

WIPO



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FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS
(BERNE UNION)

ASSEMBLY

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MATTERS CONCERNING A POSSIBLE PROTOCOL
TO THE BERNE CONVENTION AND
A POSSIBLE INSTRUMENT FOR THE PROTECTION
OF THE RIGHTS OF PERFORMERS
AND PRODUCERS OF PHONOGRAMS

Addendum to the memorandum prepared by the Director General

1. In addition to the comments referred to in paragraph 6 of document B/A//XVI/1, and included in the Annex to that document, on September 23 and 26, 1994, respectively, the International Bureau received comments from three more Governments on the provisional documents for the next sessions of the Committee of Expert on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms.

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2. On September 23, 1994, the International Bureau received a letter from the Government of Lesotho. On September 26, 1994, the International Bureau received a note verbale from the Permanent Mission of the Argentine Republic in Geneva. Also on September 26, 1994, the International Bureau received hand delivered comments from the Delegation of Japan attending the meetings of the Governing Bodies of WIPO and the Unions Administered by WIPO. The comments thus communicated are reproduced in the Annex.

[Annex follows]

ANNEX

Comments received on the provisional documents

I.

On September 23, 1994, the Director General of WIPO received the following letter from the Ministry of Tourism, Sports and Culture of the Government of Lesotho, Maseru:

"Lesotho has studied both documents and after careful consideration is of opinion that both the possible instrument for the protection of performers and producers of phonograms and a possible protocol to the Berne Convention are inevitable and timeous. Lesotho further agrees with the contents of both provisional documents and has nothing to add."

II.

On September 26, 1994, the International Bureau received the following note verbale from the Permanent Mission of the Argentine Republic in Geneva:

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva presents its compliments to the International Bureau of the World Intellectual Property Organization (WIPO) and, with reference to the decision adopted by the Assembly of the Berne Union at its fourth extraordinary session, has the honor to convey to the said Bureau the comments of the Argentine Government on the provisional documents on 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Permanent Mission of the Argentine Republic to the International Organizations in Geneva renews to the International Bureau of the World Intellectual Property Organization (WIPO) the assurances of its highest consideration."

The comments of the Directorate General of Copyright, Ministry of Justice, dated September 23, 1994, which accompanied the note verbale, read as follows:

"I have the honor to write to you in response to the request that we comment in writing on provisional documents relating to 'Questions concerning a possible protocol to the Berne Convention' and 'Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms.'

"The Argentine Government, through its delegation, has expressed its constant support for the work undertaken by WIPO, and the comments given below are intended to contribute to the making of both instruments into international treaties.

"(I) Matters Concerning a Possible Protocol to the Berne Convention

"According to paragraph 1, the protocol would be intended to clarify existing--or establish new--international norms. Paragraph 6 informs us moreover that the International Bureau, in drafting the memorandum, took the provisions of the TRIPS Agreement into account.

"Computer programs. This subject was exhaustively studied at previous meetings. Particular stress was placed on the need to devise a wording that left it in no doubt that this kind of work was already protected by the provisions of the Berne Convention and that, if provisions were required in the present instrument, they would be merely clarifying ones.

"The three-party proposal in paragraph 10 does not depart from the provisions of the Berne Convention, so that pursuant to paragraph 12 they are of a declarative nature.

"While Article 2 of the Berne Convention refers to "literary and artistic works," the list is illustrative and not exhaustive, so that the computer program is not necessarily a literary work in the strict sense of the word, and may also come into the category of scientific creations, the protection of which is confined to their written expression. This is the criterion that the Commission appointed by the Ministry of Justice, in Resolution No. 123/91, invoked when it embarked on the reform of Law 11723, on Copyright, an undertaking that has now reached the stage of the submission of the preliminary draft. Article 1 of the preliminary draft lists the protected literary, scientific and artistic works, which include "computer programs, their technical literature and users' manuals." This for the time being has been the protection criterion adopted in our country, based on the non-exhaustive enumeration of works in Article 1 of Law 11723.

"With reference to paragraph 13, we agree that "shall" form should not be used for the verb; this is a fundamental point if everything referring to computer programs is to be in the nature of a mere declaration, not an obligation.

"We also agree entirely with paragraph 14, in the sense that the Berne Convention's general provisions on literary and artistic works are applicable to computer programs, and not the specific provisions on particular literary works and particular artistic works.

