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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
FOR THE PROTECTION OF THE RIGHTS
OF PERFORMERS AND PRODUCERS OF PHONOGRAMS
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 for the Protection of Rights of Performers and Producers of Phonograms. There are 27 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 substantive provisions of the proposed Treaty have been organized in four Chapters. Chapter I includes general provisions, Chapter II and Chapter III contain provisions of the rights of performers and producers of phonograms respectively, and Chapter IV includes common provisions. In Chapters II and III, most Articles and Notes are parallel. This solution has led to certain repetitiveness. It has, however, been necessary in order to enable a discussion on each of the Articles and to take into consideration the requests expressed during the work of the Committee of Experts.

21. 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.

22. 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 Instrument for the Protection of the Rights of Performers and Producers of Phonograms were the following:

The European Community and its Member States (INR/CE/V/2)

Argentina (INR/CE/V/3)

Argentina (INR/CE/V/3 Corr.)

The Sudan (INR/CE/V/4)

China (INR/CE/V/5)

Uruguay (INR/CE/V/6)

Brazil (INR/CE/V/7)

The United States of America (INR/CE/V/8)

Japan (INR/CE/V/9)

Canada (INR/CE/V/10)

23. 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, the Sudan, Togo, Tunisia, and Zambia (INR/CE/V/12)

Argentina, Bolivia, Brazil, Chile, Colombia, Cuba, Ecuador, El Salvador, Honduras, Jamaica, Mexico, Panama, Paraguay, Peru, Trinidad and Tobago, Uruguay, and Venezuela (INR/CE/V/13)

24. 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
for the Protection of the Rights
of Performers and Producers of Phonograms**

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Notes on the Title and the Preamble

0.01 During the preparatory stages that led to the production of this proposed Treaty, the expression "Possible Instrument" had been used as a working title. Since the term "instrument" is commonly used as a generic expression for any unspecified contract, deed or other document, it is suggested that this term should not be used in the official title of the proposed Treaty. The title "Treaty for the Protection of the Rights of Performers and Producers of Phonograms" is offered as an accurate characterization of the contents of this proposed Treaty.

0.02 The Preamble sets forth the objective of the proposed 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 (hereinafter referred to in these Notes as "the Berne Convention").

0.04 The second paragraph pronounces the recognition that new international 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 subject matter, and it has a profound impact on the production and distribution of the results of work by performers and producers of phonograms. While introducing certain provisions on "traditional issues", the proposed Treaty also includes solutions to urgent questions raised by the technological development 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 on Certain Questions Concerning the Protection of Literary and Artistic Works (hereinafter referred to in these Notes as "the New Copyright Treaty"). However, in the present proposed Treaty no reference is made to the need to clarify the interpretation of certain existing rules. The present proposed Treaty is intended to be a comprehensive instrument rather than an instrument that clarifies existing norms.

[End of Notes on the Title and the Preamble]

Preamble

The Contracting Parties,

Desiring to develop and maintain the protection of the rights of performers and producers of phonograms in a manner as effective and uniform as possible,

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

Recognizing the profound impact of the development and convergence of information and communication technologies on the production and use of performances and phonograms,

Have agreed as follows:

[End of Preamble]

Notes on Article 1

1.01 Paragraph (1) of Article 1 contains a "Rome safeguard" clause modelled after Article 2.2 of 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"), which is the most recent of such provisions made in existing treaties. Nothing in the proposed Treaty shall derogate from existing obligations that Contracting Parties may have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (hereinafter referred to in these Notes as "the Rome Convention").

1.02 Paragraph (2) contains a corresponding clause which confirms that the proposed Treaty shall not interfere with the obligations that Contracting Parties may have to each other under treaties in the field of copyright in general, and in particular under the Berne Convention.

[End of Notes on Article 1]

CHAPTER I
GENERAL PROVISIONS

Article 1

Relation to Other Conventions

(1) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations done in Rome, October 26, 1961 (hereinafter the "Rome Convention").

(2) Nothing in this Treaty shall derogate from existing obligations that Contracting Parties may have to each other under treaties for the protection of literary and artistic works, and in particular, nothing in this Treaty shall in any way prejudice the rights granted to authors under the Berne Convention for the Protection of Literary and Artistic Works.

[End of Article 1]

Notes on Article 2

2.01 When preparation of the proposed Treaty began in 1993, a set of definitions was drafted by the International Bureau and submitted to the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms (hereinafter referred to in these Notes as "the Committee of Experts" or "the Committee") in document INR/CE/I/2. In 1994, after the first two meetings of the Committee of Experts, the International Bureau, having taken into account suggestions made during discussions, resubmitted the draft definitions to the Committee (document INR/CE/III/2). At its third session, the Committee further discussed the proposed definitions. On the basis of these discussions a summary of all interventions on definitions was published as a supplement to the report of the meeting (INR/CE/III/3-Suppl.). In the proposals for the fifth session, in February 1996, Argentina submitted a comprehensive set of definitions and the United States of America took the view that the issue of definitions must be addressed. The European Community and its Member States indicated that discussions should proceed on the basis of agreements reached at previous meetings of the Committee of Experts and on the basis of the memoranda prepared by the International Bureau.

2.02 Article 2 contains definitions of the key terms used in the proposed Treaty. The definitions have been prepared on the basis of the proposals by the International Bureau and the February 1996 submission by Argentina taking into account comments and suggestions made in Committee sessions.

2.03 Item (a) defines the term "performers". A model for the definition of this term is found in Article 3(a) of the Rome Convention: " 'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works". The definition in the Rome Convention is thus entirely built on the performances of literary and artistic works. Article 9 of the Rome Convention contains a provision that permits Contracting States to extend the scope of protection: "Any Contracting State may, by its domestic laws and regulations, extend the protection provided for in this Convention to artists who do not perform literary and artistic works."

2.04 The proposed definition in item (a) follows the wording of the definition in the Rome Convention. It includes, however, two modifications. The first modification is the insertion, in accordance with the proposal made by Argentina, of the word "interpret" in the list of examples of the types of activities susceptible of performance. The second modification is an extension of the scope of artists covered by the definition. In accord with the suggestions made by Argentina and the International Bureau, the proposed definition of "performers" would include persons who perform expressions of folklore. In some cases, of course, the object of a performance may be a literary or artistic work, and performers of these works would enjoy protection even without the proposed extension. The effect of the proposed definition would be that this added group of performers would enjoy protection irrespective of the nature of the object of the performance.

Article 2

Definitions

For the purposes of this Treaty:

(a) "performers" are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore;

[Article 2 continues]

2.05 As regards the need for protection of expressions of folklore, a reference should be made to discussions within the Committees of Experts. The proposed definition would extend international protection to a category of performance that is important to the cultural fabric of many nations.

2.06 Item (b) defines the term "phonogram". In Article 3(b) of the Rome Convention, the term was defined as follows: " 'phonograms' means any exclusively aural fixation of the sounds of a performance or of other sounds". This definition has been developed further in two respects in the proposed Treaty.

2.07 First, the definition of a phonogram is modernized by extending its coverage to phonograms that are not fixations of sounds. Phonograms may be produced for instance using digital technology that fixes data which can be used to generate sounds even though no "real" sounds have yet been produced. The data, of course, can be made audible by means of appropriate electronic equipment. Argentina, and earlier the International Bureau, suggested that the proposed definition include "digital representations of sounds". This approach would serve to modernize the Rome Convention definition, but the qualification "digital" may itself become obsolete as technology evolves. Accordingly, this qualification has been omitted.

2.08 Second, the expression "exclusively aural", as used in the Rome Convention, has been replaced for the reasons discussed above, namely that sounds may be fixed in the form of data before they have been even aurally perceptible. According to the second clause of the definition, audiovisual fixations, representations of sounds and images and the sound portion of either of these are not phonograms.

2.09 In item (c), two alternatives are presented for the definition of "fixation". Alternative A confines the definition solely to the fixations of sounds or representations thereof. This corresponds to the meaning of the word "fixation" as it has been used in the definition of "phonogram" in Article 3(b) of the Rome Convention. In Alternative B, the definition extends, in addition, to images and representations thereof. The definition uses the word "embodiment" for the material form of "fixation". The last part of the definition, "from which they can be perceived, reproduced or communicated", has been transferred from the first version of the definition presented by the International Bureau in 1993. It is apparent that the perceiving, reproducing or communicating may take place only with the aid of a machine or device. As this element was explicitly included in the proposal made by Argentina and in the 1994 proposals of the International Bureau, it has also been included. The definition does not qualify or quantify the duration of the life of the embodiment necessary to result in fixation. This is to say, the definition does not set any conditions regarding the requisite permanence or stability of the embodiment; there is no set requirement in the proposed Treaty.

2.10 It may be observed that no definition of "reproduction" has been proposed. This is because the meaning of the term is developed fully in Articles 7 and 14.

2.11 A substantial issue that must be considered by the Diplomatic Conference is whether to accord rights to performers in audiovisual fixations of their performances. In the provisions on rights of performers in the proposed Treaty, alternatives are presented in such a manner as to permit the Conference to visualize a Treaty with or without this new right. As noted above, item (c) contains the first instance of this presentation of alternatives. Corresponding

[Article 2, continued]

(b) "phonogram" means the fixation of the sounds of a performance or of other sounds, or of a representation of sounds; an audiovisual fixation, the representation of sounds and images or the sound part of either is not a phonogram;

(c) "fixation" means the embodiment of

Alternative A: sounds,

Alternative B: sounds or images,

or of the representations thereof, from which they can be perceived, reproduced or communicated through an appropriate device;

[Article 2 continues]

alternatives are included in nine other provisions, namely paragraph (h) of Article 2, definition of "communication to the public"; Article 5, moral rights of performers; Article 6, economic rights of performers in their unfixed performances; Article 7, right of reproduction; Article 8, right of modification; Article 9, right of distribution and right of importation; Article 10, right of rental; Article 11, right of making available of fixed performances; and Article 21, term of protection.

