THE WIPO COPYRIGHT TREATY (WCT) AND THE WIPO PERFORMANCES AND PHONOGRAMS TREATY (WPPT)

Document prepared by the International Bureau of WIPO

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A. THE WIPO COPYRIGHT TREATY

I. INTRODUCTION

1. The Berne Convention for the Protection of Literary and Artistic Works (hereinafter: "the Berne Convention"), after its adoption in 1886, was revised quite regularly, approximately every 20 years, until the "twin revisions" which took place in Stockholm in 1967 and in Paris in 1971 ("twin revision," because the substantive provisions of the Stockholm Act did not enter into force, but (with the exception of the protocol to that Act) were incorporated–practically unchanged–by the Paris Act, in which only the Appendix, concerning non-voluntary licenses applicable in developing countries, included new substantive modifications.)

2. The revision conferences were convened, in general, in order to find responses to new technological developments (such as sound recording technology, photography, radio, cinematography and television).

3. In the 1970s and 1980s, a number of important new technological developments took place (reprography, videotechnology, compact cassette systems facilitating "home taping," satellite broadcasting, cable television, the increase of the importance of computer programs, computer-generated works and electronic databases, etc.).

4. For a while, the international copyright community followed the strategy of "guided development,"[*] rather than trying to establish new international norms.

5. The recommendations, guiding principles and model provisions worked out by the various WIPO bodies (at the beginning, frequently in cooperation with Unesco) offered guidance to governments on how to respond to the challenges of new technologies. Those recommendations, guiding principles and model provisions were based, in general, on interpretation of existing international norms, particularly the Berne Convention (for example, concerning computer programs, databases, "home taping," satellite broadcasting, cable television); but they also included some new standards (for example, concerning distribution and rental of copies).

6. The guidance thus offered in the said "guided development" period had an important impact on national legislation, contributing to the development of copyright all over the world.

7. At the end of the 1980s, however, it was recognized that mere guidance would not suffice any longer; new binding international norms were indispensable.

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[*] Sam Ricketson used this expression in his book "The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986", Kluwer, London, 1986. He wrote the following: "In essence, 'guided development' appears to be the present policy of WIPO, whose activities in promoting study and discussion on problem areas have been of fundamental importance to international copyright protection in recent years."

8. The preparation of new norms began in two forums. At GATT, in the framework of the Uruguay Round negotiations, and at WIPO, first, in one committee of experts and, later, in two parallel committees of experts.

9. For a while, the preparatory work in the WIPO committees was slowed down, since governments concerned wanted to avoid undesirable interference with the complex negotiations on the trade-related aspects of intellectual property rights (TRIPS) then taking place within the Uruguay Round.

10. After the adoption of the TRIPS Agreement, a new situation emerged. The TRIPS Agreement included certain results of the period of "guided development," but it did not respond to all challenges posed by the new technologies, and, whereas, if properly interpreted, it has broad application to many of the issues raised by the spectacular growth of the use of digital technology, particularly through the Internet, it did not specifically address some of those issues.

11. The preparatory work of new copyright and neighboring rights norms in the WIPO committees was, therefore, accelerated, leading to the relatively quick convocation of the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions which took place in Geneva from December 2 to 20, 1996.

12. The Diplomatic Conference adopted two treaties: the WIPO Copyright Treaty (hereinafter also referred to as "the WCT" or as "the Treaty") and the WIPO Performances and Phonograms Treaty (hereinafter referred to as "the WPPT").

II. LEGAL NATURE OF THE WCT AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL TREATIES

13. The first sentence of Article 1(1) of the WCT provides that "[t]his Treaty is a special agreement within the meaning of Article 20 of the Berne Convention for the Protection of Literary and Artistic Works, as regards Contracting Parties that are countries of the Union established by that Convention." Article 20 of the Berne Convention contains the following provision: "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, in so far as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention." Thus, the above-quoted provision of Article 1(1) of the WCT has specific importance for the interpretation of the Treaty. It makes clear that no interpretation of the WCT is acceptable which may result in any decrease of the level of protection granted by the Berne Convention.