"In paragraph 16, the provision referring to ideas, procedures, methods of operation or mathematical concepts as such is applicable to all types of work, in view of the fact that it involves a general principle of copyright.

"If one analyzes paragraphs 19, 20, 21, 22 and 23, the new wording of Article 9(2), in that it extends the limitations on the author's exclusive rights, is an important amendment to the Berne Convention, and

indeed could become unacceptable under the provisions of the latter's Article 20. Nevertheless, national legislation will be incorporating these new limitations owing to the specific characteristics of computer programs.

"Adaptation of the program for the making of other, derived programs, and also decompilation limited to those parts of the program that are necessary to achieve interoperability with other programs, must be allowed, but in that case the provisions cannot be declarative.

"The preliminary draft to which we are referring (Ministerial Resolution 123.91) provides in its Article 86 that "the author may not, unless otherwise agreed, object to the assignee of exploitation rights making or authorizing the making of successive versions of his program or of programs derived therefrom. Unless otherwise provided, the author may not object to the adaptation of a program made by the user for his exclusive use within the limits that the author has allowed, nor may he exercise his right to integrity or his right to disavow."

"Databases. This subject was likewise a subject of debate at earlier meetings. The problem is that of extending protection to databases that do not meet the requirement of sufficient originality to qualify for copyright protection.

"There can be no possible objection in our country to the inclusion in the protocol of protection for any type of database, without original or not, in view of the fact that our case law has judged the work of merely ordering and selecting data to be eligible for protection.

"Moreover, Article 1(b) of Decree 165/94 (B.O. 8.2.94) defines the database as follows:

"'Database works included in the category of literary works shall be construed as meaning productions consisting of an organized set of interrelated data compiled with a view to storage, processing and retrieval by means of computer techniques and systems.'

"Argentina could propose such a wording, changing the end to "by means of any technique or system" in order to avoid confining it to the computer context.

"Non-voluntary licenses for the sound recording of musical works. This subject was already dealt with at the other meetings. A consensus emerged in favor of removing them for want of current relevance. It seems reasonable to allow a period of five years, or perhaps less, for States to dispose of any licenses that they may have granted. This option has never been made use of in our country.

"Non-voluntary licenses for primary broadcasting and satellite communication. The reasoning here is identical to that in the previous paragraph. Licenses should be removed both for primary, airwave broadcasting and for satellite broadcasting. As far as the period is concerned, up to five years is appropriate, and in principle there is a consensus in favor of it.

"Distribution right, including importation right. Under numerous national laws the right of distribution was exhausted after the first sale of copies. The protocol proposes recognizing, among the specific rights of the author, a right of distribution that survives the first act of sale.

"With regard to public lending, few delegations were in favor of retaining it.

"On the other hand, they were almost unanimous in considering that a right to authorize the rental of copies of certain works should be included (including among such works those that were embodied in sound recordings, and also computer programs).

"On the subject of paragraph 68, our country is able to endorse the principle of introducing an exclusive right for the author or other owner of rights in the case of the rental of an audiovisual work, a work recorded on a phonogram or computer programs. This is what is proposed in our preliminary draft, whose Article 74(e) provides as follows:

"That person shall be punished with imprisonment for one month to one year and a fine of one thousand to thirty thousand pesos who (...)

"(e) rents, without the written authorization of the author or his successors in title, copies of material on which computer programs, performances of musical works, sheet music or audiovisual or cinematographic works are fixed.'

"The proposal in paragraph 68 is reasonable. An attempt will be made to propose the addition to "sheet music" of the sole paper copy the rental of which is liable to prejudice the author's interests. As far as the rental of copies of works is concerned, our country has provided for exclusive rights in the preliminary draft.

"Importation. While some countries have carried out economic studies with a view to taking a position on this subject, we consider that the reasoning set forth by the International Bureau in paragraph 82 is the right one: parallel importation will bring more difficulties than advantages, even though it is presented as a way of bringing down costs and benefiting consumers.

"The preliminary draft produced in our country establishes the right of importation as an exclusive right of the author or owner of rights.

"Duration of the protection of photographic works. There are no noticeable problems in the protection periods.

"Communication to the public by satellite broadcasting. We consider ourselves in a position to subscribe to the proposal in paragraph 91.

