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**DIPLOMATIC CONFERENCE
ON
CERTAIN COPYRIGHT AND NEIGHBORING RIGHTS QUESTIONS**

Geneva, December 2 to 20, 1996

BASIC PROPOSAL
FOR THE SUBSTANTIVE PROVISIONS OF THE TREATY
ON CERTAIN QUESTIONS CONCERNING
THE PROTECTION OF LITERARY AND ARTISTIC WORKS
TO BE CONSIDERED BY THE DIPLOMATIC CONFERENCE

*prepared by the Chairman of the Committees of Experts
on a Possible Protocol to the Berne Convention
and
on a Possible Instrument for the Protection of the Rights of Performers
and Producers of Phonograms*

Memorandum Prepared by the Chairman of the Committees of Experts

1. In 1989, the Assembly and the Conference of Representatives of the Berne Union adopted the program of WIPO making a provision for convening a Committee of Experts to examine questions concerning a possible protocol to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter referred to as "the Berne Convention"). The objective of convening the Committee of Experts was to examine whether the preparation of a protocol to the Berne Convention should commence. According to the WIPO program for the 1990-91 biennium "[t]he 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)).

2. The Committee of Experts was convened in two sessions, the first in November 1991 and the second in February 1992. The sessions were started on the basis of working documents covering a broad range of topic areas including the subject matter of copyright, certain particular rights, the applicability of minima, and the obligation of granting national treatment. Among the questions concerning subject matter was the desirability of covering the rights of producers of sound recordings in the protocol.

3. The Assembly and the Conference of Representatives of the Berne Union determined in 1992 that the work of the Committee of Experts would be most effectively advanced by the formation of two Committees of Experts, one for the preparation of a possible protocol to the Berne Convention and the other for the preparation of a possible new instrument on the protection of the rights of performers and producers of phonograms (document B/A/XIII/2).

4. The Committee of Experts on a Possible Protocol to the Berne Convention was charged with the responsibility of considering ten specific items: (1) computer programs, (2) databases, (3) rental rights, (4) non-voluntary licences for sound recordings of musical works, (5) non-voluntary licences for primary broadcasting and satellite communication, (6) distribution rights, including an importation right, (7) duration of the protection of photographic works, (8) communication to the public by satellite broadcasting, (9) enforcement of rights, and (10) national treatment.

5. The Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms was charged with the responsibility of discussing all questions concerning the effective international protection of the rights of performers and producers of phonograms. This broad charge left unresolved whether the Committee should consider the rights of performers to extend exclusively to the fixation of their performances in phonograms or also to audiovisual fixations.

6. The Committee of Experts on a Possible Protocol to the Berne Convention then held five further sessions, the third in June 1993, the fourth in December 1994, the fifth in September 1995, the sixth in February 1996 and the seventh in May 1996.

7. The Committee of Experts on a Possible Instrument for the Protection of the Rights of the Performers and Producers of Phonograms held six sessions, the first in June-July 1993, the

second in November 1993, the third in December 1994, the fourth in September 1995, the fifth in February 1996 and the sixth in May 1996.

8. The last three sessions of the two Committees (referred to subsequently as the Committees of Experts) were convened on the same dates, and parts of the sessions were held jointly.

9. The work of the Committees of Experts was based on memoranda prepared by the International Bureau of WIPO until December 1994. Following the recommendation of the Committees of Experts, the Director General of WIPO invited Government members of the Committees and the European Commission to submit proposals for discussion at the September 1995 and February 1996 sessions.

10. As a result of this invitation from the Director General, the International Bureau received written proposals and comments from Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, South Africa, the Sudan, the United States of America, and Uruguay.

11. The Committees of Experts recommended at the February 1996 sessions that a Diplomatic Conference for the conclusion of appropriate treaties be held in December 1996. From May 20 to 24, 1996, meetings were held in Geneva by the Preparatory Committee of the Proposed Diplomatic Conference, the General Assembly of WIPO and the Assembly of the Berne Union. The Preparatory Committee and the Assemblies decided that a WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions would be convened from December 2 to 20, 1996.

12. The Chairman of the Committees of Experts was entrusted at the February 1996 sessions with the task of preparing the draft texts ("the basic proposals") for the Diplomatic Conference; the WIPO International Bureau was to publish and circulate these draft texts by September 1, 1996, to the States, intergovernmental and non-governmental organizations to be invited to the Diplomatic Conference. The Director General of WIPO proposed that the International Bureau would prepare the draft of the final clauses of the treaty or treaties. The draft Final Clauses prepared by the Director General (document CRNR/PM/2) were examined by the Preparatory Committee of the Proposed Diplomatic Conference in May 1996.

13. In the introduction to the draft Final Clauses, the Director General of WIPO stated: "On the basis of the deliberations of the Committees of Experts, it is assumed that the aim of the Diplomatic Conference will be to adopt one or more multilateral treaty or treaties on questions of copyright, on questions of two branches (one concerning performing artists, the other concerning producers of phonograms) of neighboring rights and, perhaps, also on questions concerning a *sui generis* protection of data bases."

14. There is no decision on the number of treaties to be proposed for adoption by the Diplomatic Conference in December 1996. The Committees of Experts have made no recommendation on this issue, and after extensive discussion, the question was left open in the May 1996 meetings of the Preparatory Committee, the General Assembly of WIPO and the Assembly of the Berne Union. In this respect, the mandate given to the Chairman of the Committees of Experts was therefore open and included the possibility of establishing draft texts for one, two or three treaties.

15. Basic Proposals for the substantive provisions of three treaties are proposed by the Chairman of the Committees of Experts:

1. "Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works",
2. "Treaty for the Protection of the Rights of Performers and Producers of Phonograms",
3. "Treaty on Intellectual Property in Respect of Databases".

16. It is the assessment of the Chairman of the Committees of Experts that the expectations of the majority of Delegations participating in the meetings referred to in paragraphs 6, 7 and 11 are most closely met by proposing three draft texts. The Diplomatic Conference has the power to combine separate draft treaties into one single treaty should it find this course of action appropriate. A combined text would have several advantages, and such an option may be viewed as one of legal technique; on the other hand, a single text approach would entail certain political and doctrinal considerations. For example, Governments contemplating ratification of or accession to such a single text would have to analyze and consider implementation of the whole contents of the combined instrument.

17. The present set of draft substantive provisions of the Basic Proposals referred to in paragraph 15, of which the present document is one, have been prepared by the Chairman of the Committees of Experts according to decisions made by the Committees at their February 1996 sessions. The Basic Proposal for the Administrative and Final Clauses of all these proposed Treaties have been submitted by the Director General of WIPO in a separate document.

18. The present document sets forth the substantive provisions of the Basic Proposal of the Treaty on Certain Questions Concerning the Protection of Literary and Artistic Works. There are 16 Articles preceded by a Preamble. Each provision is accompanied by explanatory Notes.

19. The purpose of the explanatory Notes is:

- (i) to explain briefly the contents and rationale of the proposals and to offer guidelines for understanding and interpreting specific provisions,
- (ii) to indicate the reasoning behind the proposals, and
- (iii) to include references to proposals and comments made at sessions of the Committees of Experts, as well as references to models and points of comparison found in existing treaties.

20. The present Basic Proposal has been prepared on the basis of the proposals made during the work of the Committees of Experts and taking into account discussions in the Committees of Experts. These proposals have been carefully studied, and portions of them appear in several places in the proposed Treaty, sometimes in a reformulated or combined format. Additional elements have been introduced where necessary, and not all elements of all proposals are reflected in the proposed Treaty. In some instances, alternative solutions are proposed, but the number of proposed alternatives is limited. Alternatives have been designated in the text using capital letters in accordance with Rule 29(b) of the draft Rules of Procedure for the Diplomatic Conference. One of the proposed alternative solutions includes an Annex with special provisions on enforcement.

21. In the present Basic Proposal reference is often made without the document number to the proposals presented by the Government members and the European Community and its

Member States for the sessions of the Committees of Experts. The proposals presented for the session of February 1 to 9, 1996 of the Committee of Experts on a Possible Protocol to the Berne Convention were the following:

The European Community and its Member States (BCP/CE/VI/2)
Argentina (BCP/CE/VI/3)
China (BCP/CE/VI/4)
Uruguay (BCP/CE/VI/5)
Australia (BCP/CE/VI/6)
Brazil (BCP/CE/VI/7)
The United States of America (BCP/CE/VI/8)
Japan (BCP/CE/VI/9)
Canada (BCP/CE/VI/10)
The Republic of Korea (BCP/CE/VI/11)
The Republic of Korea (BCP/CE/VI/11 Corr.)