14. Article 1(4) of the Treaty establishes a further guarantee for fullest possible respect of the Berne Convention, since it includes, by reference, all substantive provisions of the Berne Convention, providing that "Contracting Parties shall comply with Articles 1 to 21 and the Appendix of the Berne Convention." Article 1(3) of the Treaty clarifies that, in this context, the Berne Convention means the 1971 Paris Act of that Convention. These provisions should be considered in light of the provisions of Article 17 of the Treaty, discussed below, under which not only countries party to the said 1971 Paris Act, and, in general, not only countries party to any act of the Berne Convention, but also any member countries of WIPO,

irrespective of whether or not they are party to the Convention, and also certain intergovernmental organizations, may adhere to the Treaty.

15. Article 1(2) of the Treaty contains a safeguard clause similar to the one included in Article 2.2 of the TRIPS Agreement: "Nothing in this Treaty shall derogate from existing obligations that Contracting Parties have to each other under the Berne Convention for the Protection of Literary and Artistic Works." The scope of this safeguard clause differs from the parallel provision in the TRIPS Agreement. The TRIPS safeguard clause also has importance from the viewpoint of at least one article of the Berne Convention which contains substantive provisions–namely Article 6*bis* on moral rights–since that article is not included by reference in the TRIPS Agreement. Article 1(2) of the WCT only has relevance from the viewpoint of Article 22 to 38 of the Berne Convention containing administrative provisions and final clauses which are not included by reference (either in the WCT or the TRIPS Agreement) and only to the extent that those provisions provide obligations for Contracting Parties.

16. The second sentence of Article 1(1) of the WCT deals with the question of the relationship of the WCT with treaties other than the Berne Convention. It states that "[t]his Treaty shall not have any connection with treaties other than the Berne Convention, nor shall it prejudice any rights and obligations under any other treaties." The TRIPS Agreement and the Universal Copyright Conventions are examples of such "other" treaties.

17. It should also be pointed out that there is no specific relationship between the WCT and the WPPT either, and the latter is also an "other " treaty covered by the second sentence of Article 1(1) of the WCT. There is also no such relationship between the WCT and the WPPT equivalent to that between the Berne Convention and the Rome Convention. Under Article 24(2) of the Rome Convention, only those countries may adhere to that Convention which are party to the Berne Convention or the Universal Copyright Convention. While, in principle, any member country of WIPO may accede to the WPPT, it is not a condition that they be party to the WCT (or the Berne Convention or the Universal Copyright Convention). It is another matter that such a separate adherence is not desirable, and, hopefully, will not take place.

III. SUBSTANTIVE PROVISIONS OF THE WCT

1. Provisions relating to the so-called "digital agenda"

18. During the post-TRIPS period of the preparatory work which led eventually to the WCT and WPPT, it became clear that the most important and most urgent task of the WIPO committees and the eventual diplomatic conference was to clarify existing norms and, where necessary, create new norms to respond to the problems raised by digital technology, and particularly by the Internet. The issues addressed in this context were referred to as the "digital agenda."

19. The provisions of the WCT relating to that "agenda" cover the following issues: the rights applicable for the storage and transmission of works in digital systems, the limitations on and exceptions to rights in a digital environment, technological measures of protection and rights management information. As discussed below, the right of distribution may also be relevant in respect of transmissions in digital networks; its scope, however, is

much broader. Therefore, and, also due to its relationship with the right of rental, the right of distribution is discussed separately below along with that right.

a. Storage of Works in Digital Form in an Electronic Medium: The Scope of the Right of Reproduction

20. Although the draft of the WCT contained certain provisions intended to clarify the application of the right of reproduction to storage of works in digital form in an electronic medium, in the end, those provisions were not included in the Treaty. The Diplomatic Conference, however, adopted an Agreed Statement which reads as follows: "The reproduction right, as set out in Article 9 of the Berne Convention, and the exceptions permitted thereunder, fully apply in the digital environment, in particular to the use of works in digital form. It is understood that the storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Article 9 of the Berne Convention."

21. As early as in June 1982, a WIPO/Unesco Committee of Governmental Experts clarified that storage of works in an electronic medium is reproduction, and since then no doubt has ever emerged concerning that principle. The second sentence of the Agreed Statement simply confirms this. It is another matter that the word "storage" may still be interpreted in somewhat differing ways.