2.12 It may be recalled that the issue of the scope of the rights of performers has come to the fore as a result of some five years of discussion in the area. The International Bureau of WIPO prepared a memorandum for the first session of the Committee of Experts on a Possible Protocol to the Berne Convention in November 1991 (document BCP/CE/I/2). The memorandum proposed (in paragraphs 56 to 70) that the Committee consider including the rights of producers of phonograms in the Protocol. While there was broad support for improving the level of protection accorded to these producers, most delegations and observers took the view that phonograms were not appropriate subject matter for a Protocol to the Berne Convention (see document BCP/CE/I/4, paragraph 110). It was also recognized that improvements in the rights of producers of phonograms could not be effectively discussed without also discussing the rights of the performers whose performances were included in the phonograms.

2.13 On September 29, 1992, the Assembly and the Conference of Representatives of the Berne Union established and set terms of reference for a Committee of Experts on a Possible Instrument on the Protection of the Rights of Performers and Producers of Phonograms. Subparagraph (viii) of the decision set the terms of reference for the Committee of Experts as covering "all questions concerning the effective protection of rights of performers and producers of phonograms". In the memorandum prepared by the International Bureau for the first session of the Committee, the International Bureau stated that there seemed to be two possible interpretations of the terms of reference (document INR/CE/I/2, paragraphs 8 and 9).

2.14 The first possible interpretation was that the protection of the rights of performers should only be discussed as far as the fixation of their performances in phonograms and the exploitation of such fixations were concerned. This would have excluded any consideration of a new right of performers in respect of audiovisual fixations of their performances. The second possible interpretation was that all issues concerning the rights of performers should be discussed, including the questions surrounding audiovisual fixations; in support of this interpretation, the observation was made that the terms of reference included no restriction or qualification as to what rights should be discussed.

2.15 The Committee held its first session in June-July 1993, and at the conclusion of the general debate in the first session, a consensus developed in favour of the second interpretation, following the observation that "nothing in the terms of reference determined by the Governing Bodies precluded a discussion of the question of possible provisions on the rights of performers in audiovisual productions...". The Director General of WIPO then stated that in due time the International Bureau would prepare a document on audiovisual fixations (see document INR/CE/I/3, paragraphs 63 and 64).

[Article 2 continues on page 19]

2.16 During the third session of the Committee of Experts, many delegations expressed support for the inclusion in the new instrument of a right of performers in audiovisual fixations (see document INR/CE/III/3, paragraph 31). A discussion paper on this subject was prepared by the International Bureau of WIPO for the fourth session of the Committee of Experts, held in September 1995 (document INR/CE/IV/3). Arguments were presented in favour of and in opposition to the inclusion of these new rights, and a review of the relevant provisions of the Rome Convention, the TRIPS Agreement and various national laws and regional instruments was undertaken.

2.17 For the fourth session in September 1995 and the fifth session in February 1996, Government members of the Committee and the European Community and its Member States were invited to deliver proposals for circulation as working documents in the Committee sessions. In the fourth session, two proposals were presented: the European Community and its Member States suggested that certain rights of performers should be extended to audiovisual fixations, and the United States of America presented a proposal confining the protection of performers to sound recordings only. In the fifth session of the Committee, Argentina, Brazil, the European Community and its Member States, the People's Republic of China, and the Sudan presented proposals that extended the protection of performers in audiovisual fixations of their performances to varying degrees. Canada, Japan, the United States of America, and Uruguay presented proposals that, with limited exceptions, were confined to sound recordings.

2.18 It became clear from these proposals and the deliberations of the Committee of Experts that it would not be possible to present a proposal that would reasonably satisfy the interests of the advocates on each side of this issue. Accordingly, the proposed Treaty presents each position as an alternative. This was discussed in some detail in Note 2.11 above. In each instance, Alternative A contains a proposal that is confined to sound, musical performances or musical performances fixed in phonograms only, and Alternative B contains a proposal extending protection to audiovisual fixations. This method of drafting acknowledges the disagreement and calls upon the participants in the Diplomatic Conference to negotiate toward a resolution. In order to further facilitate consideration of this matter and provide another model for the possible resolution of this issue a further alternative, Alternative C in Article 25(1), is presented. This alternative solution is based on the possibility of making a reservation concerning the scope of the rights of performers. This alternative could be used only if the Diplomatic Conference bases its decision on this matter on Alternatives B. The provisions concerning rights of performers would in that case extend the protection to audiovisual fixations of performances. By making the reservation provided for in Alternative C of Article 25(1), a party becoming a Contracting Party to the Treaty could limit the protection it grants according to the Treaty to sounds, musical performances and musical performances fixed in phonograms only.

2.19 "Producer of phonograms" was defined in Article 3(c) of the Rome Convention as "the person who, or the legal entity which, first fixes the sounds of a performance or other sounds". Item (d) adds only one element to this definition: for the reasons identified in Note 2.07, "representations of sounds" have been explicitly included. In all other respects, the definition follows the established provisions of the Rome Convention. The producer is the person who takes the initiative, coordinates and assumes economic and other responsibility for the first fixation of a phonogram, regardless of the technology used. It is worth pointing out that

[Article 2, continued]

(d) "producer of a phonogram" means the person, or the legal entity, who or which first fixes the sounds of a performance or other sounds, or the representations of sounds;

[Article 2 continues]

digitizing or "re-mastering" of existing fixations of performances is not a "first fixation", irrespective of the investment made in corrections, noise removal and other such alterations.

2.20 Item (e) defines the term "publication". In Article 3(d) of the Rome Convention, "publication" has been defined as follows: " 'publication' means the offering of copies of a phonogram to the public in reasonable quantity". The proposed definition includes two additional elements. First, it adds a consent requirement such that a performance or phonogram cannot be "published" under the proposed Treaty without the consent of the relevant rightholder; this makes the concept of publication in the proposed Treaty similar to that in the Berne Convention. Second, the proposed definition adds language to take into account the new technological environment in which publication now may take place. This addition reflects the proposals made by Argentina and the International Bureau of WIPO. The making available of copies to the public through the means referred to in Articles 11 and 18 of the proposed Treaty has been added as an act that constitutes publication. In these Articles, an exclusive right is proposed to cover the making available of phonograms by interactive on-demand transmissions. Making performances and phonograms available in the on-line context may be compared to the establishment of a global record shop, offering copies to everyone, everywhere, and still satisfying the condition of "reasonable quantity" because the availability of copies is virtually unlimited.

2.21 According to the proposed definition in item (f), "rental" of a phonogram means any transfer for consideration of the possession of a copy of a phonogram for a limited period of time. The definition corresponds the proposal made by Argentina. No definition of the "public lending" of a phonogram has been incorporated in the proposed Treaty. Normally, "public lending" means the transfer of the possession of an object for a limited period of time, free of charge, in a not-for-profit transaction.

2.22 The first part of the definition of "broadcasting" in item (g) follows the definition found in Article 3(f) of the Rome Convention, according to which " 'broadcasting' means the transmission by wireless means for public reception of sounds or of images and sounds". For the reason discussed in Note 2.07, transmissions of the representations of sounds or of images and sounds have been added to the proposed definition. The second part of the definition confirms in explicit terms that transmission for public reception by satellite is "broadcasting", if it fulfils the same requirements. The third part of the definition deals with encrypted satellite broadcasting. In situations where means for decrypting are made available to the public, the effect of the transmission corresponds to the effect of any traditional broadcasting from the point of view of both the public and the rightholders phonograms. Encrypted transmissions may be broadcasts just as transmissions of open signals are. A condition is that the means for decrypting are provided to the public by the broadcasting organization or with its consent.

2.23 The proposed definitions do not include a definition of "rebroadcasting"; this is a simplification as compared to the Rome Convention. According to Article 3(g) of the Rome Convention, "rebroadcasting" means the simultaneous broadcasting by one broadcasting organization of a broadcast by another broadcasting organization. Rebroadcasting is broadcasting. In rebroadcasting, the relevant sounds or sounds and images have already been broadcast. To import the definition from the Rome Convention does not seem necessary. It

[Article 2, continued]

(e) "publication" of a fixed performance or a phonogram means

(i) the offering of copies of the fixed performance or the phonogram to the public, or

(ii) the making of the fixed performance or the phonogram available to the public, by wire or wireless means, in such a way that members of the public may access it from a place and at a time individually chosen by them,

with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;

(f) "rental" of a phonogram means any transfer of the possession of a copy of a phonogram for consideration for a limited period of time;

(g) "broadcasting" means the transmission by wireless means for public reception of sounds or of images and sounds or of the representations thereof; such transmission by satellite is also "broadcasting"; transmission of encrypted signals by satellite is "broadcasting" where the means for decrypting are provided to the public by the broadcasting organization or with its consent;

[Article 2 continues]

may be noted that the right of broadcasting in Article 7 does not cover rebroadcasting. This has been explicitly noted in the provision.

2.24 There is no definition of "communication to the public" in the Rome Convention. In item (h) a definition of "communication to the public" is offered. The definition has been tailored to the specific purposes of Articles 6, 12 and 19 of the proposed Treaty, which relate to rights in respect of communication. The definition has two parts. The first part defines "communication to the public" as transmission to the public by any medium other than broadcasting. The definition thus excludes wireless transmissions for public reception and covers any transmission by wire of an actual performance or a performance played from a phonogram to the public, when the public is not present in the place where the performance or the playing of the phonogram occurs. The definition also covers all retransmissions by wire of any other transmissions. Further examples are given in the Notes concerning each of the respective rights.

2.25 The distinction between broadcasting and communication is maintained simply by excluding broadcasting from the scope of communication to the public, as now defined. This is done purely for practical purposes and to avoid any confusion relating to the rights of performers in broadcasting and communication to the public of phonograms. These provisions lay the foundation for important economic rights accorded to the performers and producers of phonograms in the Rome Convention even if the level of protection they are accorded varies due to the reservations permitted under the Rome Convention.

2.26 Item (h) includes one of the presentations of the alternatives discussed in Note 2.11. Alternative A covers only the sounds of a performance, whereas Alternative B extends coverage to images in addition to sounds. It should be noted that this alternative is relevant only insofar as the rights of performers in their unfixed performances under Article 6 are concerned.