22. Further contribution to the work of the Committees of Experts was brought about in the proposals presented by the participants in the African consultation meeting and the consultation meeting of the countries of Latin America and the Caribbean before the February 1996 sessions of the Committees of Experts. The documents are the following:

Burkina Faso, Cameroon, Côte d'Ivoire, Egypt, Ghana, Kenya, Malawi, Namibia, Nigeria, Rwanda, Senegal, Sudan, Togo, Tunisia and Zambia (BCP/CE/VI/14)

Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay and Venezuela (BCP/CE/VI/15)

23. For the session of May 22 to 24, 1996 of the Committees of Experts the following proposals were presented:

The European Community and its Member States (BCP/CE/VII/1-INR/CE/VI/1)
The Republic of Korea (BCP/CE/VII/3-INR/CE/VI/3)

**Draft Treaty
on Certain Questions Concerning
the Protection of Literary and Artistic Works**

Contents

Preamble

[Substantive Provisions]

Article 1: Relation to the Berne Convention

Article 2: Application of Articles 3 to 6 of the Berne Convention

Article 3: Notion and Place of Publication

Article 4: Computer Programs

Article 5: Collections of Data (Databases)

Article 6: Abolition of Certain Non-Voluntary Licenses

Article 7: Scope of the Right of Reproduction

Article 8: *Alternative A* Right of Distribution and Right of Importation
Alternative B Right of Distribution

Article 9: Right of Rental

Article 10: Right of Communication

Article 11: Duration of the Protection of Photographic Works

Article 12: Limitations and Exceptions

Article 13: Obligations concerning Technological Measures

Article 14: Obligations concerning Rights Management Information

Article 15: Application in Time

Article 16: Special Provisions on Enforcement of Rights

[Administrative and Final Clauses]

ANNEX

Notes on the Title and the Preamble

0.01 During the preparatory stages that led to the production of this proposed Treaty, the expression "protocol" to the Berne Convention had been used tentatively to identify the new instrument under consideration. The proposed Treaty is, however, not an accessory to the Berne Convention. Its objective is rather to supplement and update the international regime of protection for literary and artistic works based fundamentally on the Berne Convention and recently also on the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (hereinafter referred to in these Notes as "the TRIPS Agreement"). In addition, membership of the Berne Union is not a requirement for becoming a party to the proposed Treaty. Consequently, no reference to the Berne Convention has been included in the title.

0.02 The Preamble sets forth the objective of the Treaty and the main arguments and considerations relating thereto.

0.03 The first paragraph of the Preamble expresses the most general objective of the proposed Treaty. It reflects the language of the Preamble of the Paris Act of the Berne Convention for the Protection of Literary and Artistic Works.

0.04 The second paragraph pronounces the recognition that new international rules and clarification of the interpretation of certain existing rules are needed to achieve the objective identified in the first paragraph, having regard to the manifold developments that call for improved protection in the field covered by the proposed Treaty.

0.05 The third paragraph acknowledges the connection of the proposed Treaty to the evolution of the overall environment of the intellectual property system: the accelerating development and convergence of information and communication technologies. This evolution extends its effects even to the convergence of the structures of industries and the content they produce, i.e. protected works and performances, and it has a profound impact on the production and distribution of the results of creative work by authors. While introducing certain provisions on "traditional issues", the proposed Treaty also includes solutions to urgent questions raised by the technological developments referred to above. The proposed Treaty is therefore part of a series of simultaneously published draft Treaties which could be characterized as "Global Information Infrastructure Treaties" in the field of copyright and rights related to copyright.

0.06 The Preamble of this proposed Treaty has been drafted in parallel with the Preamble of the simultaneously published proposed Treaty for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to in these Notes as "the New Instrument").

[End of Notes on the Title and the Preamble]

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible,

Recognizing the need to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural and technological developments,

Recognizing the profound impact of the development and convergence of information and communication technologies on the creation and use of literary and artistic works,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Article 1 contains general provisions governing the relationship between the Berne Convention and the proposed Treaty.

1.02 Paragraph (1) states explicitly that the proposed Treaty is a special agreement under Article 20 of the Berne Convention, which provides that "[t]he Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention". Thus, the proposed Treaty could not contain provisions that would diminish the existing rights of authors under the Berne Convention.

1.03 Paragraph (2) contains a "Berne safeguard" clause modelled after Article 2.2 of the TRIPS Agreement, which is the most recent of such provisions in existing treaties.

1.04 Paragraph (3) is self-explanatory.

1.05 Articles 1 to 21 of the Berne Convention form the bedrock of all international norms setting authors' rights in literary and artistic works. Pursuant to paragraph (4), Contracting Parties of the proposed Treaty shall undertake to comply with the obligations of those Articles. This obligation binds Contracting Parties that are not countries of the Union established by the Berne Convention, including Contracting Parties that have not joined the Paris Act of the Berne Convention. A similar structure has been adopted in the TRIPS Agreement, with an exception for Article 6*bis* of the Berne Convention concerning the moral rights of authors. Moreover, the obligation of compliance extends to all Members of the TRIPS Agreement. The reference in paragraph (4) covers Article 6*bis* because the proposed Treaty is not limited to trade-related aspects of copyright. As in the TRIPS Agreement, the provision extends not only to Articles 1 to 21 but also to the Appendix of the Berne Convention.

[End of Notes on Article 1]

Article 1

Relation to the Berne Convention

(1) This Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention.

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works.

(3) Hereinafter, "Berne Convention" shall refer to the Paris Act of July 24, 1971 of the Berne Convention for the Protection of Literary and Artistic Works.

(4) Contracting Parties that are not countries of the Union established by the Berne Convention shall comply with Articles 1 to 21 and the Appendix of the Berne Convention.

[End of Article 1]

Notes on Article 2

2.01 The basic rules and principles of the Berne Convention are presently (August 1, 1996) applied by the 119 countries of the Berne Union. These rules and principles include conditions for protection, the basic principle of national treatment, principles of automatic protection and independence of protection and a mechanism for identification of the country of origin of a work. Since these principles are definitely established and such a great number of States have adapted their laws and legislative practices to them, it seems feasible and well-founded to build new protection for literary and artistic works upon these same principles.

2.02 It is therefore proposed in Article 2 that the provisions of Articles 3 to 6 of the Berne Convention, containing these central principles, should be applied in respect of the protection provided for in the present draft Treaty. Thus, these provisions would be applied to all new rights and aspects of protection introduced in the present draft without reproducing or "re-inventing" them. This is an economical solution as regards the negotiations on the proposed Treaty, the implementation of its obligations in national laws and in terms of the legal certainty that flows from the availability of established and well-known interpretations.

2.03 According to the proposed Treaty, the provisions of Article 3 of the Berne Convention would be applied in respect of the protection afforded by this Treaty. Paragraph (1) of Article 3 of the Berne Convention includes provisions on the main points of attachment: the nationality of the author and the place of publication of the work. Paragraph (2) assimilates habitual residence of an author to nationality. Paragraph (3) defines the expression "published works". Paragraph (4) defines simultaneous publication. Article 4 of the Berne Convention extends the protection of the Convention to authors of cinematographic works, works of architecture and certain other artistic works, even where the conditions of Article 3 are not met. Article 5 of the Berne Convention confirms in its paragraph (1) the principle of national treatment and the obligation to grant the rights specially granted in the Convention and in paragraph (2) the principles of formality-free or automatic protection and independence of protection. Paragraph (3) specifies that national law governs protection in the country of origin. Paragraph (4) lays down the rules that determine the country of origin of a work. In addition, a reference to Article 6 of the Berne Convention has been made in order to provide for the possibility of restricting in certain cases the protection given to works of non-nationals of other Contracting Parties.

2.04 All the rules listed in the preceding paragraph would be applicable to the protection provided for in the proposed Treaty.

2.05 Some of these rules might be considered to be superfluous or unnecessary in the context of the proposed Treaty. In spite of this, it is submitted that the incorporation of the four provisions by reference helps to place the rights contemplated by the proposed Treaty in the proper context of a comprehensive system.

2.06 Perhaps the greatest significance of this provision is that Contracting Parties restate on a high international level the cornerstone principle for the protection of literary and artistic works: the principle of national treatment.

Article 2

Application of Articles 3 to 6 of the Berne Convention

Contracting Parties shall apply the provisions of Articles 3 to 6 of the Berne Convention in respect of the protection provided for in this Treaty.

[End of Article 2]

2.07 The provisions of this Article are similar to the provisions proposed in Article 3 of the draft New Instrument as far as the criteria for eligibility for protection are concerned; provisions of an existing Treaty are applied by reference.

[End of Notes on Article 2]

[Article 3 starts on page 19]

Notes on Article 3

3.01 Article 3(3) of the Berne Convention contains a definition of "published works". The first half of this provision offers the definition in positive terms: "The expression 'published works' means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work". The second half offers certain exclusions from the coverage of the definition: "The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication".

3.02 The definition of "published works" and the determination of "the country of origin" of a work according to Article 5(4) of the Berne Convention have an impact on the application of certain important operative clauses of the Convention. These include: application of the protection of the Convention to authors who are not nationals of one of the countries of the Union but whose works have been first published in one of those countries (Article 3(1)(b)); the comparison of terms of protection (Article 7(8)); and application of the Convention to works already in existence when their country of origin first joins the Convention (Article 18(1)).

3.03 One of the objectives of the proposed Treaty is to offer solutions to certain questions concerning the impact of new technologies on authors' rights. Numerous questions are posed, for example, by the interactive, on-demand transmission of works to the public directly into their homes or offices. New forms of electronic publishing have already replaced some forms of traditional dissemination of works. As far as the public is concerned, these new forms of publishing are functionally no different than the traditional forms: the works are available.

