

# WIPO



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**WORLD INTELLECTUAL PROPERTY ORGANIZATION**  
GENEVA

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

**Geneva, December 2 to 20, 1996**

PARTLY CONSOLIDATED TEXT OF TREATY N° 2

*prepared by the Chairman of Main Committee I*

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**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,

**Recognizing** the need to maintain a balance between the interests of the performers and producers of phonograms and the larger public interest, particularly education, research and access to information,

**Have agreed** as follows:

**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.

**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;

(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;

(d) “producer of a phonogram” means the person, or the legal entity, who or which ~~first fixes~~ takes the initiative and has the economic responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;

[Article 2 continues]

[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; in the case referred to in item (ii) above, “publication” takes place in the Contracting Party where the necessary arrangements have been made for availability of the fixed performances or the phonograms to members of the public;

(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;

(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.

### **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).

### **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.

**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 claim 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.

(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.

**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.



## **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.

(2) Subject to the ~~provisions of~~ conditions under, and without prejudice to the scope of applicability 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~~ a temporary 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 in accordance with this Treaty.

## **Article 8**

*Alternative G*

### **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.

*Alternative H*

[No such provision.]

## **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.

### *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.

## **Article 10**

### **Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial 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 for that Contracting Party.

## **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.

## **Article 12**

### **~~Right to Remuneration for Broadcasting and Communication to the Public~~**

[No Article 12, see Article 20a.]

## **Article 13**

### **~~Limitations and Exceptions~~**

[No Article 13, see Article 20b.]

**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~~ conditions under, and without prejudice to the scope of applicability 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~~ a temporary 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 in accordance with this Treaty.

**Article 15**

*Alternative A*

**Right of Modification**

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

*Alternative B*

[No such provision.]

## **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.

### *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.

## **Article 17**

### **Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial 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 for that Contracting Party.

## **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.

## **Article 19**

### **~~Right to Remuneration for Broadcasting and Communication to the Public~~**

[No Article 19, see Article 20a.]

## **Article 20**

### **~~Limitations and Exceptions~~**

[No Article 20, see Article 20b.]

## **CHAPTER IV COMMON PROVISIONS**

### **Article 20a**

#### **Right to Remuneration for Broadcasting and Communication to the Public**

(1) Performers and 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 between them. ~~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.~~

(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*.

### **Article 20b**

#### **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 and 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 a normal exploitation of the phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of phonograms.

## **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.

## **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.

## **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:

[Article 23 continues]



[Article 23, continued]

(i) to remove or alter any electronic rights management information without authority;

(ii) to distribute, import for distribution, ~~or~~ communicate or make available to the public, without authority, copies of fixed performances or phonograms from which electronic rights management information has been removed or altered without authority,

knowing that such an act induces, enables or facilitates an infringement of a right provided for in this Treaty.

(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 or making available of a fixed performance or a phonogram to the public.

## **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.~~

## **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

[Article 25 continues]

[Article 25, continued]

(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)~~ 20(a), [and paragraph (1) of this Article], no reservations to this Treaty shall be permitted.

**Article 26**

**Application in Time**

*Alternative A*

(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 performed, agreements 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.

*Alternative B*

Contracting Parties shall apply the provisions of Article 18 of the Berne Convention, *mutatis mutandis*, to the rights of performers and producers of phonograms provided for in this Treaty.

## Article 27

### Special Provisions on Enforcement of Rights

#### *Alternative A*

- (1) Special provisions regarding the enforcement of rights are included in the Annex to the Treaty. [See the Annex of Document CRNR/DC/5]
- (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.

#### *Alternative C*

- (1) Contracting Parties undertake to adopt, in accordance with their constitutions, the measures necessary to ensure the application of this Treaty.
- (2) Contracting Parties shall ensure that enforcement procedures are available under their law so as to permit effective action against any act of infringement of rights covered by this Treaty, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

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