2.27 The second part of the definition in item (h) is included in the provision solely for the purposes of Articles 12 and 19. "Communication to the public" includes under these Articles making the sounds or the representations of sounds fixed in a phonogram audible to the public. Communication of this type may include the direct playing of phonograms to the public in a discotheque, by means of a jukebox, etc. This part of the definition is also meant to include making sounds fixed in phonograms audible to the public in an indirect way, such as through a radio or television set located in a cafe, restaurant, hotel lobby or other premises open to the public.

[End of Notes on Article 2]

[Article 2, continued]

(h) "communication to the public" of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of

Alternative A: sounds

Alternative B: the images or sounds

of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Articles 12 and 19, "communication to the public" includes making the sounds or representations of sounds fixed in a phonogram audible to the public.

[End of Article 2]

Notes on Article 3

3.01 The basic rules and principles of the Rome Convention are presently (as of August 1, 1996) applied by 51 Contracting States that have ratified or acceded to the Convention. The rules concerning the conditions for protection are in Articles 4 and 5. Article 4 establishes points of attachment for granting national treatment to performers, and Article 5 establishes points of attachment for granting national treatment to producers of phonograms.

3.02 These conditions for protection are quite well established. Moreover, a significant number of States have conformed their national legislation to them. It is therefore both feasible and sound to use these conditions when developing further the protection of performers and producers of phonograms.

3.03 In fact, this method was used when 117 states concluded the TRIPS Agreement. According to Article 1.3, Members of the Agreement shall accord the treatment provided for in the Agreement to the nationals of other Members, and "[i]n respect of the relevant intellectual property right, the nationals of other Members shall be understood as those natural or legal persons that would meet the criteria for eligibility for protection provided for in the Paris Convention (1967), the Berne Convention (1971), the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits, were all members of the WTO members of those Conventions". In the same provision, the TRIPS Agreement even adopted the mechanism of notification provided for in Article 5.3 of the Rome Convention in respect of the choice of certain criteria for the protection of producers of phonograms.

3.04 It is proposed in Article 3 that a solution similar to that adopted in the TRIPS Agreement should be adopted in this proposed Treaty.

3.05 According to paragraph (1), the protection provided for in this Treaty would be accorded to the performers and producers of phonograms who are nationals of other Contracting Parties.

3.06 Paragraph (2) reproduces the language and method used in the TRIPS Agreement to incorporate the criteria for eligibility for protection contained in the Rome Convention. A clause is added to paragraph (2) obligating Contracting Parties to apply the relevant definitions in Article 2 of the proposed Treaty with respect to the criteria of eligibility in the Rome Convention. The relevant definitions are those of "publication", "fixation", "performers", "producer of a phonogram" and "phonogram".

3.07 Paragraph (3) permits Contracting Parties to make the choices permitted by Article 5.3 of the Rome Convention, but it obligates them to make a notification to the Director General of WIPO. For the sake of completeness, a similar obligation is set concerning Article 17.

3.08 The system created in Article 3 employs the established rules on points of attachment without reproducing or "re-inventing" them and, even more importantly, without deviating from them. This should streamline the negotiations on the proposed Treaty, the implementation of its obligations in national laws, and its legal interpretation, since it is based on well-known, established interpretations of an existing treaty.

Article 3

Beneficiaries of Protection under this Treaty

(1) Contracting Parties shall accord the protection provided under this Treaty to the performers and producers of phonograms who are nationals of other Contracting Parties.

(2) The nationals of other Contracting Parties shall be understood to be those performers or producers of phonograms that would meet the criteria for eligibility for protection provided under the Rome Convention, were all the Contracting Parties to this Treaty Contracting States of that Convention. In respect of these criteria of eligibility, Contracting Parties shall apply the relevant definitions in Article 2 of this Treaty.

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

[End of Article 3]

3.09 Article 2 of the proposed New Copyright Treaty employs a similar device. However, it does not address the principle of national treatment laid down in the proposed Article 4 of the present document.

[End of Notes on Article 3]

[Article 4 starts on page 31]

Notes on Article 4

4.01 Performers and producers of phonograms who fulfil the criteria of eligibility shall enjoy, in respect of performances and phonograms for which they are protected under the proposed Treaty, the rights granted by Contracting Parties to their own nationals. This basic clause on national treatment is laid down in Article 4.

4.02 The provisions of paragraph (1) have been formulated to put into use the framework proposed in Article 3. Each Contracting Party shall accord to the nationals of other Contracting Parties the treatment that it accords to its own nationals. Nationals of other Contracting Parties must be understood as defined in Article 3(2). National treatment is confined to the protection provided for in the proposed Treaty. These two points have been explicitly included in the provision. The provisions concerning eligibility for protection follow those in the TRIPS Agreement.

4.03 Paragraph (2) provides a clause formulated in accordance with Article 2.2 of the Rome Convention. According to these terms, national treatment for performers and producers of phonograms is subject to protection as set out in the relevant Articles of the proposed Treaty. It is also explicitly provided for in this provision that national treatment is subject to the limitations and exceptions specifically allowed in the proposed Treaty. The interpretation of this provision is intended to follow the interpretation of Article 2.2 of the Rome Convention.

[End of Notes on Article 4]

Article 4

National Treatment

(1) Each Contracting Party shall accord to nationals of other Contracting Parties, as defined in Article 3(2), the treatment it accords to its own nationals with regard to the protection provided for by this Treaty.

(2) The treatment provided for in paragraph (1) shall be subject to the protection specifically guaranteed, and the limitations and exceptions specifically provided for, in this Treaty.

[End of Article 4]

Notes on Article 5

5.01 Presently, performers do not enjoy moral rights under the Rome Convention or any other international agreement.

5.02 Article 5 lays down basic provisions on the moral rights of performers. They are modelled on Article *6bis* of the Berne Convention, subject only to *mutatis mutandis* changes.

5.03 Paragraph (1) sets out the right of the performer to be identified as the performer of his performances and to object to any distortion, etc. of them that would be prejudicial to his honour or reputation. As with authors' rights, alteration or modification *per se* does not concern moral rights: the question is whether the author's or performer's honour or reputation is damaged.

5.04 Paragraph (1) offers a choice of two alternatives concerning whether the rights of performers should extend to audiovisual fixations of their performances; this is one of the points discussed in Note 2.11 above that will require a decision by the Diplomatic Conference. Alternative A confines the protection of moral rights to musical performances only. Alternative B would extend the protection to all performances.

5.05 Paragraph (2) reproduces *mutatis mutandis* Article *6bis(2)* of the Berne Convention, which concerns moral rights after the death of a performer.

CHAPTER II
RIGHTS OF PERFORMERS

Article 5

Moral Rights of Performers

(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall

Alternative A: , as regards his musical performances, have the right

Alternative B: have the right

to be identified as the performer of his performances and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, his performances that would be prejudicial to his honour or reputation.

(2) The rights granted to a performer in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the Contracting Party where protection is claimed. However, those Contracting Parties whose legislation, at the moment of their ratification of or accession to this Treaty, does not provide for protection after the death of the performer of all rights set out in the preceding paragraph may provide that some of these rights will, after his death, cease to be maintained.

[Article 5 continues]

5.06 Paragraph (3) reproduces the provisions of Article *6bis*(3) of the Berne Convention.

5.07 Moral rights exist "independently of the performer's economic rights, and even after the transfer of those rights". No language regarding inalienability or *inter vivos* transfer of these rights is included in the proposal. The performer may exercise his moral rights, and he has the option not to exercise these rights; he may even waive them. To take an example, a performer may, in a contract, agree to refrain indefinitely from identifying himself as the performer of a particular performance. The position of a performer as the performer of a given performance cannot, of course, be transferred; no one can step into his shoes in this sense. The moral rights provisions in this Article have been formulated closely in line with Article *6bis* of the Berne Convention, and the established interpretation of that Article should be used directly in construing the present Article.

5.08 Argentina, Brazil, Canada, the People's Republic of China, and the Sudan made proposals on moral rights for the February 1996 session of the Committees of Experts. The proposals made by Argentina and Brazil were the most detailed ones and were parallel in substance to Article *6bis* of the Berne Convention.

[End of Notes on Article 5]

[Article 5, continued]

(3) The means of redress for safeguarding the rights granted under this Article shall be governed by the legislation of the Contracting Party where protection is claimed.

[End of Article 5]

Notes on Article 6

6.01 The Rome Convention and the TRIPS Agreement guarantee certain rights to performers in their unfixed performances. Article 7 of the Rome Convention provides performers with the right to prevent (1) the broadcasting and communication to the public of their unfixed performances without their consent except where the performance is already a broadcast performance, and (2) the fixation of their performance without their consent. Under the TRIPS Agreement, performers have the right to control the fixation of their unfixed performances in a phonogram.

6.02 Article 6 of the proposed Treaty provides performers with an exclusive right to control the fixation of their unfixed performances in any medium, and as is discussed below, the right may or may not be limited to musical performances.

6.03 The right under item (i) covers broadcasting and communication to the public as defined in Article 2, except that the right does not include rebroadcasting and retransmission by wire of a broadcast which are explicitly excluded from the scope of the right. The right of communication thus covers cable-originated transmissions and any other "original" wire or communication network transmissions of live performances, such as net radio, as well as communication by wire of a performance to another public not present in the hall where the performance takes place.

6.04 Item (ii) extends the right to the fixation of unfixed performances.

6.05 This Article contains, as do most of the other Articles pertaining to rights of performers, one of the presentations of the "2.11 alternatives". Alternative A confines the exclusive right to unfixed musical performances. It should be noted that Alternative A would cover broadcasting by radio and television, communication to the public and fixation of musical performances by audiovisual means. Alternative B would extend protection to cover all performances.

[End of Notes on Article 6]

Article 6

Economic Rights of Performers in their Unfixed Performances

Performers shall enjoy the exclusive right of

Alternative A: authorizing, as regards their musical performances:

Alternative B: authorizing:

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

[End of Article 6]

Notes on Article 7

7.01 Article 7 of the Rome Convention accords to performers the right of reproduction. The protection provided to performers by the Convention includes "the possibility of preventing" the reproduction of a fixation of their performances without their consent. This "possibility of preventing" is subject to certain specific conditions. The right applies (1) if the original fixation was made without the consent of the performer, (2) if the reproduction is made for purposes different from those for which the performer gave his consent, or (3) if the original fixation was permitted to be made on the basis of a limitation to the performer's rights and the reproduction of it is made for a different purpose.