3.04 Inevitably, the question has arisen as to whether these new forms of publication should be subject and entitled to the same legal treatment as the traditional forms. Are works that have been disseminated by means of databases and communication networks "published works" in the sense of the Berne Convention? Is a new extended definition of "published works" needed?

3.05 In fact, the provisions of Article 3(3) of the Berne Convention may be applied quite satisfactorily to new forms of electronic publication. The key requirement of Article 3(3) is the availability of copies sufficient to satisfy the reasonable requirements of the public. Electronic publishing over a computer network may easily satisfy this requirement. In an open network environment, any member of the public may have access to copies that can be downloaded into the memory of his computer. Different technical and commercial conditions may, of course, apply in respect of access.

3.06 The conclusion above is further supported by another clause in the same provision of the Berne Convention according to which " 'published works' means works ... , whatever may be the means of manufacture of the copies". In traditional publishing, copies are first manufactured and then distributed. In electronic publication through networks, copies are produced at the recipient end after the act of dissemination. "The means of manufacture" in

[Article 3 starts on page 19]

the former case is local production and in the latter case is "tele-reproduction". Nothing precludes the interpretation of Article 3 of the Berne Convention to include decentralized production of copies by means of communication networks.

3.07 The meaning of these provisions has become central to the question of whether and how the Berne Convention can continue to protect works in the new digital environment. To the extent that any nations may now have different opinions on the meaning of these provisions there are certainly well-founded reasons to require that all Contracting Parties interpret and apply these provisions in a uniform manner. This is why, in order to exclude any uncertainty, it is proposed that the interpretation presented in Notes 3.05 and 3.06 above should be confirmed by an explicit clause in the proposed Treaty.

3.08 After this interpretation of published works has been adopted, one further essential question arises: What is the place of publication? There are two possible answers. The place of publication could be any place where copies are available; this might include all countries of the world simultaneously. On the other hand, the place of publication could be considered to be the location of the "source" of the work. There is good reason to adopt the latter interpretation. The identification of a place of publication in the traditional framework is an acknowledgement that certain practical and economic activities have occurred in that location, and the same is true in the electronic publishing framework: the product of the author's efforts, although available anywhere, is located in only one place.

3.09 If, however, a work were considered to be published in all countries where copies of it are available, many unintended consequences would result. All works published electronically through networks in countries outside the Berne Union would be considered to have been published in every country of the Union. Members of the Union would thus be obligated to protect these works even in the absence of protection for their own works. When applying the Berne Convention rule on comparison of terms of protection, simultaneous publication in all countries of the Union would lead to problematic results. In the case of simultaneous publication in several countries of the Union, the country of origin is considered to be the country whose legislation grants the shortest term of protection. This would reduce the term of protection for works electronically published to the shortest term available anywhere in the Union.

3.10 The consequences discussed in the previous Note are unsatisfactory and lead to legal uncertainty. To leave this interpretation open would not encourage joining the Convention.

3.11 In paragraph (1) of Article 3, it is proposed that Contracting Parties should consider as "published works" such literary or artistic works which have been made available to the public by wire or wireless means so that it may fairly be said that copies are available. In particular, it is required that the works have been made available in such a way that members of the public may access these works from a place and at a time individually chosen by them. The wording of paragraph (1) follows closely the clause in Article 10 of the proposed Treaty concerning the making available aspect of the right of communication. A natural requirement is that the conditions specified in Article 3(3) of the Berne Convention must be fulfilled. Publication shall take place with the consent of the author, and the nature of the work must be taken into account when considering whether the availability of copies satisfies the reasonable requirements of the public.

Article 3

Notion and Place of Publication

(1) When literary or artistic works are made available to the public by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them, so that copies of these works are available, Contracting Parties shall, under the conditions specified in Article 3(3) of the Berne Convention, consider such works to be published works.

[Article 3 continues]

3.12 In paragraph (2), it is proposed that Contracting Parties shall consider works identified in paragraph (1) to have been published in the Contracting Party where the necessary arrangements were made for availability of the works to the public. The place of publication is the country where the source data file is established and where access to the work has been provided for. The expression "necessary arrangements" is intended to mean such steps as are an absolute *conditio sine qua non* for the availability of the work. Mere linking or routing arrangements are not sufficient.

3.13 The European Community and its Member States took the view in their submission for the May 1996 session of the Committee of Experts that the question of the impact of new technologies on the provisions of Article 3(3) of the Berne Convention could be examined.

3.14 The definition of published works in the Berne Convention exists exclusively to effectuate the functioning of the international system of protection under the Convention. Nothing precludes the enactment of national laws that define this term quite differently to serve national purposes.

[End of Notes on Article 3]

[Article 3, continued]

(2) When applying Article 5(4) of the Berne Convention, Contracting Parties shall consider works referred to in paragraph (1) of the present Article to be published in the Contracting Party where the necessary arrangements have been made for availability of these works to members of the public.

[End of Article 3]

Notes on Article 4

4.01 Article 4 confirms that computer programs are protected as literary works, as that term is used in Article 2 of the Berne Convention. The provision is of a declaratory nature, and it explicitly codifies the established interpretation. The protection applies to the expression of a computer program in any form, including source code and object code.

4.02 This provision combines the proposals of Canada, the European Community and its Member States, the People's Republic of China, the United States of America, and Uruguay. The proposed Article does not include a second paragraph concerning exceptions as had been proposed by the European Community and its Member States, the United States of America, and Uruguay, because provisions to the same effect are proposed in Article 1(2) and in Article 12 as general rules.

4.03 Article 4 embodies the essential contents of the provisions of Article 10.1 of the TRIPS Agreement.

[End of Notes on Article 4]

Article 4

Computer Programs

Computer programs are protected as literary works within the meaning of Article 2 of the Berne Convention. Such protection applies to the expression of a computer program in any form.

[End of Article 4]

Notes on Article 5

5.01 The wording of Article 5 follows closely the provision on the protection of databases in Article 10.2 of the TRIPS Agreement. The term "collection" has been used in the proposal while the TRIPS Agreement uses the term "compilation". No substantive difference is intended; "collection" is a term used in Article 2(5) of the Berne Convention for a protectable collection of works, while in the proposed Article 5 the term "collection" refers to all collections or compilations of data or other materials, including works. It should be understood that protection under this Article arises by virtue of the creative efforts of the author in selecting or arranging such materials.

5.02 This provision is of a declaratory nature. It confirms what is already covered by the Berne Convention.

[End of Notes on Article 5]

Article 5

Collections of Data (Databases)

Collections of data or other material, in any form, which by reason of the selection or arrangement of their contents constitute intellectual creations, are protected as such. This protection does not extend to the data or the material itself and is without prejudice to any rights subsisting in the data or material contained in the collection.

[End of Article 5]

Notes on Article 6

6.01 Paragraph (1) of Article 6 includes an obligation to abolish non-voluntary licences for primary broadcasting within three years of ratifying or acceding to the proposed Treaty. Broadcasting may be either terrestrial or by satellite. The obligation does not extend to communication to the public by wire or to rebroadcasting in the sense of Article 11*bis*(1)(ii). The possibility of making so-called "minor reservations" is discussed in the Notes on Article 12 concerning limitations and exceptions.

6.02 Paragraph (1) comprises a converging of the main parts of the proposals made by Argentina, Australia, Canada, the European Community and its Member States, the Republic of Korea, the United States of America, Uruguay, and the group of countries of Latin America and the Caribbean.

6.03 No exceptions or conditions concerning the existence or operation of organizations for the collective management of rights has been included in the provision. In all circumstances, the establishment of collective management of rights is a matter which deserves encouragement wherever rights management organizations do not exist.

6.04 Paragraph (2) contains an obligation to abolish, within three years of ratifying or acceding to the proposed Treaty, non-voluntary licences provided for in Article 13 of the Berne Convention. The proposal combines the proposals made by Argentina, Canada, the European Community and its Member States, the Republic of Korea, Uruguay, and the group of countries of Latin America and the Caribbean.

6.05 The People's Republic of China and the group of African countries expressed disagreement with the abolition proposed to eliminate non-voluntary licences in both cases. The African group stated that if elimination becomes necessary a phasing out period of between 10 - 15 years would rather be suggested.

[End of Notes on Article 6]

Article 6

Abolition of Certain Non-Voluntary Licenses

(1) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer provide for non-voluntary licenses under Article 11bis(2) of the Berne Convention in respect of the broadcasting of a work.

(2) Within three years of ratifying or acceding to this Treaty, Contracting Parties shall no longer apply the provisions of Article 13 of the Berne Convention.

[End of Article 6]

Notes on Article 7

7.01 The author's right of reproduction in literary and artistic works has been laid down in Article 9 of the Berne Convention. According to paragraph (1) of that Article, "[a]uthors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form". The scope of the right of reproduction is already broad. The expression "in any manner or form" could not be more expansive in scope. It clearly includes the storage of a work in any electronic medium; it likewise includes such acts as uploading and downloading a work to or from the memory of a computer. Digitization, i.e. the transfer of a work embodied in an analog medium to a digital one constitutes always an act of reproduction.

