, the United States of America and Venezuela and the Latin American Federation of Producers of Phonograms and Videograms (FLAPF), five government officials and two WIPO officials.

WIPO National Roving Seminars on Copyright and Neighboring Rights for Judges and Prosecutors (Chile). From July 12 to 21, 1995, WIPO organized those Roving Seminars in Concepción and Iquique, respectively, in cooperation with the Ministry of Foreign Affairs and the Institute for Law Studies. The Seminars were attended by a total of 120 judges, public prosecutors and lawyers. Papers were presented by four WIPO consultants from Argentina, Spain, Venezuela and the FLAPF, two government officials and a WIPO official.

Andean Countries. On July 6 and 7, 1995, two WIPO officials and a WIPO consultant from Chile participated in the first Meeting of the Administrative Committee of the Cooperation Agreement on Industrial Property Among the Competent National Offices of the Member Countries of the Cartagena Agreement, held in Caracas. The Meeting was organized by the Industrial Property Registry of Venezuela in its capacity of Secretariat *pro-tempore* of the said Committee. Twenty-three representatives of the five Andean countries attended it. The Meeting adopted decisions on the standardization of forms for patent, industrial design and trademark applications.

Chile. In July 1995, four WIPO consultants from Argentina, Spain and Venezuela and a WIPO official presented papers at a Post Graduate Course on Intellectual Property and the Process of Integration, organized in Santiago. Thirty-five graduate lawyers attended the Course.

Assistance With Training, Legislation and Modernization of Administration

Bolivia. In July 1995, a WIPO official held discussions with government officials in La Paz on the strengthening of cooperation between Bolivia and WIPO.

Brazil. In July 1995, a WIPO official visited the National Institute of Industrial Property (INPI) in Rio de Janeiro to participate in a tripartite INPI/WIPO/EPO meeting to discuss possible joint cooperation.

Colombia. In July 1995, a WIPO official undertook a mission to Santa Fe de Bogotá and held discussions with government leaders and officials on future cooperation between Colombia and WIPO in the field of industrial property and Colombia's future accession to the Paris Convention.

Also in July 1995, a WIPO consultant from Chile visited Santa Fe de Bogotá to assess the progress made in the program of computerization of the Directorate General of Industry and Commerce and to make recommendations on its further development.

Paraguay. In July 1995, the International Bureau sent to the government authorities, at their request, draft legislation on inventions and on marks and other distinctive signs.

Peru. In July 1995, a WIPO official and a WIPO consultant from Chile undertook a mission to Lima to discuss with government officials a possible technical cooperation project in the field of intellectual property and further computerization of the activities of the National Institute for the Defense of Competition and Intellectual Property Protection (INDECOPI).

Trinidad and Tobago. In July 1995, the United Nations System's Activities Resident Coordinator in Trinidad and Tobago held discussions with WIPO officials in Geneva on technical cooperation matters concerning the country.

Uruguay. In July 1995, Mr. Hugo Batalla, Vice-President of the Republic of Uruguay and President of the Senate and of the General Assembly, visited WIPO in Geneva and held discussions with WIPO officials on cooperation between Uruguay and WIPO in the field of intellectual property and the possible accession of Uruguay to the Patent Cooperation Treaty (PCT).

In late July and early August 1995, a WIPO consultant from Chile visited Montevideo, under the country project in the field of industrial property, to advise government authorities on the production of a prototype CD-ROM containing information on trademarks registered in Uruguay and on the computerization of the processing of patent applications.

Venezuela. In July 1995, a WIPO consultant from Chile visited Caracas to advise the Industrial Property Registry on the preparation of a prototype CD-ROM containing information on trademarks registered in Venezuela.

Development Cooperation (in General)

Assistance With Training, Legislation and Modernization of Administration

Organization of the Islamic Conference (OIC). In July 1995, an official from the OIC held discussions with WIPO officials in Geneva on matters of mutual cooperation.

United Nations Development Programme (UNDP). In July 1995, a WIPO official attended in Geneva the UNDP consultations with Executing Agencies on the UNDP Sixth Programming Cycle.

WIPO Medals

In July 1995, four WIPO medals were awarded to a man inventor, a woman inventor, a student inventor and a promoter of inventions at the Sixth National Science and Technology Fair and National Invention Contest of the Philippines, held in Manila.

Activities of WIPO Specially Designed for Countries in Transition to Market Economy

Regional Activities

Commission of the European Communities (CEC). In July 1995, a WIPO official undertook a mission to Brussels and held discussions with officials of the CEC on possible future cooperation in the field of copyright and neighboring rights between WIPO and the European Communities in favor of Central and Eastern European countries and Central Asian countries.