7.02 Article 7 of the proposed Treaty contains provisions on performers' rights of reproduction.

7.03 In paragraph (1), it is proposed that performers shall enjoy the exclusive right of authorizing direct and indirect reproduction of their fixed performances, whether permanent or temporary, in any manner or form.

7.04 There are several elements in the proposal that differ from the provisions of the Rome Convention and that imply an improvement in the level of protection. Instead of providing "the possibility of preventing", it is proposed that an exclusive right would be granted to performers in clear terms and without any specific conditions.

7.05 One of these elements 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 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 fixed performance 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.

7.06 Another element in the provision is intended to clarify the widely held understanding that both permanent and temporary reproduction constitute reproduction. The result of reproduction may be a tangible, permanent copy like a phonogram, a recording or a CD-ROM. It may as well be a copy of the fixed performance on the hard disk of a PC, or in the working memory of a computer. A fixed performance that is stored for a very short time may be reproduced or communicated further, or it may be made perceptible by an appropriate device.

7.07 Under proposed Article 7, performers would enjoy the exclusive right of authorizing reproduction "in any manner or form". This element manifests the broad scope of the right. Thus, storage of a fixed performance in any electronic medium, for instance, constitutes reproduction. Reproduction includes such acts as uploading and downloading a fixed performance to or from the memory of a computer. Digitization, i.e. the transfer of a fixed performance embodied in an analog medium to a digital one constitutes always an act of reproduction. The expression "in any manner or form" is already found in Article 9(1) of the

Article 7

Right of Reproduction

(1) Performers shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

in any manner or form.

[Article 7 continues]

Berne Convention concerning the right of reproduction enjoyed by authors. It has been included in the present proposal to make it clear that there is no difference between the rights of performers and authors in this respect.

7.08 Paragraph (1) contains one of the presentations of the "2.11 alternatives". According to Alternative A the right of reproduction would apply only to musical performances fixed in phonograms, whereas Alternative B would extend the right to cover all performances fixed in any medium.

7.09 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 fixed performance, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the fixed performance 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 fixed performance that is authorized by the performer or permitted by law. The purpose 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 13(2), limitations are further confined to cases that pass the three-step test in that Article, which corresponds to the test in Article 9(2) of the Berne Convention.

7.10 For the May 1996 session of the Committees of Experts the European Community and its Member States proposed that the proposed Treaty include a clause on the right of reproduction of performers (document BCP/CE/VII/1-INR/CE/VI/1). 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 fixed performance in any electronic medium constitutes a reproduction. This includes acts such as uploading and downloading of a fixed performance to or from the memory of a computer."

7.11 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committee. 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.

7.12 The proposal included in paragraph (1) of this Article 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.

7.13 For the February 1996 session of the Committees of Experts Argentina made a proposal on the definition of "reproduction": " 'Reproduction' of a phonogram or of a performance fixed on a phonogram means the fact of making one or more originals or copies of all or a substantial part thereof, regardless of the method used to make the copy or the medium in which it is made, including storage of the phonogram or of the performance fixed on a phonogram in electronic form, regardless of the duration of the storage." The proposal corresponds in substance with the earlier proposal made by the International Bureau of WIPO. As was stated in Note 2.10, above no definition of "reproduction" is included in the proposed

[Article 7, continued]

(2) Subject to the provisions of Article 13(2), 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 fixed performance 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 fixed performance that is authorized by the performer or permitted by law.

[End of Article 7]

Treaty. It appears, however, that the operative clause on the right of reproduction includes all the essential aspects of the proposal made by Argentina.

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

7.15 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 fixed performance 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 fixed performance perceptible. In such cases, successive reproduction of portions of a fixed performance may, over a period of time, cover the whole fixed performance.

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

7.17 Today, different countries 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 a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary position. The Rome Convention does not serve to harmonize the right of reproduction among the Contracting States of that Convention.

7.18 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 system of rights in a digital future.

7.19 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.

7.20 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 many countries, having freedom of interpretation with respect to these rights, 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.

7.21 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 fixed performance. The cases shall pass the three-step test of Article 13(2).

[Article 8 starts on page 47]

7.22 Note 11.07, concerning liability issues, applies with equal force to this Article.

7.23 Proposals concerning the performers' right of reproduction were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the People's Republic of China, the Sudan, the United States of America, and Uruguay. Canada suggested that economic rights for performers in their performances fixed in phonograms would be included in the Treaty. The European Community and its Member States made a further proposal on this issue for the May 1996 session of the Committee of Experts.

7.24 Article 14 contains provisions concerning the right of reproduction of producers of phonograms; it corresponds closely to this Article. The Notes on Article 14 concerning comparable elements are parallel to those above.

[End of Notes on Article 7]

[Article 8 starts on page 47]

Notes on Article 8

8.01 Article 8 provides performers with the exclusive right to control modification of their performances.

8.02 The Article combines proposals made by Argentina, the United States of America, and Uruguay. Argentina used the term "modification" in its proposal, whereas the other proposals used the terms "adaptation" and "alteration". The term "modification" has been used in proposed Article 8 because it is sufficiently neutral and general and because it does not imply any interference with Article 2(3) of the Berne Convention, according to which certain adaptations and alterations of works may be protected.

8.03 The Article includes another instance of the "2.11 alternatives". Alternative A confines the right of modification to musical performances fixed in phonograms. Alternative B would extend the protection to any performances fixed in any medium.

8.04 It was suggested in sessions of the Committees of Experts that no separate right of alteration, adaptation or modification is necessary. It has been argued that any alteration or modification of a performance or a phonogram cannot occur without reproducing the fixation of the performance or the phonogram. This modification right is proposed, however, in order to cover any possible situation in which digital or other technological manipulation might be used to circumvent traditional notions of reproduction.

8.05 Article 15 contains provisions concerning the rights of producers of phonograms; it corresponds closely to this Article. The Notes on Article 15 concerning comparable elements are parallel to those above.

[End of Notes on Article 8]

Article 8

Right of Modification

Performers shall enjoy the exclusive right of authorizing the modification of their

Alternative A: musical performances fixed in phonograms.

Alternative B: performances fixed in any medium.

[End of Article 8]

Notes on Article 9

9.01 Performers do not have rights in respect of the distribution of their fixed performances or phonograms under any existing international agreement.

9.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a general right of distribution for performers, accompanied by appropriate provisions on exhaustion 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 fixed performance. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a fixed performance 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.

9.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even be dealt with in an international instrument in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 10 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

9.04 Article 9 provides an exclusive right of distribution to performers in their fixed performances. Because of the differences described in Note 9.02, two alternatives are offered. Alternative E is based on the principle of national or regional exhaustion. Alternative F allows global or international exhaustion. The basic provision on the right of distribution is identical in both alternatives: performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their fixed performances 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.

9.05 Alternative E also provides a right of importation, in addition to the general right of distribution, to performers in respect of copies of their fixed performances.

9.06 Paragraph (1) of Alternative E provides for the exclusive right. Item (i), on the right of distribution, and item (ii), on the right of importation, in paragraph (1) of Alternative E both contain a set of "2.11 alternatives". According to both Alternatives A the right of distribution would apply only to musical performances fixed in phonograms, whereas in both Alternatives B any performances fixed in any medium would be covered.

9.07 Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of fixed performances 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 personal and non-commercial use.

9.08 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

Article 9

Alternative E

Right of Distribution and Right of Importation

(1) Performers shall enjoy the exclusive right of authorizing:

(i) the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

through sale or other transfer of ownership;

(ii) the importation of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

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 a fixed performance 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 9 continues]

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. Thus, there is no need to make separate mention of regional economic integration areas.

9.09 Alternative F 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 fixed performance by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

9.10 No right of importation is provided for in Alternative F.

9.11 Paragraph (1) of Alternative F provides the exclusive right. It contains another presentation of the "2.11 alternatives". According to Alternative A the right of distribution would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

9.12 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 F 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.

9.13 The main contents of Alternative E follow the proposals made by Argentina, Brazil, the European Community and its Member States, the Sudan, the United States of America, and Uruguay for the February 1996 session of the Committees of Experts. Alternative F is based on the main approach taken in the proposal made by Japan.

9.14 Article 16 contains provisions concerning the right of distribution of producers of phonograms; it corresponds closely to this Article. The Notes on Article 16 concerning comparable elements are parallel to those above.

[End of Notes on Article 9]

[Article 9, continued]

Alternative F

Right of Distribution

(1) Performers shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their

Alternative A: musical performances fixed in phonograms

Alternative B: performances fixed in any medium

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 performances by or pursuant to an authorization.

[End of Article 9]

Notes on Article 10

10.01 The Rome Convention does not contain any provisions on the rental of copies of fixed performances or phonograms.

10.02 Article 10 provides performers with the exclusive right to authorize rental of the original and copies of their fixed performances. The rental of phonograms has been defined in Article 2.

10.03 Paragraph (1) contains another presentation of the "2.11 alternatives". According to Alternative A, the right of rental would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

10.04 Paragraph (2) contains a clause permitting Contracting Parties to maintain, for a limited period of time, any systems they may have for providing equitable remuneration to performers for the rental of copies. This clause has been modelled on Article 14.4 of the TRIPS Agreement. According to the TRIPS Agreement, Members "may maintain such systems provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders". Contracting Parties that, on April 15, 1994, had and continue to have such systems may maintain them; however, instead of leaving this possibility open for an indefinite period of time, a three-year time limit is proposed, beginning from the entry into force of the proposed Treaty.

10.05 The performers' right of rental in respect of their fixed performances was included in the proposals submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay. Japan confined its proposals to the rental of phonograms, and the United States of America confined its proposals to phonograms and musical performers only.

10.06 Article 17 contains provisions concerning the right of rental of producers of phonograms; it corresponds closely to this Article. The Notes on Article 17 concerning comparable elements are parallel to those above.