7.02 Article 7 of the proposed Treaty contains a proposal on the scope of the right of reproduction laid down in Article 9 of the Berne Convention. It is proposed that Contracting Parties would agree on their understanding of the provisions in the Convention.

7.03 In paragraph (1) of the present draft, it is proposed that Contracting Parties would articulate their agreement that the right of reproduction in the Berne Convention includes direct and indirect reproduction, whether permanent or temporary, in any manner or form.

7.04 The first element in this provision is the explicit inclusion of direct and indirect reproduction. This language may already be found in Article 10 of the Rome Convention concerning the rights of producers of phonograms. The purpose of this provision in the proposed Article 7 is to make it clear that the exclusive right may not be diminished simply because of the distance between the place where an original work is situated and the place where a copy is made of it. Recording from a broadcast or wire transmission is as relevant as copying locally from one cassette to another. Any form of remote copying that is made possible by a communication network between the original and the copy is intended to come within the reach of this provision.

7.05 The second element in the proposal is intended to clarify the widely held understanding that both permanent and temporary reproduction constitute reproduction within the meaning of Article 9(1) of the Berne Convention. The result of reproduction may be a tangible, permanent copy like a book, a recording or a CD-ROM. It may as well be a copy of the work on the hard disk of a PC, or in the working memory of a computer. A work that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device.

7.06 It is emphasized that both of these elements described in the preceding Notes are well within any fair interpretation of Article 9(1) of the Berne Convention.

7.07 According to paragraph (2) of the present proposal, it would be a matter for the legislation of Contracting Parties to limit the right of reproduction in the case of temporary reproduction of a work, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the work perceptible or where the reproduction is of a transient or incidental nature. Moreover, the temporary reproduction must always take place in the course of use of the work that is authorized by the author or permitted by law. The purpose

Article 7

Scope of the Right of Reproduction

(1) The exclusive right accorded to authors of literary and artistic works in Article 9(1) of the Berne Convention of authorizing the reproduction of their works shall include direct and indirect reproduction of their works, whether permanent or temporary, in any manner or form.

(2) Subject to the provisions of Article 9(2) of the Berne Convention, it shall be a matter for legislation in Contracting Parties to limit the right of reproduction in cases where a temporary reproduction has the sole purpose of making the work perceptible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the work that is authorized by the author or permitted by law.

[End of Article 7]

of this provision is to make it possible to exclude from the scope of the right of reproduction acts of reproduction that are not relevant in economic terms. By reference to Article 9(2) of the Berne Convention, the limitations are further confined to cases that pass the three-step test of that provision.

7.08 The European Community and its Member States proposed for the May 1996 session of the Committees of Experts (document BCP/CE/VII/1-INR/CE/VI/1) that the existing treaty language in the Berne Convention should not be modified. The European Community and its Member States also proposed that the following points should be included in the "Records of the Conference"/"General Report": "Contracting Parties confirm that the permanent or temporary storage of a protected work in any electronic medium constitutes a reproduction within the meaning of Article 9(1) of the Berne Convention. This includes acts such as uploading and downloading of a work to or from the memory of a computer."

7.09 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committees. In the discussions at the May 1996 session, several Delegations proposed that a provision with the same contents should be included in the proposed Treaty.

7.10 The proposal included in paragraph (1) of this Article 7 is in substantial conformity with the proposal of the European Community and its Member States. At the same time, it meets the proposals referred to above in the discussions of the Committees of Experts.

7.11 As further support for the proposal in Article 7 the following points may be made.

7.12 Technological developments have had a great impact on the means that may be used for reproduction. Complete and accurate reproductions may be made quickly and in such a way that the material reproduced resides only a short while in the memory of a computer. In some cases, a certain work or piece of data may never be reproduced as a whole in the memory of a computer; only those parts of the material that are necessary to achieve a certain result may be reproduced, for instance in order to make a work perceptible. In such cases, successive reproduction of portions of a work may, over a period of time, cover the whole work.

7.13 Some relevant uses may, now or in the future, become totally based on a temporary reproduction.

7.14 Today, the countries of the Berne Union may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction the results of which live only a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary interpretation.

7.15 The interpretation of a right of such importance as the right of reproduction should be in fair and reasonable harmony all over the world. A uniform interpretation is necessary. Already, the need for legal certainty and predictability has been felt and found lacking in concrete cases. The need for a uniform interpretation is dictated by the need to secure the functioning of the copyright system in a digital future.

[Article 8 starts on page 35]

7.16 The only way to harmonize effectively the interpretation of the scope of the right of reproduction is to confirm that temporary reproduction falls within the scope of the right.

7.17 It has been asserted in the discussions in the Committees of Experts that a reproduction right of wide scope might have some unintended and problematic effects. In principle, there are two ways to avoid such effects. The first is to narrow the definition of reproduction. The second is by way of limitations of the right. It seems that the countries of the Berne Union, having freedom of interpretation with respect to Article 9(1), have already excluded the first possibility. This leaves only the second option: designing a limitations clause that makes it possible to avoid any problematic and unintended effects.

7.18 The provisions proposed in paragraph (2) are intended to focus on incidental, technical, and in some cases technically indispensable instances of reproduction which form part of another authorized or otherwise lawful use of a protected work. The cases shall pass the three-step test of Article 9(2) of the Berne Convention.

[End of Notes on Article 7]

[Article 8 starts on page 35]

Notes on Article 8

8.01 Authors of literary and artistic works have not been granted a general right of distribution under any existing international agreements. The Berne Convention contains a right of distribution only in respect of cinematographic works.

8.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a broad right of distribution has gained wide international acceptance. However, no convergence of views has developed in respect of the scope or extent of the right of distribution after the first sale or other transfer of ownership of a copy of a work. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a work the right of distribution ceases to exist, i.e. is exhausted, after the first sale of that copy. Views differ as to whether the exhaustion should be national, regional or global.

8.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even in an international instrument be dealt with in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 8 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

8.04 Article 8 provides an exclusive right of distribution to authors of literary and artistic works. Because of the differences described in Note 8.02, two alternatives are offered. Alternative A is based on the principle of national or regional exhaustion. Alternative B allows global or international exhaustion. The basic provision on the right of distribution is identical in both alternatives: authors shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership. Public lending falls outside the scope of this provision since it does not involve a sale or other transfer of ownership.

8.05 Alternative A also provides a right of importation, in addition to the general right of distribution, to the authors of literary and artistic works.

8.06 Paragraph (1) of Alternative A provides the exclusive right. Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of a work that have been distributed with the consent of the rightholder in the territory of a Contracting Party. The right of importation is not affected by the first sale or other transfer of ownership. Paragraph (3) excludes from the scope of the right of importation those situations where the importation is effected by a person solely for his own personal and non-commercial use.

8.07 Some proposals presented for the February 1996 session of the Committee of Experts suggested that regional economic integration areas with their own legislation in this field might be explicitly mentioned in the clause concerning national or regional exhaustion. The obligations of the Treaty apply only to regional economic integration areas or organizations that are Contracting Parties to the Treaty. The territories of these Contracting Parties consist of the territories of their member countries. There is thus no need to make separate mention of regional economic integration areas.

Article 8

Alternative A

Right of Distribution and Right of Importation

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their works through sale or other transfer of ownership;

(ii) the importation of the original and copies of their works, even following any sale or other transfer of ownership of the original or copies by or pursuant to authorization.

(2) National legislation of a Contracting Party may provide that the right provided for in paragraph (1)(i) does not apply to distribution of the original or any copy of any work that has been sold or the ownership of which has been otherwise transferred in that Contracting Party's territory by or pursuant to authorization.

(3) The right of importation in paragraph (1)(ii) does not apply where the importation is effected by a person solely for his personal and non-commercial use as part of his personal luggage.

[Article 8 continues]

8.08 Alternative B allows for international exhaustion. Contracting Parties may, in their national legislation, provide that the right of distribution will not extend to distribution after the first sale or other transfer of ownership of the original or copies of a work by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

8.09 No right of importation is provided for in Alternative B.

8.10 The two Alternatives presented in Article 8 reflect the genuine diverging views of many nations in this matter. On the level of an international agreement the Alternatives seem to exclude each other, are apparently contradictory and impossible to reconcile. As an intermediate solution the introduction of agreed conditional limitations of the right of distribution and right of importation, based on Alternative A in Article 8(1), could be explored. National legislation of a Contracting Party could for example provide that these rights do not apply to the distribution or importation of copies of works that have been sold with the consent of the author anywhere in the world, if copies of that work have not been made available in a Contracting Party in a quantity sufficient to satisfy the reasonable needs of the public, within an agreed period of time, e.g. one year, calculated from the publication of that work outside that Contracting Party. An alternative along these lines has not, however, been presented. Any third alternative would have required extensive international consultations which it would not have been possible to organize during the preparation of the proposed Treaty.

8.11 The rights provided for in the proposed Treaty, including the right of distribution, are minimum rights. Contracting Parties may provide a higher level of protection. A more restricted concept of exhaustion than international exhaustion represents a higher level of protection. Thus, the solution in Alternative B would not preclude any Contracting Party from applying any conditions or restrictions to the circumstances giving rise to exhaustion. National or regional exhaustion is in full conformity with this provision for those Contracting Parties that take this approach to the distribution right. Introduction of a right of importation is not excluded either.