National Activities

Albania. In July 1995, on the occasion of the deposit of Albania's instruments of accession to the Paris Convention for the Protection of Industrial Property, the Madrid Agreement Concerning the International Registration of Marks and the Patent Cooperation Treaty (PCT), Mr. Maksim Knomi, Chairman of the Committee of Science and Technology, and Mr. Albert Kushti, Director of the Patents and Trademarks Office, held discussions with WIPO officials in Geneva on the development of the national industrial property legislation and further cooperation between Albania and WIPO under the United Nations Development Programme (UNDP)-financed project.

Kyrgyzstan. In July 1995, three WIPO officials were received by H.E. Askar Akayev, President of Kyrgyzstan, in Bishkek, in the presence of other government officials, and held discussions on reinforced cooperation between the country and WIPO for further developing the national infrastructure for the protection of industrial property.

Russian Federation. In July 1995, Mr. Leonid Bochin, Chairman of the State Committee for Antimonopoly Policy and Promotion of New Economic Structures, and another government official held discussions with the Director General and other WIPO officials in Geneva on the enforcement and implementation of the recently adopted national legislation on unfair competition and copyright.

Ukraine. In July 1995, Mr. Vladymir Drobyazko, Chairman of the State Copyright Agency of Ukraine, and three government officials held discussions with the Director General and other WIPO officials in Geneva on future cooperation between Ukraine and WIPO.

Contacts of the International Bureau of WIPO With Other Governments and With International Organizations

National Contacts

Germany. In July 1995, a WIPO official attended a celebration in Munich in honor of Dr. Erich Häusser, on his retirement after over 20 years as President of the German Patent Office.

United Nations

United Nations Economic and Social Council (ECOSOC). In July 1995, three WIPO officials attended several meetings in the framework of ECOSOC in Geneva.

Joint United Nations Information Committee (JUNIC). In July 1995, a WIPO official attended the 21st session of JUNIC, held in Paris.

United Nations Joint Staff Pension Board (UNJSPB). In July 1995, two WIPO officials attended the 47th session of the UNJSPB, held in New York.

Intergovernmental Organizations

European Patent Office (EPO). In July 1995, a WIPO official attended a workshop on corrections of patent documents (either issued on paper or published on electronic media), convened by the EPO in Munich.

Office for Harmonization in the Internal Market (Trade Marks and Designs) (OHIM). In July 1995, a WIPO official attended the fourth session of the Administrative Board of OHIM, in Alicante (Spain).

World Trade Organization (WTO). In July 1995, a group of 25 government officials enrolled in a WTO Special Trade Policy Course for Eastern and Central European Countries visited WIPO in Geneva and were briefed by WIPO officials on WIPO activities in general, and, in particular, on those activities specially designed for Central and Eastern European countries.

Also in July 1995, a WIPO official represented WIPO, in an observer capacity, at an extraordinary session of the WTO General Council, held in Geneva.

Other Organizations

Association des conseils en propriété industrielle (France). In July 1995, a representative of that Association visited WIPO in Geneva and was briefed by WIPO officials on WIPO activities.

International Association for the Advancement of Teaching and Research in Intellectual Property (ATRIP). In July 1995, the 14th annual meeting of ATRIP was held at Seattle (Washington). The meeting was attended by 80 participants from 33 countries. The travel and subsistence expenses of 12 professors from China, Colombia, India, Lesotho, Malaysia, Mexico, Nigeria, Pakistan, South Africa, Sudan and Venezuela were borne by WIPO. A WIPO official also attended the meeting.

Max Planck Institute for Foreign and International Patent, Copyright and Competition Law (MPI). In July 1995, a WIPO official attended a Colloquium on the Relationship Between Intellectual Protection and Economic Law and a Symposium on Trade-Related Aspects of Intellectual Property Rights, both organized by MPI in Ringberg (Germany).

Seoul National University. In July 1995, three researchers from the Center for Area Studies of the Seoul National University were briefed by two WIPO officials in Geneva on copyright issues relating to digital dissemination and use of works.

University of Amsterdam. In July 1995, a WIPO official presented a paper at the Academy Colloquium on the Future of Copyright in a Digital Environment, organized by the University of Amsterdam in that city.

Miscellaneous News

National News

Czech Republic. Law No. 137 on Trademarks of June 21, 1995, will enter into force on October 1, 1995.

Hungary. Law No. XXXIII on the Protection of Inventions by Patents of April 25, 1995, will enter into force on January 1, 1996.

India. The Copyright Act, 1957, as last amended by the Copyright (Amendment) Act, 1992 (No. 13 of April 3, 1992), was further amended by the Copyright (Amendment) Act, 1994 (No. 38 of June 9, 1994), which entered into force on May 10, 1995.

Namibia. The Copyright and Neighboring Rights Protection Act, 1994 (No. 6 of April 14, 1994), will enter into force at a later date to be established.