[End of Notes on Article 10]

Article 10

Right of Rental

(1) Performers shall enjoy the exclusive right of authorizing the rental of the original and copies of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

even after distribution of them by or pursuant to authorization by the performer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of performers for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

[End of Article 10]

Notes on Article 11

11.01 Article 11 introduces a new right for performers: the exclusive right of making their fixed performances available to the public. Article 11 is based on the May 1996 proposal made by the European Community and its Member States.

11.02 The proposed new right covers the making available of fixed performances by wire or wireless means. A distinction is thus made between the distribution of copies of fixed performances in physical, tangible form, which is covered by the right of distribution under Article 9, and the making available of fixed performances by transmission.

11.03 The right of making available is limited to situations where members of public may access fixed performances from a place and at a time individually chosen by them. Thus, availability is based on interactivity and on on-demand access.

11.04 The proposed new right is designed to operate as a basic rule for the proper functioning of the electronic marketplace. The electronic or digital "record shop" can be compared to a record manufacturing plant or a CD factory. The functions of the manufacturing and distribution portions of the music industry and retail record shops may be replaced by a database open to the public for the direct delivery of music productions via communication networks to home computers.

11.05 The exclusive right laid down in Article 11 covers the making available of fixed performances through systems that permit direct access to a certain performance stored in a database. The expressions "may access" and "from a place and at a time individually chosen" cover directly all situations that are interactive.

11.06 There are, however, systems and services based on particular technical arrangements and programming structures which make it possible to access the fixed performances provided by the service without such access being fully interactive. Such services are offered on a subscription basis. From the point of view of the members of the public these services are "near to interactive". In many cases the only difference between interactive and "near to interactive" is in the time required for access. For both members of the public and rightholders, the shorter the delay, the closer the effect of such practices is to those of services that enable immediate access. The volume of protected subject matter that may be offered to the public in this way, combined with the fact that it may be made available through a number of parallel channels may add significantly to the ease of access. As the technical capacity of storage devices and communication networks grows these services are likely to develop further. They can be established by using cable or wire networks or by wireless means.

11.07 Practices described in the preceding Note could conflict with the normal exploitation of fixed performances and unreasonably prejudice the legitimate interests of rightholders. Single channels offered on a subscription basis without being part of such services do not have these effects.

11.08 The proposed right of making available of fixed performances in Article 11 is intended to cover both directly interactive ways of making available and services with similar effects,

Article 11

Right of Making Available of Fixed Performances

Performers shall enjoy the exclusive right of authorizing the making available of their

Alternative A: musical performances fixed in phonograms,

Alternative B: performances fixed in any medium,

by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[End of Article 11]

as described above. Both types of service fulfil the criteria laid down in Article 11 since members of the public may access fixed performances from a place and at a time individually chosen by them.

11.09 The right proposed in Article 11 is an exclusive right. This is fundamental.

11.10 Article 11 contains another presentation of the "2.11 alternatives". According to Alternative A the right of making available would apply only to musical performances fixed in phonograms, whereas Alternative B would cover all performances fixed in any medium.

11.11 It is strongly emphasized that Article 11 does not attempt to define the nature or extent of liability on a national level. The proposed international agreement determines only the scope of the exclusive rights that shall be granted to performers in respect of their fixed performances. The question of who shall be 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.

11.12 Proposals concerning digital transmission were presented for the February 1996 session of the Committees of Experts by Argentina, the United States of America, and Uruguay. The group of countries of Latin America and the Caribbean considered that an exclusive right of digital transmission might be adopted by national legislation as a form of communication to the public or as a right of distribution by transmission. The European Community and its Member States made a proposal on this issue for the May 1996 session of the Committees of Experts.

11.13 Article 18 contains provisions concerning the right of making available of producers of phonograms; it corresponds closely to this Article. The Notes on Article 18 concerning comparable elements are parallel to those above.

[End of Notes on Article 11]

[Article 12 starts on page 59]

Notes on Article 12

12.01 Article 12 of the Rome Convention grants to performers and to producers of phonograms the right to a single equitable remuneration if their phonogram is published for commercial purposes or if a reproduction of the phonogram is used for broadcasting or any communication to the public. The remuneration is paid by the user to the performer or to the producer of the phonogram or to both. In the absence of an agreement between these parties, national legislation may lay down the rules that govern the sharing of this remuneration.

12.02 The right to remuneration is subject to the reservations permitted in Article 16 of the Rome Convention. Under Article 16, any state may declare that it will not apply the provisions of that Article or that it will not apply them in respect of certain uses. Furthermore, a state may declare that it will not apply the right to remuneration in respect of phonograms the producer of which is not a national of another Contracting State. A Contracting State may also make the right to remuneration subject to reciprocity as regards the extent to which, and the term for which, another state grants protection to phonograms fixed by a national of the state making such a reservation.

12.03 Article 12 of the proposed Treaty accords to performers a right to equitable remuneration for the use of phonograms (in which their performances are fixed) published for commercial purposes or the use of a reproduction of such phonograms for broadcasting or any communication to the public. In general, this right corresponds to the right provided for in Article 12 of the Rome Convention.

12.04 Paragraph (1) does, however, propose additional elements that are not included in Article 12 of the Rome Convention. The right to remuneration would cover not only direct uses of phonograms but also indirect uses for broadcasting or for communication to the public. Remuneration should always be received both by performers and producers. In this way, the proposed Article 12 excludes the possibility that performers would not receive at least a single equitable remuneration.

12.05 "Broadcasting" and "communication" are defined in Article 2. The definition of broadcasting covers rebroadcasting as discussed in Note 2.23 above. Communication covers all cases of cable or wire transmission, such as cable-originated television transmissions and sound radio by cable or in communication networks. Because the right covers both direct and indirect uses of phonograms, all forms of retransmission by cable and wire also fall within the scope of the right. The definition of communication also covers situations where a phonogram is played directly to the public present at the same location. Indirect communication of a phonogram covers situations where a radio or television set or other apparatus is used to make a phonogram that is included in a broadcast or wire communication audible to the public in a cafe, restaurant, hotel lobby or other place that is open to the public.

12.06 Paragraph (2) permits Contracting Parties to establish rules governing the way in which remuneration is shared between performers and producers of phonograms and the way in which users pay the required remuneration. These are logistical concerns that are beyond the scope of international agreements.

Article 12

Right to Remuneration for Broadcasting and Communication to the Public

(1) Performers shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

[Article 12 continues]

12.07 As noted above, the right to remuneration under the Rome Convention is subject to reservations. This basic structure has been reproduced in the proposed Treaty. The reservations clause in paragraph (3) leaves the degree of reservation open, subject to the provisions of paragraph (4). Contracting Parties may make minute or more extensive reservations to the right of remuneration. Contracting Parties may even set reciprocity (as to particular terms, such as duration of protection, or complete reciprocity) as a condition for according the remuneration right to performers and producers of phonograms who fulfil the criteria of eligibility in relation to another Contracting Party. Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16.1(a)(iv) of the Rome Convention. However, Contracting Parties may not make any reservations to this Article, or the rights provided for therein, that would derogate from their obligations to each other under the Rome Convention; Article 1(1) of the proposed Treaty makes this clear.

12.08 In paragraph (4) it is proposed that the possibility of making a reservation to the right of remuneration laid down in this Article would not apply to broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription-based services. The reason for this proposal is that in the context of such services, fixed performances of performers are exploited directly for commercial gain.

12.09 The remuneration right proposed in this Article is an attempt to reconcile two extremes: on the one hand, there is the position that performers and producers of phonograms are not entitled to any right to remuneration in respect of the fruits of their labour; on the other hand, there is the position that the right to remuneration should be broad or even that the right should be exclusive. Written proposals concerning this matter were submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

12.10 Article 19 contains provisions concerning the right of remuneration of producers of phonograms; it corresponds closely to this Article. The Notes on Article 19 concerning comparable elements are parallel to those above.

[End of Notes on Article 12]

[Article 12, continued]

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

[End of Article 12]

Notes on Article 13

13.01 Article 13 sets forth limitations of and exceptions to the rights of performers provided for in this Treaty.

13.02 Paragraph (1) reproduces the main principle of Article 15.2 of the Rome Convention. Contracting Parties may provide at the national level the same kinds of limitations or exceptions with regard to the protection of performers under the proposed Treaty as they provide with regard to the protection of copyright in literary and artistic works.

13.03 As drafted, the proposed Treaty incorporates (in this Article) the structure employed in Article 9(2) of the Berne Convention to limit the scope of permitted limitations of and exceptions to authors' reproduction rights. The proposed Treaty applies this structure to all limitations and exceptions permitted to be taken hereunder. The structure includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with the normal exploitation of the protected subject matter. Finally, any limitations or exceptions may never unreasonably prejudice the legitimate interests of the performer.

13.04 Paragraph (2) contains these provisions. Interpretation of them may follow the established interpretation of Article 9(2) of the Berne Convention.

13.05 Written proposals on limitations and exceptions were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, the European Community and its Member States, Japan, the Sudan, and the United States of America.

13.06 Article 20 contains provisions concerning limitations and exceptions to the rights of producers of phonograms; it corresponds closely to this Article. The Notes on Article 20 concerning comparable elements are parallel to those above.

[End of Notes on Article 13]

Article 13

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of performers as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the performance and do not unreasonably prejudice the legitimate interests of the performer.

[End of Article 13]

Notes on Article 14

14.01 Article 10 of the Rome Convention accords a right of reproduction to producers of phonograms. It provides that "producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms".

14.02 Article 14 of the proposed Treaty contains a proposal concerning the right of reproduction of producers of phonograms.

14.03 In paragraph (1), it is proposed that producers of phonograms shall enjoy the exclusive right of authorizing direct and indirect reproduction of their phonograms, whether permanent or temporary, in any manner or form.

14.04 The language of this provision is in harmony with the corresponding provision on performers' rights. It is proposed that producers of phonograms would be granted "the exclusive right of authorizing" direct or indirect reproduction. In this respect, there are no differences between the proposal and Article 10 of the Rome Convention.