8.12 The main contents of Alternative A follow the proposal made by the United States of America for the February 1996 session of the Committees of Experts. As far as the basic right is concerned, Argentina and Uruguay presented proposals with the same effect but without offering a proposal concerning exhaustion. Alternative B is based on the main approach taken in the proposals made by Australia, Brazil, Canada, Japan, and the Republic of Korea. The group of African countries favoured the international exhaustion of the right of distribution and supported the proposal made by Australia.

[End of Notes on Articles 8]

[Article 8, continued]

Alternative B

Right of Distribution

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their works through sale or other transfer of ownership.

(2) A Contracting Party may provide that the right provided for in paragraph (1) does not apply to distribution after the first sale or other transfer of ownership of the original or copies of works by or pursuant to authorization.

[End of Article 8]

Notes on Article 9

9.01 The Berne Convention does not contain any provisions on the rental of copies of literary and artistic works.

9.02 Rental rights concerning computer programs and cinematographic works were included in the TRIPS Agreement. Members of the TRIPS Agreement shall provide authors (and their successors in title) the right to authorize or prohibit the commercial rental to the public of originals or copies of their copyrighted works. As far as cinematographic works are concerned, the TRIPS Agreement provides for an impairment test: a Member shall be excepted from according the right in respect of cinematographic works unless such rental has led to widespread copying of such works which is materially impairing the exclusive right of reproduction conferred in that Member on authors. Computer programs are excluded, under the TRIPS Agreement, from the scope of the right of rental in a single case: if the program is not the essential object of the rental, the obligation to grant a rental right does not apply.

9.03 The right of rental has been discussed in the Committees of Experts on several occasions. The trend has been towards a broad rental right covering all, or almost all, categories of works as an exclusive right.

9.04 Paragraph (1) of Article 9 provides authors of literary and artistic works with the exclusive right of authorizing the rental of the original and copies of their works. The right of rental differs from the right of distribution as laid down in Article 8. Paragraph (1) explicitly provides that the right of rental survives distribution, i.e. the first sale or other transfer of ownership. In principle, this right could cover all categories of works. However, in order to design a proposal that would be acceptable to as many Contracting Parties as possible, such a far reaching solution has not been proposed.

9.05 Paragraph (2) would maintain the exclusive right of rental for three specific types of works: computer programs, collections of data or other material, within the meaning of Article 5, in machine-readable form, and musical works embodied in phonograms. Contracting Parties could exempt other categories of works from this right, but they would not have this option if such rental led to widespread copying that materially impaired the exclusive right of reproduction. Thus, these categories of works would be accorded the same level of rental right as is accorded to cinematographic works in the TRIPS Agreement. The right of rental would be subject to the impairment test.

9.06 Paragraph (3) would allow Contracting Parties to exclude architectural works and works of applied art from the scope of this right.

9.07 The proposal is formulated in such a way that it would, compared to the TRIPS Agreement, raise the level of the right of rental for databases in machine-readable form and musical works embodied in phonograms by providing an unconditional exclusive right. Computer programs and these types of works would enjoy the same treatment. As regards databases in machine-readable form, this proposal would bring the protection of authors to the same level provided for the makers of databases according to the proposed new Treaty on the Intellectual Property in respect of Databases. The makers of databases would enjoy the exclusive right of rental as a part of the right of utilization. On the other hand, authors would

Article 9

Right of Rental

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing the rental of the original and copies of their works even after distribution of them by or pursuant to authorization by the author.

(2) Except in the case of computer programs, collections of data or other material in machine-readable form, and musical works embodied in phonograms, specific types of works may be excepted from the provisions of paragraph (1) unless the rental of such works has led to widespread copying that materially impairs the exclusive right of reproduction.

(3) Contracting Parties may provide in their national legislation that the provisions of paragraph (1) and paragraph (2) do not apply in respect of architectural works or in respect of works of applied art.

[End of Article 9]

enjoy the right of rental in respect of the musical works embodied in phonograms while, according to the New Instrument, the producers of phonograms would enjoy the right of rental in respect of phonograms.

9.08 Proposals in favour of the right of rental were presented for the February 1996 session of the Committees of Experts by Argentina, Australia, Brazil, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, the United States of America, and Uruguay. The proposal made by Australia was supported by the group of African countries. A broad right of rental was favoured by Argentina, Brazil, the European Community and its Member States, Uruguay, and the group of countries of Latin America and the Caribbean. The minimum level of protection in other proposals was based on the TRIPS Agreement, in some cases with additional elements, including an exclusive rental right of musical works embodied in phonograms and the extension of the impairment test to all categories of works.

9.09 In the TRIPS Agreement, computer programs have been excluded from the scope of the right of rental where the program is not the essential object of the rental. This aspect was included in some of the proposals made. However, this detail has not been included in the present proposal. The question of the essentiality of the object of rental may also concern other categories of works, such as databases. The proposed Treaty takes the position that this matter may most feasibly be settled at the national level.

[End of Notes on Article 9]

[Article 10 starts on page 45]

Notes on Article 10

10.01 In the Berne Convention the exclusive right of communication to the public of works has been regulated in a fragmented manner.

10.02 The most comprehensive provision is found in Article 11(1)(ii) of the Berne Convention. This provision grants authors of dramatic, dramatico-musical and musical works the exclusive right of authorizing any communication to the public of the performance of their works, and paragraph (2) confirms that these authors enjoy the same rights in translations as they enjoy in their original works. Similar provisions concerning the communication to the public of recitations of literary works are set forth in Article 11ter.

10.03 According to Article 14(1)(ii) of the Berne Convention, authors of literary or artistic works have the exclusive right of authorizing the communication to the public by wire of their works adapted or reproduced by means of cinematography. Article 14*bis*(1) grants the same protection to the cinematographic works themselves.

10.04 The exclusive right in certain forms of communication to the public has been provided for in a special provision in Article 11*bis*(1) concerning all categories of literary and artistic works. These rights are (1) the right of broadcasting, (2) the right of communication to the public by wire and the right of rebroadcasting of a broadcast, and (3) the right of public communication of the broadcast by loudspeaker, etc. The provisions of paragraph (1)(i) of that Article cover, in addition to the right of broadcasting, the communication of works to the public "by any other means of wireless diffusion of signs, sounds or images".

10.05 Technological developments have made it possible to make protected works available in many ways that differ from traditional methods. This is a source of concern in connection with the categories of works that are not covered by the provisions on the right of communication in the Berne Convention. In addition, the interpretation of these provisions may differ. It has become evident that the relevant obligations need to be clarified and that the rights currently provided under the Berne Convention need to be supplemented by extending the field of application of the right of communication to the public to cover all categories of works.

10.06 The right of communication does not presently extend to literary works, except in the case of recitations thereof. Literary works, including computer programs, are presently one of the main objects communicated over networks. Other affected categories of works are also not covered by the right of communication, significant examples being photographic works, works of pictorial art and graphic works.

10.07 The European Community and its Member States made a proposal on the right of communication to the public for the May 1996 session of the Committees of Experts (document BCP/CE/VII/1-INR/CE/VI/1). The wording of the proposal was as follows: "Without prejudice to the rights provided for in Articles 11, 11*bis*, 11ter, 14 and 14*bis* of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them".

[Article 10 starts on page 45]

10.08 The proposal made by the European Community and its Member States received a positive reaction from many Government members of the Committee. The proposal included in Article 10 reproduces the proposal of the European Community and its Member States.

10.09 The provisions of Article 10 consist of two parts. The first part extends the exclusive right of communication to the public to all categories of works, including any communication by wire or wireless means. It leaves the provisions of Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) applicable as they are in the Berne Convention.

10.10 The second part of Article 10 explicitly states that communication to the public includes the making available to the public of works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them. The relevant act is the making available of the work by providing access to it. What counts is the initial act of making the work available, not the mere provision of server space, communication connections, or facilities for the carriage and routing of signals. It is irrelevant whether copies are available for the user or whether the work is simply made perceptible to, and thus usable by, the user.

10.11 One of the main objectives of the second part of Article 10 is to make it clear that interactive on-demand acts of communication are within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public may have access to the works from different places and at different times. The element of individual choice implies the interactive nature of the access.

10.12 The features described in the preceding Note entail important delimitations of the relevant acts. The provision excludes mere private communication by using the term "public". Furthermore, the requirement of individual choice excludes broadcasting from the scope of the provision.

10.13 Article 10 leaves intact the rights provided for in the listed Berne Convention provisions. The proposal supplements existing Berne Convention protection by adding a right of communication to the public for all categories of works, including literary works, to which the existing right of communication does not apply. These elements in the proposal constitute new rights or an additional dimension to the right of communication. However, the features that have been confirmed in the second half, the "making available" part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention. Nevertheless, other interpretations may also exist concerning obligations under the Convention. The objective of the proposal is to harmonize the obligations and to avoid any discrepancies that may be caused by different interpretations.