"Enforcement of rights. The adoption of the TRIPS text seems reasonable, in view of the fact that the wording of the Agreement has been worked on for some considerable time, while the Agreement itself is

an instrument that has been negotiated by a large number of countries already. The text of our preliminary draft, while it has a wording of its own, is essentially comparable, and it includes the TRIPS provisions with respect to procedures, precautionary measures, security guarantees, seizures, indemnification of the injured party, ex officio action, etc.

"Likewise, as proposed in paragraph 96 onwards, provision has been made in the preliminary draft for specific measures regarding the technical means of preventing the unlawful use of works. In this connection Article 75(1) provides as follows:

"that person shall be punished with imprisonment for a term of one month to three years and a fine of one thousand to thirty thousand pesos who, without the authorization of the owner of rights:

"(i) alters, removes, modifies or in any way uses the technical devices incorporated in the copies of the protected works or productions for the purpose of preventing or restricting copying;

"(ii) alters, removes, modifies or in any way renders useless coded signals with a view to restricting the communication to the public of protected works, productions or broadcasts, or to preventing the copying thereof;

"(iii) imports or markets technical apparatus, programs or devices that allow or facilitate the circumvention of the technical devices or signals incorporated in order to prevent or restrict the copying or communication of works and productions.'

National treatment. In view of the opinions on the subject that have been encountered, consideration of this question is adjourned.

"II. Questions concerning a possible instrument for the protection of the rights of performers and producers of phonograms

"Scope of the new instrument. We confirm our position, which was that the scope of the new instrument should be limited to the rights of performers in audio recordings.

"The Argentine Government agrees with the urgent need to bring up to date and otherwise modernize the protection of performers, but, as far as the new instrument is concerned, that updating should not go beyond its original objective and its raison d'être, which was to maintain the parallels between the updating and modernization of the rights of producers of phonograms and that of the rights of those who, like performers, are inseparably tied up with the sound recording of musical works.

"If one were to introduce the subject of performers in relation to audiovisual recordings, this would be bound to involve reconciling their rights with those of the authors of such works, which is not within the terms of reference of the new instrument.

"Definitions. In conformity with the stance adopted by us in the earlier discussions, we agree that it would be appropriate to broaden the definition of phonograms to include fixations of digital representations of sounds.

"By the same token, it is not only justified but essential, for provisions projected towards the technology of the future, that the definition of publication be broadened to include the transmission of phonograms "across electronic retrieval systems (digital media) that enable the persons connected to such systems to listen to a given phonogram at any moment, at their own discretion."

"In our preliminary draft, Article 103 is intended to settle the rights of authors and producers in relation to such forms of digital communication.

"Moral rights of performers. The establishment of the moral rights of performers in an international instrument is a widely perceived necessity. We agree with the proposal set forth in paragraphs 35 and 36.

"Economic rights of performers

"(a)

"In their live performances. Having examined the proposal in paragraph 41, we find it adequate and consistent with the amendment to Article 58 of Law 11723 as proposed in our preliminary draft.

"(b)

"In performances fixed on phonograms. We have no objection to the recognition of rights of reproduction (63(a)), distribution (63(b)) and importation (63(c)); nevertheless we would point out that there should be a provision in the international instrument to the effect that those rights are seldom or never exercised in practice by the performers on their own initiative, neither are they a feature of the collective management of their rights, but it is rather the producers of phonograms who are responsible for the defense of their phonographic repertoires--which contain performances--against piracy, unauthorized rental or lending and parallel importation.

"With regard to the right of adaptation (63(d)), when it came under discussion, the Argentine delegation was among those advocating a change of terminology with a view to distinguishing that right of performers from the right of the same name belonging to authors. Even the WIPO Glossary supported this view, defining it thus: "generally understood as the modification of a pre-existing work from one genre of work to another." This definition does not apply to modification by digital manipulation of performances. The definition of the word adaptation that applies to the concept of performers' rights is the one that speaks of "altering the work (performance) within the same genre to make it suitable for different conditions of exploitation"; this is the definition of the term adaptation that comes closest to the conception of the right that is to be protected, which is why we repeat the suggestion

that the right should be called a right of modification, which moreover is the one used in Article 91 (a) of our preliminary draft. With regard to the rights of communication to the public and broadcasting (63(e), (f) and (g)), Argentina has opted for retention of the equitable remuneration solution written into Article 12 of the Rome Convention, but with the exception of digital communication, which enables those connected to electronic retrieval systems to select phonograms at their discretion, at any time, in which case there is justification for exclusive rights.