14.05 There are two elements in the proposal that differ from the provisions of the Rome Convention and that imply an improvement in the level of protection. According to an explicit clause in the Article, the reproduction right would extend to both permanent and temporary reproduction. The result of reproduction may be a tangible permanent copy like a phonogram, a recording or a CD-ROM. It may as well be a copy of the phonogram on the hard disk of a PC, or in the working memory of a computer. Phonograms that are stored for a very short time may be reproduced or communicated further, or they may be made perceptible by an appropriate device.

14.06 Under the proposed Article 14, producers of phonograms would enjoy the exclusive right of authorizing reproduction "in any manner or form". This element manifests the broad scope of the right. Thus, storage of a phonogram in any electronic medium, for instance, constitutes reproduction. Reproduction includes such acts as uploading and downloading a phonogram to or from the memory of a computer. Digitization, i.e. the transfer of a phonogram embodied in an analog medium to a digital one constitutes always an act of reproduction. The expression "in any manner or form" is already found in Article 9(1) of the Berne Convention concerning the right of reproduction enjoyed by authors. It has been included in the present proposal to make it clear that there is no difference between the rights of producers of phonograms and authors in this respect.

14.07 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 phonogram, in whole or in part, in certain specific cases, namely where the purpose of the temporary reproduction is solely to make the phonogram 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 phonogram that is authorized by the producer of the phonogram or permitted by law. The purpose 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 20(2), the limitations are further

CHAPTER III
RIGHTS OF PRODUCERS OF PHONOGRAMS

Article 14

Right of Reproduction

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the direct or indirect reproduction, whether permanent or temporary, of their phonograms, in any manner or form.

(2) Subject to the provisions of Article 20(2), 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 phonogram audible or where the reproduction is of a transient or incidental nature, provided that such reproduction takes place in the course of use of the phonogram that is authorized by the producer of the phonogram or permitted by law.

[End of Article 14]

confined to cases that pass the three-step test in that Article, which corresponds to the test in Article 9(2) of the Berne Convention.

14.08 The European Community and its Member States proposed at the May 1996 session of the Committees of Experts that the proposed Treaty include a clause on the right of reproduction of producers of phonograms (document BCP/CE/VII/1-INR/CE/VI/1). 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 phonogram in any electronic medium constitutes a reproduction. This includes acts such as uploading and downloading of a phonogram to or from the memory of a computer."

14.09 The proposal by the European Community and its Member States received a positive reaction from many Government members of the Committee. 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.

14.10 The proposal included in paragraph (1) of this Article 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.

14.11 For the February 1996 session of the Committees of Experts Argentina made a proposal on the definition of "reproduction": " 'Reproduction' of a phonogram or performance fixed on a phonogram means the act of making one or more originals or copies of all or a substantial part thereof, regardless of the method used to make the copy or the medium in which it is made, including storage of the phonogram or of the performance fixed on a phonogram in electronic form, regardless of the duration of the storage." The proposal corresponds in substance to the earlier proposal made by the International Bureau of WIPO. As was stated in Note 2.10 above, no definition of "reproduction" is included in the proposed Treaty. It appears, however, that the operative clause on the right of reproduction includes all the essential aspects of the proposal made by Argentina.

14.12 As further support for the proposal in Article 14, the following points may be made.

14.13 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 phonogram 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 phonogram perceptible. In such cases, the successive reproduction of portions of a phonogram may, over a period of time, cover the whole phonogram.

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

14.15 Today, different countries may interpret the right of reproduction in different ways. Some countries may consider that temporary reproduction, at least some acts of reproduction

[Article 15 starts on page 71]

the results of which live a very short time, does not fall under the right of reproduction, whereas other countries may take a contrary position. The Rome Convention does not serve to harmonize the right of reproduction among the Contracting States of that Convention.

14.16 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 system of rights in a digital future.

14.17 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.

14.18 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 the reproduction. The second is by way of limitations of the right. It seems that many countries, having freedom of interpretation with respect to these rights, have already excluded the first possibility. This leaves only the second option: designing a limitations clause which makes it possible to avoid any problematic and unintended effects.

14.19 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 phonogram. The cases shall pass the three-step test of Article 20(2).

14.20 Note 18.06, concerning liability issues, applies with equal force to this Article.

14.21 Proposals concerning the right of reproduction of producers of phonograms were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the People's Republic of China, the Sudan, the United States of America, and Uruguay. Canada suggested that economic right for producers of phonograms in their phonograms would be included in the Treaty. The European Community and its Member States made a further proposal on this issue for the May 1996 session of the Committee of Experts.

14.22 Article 7 contains provisions concerning the right of reproduction of performers; it corresponds closely to this Article. The Notes on Article 7 concerning comparable elements are parallel to those above.

[End of Notes on Article 14]

[Article 15 starts on page 71]

Notes on Article 15

15.01 Article 15 provides producers of phonograms with the exclusive right to control modification of their phonograms.

15.02 The Article combines proposals made by Argentina, the United States of America, and Uruguay. Argentina used the term "modification" in its proposal, whereas the other proposals used the terms "adaptation" and "alteration". The term "modification" has been used in proposed Article 8 because it is sufficiently neutral and general and because it does not imply any interference with Article 2(3) of the Berne Convention, according to which certain adaptations and alterations of works may be protected.

15.03 It was suggested in sessions of the Committees of Experts that no separate right of alteration, adaptation, or modification is necessary. It has been argued that any alteration or modification of a performance or a phonogram cannot occur without reproducing the fixation of the performance or the phonogram. This modification right is proposed, however, in order to cover any possible situation in which digital or other technological manipulation might be used to circumvent traditional notions of reproduction.

15.04 Article 8 contains provisions concerning the right of modification of performers; it corresponds closely to this Article. The Notes on Article 8 concerning comparable elements are parallel to those above.

[End of Notes on Article 15]

Article 15

Right of Modification

Producers of phonograms shall enjoy the exclusive right of authorizing the modification of their phonograms.

[End of Article 15]

Notes on Article 16

16.01 Producers of phonograms do not have a general right of distribution of their phonograms under any existing international agreement. The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms, done in Geneva, October 29, 1971, provides producers of phonograms with protection against unauthorized duplication and against unauthorized importation and distribution of duplicates of their phonograms.

16.02 During the discussions that led to the proposed Treaty, it became clear that the principle of a general right of distribution for producers of phonograms, accompanied by appropriate provisions on exhaustion 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 phonogram. National legislation differs in this respect. In many jurisdictions, the principle is that in respect of a copy of a phonogram 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.

16.03 In many legal systems, the right of rental is considered to be a part of the general right of distribution, and it could even be dealt with in an international instrument in that context. For practical reasons, the right of rental is dealt with as a separate issue in Article 17 of the proposed Treaty. This structure follows the way in which these issues were approached during the preparatory stages.

16.04 Article 16 provides an exclusive right of distribution to producers of phonograms. Because of the differences described in Note 16.02, 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: producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms 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.

16.05 Alternative A also provides a right of importation, in addition to the general right of distribution, to the producers of phonograms in respect of copies of their phonograms.

16.06 Paragraph (1) of Alternative A provides for the exclusive right; item (i) delineates the right of distribution, and item (ii) delineates the right of importation.

16.07 Paragraph (2) allows Contracting Parties to provide in their national legislation that the right of distribution will not apply in respect of copies of phonograms 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 personal and non-commercial use.

Article 16

Alternative A

Right of Distribution and Right of Importation

(1) Producers of phonograms shall enjoy the exclusive right of authorizing:

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

(ii) the importation of the original or copies of their phonograms, 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 a phonogram 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 16 continues]

16.08 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. Thus, there is no need to make separate mention of regional economic integration areas.

16.09 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 phonogram by or pursuant to authorization. The first sale or transfer of ownership may have taken place in the Contracting Party or anywhere else.

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

16.11 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.

16.12 The main contents of Alternative A follow the proposal of Argentina, Brazil, the European Community and its Member States, the Sudan, the United States of America, and Uruguay for the February 1996 session of the Committees of Experts. Alternative B is based on the main approach taken in the proposals made by Canada and Japan.

16.13 Article 9 contains provisions concerning the right of distribution of performers; it corresponds closely to this Article. The Notes on Article 9 concerning comparable elements are parallel to those above.

[End of Notes on Article 16]

[Article 16, continued]

Alternative B

Right of Distribution

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public of the original and copies of their phonograms 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 phonograms by or pursuant to an authorization.

[End of Article 16]

Notes on Article 17

17.01 The Rome Convention does not contain any provisions on the rental of copies of fixed performances or phonograms.

17.02 In the TRIPS Agreement, producers of phonograms were accorded a right of rental. Article 14.4 of the Agreement obligates Members to apply *mutatis mutandis* the provisions of TRIPS Article 11, which concerns rental, for the benefit of producers of phonograms and any other rightholders as may exist in phonograms under a Member's national law.

17.03 Paragraph (1) of Article 17 provides producers of phonograms with the exclusive right of authorizing the rental of the original and copies of their phonograms. The rental of phonograms has been defined in Article 2.

17.04 Paragraph (2) contains a clause permitting Contracting Parties to maintain, for a limited period of time, any systems they may have for providing equitable remuneration to producers of phonograms for the rental of copies. This clause has been modelled on Article 14.4 of the TRIPS Agreement. According to the TRIPS Agreement, Members "may maintain such systems provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of right holders". Contracting Parties that, on April 15, 1994, had and continue to have such systems may maintain them; however, instead of leaving this possibility open for an indefinite period of time, a three-year time limit is proposed, beginning from the entry into force of the proposed Treaty.

17.05 The rental right for producers of phonograms was included in the proposals submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

17.06 Article 10 contains provisions concerning the right of rental of performers; it corresponds closely to this Article. The Notes on Article 10 concerning comparable elements are parallel to those above.

[End of Notes on Article 17]

Article 17

Right of Rental

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the rental of the original and copies of their phonograms, even after distribution of them by or pursuant to authorization by the producer.

(2) Notwithstanding the provisions of paragraph (1), a Contracting Party that, on April 15, 1994, had and continues to have in force a system of equitable remuneration of producers of phonograms for the rental of copies of their phonograms, may maintain that system for a period of 3 years from the entry into force of this Treaty.