10.14 The expression "communication to the public" of a work means making a work available to the public by any means or process other than by distributing copies. This includes communication by wire or wireless means. The technology used may be analog or digital, and it may be based on electromagnetic waves or guided optical beams. The use of the non-restrictive term "any" in front of the word "communication" in Article 10, and in certain provisions of the Berne Convention, emphasizes the breadth of the act of communication. "Communication" implies transmission to a public not present in the place where the communication originates.

Article 10

Right of Communication

Without prejudice to the rights provided for in Articles 11(1)(ii), 11*bis*(1)(i), 11*ter*(1)(ii), 14(1)(i) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, including the making available to the public of their works, by wire or wireless means, in such a way that members of the public may access these works from a place and at a time individually chosen by them.

[End of Article 10]

Communication of a work can involve a series of acts of transmission and temporary storage, such incidental storage being a necessary feature of the communication process. If, at any point, the stored work is made available to the public, such making available constitutes a further act of communication which requires authorization. It should be noted that storage falls within the scope of the right of reproduction (see Notes on Article 7).

10.15 As communication always involves transmission, the term "transmission" could have been chosen as the key term to describe the relevant act. The term "communication" has been maintained, however, because it is the term used in all relevant Articles of the Berne Convention in its English text. It deserves to be mentioned that in the French text the expression "la transmission publique" has been used in Articles 11 and 11*ter*, and the expression "la transmission par fil au public" has been used in Article 14 while "communication to the public" and "communication to the public by wire" are the English expressions. In Article 11*bis* of the French text of the Convention, the corresponding expression is "la communication publique".

10.16 It seems clear that, at the treaty level, the term "communication" can be used as a bridging term to ensure the international interoperability and mutual recognition of exclusive rights that have been or will be provided in national legislations using either the term "transmission" or the term "communication". The former refers to a technical transfer while the latter implies, in addition to the technical transfer, that something is communicated. For the purposes of the proposed Treaty, this slight difference between the terms is irrelevant. What is transferred or communicated is the work.

10.17 The term "public" has been used in Article 10 as it has been used in the present provisions of the Berne Convention. It is a matter for national legislation and case law to define what is "public". However, the aspects dealt with in Note 10.10 should be taken into account. The "public" consists of individual "members of the public" who may access the works from different places and at different times.

10.18 It is stated in Note 10.13 that one of the purposes of Article 10 is to "complete" the right of communication, extending it to all works. One may note that the proposed language of Article 10 does not explicitly include the limiting terms "performance" or "recitation" of a work as included in Article 11(1)(ii) and Article 11*ter*(1)(ii) of the Berne Convention. This is not an omission but a more modern formulation of the provision. The wording "communication ... of their works" also covers the communication of performances and recitations of works. It may be recalled, for example, that when Article 9 and Article 11*bis* were introduced into the Berne Convention, no corresponding clauses were considered to be necessary.

10.19 No specific reference is made to Article 11(2) or Article 11*ter*(2) of the Berne Convention, and no corresponding provisions have been proposed. It goes without saying that authors have the same rights with respect to translations, adaptations, arrangements and other alterations of their works. The work is the work even in translation, adaptation, etc. The example concerning Article 9 and Article 11*bis* may be reiterated here.

10.20 It should be pointed out that no rights are exhausted in connection with communication to the public. Should communication of a work result in the reproduction of a copy at the

[Article 11 starts on page 51]

recipient end, the work may not be communicated further to the public or distributed to the public without authorization. Exhaustion of rights is only associated with the distribution of tangible copies.

10.21 It is strongly emphasized that Article 10 does not attempt to define the nature or extent of liability on a national level. This proposed international agreement determines only the scope of the exclusive rights that shall be granted to authors in respect of their works. Who is liable for the violation of these rights and what the extent of liability shall be for such violations is a matter for national legislation and case law according to the legal traditions of each Contracting Party.

10.22 In respect of rights provided for in Article 10, Contracting Parties may apply certain limitations and exceptions traditionally considered acceptable under the Berne Convention. The proposal is not intended to impair the ability of Contracting Parties to maintain in their national laws exceptions that have traditionally been viewed as "minor reservations".

10.23 Proposals on the rights of transmission, communication to the public, public performance and the right of digital transmission were presented for the February 1996 session of the Committee of Experts by Argentina, Australia, Canada, Japan, and the United States of America. The group of countries of Latin America and the Caribbean expressed a recognition of a general right of communication to the public by any means or process.

[End of Notes on Article 10]

[Article 11 starts on page 51]

Notes on Article 11

11.01 Article 11 contains a proposal according to which the duration of the protection of photographic works would be governed by the general rules on the term of protection provided under Article 7 of the Berne Convention. This proposal combines the proposals made by Argentina, Australia, Canada, the European Community and its Member States, Japan, the People's Republic of China, the Republic of Korea, the United States of America, and Uruguay.

[End of Notes on Article 11]

Article 11

Duration of the Protection of Photographic Works

In respect of photographic works, the Contracting Parties shall apply the provisions of Articles 7(1), 7(3), 7(5), 7(6), 7(7) and 7(8) of the Berne Convention and shall not apply the provisions of Article 7(4).

[End of Article 11]

Notes on Article 12

12.01 Provisions on limitations of and exceptions to the rights of authors in literary and artistic works are laid down in Article 12.

12.02 Paragraph (1) permits Contracting Parties to provide for limitations of or exceptions to the rights granted to authors in this Treaty, subject to conditions that are identical to those of Article 9(2) of the Berne Convention. The provision includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with normal exploitation of the protected subject matter. Finally, any limitations or exceptions may never unreasonably prejudice the legitimate interests of the author.

12.03 Paragraph (2) introduces an obligation for Contracting Parties to apply these same conditions to any limitations that they would make to the rights provided for in the Berne Convention. This provision limits the permissible scope of limitations under the Berne Convention. By virtue of Article 9(2) of the Berne Convention, these conditions already apply to the right of reproduction.

12.04 The conditions of Article 9(2) of the Berne Convention concerning the right of reproduction have been incorporated in Article 13 of the TRIPS Agreement as general principles governing limitations of and exceptions to rights.

12.05 Interpretation of the provisions of Article 12 should follow the established interpretation of Article 9(2) of the Berne Convention. In the Report on the Work of the Main Committee I of the Stockholm Conference (1967), the following explanation was given (page 1145, paragraph 85): "If it is considered that reproduction conflicts with the normal exploitation of the work, reproduction is not permitted at all. If it is considered that reproduction does not conflict with the normal exploitation of the work, the next step would be to consider whether it does not unreasonably prejudice the legitimate interests of the author. Only if such is not the case would it be possible in certain special cases to introduce a compulsory license, or to provide for use without payment. A practical example might be photocopying for various purposes. If it consists of producing a very large number of copies, it may not be permitted, as it conflicts with a normal exploitation of the work. If it implies a rather large number of copies for use in industrial undertakings, it may not unreasonably prejudice the legitimate interests of the author, provided that, according to national legislation, an equitable remuneration is paid. If a small number of copies is made, photocopying may be permitted without payment, particularly for individual or scientific use."

12.06 In the context of the provisions on limitations and exceptions in the proposed Treaty, there is reason to make a reference to the so-called "minor reservations". In Brussels (1948) and in Stockholm (1967) this issue was touched upon. The Report on the Work of the Main Committee I of the Stockholm Conference states the following (page 1166, paragraph 209): "In the General Report of the Brussels Conference, the Rapporteur was instructed to refer explicitly, in connection with Article 11, to the possibility of what it had been agreed to call 'the minor reservations' of national legislation. Some delegates had referred to the exceptions

permitted in respect of religious ceremonies, performances by military bands and the requirements of

Article 12

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for limitations of or exceptions to the rights granted to authors of literary and artistic works under this Treaty only in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

(2) Contracting Parties shall, when applying the Berne Convention, confine any limitations of or exceptions to rights provided for therein to certain special cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author.

[End of Article 12]

education and popularization. The exceptions also apply to Articles 11*bis*, 11*ter*, 13 and 14. The Rapporteur ended by saying that these allusions were given lightly without invalidating the principle of the right (cf. *Documents de la Conférence de Bruxelles*, page 100)."

12.07 The proposed provisions of Article 12 are applicable to any limitations. No limitations, not even limitations that belong to the category of minor reservations, may exceed the limits set by the three-step test.

12.08 It bears mention that this Article is not intended to prevent Contracting Parties from applying limitations and exceptions traditionally considered acceptable under the Berne Convention. It is, however, clear that not all limitations currently included in the various national legislations would correspond to the conditions now being proposed. In the digital environment, formally "minor reservations" may in reality undermine important aspects of protection. Even minor reservations must be considered using sense and reason. The purpose of the protection must be kept in mind.

12.09 When a high level of protection is proposed, there is reason to balance such protection against other important values in society. Among these values are the interests of education, scientific research, the need of the general public for information to be available in libraries and the interests of persons with a handicap that prevents them from using ordinary sources of information.

12.10 No proposals on limitations were submitted by Governments for the February 1996 session of the Committees of Experts.