Norway. The Regulations Concerning Applications for Patents (Royal Decree of October 12, 1979, as last amended by Royal Decree of June 23, 1995) entered into force on July 1, 1995.

Switzerland. The Federal Law on Copyright and Neighboring Rights of October 9, 1992, was amended by the Federal Law of December 16, 1994, which entered into force on July 1, 1995.

The Ordinance on Industrial Designs of July 27, 1900, was amended by the Ordinance of May 17, 1995, which entered into force on July 1, 1995.

The Ordinance on the Protection of Trademarks of December 23, 1992, was amended by the Ordinance of May 17, 1995, which entered into force on July 1, 1995.

The Ordinance on the Protection of Topographies of Semiconductor Products of April 26, 1993, was amended by the Ordinance of May 17, 1995, which entered into force on July 1, 1995.

Turkey. Decree No. 551 on the Protection of Patents of June 27, 1995, entered into force on the same date.

Decree No. 554 on the Protection of Industrial Designs of June 27, 1995, entered into force on the same date.

Decree No. 555 on the Protection of Geographical Signs of June 27, 1995, entered into force on the same date.

Decree No. 556 on the Protection of Trademarks of June 27, 1995, entered into force on the same date.

United Kingdom. The Trade Marks (EC Measures Relating to Counterfeit Goods) Regulations 1995 (No. 1444) entered into force on July 1, 1995.

The Copyright (EC Measures Relating to Pirated Goods and Abolition of Restrictions on the Import of Goods) Regulations 1995 (No. 1445) entered into force on July 1, 1995.

The Counterfeit and Pirated Goods (Consequential Provisions) Regulations 1995 (No. 1447) entered into force on July 1, 1995.

Selected WIPO Publications

The following new publications[1] were issued by WIPO from July 1 to 31, 1995:

Directory of National Copyright Administrations, No. 619(EF), 35 Swiss francs.

International Patent Classification–General Information (in Arabic, Portuguese, Russian and Spanish), No. 409(A)(P)(R)(S), free.

IP/STAT/1993/B Industrial Property Statistics 1993 (EF) (publication B), Parts I and II, 60 Swiss francs each.

States Party to the Convention Establishing the World Intellectual Property Organization (WIPO) and the Treaties Administered by WIPO; States Members of Governing Bodies and Committees, No. 423(E)(F), free.

WIPO Mediation Rules, Arbitration Rules, Expedited Arbitration Rules (in Arabic), No. 446(A), free.

World Intellectual Property Organization (WIPO): General Information (in German), No. 400(G), free.

[1] WIPO publications may be obtained from the Publications Sales and Distribution Unit, WIPO, 34, chemin des Colombettes, CH-1211 Geneva 20, Switzerland (telex: 412 912 OMPI CH; fax: (41-22) 733 5428; telephone: (41-22) 730 9111).

Orders should indicate: (a) the number or letter code of the publication desired, the language (A for Arabic, E for English, F for French, G for German, P for Portuguese, R for Russian, S for Spanish), the number of copies; (b) the full address for mailing; (c) the mail mode (surface or air). Prices cover surface mail.

Bank transfers should be made to WIPO account No. 487080-81, at the Swiss Credit Bank, 1211 Geneva 20, Switzerland.

Calendar of Meetings

WIPO Meetings

(Not all WIPO meetings are listed. Dates are subject to possible change.)

1995

November 6 to 10 (Geneva)

Committee of Experts of the Nice Union for the International Classification of Goods and Services for the Purposes of the Registration of Marks (Seventeenth Session)

The Committee will examine and consider the proposals concerning the amendments or changes to the International Classification of Goods and Services for the Purposes of the Registration of Marks.

Invitations: States members of the Nice Union and, as observers, States members of the Paris Union or of WIPO not members of the Nice Union, and certain organizations.

November 13 to 16 (Geneva)

Committee of Experts on Well-Known Marks

The Committee will study questions concerning the application of Article 6*bis* of the Paris Convention (e.g., whether that Article applies also where the well-known mark is not actually used in the country in which its protection is claimed) and the conditions, as well as scope of protection, in particular, in respect of famous or well-known marks, against dilution and/or undue exploitation of the goodwill acquired by such marks. Moreover, it will study the feasibility of setting up, under the aegis of WIPO, a voluntary international information network for the exchange of information among countries concerning marks that may be considered to be well known or famous.
Invitations: States members of the Paris Union and, as observers, States members of WIPO not members of the Paris Union and certain organizations.

December 15 (a.m.) (Geneva)

Information Meeting for Non-Governmental Organizations on Intellectual Property

Participants in this informal meeting will be informed about the recent activities and future plans of WIPO in the fields of industrial property and copyright and their comments on the same will be invited and heard.
Invitations: International non-governmental organizations having observer status with WIPO.