[End of Article 17]

Notes on Article 18

18.01 Article 18 introduces a new right for producers of phonograms: the exclusive right of making their phonograms available to the public. Article 18 is based on the May 1996 proposal made by the European Community and its Member States.

18.02 The proposed new right covers the making available of phonograms by wire or wireless means. A distinction is thus made between the distribution of copies of phonograms in physical, tangible form, which is covered by the right of distribution under Article 16, and the making available of phonograms by transmission.

18.03 The right of making available is limited to situations where members of public may access phonograms from a place and at a time individually chosen by them. Thus, the availability is based on interactivity and on on-demand access.

18.04 The proposed new right is designed to operate as a basic rule for the proper functioning of the electronic marketplace. The electronic or digital "record shop" can be compared to a record manufacturing plant or a CD factory. The functions of the manufacturing and distribution portions of the music industry and retail record shops may be replaced by a database open to the public for the direct delivery of music productions via communication networks to home computers.

18.05 The exclusive right laid down in Article 18 covers the making available of phonograms through systems that permit direct access to a certain phonogram stored in a database. The expressions "may access" and "from a place and at a time individually chosen" cover directly all situations that are interactive.

18.06 There are, however, systems and services based on particular technical arrangements and programming structures which make it possible to access the phonograms provided by the service without such access being fully interactive. Such services are offered on a subscription basis. From the point of view of the members of the public these services are "near to interactive". In many cases the only difference between interactive and "near to interactive" is in the time required for access. For both members of the public and rightholders, the shorter the delay, the closer the effect of such practices is to those of services that enable immediate access. The volume of protected subject matter that may be offered to the public in this way, combined with the fact that it may be made available through a number of parallel channels may add significantly to the ease of access. As the technical capacity of storage devices and communication networks grows these services are likely to develop further. They can be established by using cable or wire networks or by wireless means.

18.07 Practices described in the preceding Note could conflict with the normal exploitation of phonograms and unreasonably prejudice the legitimate interests of rightholders. Single channels offered on a subscription basis without being part of such services do not have these effects.

18.08 The proposed right of making available of phonograms in Article 18 is intended to cover both directly interactive ways of making available and services with similar effects, as

Article 18

Right of Making Available of Phonograms

Producers of phonograms shall enjoy the exclusive right of authorizing the making available of their phonograms, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them.

[End of Article 18]

described above. Both types of service fulfil the criteria laid down in Article 18 since members of the public may access phonograms from a place and at a time individually chosen by theme.

18.09 The right proposed in Article 18 is an exclusive right. This is fundamental.

18.10 It is strongly emphasized that Article 18 does not attempt to define the nature or extent of liability on a national level. The proposed international agreement determines only the scope of the exclusive rights that shall be granted to producers of phonograms in respect of their phonograms. The question of who shall be 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.

18.11 Proposals concerning digital transmission were presented for the February 1996 session of the Committees of Experts by Argentina, the United States of America, and Uruguay. The European Community and its Member States made a proposal on this issue for the May 1996 session of the Committees of Experts.

18.12 Article 11 contains provisions concerning the right of making available of performers; it corresponds closely to this Article. The Notes on Article 11 concerning comparable elements are parallel to those above.

[End of Notes on Article 18]

[Article 19 starts on page 83]

Notes on Article 19

19.01 Article 12 of the Rome Convention grants to performers and to producers of phonograms the right to a single equitable remuneration if their phonogram is published for commercial purposes or if a reproduction of the phonogram is used for broadcasting or any communication to the public. The remuneration is paid by the user to the performer or to the producer of the phonogram or to both. In the absence of an agreement between these parties, national legislation may lay down the rules that govern the sharing of this remuneration.

19.02 The right to remuneration is subject to the reservations permitted in Article 16 of the Rome Convention. Under Article 16, any state may declare that it will not apply the provisions of that Article or that it will not apply them in respect of certain uses. Furthermore, a state may declare that it will not apply the right to remuneration in respect of phonograms the producer of which is not a national of another Contracting State. A Contracting State may also make the right to remuneration subject to reciprocity as regards the extent to which, and the term for which, another state grants protection to phonograms fixed by a national of the state making such a reservation.

19.03 Article 19 of the proposed Treaty accords to the producers of phonograms a right to equitable remuneration for the use of their phonograms that are published for commercial purposes or the use of a reproduction of such phonograms for broadcasting or any communication to the public. In general, this right corresponds to the right provided for in Article 12 of the Rome Convention.

19.04 Paragraph (1) does, however, propose additional elements that are not included in Article 12 of the Rome Convention. The right to remuneration would cover not only direct uses of phonograms but also indirect uses for broadcasting or for communication to the public. Remuneration should always be received both by performers and producers. In this way, the proposed Article 19 excludes the possibility that producers of phonograms would not receive at least a single equitable remuneration.

19.05 "Broadcasting" and "communication" are defined in Article 2. The definition of broadcasting covers rebroadcasting as discussed in Note 2.23 above. Communication covers all cases of cable or wire transmission, such as cable-originated television transmissions and sound radio by cable or in communication networks. Because the right covers both direct and indirect uses of phonograms, all forms of retransmission by cable and wire also fall within the scope of the right. The definition of communication also covers situations where a phonogram is played directly to the public present at the same location. Indirect communication of a phonogram covers situations where a radio or television set or other apparatus is used to make a phonogram that is included in a broadcast or wire communication audible to the public in a cafe, restaurant, hotel lobby or other place that is open to the public.

19.06 Paragraph (2) permits Contracting Parties to establish rules governing the way in which remuneration is shared between performers and producers of phonograms and the way in which users pay the required remuneration. These are logistical concerns that are beyond the scope of international agreements.

Article 19

Right to Remuneration for Broadcasting and Communication to the Public

(1) Producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes or reproductions of such phonograms for broadcasting or for any communication to the public.

(2) Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration. In the absence of either national legislation or an agreement between the performer and the producer of a phonogram, the performer and the producer of the phonogram shall equally share the single equitable remuneration between them.

[Article 19 continues]

19.07 As noted above, the right to remuneration under the Rome Convention is subject to reservations. This basic structure has been reproduced in the proposed Treaty. The reservations clause in paragraph (3) leaves the degree of reservation open, subject to the provisions of paragraph (4). Contracting Parties may make minute or more extensive reservations to the right of remuneration. Contracting Parties may even set reciprocity (as to particular terms, such as duration of protection, or complete reciprocity) as a condition for according the remuneration right to performers and producers of phonograms who fulfil the criteria of eligibility in relation to another Contracting Party. Paragraph (3) contains an explicit clause referring to reservations attached to reciprocity in Article 16.1(a)(iv) of the Rome Convention. However, Contracting Parties may not make any reservations to this Article, or the rights provided for therein, that would derogate from their obligations to each other under the Rome Convention; Article 1(1) of the proposed Treaty makes this clear.

19.08 In paragraph (4) it is proposed that the possibility of making a reservation to the right of remuneration laid down in this Article would not apply to broadcasting and communication to the public by wire or wireless means which is offered to the public in the form of subscription-based services. The reason for this proposal is that in the context of such services, phonograms are exploited directly for commercial gain.

19.09 The remuneration right proposed in this Article is an attempt to reconcile two extremes: on the one hand, there is the position that performers and producers of phonograms are not entitled to any right to remuneration in respect of the fruits of their labour, on the other hand, there is the position that the right to remuneration should be broad or even that the right should be exclusive. Written proposals concerning this matter were submitted for the February 1996 session of the Committees of Experts by Argentina, Brazil, the European Community and its Member States, Japan, the Sudan, the United States of America, and Uruguay.

19.10 Article 12 contains provisions concerning the right to remuneration of performers; it corresponds closely to this Article. The Notes on Article 12 concerning comparable elements are parallel to those above.

[End of Notes on Article 19]

[Article 19, continued]

(3) Any Contracting Party may, subject to the provisions of paragraph (4), in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of paragraph (1) only in respect of certain uses, or that it will limit their application in some other way, or that it will not apply these provisions at all. In availing itself of this possibility, any Contracting Party may apply the provisions of Article 16.1(a)(iv) of the Rome Convention *mutatis mutandis*.

(4) The provisions of paragraph (3) do not apply to any broadcasting or any communication by wire or wireless means which can only be received on the basis of subscription and against payment of a fee.

[End of Article 19]

Notes on Article 20

20.01 Article 20 sets forth limitations of and exceptions to the rights of producers of phonograms provided for in this Treaty.

20.02 Paragraph (1) reproduces the main principle of Article 15.2 of the Rome Convention. Contracting Parties may provide at the national level the same kinds of limitations or exceptions with regard to the protection of producers of phonograms under the proposed Treaty as they provide with regard to the protection of copyright in literary and artistic works.

20.03 As drafted, the proposed Treaty incorporates (in this Article) the structure employed in Article 9(2) of the Berne Convention to limit the scope of permitted limitations of and exceptions to authors' reproduction rights. The proposed Treaty applies this structure to all limitations and exceptions permitted to be taken hereunder. The structure includes a three-step test. Any limitations or exceptions must be confined to certain special cases. No limitations or exceptions may ever conflict with the normal exploitation of the protected subject matter. Finally, limitations or exceptions may never unreasonably prejudice the legitimate interests of producers of phonograms.

20.04 Paragraph (2) contains these provisions. Interpretation of them may follow the established interpretation of Article 9(2) of the Berne Convention.

20.05 Written proposals on limitations and exceptions were presented for the February 1996 session of the Committees of Experts by Argentina, Brazil, Canada, the European Community and its Member States, Japan, the Sudan, and the United States of America.

20.06 Article 13 contains provisions concerning limitations and exceptions of rights of performers; it corresponds closely to this Article. The Notes on Article 13 concerning comparable elements are parallel to those above.

[End of Notes on Article 20]

Article 20

Limitations and Exceptions

(1) Contracting Parties may, in their national legislation, provide for the same kinds of limitations or exceptions with regard to the protection of producers of phonograms as they provide for, in their national legislation, in connection with the protection of copyright in literary and artistic works.

(2) Contracting Parties shall confine any limitations of or exceptions to rights provided for in this Treaty to certain special cases which do not conflict with the normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the producer of phonograms.