[End of Notes on Article 12]

[Article 13 starts on page 57]

Notes on Article 13

13.01 Article 13 contains provisions on obligations concerning technological measures.

13.02 According to paragraph (1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices or the offer or performance or services having the same effect. A condition for proscription is that the person performing the act knows or has reasonable grounds to know that the device or service will be used for or in the course of the unauthorized exercise of any of the rights provided for under the proposed Treaty. This knowledge requirement therefore focuses on the purpose for which the device or service will be used. The expression "knowing or having reasonable grounds to know" has the same meaning as the expression "knowingly or with reasonable grounds to know" in the provisions on enforcement in the TRIPS Agreement.

13.03 Paragraph (2) includes a provision on remedies against the unlawful acts referred to in paragraph (1). The reason for a special provision on remedies is the fact that the provisions on enforcement in the TRIPS Agreement, which are applicable according to Article 16 of the proposed Treaty, only concern "any act of infringement of intellectual property rights covered by this Agreement". The obligations established in the proposed Article 13 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

13.04 Contracting Parties are free to choose appropriate remedies according to their own legal traditions. The main requirement is that the remedies provided are effective and thus constitute a deterrent and a sufficient sanction against the prohibited acts.

13.05 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices and the lawful use of subject matter that is in the public domain. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

13.06 Paragraph (3) contains the definition of a "protection-defeating device". It describes the characteristics of devices falling within the scope of the obligations under paragraph (1). To achieve the necessary coverage, the phrase "primary purpose or primary effect of which is to circumvent..." has been used rather than "specifically designed or adapted to circumvent...".

13.07 Proposals concerning the obligations of Contracting Parties in connection with protection-defeating devices and other technological measures were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, and the United States of America. The People's Republic of China suggested that matters such as technical measures should be studied further. The European Community and its Member States, and the Republic of Korea also made proposals on this issue for the May 1996 session of the Committees of Experts.

[End of Notes on Article 13]

Article 13

Obligations concerning Technological Measures

(1) Contracting Parties shall make unlawful the importation, manufacture or distribution of protection-defeating devices, or the offer or performance of any service having the same effect, by any person knowing or having reasonable grounds to know that the device or service will be used for, or in the course of, the exercise of rights provided under this Treaty that is not authorized by the rightholder or the law.

(2) Contracting Parties shall provide for appropriate and effective remedies against the unlawful acts referred to in paragraph (1).

(3) As used in this Article, "protection-defeating device" means any device, product or component incorporated into a device or product, the primary purpose or primary effect of which is to circumvent any process, treatment, mechanism or system that prevents or inhibits any of the acts covered by the rights under this Treaty.

[End of Article 13]

Notes on Article 14

14.01 Article 14 contains provisions on obligations with regard to rights management information.

14.02 According to paragraph (1) Contracting Parties shall make it unlawful for any person to remove or alter any electronic rights management information without authority, or to distribute, import for distribution or communicate to the public, without authority, copies of works from which such information has been removed or in which it has been altered. A requirement for proscription is that the person who performs these acts does so knowingly. The obligation of Contracting Parties covers rights management information in electronic form only.

14.03 Paragraph (2) identifies the information that is within the scope of this Article. The scope has been limited to information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information. The obligations of this provision cover such information only when it is attached to a copy of a work or appear in connection with the communication of a work to the public. Nothing precludes a broader field of application for provisions on rights management information in national legislation.

14.04 Contracting Parties may design the exact field of application of the provisions envisaged in this Article taking into consideration the need to avoid legislation that would impede lawful practices. Having regard to differences in legal traditions, Contracting Parties may, in their national legislation, also define the coverage and extent of the liability for violation of the prohibition enacted according to paragraph (1).

14.05 Contracting Parties may, when implementing the obligations established by this Article, specifically limit the scope of the provisions in their national law in such a way that technically non-feasible requirements are not imposed on broadcasting organizations and other users engaged in the duly authorized communication of works or retransmission of broadcasts.

14.06 It should be pointed out that the use of electronic rights management information is voluntary. The obligations of Contracting Parties concerning rights management information only apply in cases where such information has been given.

14.07 It should be observed that the wilful removal or alteration of rights management information in order to achieve financial gain is a matter which falls within the scope of the provisions of the penal codes in most countries. This may be taken into account when the obligations of the Contracting Parties are considered by the Diplomatic Conference.

14.08 Proposals on rights management information were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, and the United States of America.

[End of Notes on Article 14]

Article 14

Obligations concerning Rights Management Information

(1) Contracting Parties shall make it unlawful for any person knowingly to perform any of the following acts:

- (i) to remove or alter any electronic rights management information without authority;
- (ii) to distribute, import for distribution or communicate to the public, without authority, copies of works from which electronic rights management information has been removed or altered without authority.

(2) As used in this Article, "rights management information" means information which identifies the work, the author of the work, the owner of any right in the work, and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a work or appear in connection with the communication of a work to the public.

[End of Article 14]

Notes on Article 15

15.01 Article 15 incorporates by reference Article 18 of the Berne Convention.

[End of Notes on Article 15]

Article 15

Application in Time

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention to all protection provided for in this Treaty.

[End of Article 15]

Notes on Article 16

16.01 Two alternatives on enforcement are presented in Article 16. The choice between them has been left to the Diplomatic Conference. This is because the issue of enforcement is a horizontal one that must be considered in connection with the two other proposed Treaties published simultaneously with the present proposed Treaty. Each of the two alternatives is based on the enforcement provisions of Part III, Articles 41 to 61, of the TRIPS Agreement.

16.02 Alternative A consists of the text of Article 16 and an Annex. Paragraph (1) introduces the Annex which contains the substantive provisions on enforcement. Paragraph (2) states that the Annex forms an integral part of the proposed Treaty. The provisions of the Annex have the same status as the provisions of the proposed Treaty.

16.03 Alternative B incorporates the enforcement provisions in the TRIPS Agreement by reference. The provisions of Alternative B obligate Contracting Parties to ensure that proper enforcement procedures, as specified in Part III, are available. To this end, Contracting Parties shall apply the relevant provisions of the TRIPS Agreement *mutatis mutandis*.

[End of Notes on Article 16]

Article 16

Special Provisions on Enforcement of Rights

Alternative A (continues on page 65)

(1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty.

(2) The Annex forms an integral part of this Treaty.

Alternative B

Contracting Parties shall ensure that the enforcement procedures specified in Part III, Articles 41 to 61, of the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Annex 1C, of the Marrakesh Agreement Establishing the World Trade Organization, concluded on April 15, 1994 (the "TRIPS Agreement"), are available under their national laws so as to permit effective action against any act of infringement of the rights provided under this Treaty, including expeditious remedies to prevent infringements, and remedies that constitute a deterrent to further infringements. To this end, Contracting Parties shall apply *mutatis mutandis* the provisions of Articles 41 to 61 of the TRIPS Agreement.

[End of Article 16]

Notes on the Annex

17.01 The Annex forms the second part of Alternative A of Article 16. The Annex reproduces in its Articles 1 to 21, Part III, Articles 41 to 61, of the TRIPS Agreement. Certain necessary technical adaptations have been made, corresponding to the joint proposal made by the European Community and its Member States and Australia concerning the enforcement of rights which was submitted for the September 1995 sessions of the Committees of Experts (document BCP/CE/V/8). Certain other modifications have been made concerning clauses that are not relevant with regard to the proposed Treaty.

17.02 No detailed Notes are offered on the specific provisions of the Annex.

[End of Notes on the Annex]

Alternative A (continued from page 63)

ANNEX

Enforcement of Rights

SECTION 1

GENERAL OBLIGATIONS

Article 1

1. Contracting Parties shall ensure that enforcement procedures as specified in this Annex are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
2. Procedures concerning the enforcement of rights covered by this Treaty shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
3. Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
4. Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Contracting Party's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittals in criminal cases.
5. It is understood that this Annex does not create any obligation to put in place a judicial system for the enforcement of rights covered by this Treaty distinct from that for the enforcement of law in general, nor does it affect the capacity of Contracting Parties to enforce their law in general. Nothing in this Annex creates any obligation with respect to the distribution of resources as between enforcement of rights covered by this Treaty and the enforcement of law in general.

SECTION 2

CIVIL AND ADMINISTRATIVE PROCEDURES AND REMEDIES

Article 2

Fair and Equitable Procedures

Contracting Parties shall make available to the right holders¹ civil judicial procedures concerning the enforcement of any right covered by this Treaty. Defendants shall have the right to written notice which is timely and contains sufficient detail, including the basis of the claims. Parties shall be allowed to be represented by independent legal counsel, and procedures shall not impose overly burdensome requirements concerning mandatory personal appearances. All parties to such procedures shall be duly entitled to substantiate their claims and to present all relevant evidence. The procedure shall provide a means to identify and protect confidential information, unless this would be contrary to existing constitutional requirements.

Article 3

Evidence

1. The judicial authorities shall have the authority, where a party has presented reasonably available evidence sufficient to support its claims and has specified evidence relevant to substantiation of its claims which lies in the control of the opposing party, to order that this evidence be produced by the opposing party, subject in appropriate cases to conditions which ensure the protection of confidential information.
2. In cases in which a party to a proceeding voluntarily and without good reason refuses access to, or otherwise does not provide necessary information within a reasonable period, or significantly impedes a procedure relating to an enforcement action, a Contracting Party may accord judicial authorities the authority to make preliminary and final determinations, affirmative or negative, on the basis of the information presented to them, including the complaint or the allegation presented by the party adversely affected by the denial of access to information, subject to providing the parties an opportunity to be heard on the allegations or evidence.