"With regard to paragraph 64(a), we repeat that the concept of "exhaustion rights on first sale" is foreign to our legal system, and we consider it undesirable.

"With regard to the right of rental (64(c)), we are strongly in favor of the exclusive right to authorize or prohibit, and would mention once again that the exercise of the right generally falls to the producer of phonograms.

"As for paragraph 65(a), (b) and (c), we have given our support to equitable remuneration for private copying of phonograms for the benefit of authors, performers and producers, and we support the proposed solutions.

"Rights of producers of phonograms. All the rights advocated for the producers of phonograms in paragraph 67(a), (b), (c) and (d) are recognized in Article 91 of the preliminary draft, with the right of adaptation in paragraph 61(d) called "modification," which is why we support its inclusion.

"With regard to the rental of phonograms, we have opted for the right to authorize or prohibit and for not including the concept of exhaustion in our legislative system. With regard to the rights of communication to the public and broadcasting, we appreciate the wisdom of limiting them to equitable remuneration, but conceding exclusive rights when the communication takes place by digital means in the form of transmission, at the request of the user, to a specified place at a set time. We reserve our position, pending closer study, on the possibility of exclusive rights in other forms of digital communication.

"The approach mentioned was adopted in Article 103 of the preliminary draft under the heading of "rights in relation to digital distribution," on the understanding that this form of communication was equivalent to an act of distribution.

"With regard to the proposal in paragraph 69(a), (b) and (c), we confirm our support. This right belonging to authors, performers and producers is recognized in Articles 104 to 111 of our preliminary draft.

"Exceptions to economic rights. Without prejudice to the adjournment to a later session of the Committee of the matter of what specific limitations would be peculiar to neighboring rights, the principle according to which "all the limitations laid down in this law with respect to copyright shall likewise be applicable to the rights of performers and producers of phonograms" could already be written into the new instrument.

"Term of protection of economic rights. The term of 50 years from the end of the year in which the fixation of the performance was made seems acceptable as a minimum level of protection.

"Formalities. The proposal is endorsed under which no country may demand of the owners of rights that they comply with any formality as a condition of protection. It is however suggested that it might be appropriate for the new instrument to reproduce the provision in Article 11 of the Rome Convention and Article 5 of the Phonograms Convention, in view of the fact that the use of the circled letter P symbol has proved very useful in practice for the protection in our country of phonograms published abroad.

"Enforcement of rights. To ensure the effective protection of the rights recognized, we would consider the inclusion of appropriate judicial measures such as those proposed in the TRIPS Agreement extremely useful. Our preliminary draft contains a chapter on criminal sanctions, another on preventive measures, another on civil proceedings and also specific guidelines on compensation for damages due to unlawful acts, all of which are somewhat above the proposed minimum levels. In particular we should mention, as indeed we already have, our Article 76(iii) which includes criminal provisions to punish the abuse of technical devices.

"Criteria of eligibility for protection. We agree with the eligibility criteria proposed in paragraph 112."

III.

On September 26, 1994, the International Bureau received the following comments from the Delegation of Japan attending the meetings of the Governing Bodies of WIPO and the Unions Administered by WIPO:

"1. The Committees of Experts on "A Possible Protocol to the Berne Convention" and "A Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms" have a very important task of establishing the standards of international protection of copyright and neighboring rights in the future. The Government of Japan supports the continuation of the work of the two Committees and intends to participate in this exercise in an active manner.

"2. The Government of Japan believes that the following points should be taken into account when the two Committees examine the Provisional Documents before us.

"(1) In order to promote the protection of copyright and neighboring rights while keeping the necessary balance between them, the work of the two Committees should be continued in parallel and paying attention to close relationship each other.

"(2) In the work of the two Committees, the result of the TRIPS negotiation in GATT Uruguay Round should be respected and adopted as a starting point of the exercise. Furthermore, taking advantage of the expertise of WIPO in the field of intellectual property rights, the Committees should aim at further harmonization to the extent possible.

"(3) Studies on copyright issues relating to the development of digital technology and network are under way in a number of countries including Japan. In order to ensure appropriate and internationally harmonized measures in this regard, these issues should be examined in the future work of the two Committees without delay, having due regard to the appropriate balance of interests between right holders and users of copyright works.

"3. The Government of Japan accepts the Provisional Documents as they stand as bases of the meetings of the Committees of Experts in December, although it reserves its positions on each specific items in the Documents until the discussions in the above meetings."

[End of Annex and of document]