[End of Article 20]

Notes on Article 21

21.01 The Rome Convention sets a minimum term of protection for performers and producers of phonograms of twenty years. According to Article 14, the term is calculated from the year in which the fixation was made, or in which the performance took place.

21.02 The TRIPS Agreement sets a term of protection for performers and producers of phonograms of fifty years. According to Article 14.5 of the Agreement, the term shall last at least until the end of a period of fifty years calculated from the end of the calendar year in which the fixation was made or in which the performance took place.

21.03 Article 21 proposes a general term of protection for performers and producers of phonograms of fifty years.

21.04 According to paragraph (1), the term of protection for performers would be calculated from the end of the year in which a fixed performance was published. In the case of unpublished fixed performances, the term would be calculated from the end of the year in which the performance took place. This paragraph contains another presentation of the "2.11 alternatives". Alternative A would be the proper selection if the Diplomatic Conference determined that the protection of performers ought to be confined to musical performances only. Alternative B would be the proper selection if the protection of the proposed Treaty were extended to performances fixed in any medium.

21.05 According to paragraph (2), the term of protection for producers of phonograms would be calculated from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

21.06 The reasons for setting the term of protection at this proposed level are obvious. There is a clear trend towards a fifty-year term of protection for performers and for producers of phonograms. The International Bureau of WIPO proposed this term in its memoranda to the first session of the Committee of Experts in 1993 (document INR/CE/I/2) and to the third session in 1994 (document INR/CE/III/2).

21.07 A fifty-year term of protection for performers and producers of phonograms was suggested by Argentina, Canada, the European Community and its Member States, Japan, the United States of America, and Uruguay. Argentina and Uruguay proposed a term of fifty years *post mortem* for performers. In other proposals, the method of calculation was attached in different ways to the years of publication, fixation and/or performance. The proposal in the proposed Treaty makes an attempt to combine these approaches.

[End of Notes on Article 21]

CHAPTER IV
COMMON PROVISIONS

Article 21

Term of Protection

(1) The term of protection to be granted to performers under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the

Alternative A: musical performance fixed in a phonogram

Alternative B: performance fixed in any medium

was published, and in case of unpublished fixed performances, from the end of the year in which the performance took place.

(2) The term of protection to be granted to producers of phonograms under this Treaty shall last, at least, until the end of a period of 50 years computed from the end of the year in which the phonogram was published, and in case of unpublished phonograms, from the end of the year in which the fixation was made.

[End of Article 21]

Notes on Article 22

22.01 Article 22 contains provisions on obligations concerning technological measures.

22.02 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.

22.03 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 27 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 22 are more akin to public law obligations directed at Contracting Parties than to provisions granting "intellectual property rights".

22.04 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.

22.05 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).

22.06 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...".

22.07 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 European Community and its Member States, and the Republic of Korea made a proposal on this issue for the May 1996 session of the Committees of Experts.

[End of Notes on Article 22]

Article 22

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 22]

Notes on Article 23

23.01 Article 23 contains provisions on obligations with regard to rights management information.

23.02 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 fixed performances or phonograms 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.

23.03 Paragraph (2) identifies the information that is within the scope of this Article. The scope has been limited to information which identifies the performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram 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 fixed performance or a phonogram, or appear in connection with the communication of a fixed performance or phonogram to the public. Nothing precludes a broader field of application for provisions on rights management information in national legislation.

23.04 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).

23.05 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 fixed performances or phonograms or retransmission of broadcasts.

23.06 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.

23.07 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.

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

[End of Notes on Article 23]

Article 23

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 fixed performances or phonograms 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 performer, the performance of the performer, the producer of the phonogram, the phonogram, and the owner of any right in the performance or phonogram and any numbers or codes that represent such information, when any of these items of information are attached to a copy of a fixed performance or a phonogram, or appear in connection with the communication of a fixed performance or a phonogram to the public.

[End of Article 23]

Notes on Article 24

24.01 Article 24 states the fundamental principles of formality-free protection and independence of protection which follow the model of the Berne Convention. The provisions are to be interpreted in an equivalent manner to those of the Berne Convention.

24.02 Paragraph (1) sets forth the principle of automatic protection. No formalities may be set as a condition for the enjoyment and exercise of rights provided for in the proposed Treaty. The wording of the provision follows the wording of Article 5(2) of the Berne Convention.

24.03 Paragraph (2) includes a provision on the independence of protection which is in line with the second half of the first sentence of Article 5(2) of the Berne Convention.

[End of Notes on Article 24]

Article 24

Formalities and Independence of Protection

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

(2) Such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the performance or phonogram.

[End of Article 24]

Notes on Article 25

25.01 The driving principle behind this Article is that no reservations are permitted to the proposed Treaty.

25.02 It has, however, been necessary to propose that reservations would be permitted in respect of two issues. These provisions have been taken in Article 25.

25.03 As was discussed in Note 2.18 above, an alternative solution is offered based on the possibility of limiting the scope of the rights of performers. It is proposed that any party, upon becoming a Contracting Party, could make a reservation and confine the protection accorded by them to performers to musical performances or to musical performances fixed in phonograms only. This proposal is included in paragraph (1) of Article 25 as Alternative C. This Alternative may be selected only if the Diplomatic Conference should decide to adopt Alternatives B in all the Articles listed in Alternative C of Article 25(1). (See also Note 2.18.)

25.04 Alternative D is presented in Article 25(1) for the case where the Diplomatic Conference does not base its decision on the scope of performers' rights on Alternatives B in the Articles listed in Alternative C of Article 25(1), and decides not to use the technique of reservation in this issue. In such a case the proposed paragraph (2) of Article 25 would replace the proposed paragraph (1).

25.05 The right to remuneration for broadcasting and communication to the public may be subject to reservation according to Article 12(3) and Article 19(3), subject to the provisions of Article 12(4) and Article 19(4) concerning subscription-based services.

25.06 The possibility of making reservations referred to in the preceding Note has been taken into the proposed Treaty in order to achieve the widest possible acceptance of the Treaty as a whole. Different degrees of reservation are permitted. Over a period of years there has been a substantial opportunity to observe the operation of Article 12 of the Rome Convention. Most Contracting States of that Convention have chosen not to make a total reservation to the right of remuneration. By constructing the proposed Treaty in a manner likely to achieve the widest acceptance, it may be possible to establish not only an important general level of international protection but also bring together countries that, between themselves, wish to maintain a higher level of protection.

[End of Notes on Article 25]

Article 25

Reservations

Alternative C

(1) Any party upon becoming a Contracting Party to this Treaty, may, in a notification deposited with the Director General of WIPO, declare that it will apply the provisions of:

- (i) Article 2(c) and Article 2(h) to sounds only;
- (ii) Article 5(1) and Article 6 to musical performances only; and
- (iii) Article 7, Article 8, Article 9(1), Article 10, Article 11, and Article 21(1) to musical performances fixed in phonograms only.

Alternative D

[No such provision]

(2) Subject to the provisions of Article 12(3), 19(3), and paragraph (1) of this Article, no reservations to this Treaty shall be permitted.

[End of Article 25]

Notes on Article 26

26.01 Article 26 contains the provisions that govern application of the proposed Treaty in respect of performances, phonograms, rights and obligations that came into being before the proposed Treaty would come into force. By including these provisions in the proposed Treaty, more uniform worldwide application will be achieved.

26.02 According to paragraph (1), the proposed Treaty would be applicable to performances that took place and phonograms that were fixed before the date on which the Treaty would enter into force for the respective Contracting Parties. This approach differs from that adopted in the Rome Convention, but it is similar to the approach taken in the TRIPS Agreement. The objective of the provision is a wide harmonization of protection at least insofar as the time aspect is concerned. The reproduction and distribution of protected subject matter does not follow national or regional boundaries and the market has become truly international. It is therefore critical to avoid the discrepancies that might result from a less comprehensive solution.

26.03 The provisions of paragraph (1) are intended to be as clear as possible in order to avoid any legal uncertainty. Even though it goes without saying, an explicit statement has been included at the end of paragraph (1) repeating the fact that the duration of the protection granted to existing subject matter follows the provisions of Article 21.

26.04 Paragraph (2) makes clear that the protection accorded by the proposed Treaty shall not be retroactive. It safeguards previously acquired rights in the same way as Article 20.1 of the Rome Convention. In addition, it specifies that the protection accorded by the proposed Treaty is without prejudice to any acts performed, agreements concluded or rights acquired before the entry into force of the proposed Treaty for each Contracting Party.

26.05 Paragraph (3) allows transitional arrangements concerning fixations of performances and copies of phonograms lawfully made before the entry into force of the Treaty for each Contracting Party. Contracting Parties may fix a term during which the sale and rental of previously made fixations of performances or copies of phonograms may continue. Contracting Parties that avail themselves of this option should nonetheless take into consideration the economic implications of the term they fix. Contracting Parties should take into account both the legitimate interests of users who have invested in good faith in the production of copies at a time when fixed performances and phonograms were not protected, and the purpose of the proposed Treaty, which is to provide rightholders with effective protection.

[End of Notes on Article 26]

Article 26

Application in Time

(1) Contracting Parties shall also apply provisions of this Treaty to performances that took place and phonograms that were fixed before the date of entry into force of this Treaty for each that Contracting Party. The duration of the protection shall be determined according to the provisions of Article 21.

(2) The protection provided for in paragraph (1) shall be without prejudice to any acts concluded or rights acquired before the entry into force of this Treaty for each Contracting Party.

(3) Contracting Parties may provide for conditions under which fixations of performances and copies of phonograms which were lawfully made before the entry into force of this Treaty for each Contracting Party may be distributed to the public or rented during a limited period of time.

[End of Article 26]

Notes on Article 27

27.01 Two alternatives on enforcement are presented in Article 27. 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 on enforcement.

27.02 Alternative A consists of the text of Article 27 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.

27.03 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 27]

Article 27

Special Provisions on Enforcement of Rights

Alternative A (continues on page 103)

(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 27]

Notes on the Annex

28.01 The Annex forms the second part of Alternative A of Article 27. 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.

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

[End of Notes on the Annex]

Alternative A (continued from page 101)

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]