¹ For the purpose of this Annex, the term "right holder" includes federations and associations having legal standing to assert such rights.

Article 4

Injunctions

1. The judicial authorities shall have the authority to order a party to desist from an infringement, inter alia to prevent the entry into the channels of commerce in their jurisdiction of imported goods that involve the infringement of a right covered by this Treaty, immediately after customs clearance of such goods. Contracting Parties are not obliged to accord such authority in respect of protected subject matter acquired or ordered by a person prior to knowing or having reasonable grounds to know that dealing in such subject matter would entail the infringement of a right covered by this Treaty.

[Paragraph 2 of Article 44 of the TRIPS Agreement is not reproduced here.]

Article 5

Damages

1. The judicial authorities shall have the authority to order the infringer to pay the right holder damages adequate to compensate for the injury the right holder has suffered because of an infringement of that person's right covered by this Treaty by an infringer who knowingly, or with reasonable grounds to know, engaged in infringing activity.

2. The judicial authorities shall also have the authority to order the infringer to pay the right holder expenses, which may include appropriate attorney's fees. In appropriate cases, Contracting Parties may authorize the judicial authorities to order recovery of profits and/or payment of pre-established damages even where the infringer did not knowingly, or with reasonable grounds to know, engage in infringing activity.

Article 6

Other Remedies

In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. [A clause not reproduced here.]

Article 7

Right of Information

Contracting Parties may provide that the judicial authorities shall have the authority, unless this would be out of proportion to the seriousness of the infringement, to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channels of distribution.

Article 8

Indemnification of the Defendant

1. The judicial authorities shall have the authority to order a party at whose request measures were taken and who has abused enforcement procedures to provide to a party wrongfully enjoined or restrained adequate compensation for the injury suffered because of such abuse. The judicial authorities shall also have the authority to order the applicant to pay the defendant expenses, which may include appropriate attorney's fees.

2. In respect of the administration of any law pertaining to the protection or enforcement of rights covered by this Treaty, Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith in the course of the administration of that law.

Article 9

Administrative Procedures

To the extent that any civil remedy can be ordered as a result of administrative procedures on the merits of a case, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 3

PROVISIONAL MEASURES

Article 10

1. The judicial authorities shall have the authority to order prompt and effective provisional measures:

- (a) to prevent an infringement of any right covered by this Treaty from occurring, and in particular to prevent the entry into the channels of commerce in their jurisdiction of goods, including imported goods immediately after customs clearance;
- (b) to preserve relevant evidence in regard to the alleged infringement.

2. The judicial authorities shall have the authority to adopt provisional measures inaudita altera parte where appropriate, in particular where any delay is likely to cause irreparable harm to the right holder, or where there is a demonstrable risk of evidence being destroyed.

3. The judicial authorities shall have the authority to require the applicant to provide any reasonably available evidence in order to satisfy themselves with a sufficient degree of certainty that the applicant is the right holder and that the applicant's right is being infringed or that such infringement is imminent, and to order the applicant to provide a security or equivalent assurance sufficient to protect the defendant and to prevent abuse.

4. Where provisional measures have been adopted inaudita altera parte, the parties affected shall be given notice, without delay after the execution of the measures at the latest. A review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period after the notification of the measures, whether these measures shall be modified, revoked or confirmed.

5. The applicant may be required to supply other information necessary for the identification of the goods concerned by the authority that will execute the provisional measures.

6. Without prejudice to paragraph 4, provisional measures taken on the basis of paragraphs 1 and 2 shall, upon request by the defendant, be revoked or otherwise cease to have effect, if proceedings leading to a decision on the merits of the case are not initiated within a reasonable period, to be determined by the judicial authority ordering the measures where a Contracting Party's law so permit or, in the absence of such a determination, not to exceed 20 working days or 31 calendar days, whichever is the longer.

7. Where the provisional measures are revoked or where they lapse due to any act or omission by the applicant, or where it is subsequently found that there has been no infringement or threat of infringement of a right covered by this Treaty, the judicial authorities shall have the authority to order the applicant, upon request of the defendant, to provide the defendant appropriate compensation for any injury caused by these measures.

8. To the extent that any provisional measure can be ordered as a result of administrative procedures, such procedures shall conform to principles equivalent in substance to those set forth in this Section.

SECTION 4

SPECIAL REQUIREMENTS RELATED TO BORDER MEASURES²

Article 11

Suspension of Release by Customs Authorities

Contracting Parties shall, in conformity with the provisions set out below, adopt procedures³ to enable a right holder, who has valid grounds for suspecting that the importation of [words omitted] pirated goods⁴ may take place, to lodge an application in writing with competent authorities, administrative or judicial, for the suspension by the customs authorities of the release into free circulation of such goods. [A clause omitted]. Contracting Parties may also provide for corresponding procedures concerning the suspension by the customs authorities of the release of infringing goods destined for exportation from their territories.

Article 12

Application

Any right holder initiating the procedures under Article 11 shall be required to provide adequate evidence to satisfy the competent authorities that, under the laws of the country of importation, there is prima facie an infringement of the right holder's right covered by this

² Where a Contracting Party has dismantled substantially all controls over movement of goods across its border with another Contracting Party with which it forms part of a customs union, it shall not be required to apply the provisions of this Section at that border.

³ It is understood that there shall be no obligation to apply such procedures to imports of goods put on the Market in another country by or with the consent of the right holder, or to goods in transit.

⁴ For the purposes of this Annex:
"pirated goods" shall mean any goods which are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and which are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a right covered by this Treaty under the law of the country of importation.

Treaty and to supply a sufficiently detailed description of the goods to make them readily recognisable by the customs authorities. The competent authorities shall inform the applicant within a reasonable period whether they have accepted the application and, where determined by the competent authorities, the period for which the customs authorities will take action.

Article 13

Security or Equivalent Assurance

1. The competent authorities shall have the authority to require an applicant to provide a security or equivalent assurance sufficient to protect the defendant and the competent authorities and to prevent abuse. Such security or equivalent assurance shall not unreasonably deter recourse to these procedures.

[Paragraph 2 of Article 53 of the TRIPS Agreement is not reproduced here.]

Article 14

Notice of Suspension

The importer and the applicant shall be promptly notified of the suspension of the release of goods according to Article 11.

Article 15

Duration of Suspension

If, within a period not exceeding 10 working days after the applicant has been served notice of the suspension, the customs authorities have not been informed that proceedings leading to a decision on the merits of the case have been initiated by a party other than the defendant, or that the duly empowered authority has taken provisional measures prolonging the suspension of the release of the goods, the goods shall be released, provided that all other conditions for importation or exportation have been complied with; in appropriate cases, this time-limit may be extended by another 10 working days. If proceedings leading to a decision on the merits of the case have been initiated, a review, including a right to be heard, shall take place upon request of the defendant with a view to deciding, within a reasonable period, whether these measures shall be modified, revoked or confirmed. Notwithstanding the above, where the suspension of the release of goods is carried out or continued in accordance with a provisional judicial measure, the provisions of paragraph 6 of Article 10 shall apply.

Article 16

Indemnification of the Importer and of the Owner of the Goods

Relevant authorities shall have the authority to order the applicant to pay the importer, the consignee and the owner of the goods appropriate compensation for any injury caused to them through the wrongful detention of goods or through the detention of goods released pursuant to Article 15.

Article 17

Right of Inspection and Information

Without prejudice to the protection of confidential information, Contracting Parties shall provide the competent authorities the authority to give the right holder sufficient opportunity to have any goods detained by the customs authorities inspected in order to substantiate the right holder's claims. The competent authorities shall also have authority to give the importer an equivalent opportunity to have any such goods inspected. Where a positive determination has been made on the merits of a case, Contracting Parties may provide the competent authorities the authority to inform the right holder of the names and addresses of the consignor, the importer and the consignee and of the quantity of goods in question.

Article 18

Ex Officio Action

Where Contracting Parties require competent authorities to act upon their own initiative and to suspend the release of goods in respect of which they have acquired prima facie evidence that a right covered by this Treaty is being infringed:

- (a) the competent authorities may at any time seek from the right holder any information that may assist them to exercise these powers;
- (b) the importer and the right holder shall be promptly notified of the suspension. Where the importer has lodged an appeal against the suspension with the competent authorities, the suspension shall be subject to the conditions, mutatis mutandis, set out at Article 15;
- (c) Contracting Parties shall only exempt both public authorities and officials from liability to appropriate remedial measures where actions are taken or intended in good faith.

Article 19

Remedies

Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 6. [A clause not reproduced here.]

Article 20

De Minimis Imports

Contracting Parties may exclude from the application of above provisions small quantities of goods of a non-commercial nature contained in travellers' personal luggage or sent in small consignments.

SECTION 5

CRIMINAL PROCEDURES

Article 21

Contracting Parties shall provide for criminal procedures and penalties to be applied at least in cases of wilful [words omitted] piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. In appropriate cases, remedies available shall also include the seizure, forfeiture and destruction of the infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence. [A clause not reproduced here.]

[End of document]