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

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

DRAFT  
WIPO PERFORMANCES AND PHONOGRAMS TREATY

*submitted by Main Committees I and II to the Conference,  
meeting in Plenary*

**Draft Treaty  
for the Protection of the Rights  
of Performers and Producers of Phonograms**

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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 rights 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) Protection granted under this Treaty shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Treaty may be interpreted as prejudicing such protection.

(3) This Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties.

## 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 other than in the form of a fixation incorporated in a cinematographic or other audiovisual work;
- (c) “fixation” means the embodiment of sounds, or of the representations thereof, from which they can be perceived, reproduced or communicated through a device;
- (d) “producer of a phonogram” means the person, or the legal entity, who or which takes the initiative and has the responsibility for the first fixation of the sounds of a performance or other sounds, or the representations of sounds;
- (e) “publication” of a fixed performance or a phonogram means the offering of copies of the fixed performance or the phonogram to the public, with the consent of the rightholder, and provided that copies are offered to the public in reasonable quantity;
- (f) “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 is “broadcasting” where the means for decrypting are provided to the public by the broadcasting organization or with its consent;
- (g) “communication to the public” of a performance or a phonogram means the transmission to the public by any medium, otherwise than by broadcasting, of sounds of a performance or the sounds or the representations of sounds fixed in a phonogram. For the purposes of Article [17], “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.
- [Except as otherwise provided in Article [17(3)] 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 subject matter protected by this Treaty.]
- [(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 rights provided for by this Treaty.
  - (2) The treatment provided for in paragraph (1) shall be subject to the rights specifically provided for, and the limitations and exceptions specifically provided for, in this Treaty.
  - (3) The obligation provided for in paragraph (1) shall not apply to the extent to which the other Contracting Party makes use of the reservations allowed under Article[s] [5 and 17] of this Treaty.

(4) A Contracting Party shall not be obliged to accord to nationals, as defined in Article 3(2), of another Contracting Party the treatment provided for in paragraph (1) in respect of rights which do not derive from express provisions of this Treaty or which might be recognized by national legislation in the context of limitations and exceptions under Article [19] of 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, as regards his [musical] performances, 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.

[(1) Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his performances, have the right to claim to be identified as the performer of his performances except where omission is dictated by the manner of the use of the performance and to object to any distortion, mutilation or other modification of his performances that would be prejudicial to his 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.

[(4) Any Contracting Party may in a notification deposited with the Director General of WIPO, declare that it will not apply the provisions of this Article.]]

## **Article 6**

### **Economic Rights of Performers in their Unfixed Performances**

Performers shall enjoy the exclusive right of authorizing, as regards their performances:

- (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 performances fixed in phonograms, in any manner or form.

[(2) Subject to the conditions under, and without prejudice to the scope of applicability of, Article 19(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 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**

### **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 performances fixed in phonograms through sale or other transfer of ownership.

(2) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or other transfer of ownership of the original or a copy of the fixed performance with the authorization of the performer.



## **Article 9**

### **Right of Rental**

(1) Performers shall enjoy the exclusive right of authorizing the commercial rental to the public of the original and copies of their performances fixed in phonograms as determined in the national law of Contracting Parties, 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 performances fixed in phonograms, may maintain that system provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of performers.

## **Article 10**

### **Right of Making Available of Fixed Performances**

Performers shall enjoy the exclusive right of authorizing the making available to the public of their performances fixed in 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.

## **CHAPTER III RIGHTS OF PRODUCERS OF PHONOGRAMS**

## **Article 11**

### **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 conditions under, and without prejudice to the scope of applicability of, Article 19(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 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 12**

### **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) Nothing in this Treaty shall affect the freedom of Contracting Parties to determine the conditions, if any, under which the exhaustion of the right in paragraph (1) applies after the first sale or transfer of ownership of the original or a copy of the phonogram with the authorization of the producer of phonograms.

## **Article 13**

### **Right of Rental**

(1) Producers of phonograms shall enjoy the exclusive right of authorizing the commercial rental to the public 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 provided that the commercial rental of phonograms is not giving rise to the material impairment of the exclusive rights of reproduction of producers of phonograms.

## **Article 14**

### **Right of Making Available of Phonograms**

Producers of phonograms shall enjoy the exclusive right of authorizing the making available to the public 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.

## **CHAPTER IV COMMON PROVISIONS**

### **Article 15**

#### **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] 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.

(3) Any Contracting Party may 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) For the purposes of this Article, phonograms published for commercial purposes include phonograms made available to the public 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 16**

#### **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 17**

### **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 [musical] performance was fixed in a phonogram.

(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, or failing such publication within 50 years from fixation of the phonogram, 50 years from the end of the year in which the fixation was made.

## **Article 18**

### **Obligations concerning Technological Measures**

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

## **Article 19**

### **Obligations concerning Rights Management Information**

(1) Contracting Parties shall provide adequate and effective legal remedies against any person knowingly performing any of the following acts knowing or, with respect to civil remedies, having reasonable grounds to know that it will induce, enable, facilitate or conceal an infringement of any right covered by this Treaty:

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

(ii) to distribute, import for distribution, broadcast, communicate or make available to the public, without authority, performances, copies of fixed performances or phonograms knowing that 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, the owner of any right in the performance or phonogram, or information about the terms and conditions of use of the performance or phonogram, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a fixed performance or a phonogram or appears in connection with the communication or making available of a fixed performance or a phonogram to the public.

**Article 23**

**Formalities**

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

## **Article 24**

### **Reservations**

Subject to the provisions of Article[s] [5(4) and 17(3)], no reservations to this Treaty shall be permitted.

## **Article 25**

### **Application in Time**

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 26**

### **Provisions on Enforcement of Rights**

- (1) Contracting Parties undertake to adopt, in accordance with their legal systems, 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.

## **CHAPTER V**

### **ADMINISTRATIVE AND FINAL CLAUSES**

#### **Article 27 [former 98 later renamed 100]**

##### **Assembly**

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

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

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

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

(b) The Assembly shall perform the function allocated to it under Article 29(2) in respect of the admission of certain intergovernmental organizations to become party to this Treaty.

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

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

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

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

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

## **Article 28 [former 99 later renamed 101]**

### **International Bureau**

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

**Article 29 [former 100 later renamed 102]**

**Eligibility for Becoming Party to the Treaty**

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

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

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

**Article 30 [former 103]**

**Rights and Obligations under the Treaty**

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

**Article 31 [former 101 later renamed 104]**

**Signature of the Treaty**

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

**Article 32 [former 102 later renamed 105]**

**Entry into Force of the Treaty**

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



**Article 33 [former 103 later renamed 106]**

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

This Treaty shall bind

(i) the 30 States referred to in Article 32, from the date on which this Treaty has entered into force;

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

(iii) the European Community, from the expiration of three months after the deposit of its instrument of ratification or accession if such instrument has been deposited after the entry into force of this Treaty according to Article 32, or, three months after the entry into force of this Treaty if such instrument has been deposited before the entry into force of this Treaty;

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

**Article 34 [former 104 later renamed 107]**

**No Reservations to the Treaty**

No reservation to this Treaty shall be admitted.

**Article 35 [former 105 later renamed 108]**

**Denunciation of the Treaty**

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

**Article 36 [former 106 later renamed 109]**

**Languages of the Treaty**

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

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

**Article 37 [former 107 later renamed 110]**

**Depositary**

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

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