22. As far as the first sentence is concerned, it follows from it that Article 9(1) of the Convention is fully applicable. This means that the concept of reproduction under Article 9(1) of the Convention, which extends to reproduction "in any manner or form" irrespective of the duration of the reproduction, must not be restricted merely because a reproduction is in digital form through storage in an electronic memory, and just because a reproduction is of a temporary nature. At the same time, it also follows from the same first sentence that Article 9(2) of the Convention is also fully applicable, which offers an appropriate basis to introduce any justified exceptions such as the above-mentioned cases of transient and incidental reproductions in national legislation, in harmony with the "three-step test" provided for in that provision of the Convention.

b. Transmission of Works in Digital Networks; the So-called "Umbrella Solution"

23. During the preparatory work, an agreement emerged in the WIPO committees that the transmission of works on the Internet and in similar networks should be the object of an exclusive right of authorization of the author or other copyright owner; with appropriate exceptions, of course.

24. There was, however, no agreement concerning the right or rights which should actually be applied, although the rights of communication to the public and distribution were identified as the two major possibilties. It was, however, also noted that the Berne Convention does not offer full coverage for those rights; the former does not extend to certain categories of works, while explicit recognition of the latter covers only one category, namely that of cinematographic works.

25. Differences in the legal characterization of digital transmissions were partly due to the fact that such transmissions are of a complex nature, and that the various experts considered one aspect more relevant than another. There was, however, a more fundamental reason,

namely that coverage of the above-mentioned two rights differs to a great extent in national laws. It was mainly for this reason that it became evident that it would be difficult to reach consensus on a solution based on one right over the other.

26. Therefore, a specific solution was worked out and proposed; namely, that the act of digital transmission should be described in a neutral way, free from specific legal characterization, that is, which of the two "traditional" rights mentioned above covers it; that such a description should be technology-specific and, at the same time, should convey the interactive nature of digital transmissions; that, in respect of legal characterization of the exclusive right–that is, in respect of the actual choice of the right or rights to be applied–sufficient freedom should be left to national legislation; and, finally, that the gaps in the Berne Convention in the coverage of the relevant rights– the right of communication to the public and the right of distribution–should be eliminated. This solution was referred to as the "umbrella solution."

27. The WCT applies this "umbrella solution" in a specific manner. Since the countries which preferred the application of the right of communication to the public as a general option seemed to be more numerous, the Treaty extends applicability of the right of communication to the public to all categories of works, and clarifies that that right also covers transmissions in interactive systems described in a legal-characterization-free manner. This is included in Article 8 of the Treaty which reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." As a second step, however, when this provision was discussed in Main Committee I of the Diplomatic Conference, it was stated–and no Delegation opposed the statement–that Contracting Parties are free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights. By the "other" right, of course, first of all, the right of distribution was meant, but an "other" right might also be a specific new right such as the right of making available to the public as provided for in Articles 10 and 14 of the WPPT.

28. An Agreed Statement was adopted concerning the above-quoted Article 8. It reads as follows: "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)." On the basis of discussions within Main Committee I concerning this issue, it is clear that the Agreed Statement is intended to clarify the issue of liability of service and access providers in digital networks like the Internet.

29. The Agreed Statement actually states something obvious, since it is evident that, if a person engages in an act not covered by a right provided in the Convention (and in corresponding national laws), such person has no direct liability for the act covered by such a right. It is another matter, that, depending on the circumstances, he may still be liable on another basis, such as contributory or vicarious liability. Liability issues are, however, very complex; the knowledge of a large body of statutory and case law is needed in each country so that a given case may be judged. Therefore, international treaties on intellectual property

rights, understandably and rightly, do not cover such issues of liability. The WCT follows this tradition.

c. Limitations and Exceptions in the Digital Environment

30. An Agreed Statement was adopted in this respect, which reads as follows: "It is understood that the provisions of Article 10 [of the Treaty] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention."
The provisions of Article 10 of the Treaty referred to in the agreed statement are discussed below. It is obvious that extending limitations and exceptions into the digital environment, or devising new exceptions and limitations for such environment, is subject to the three-step test included in that Article.

d. Technological Measures of Protection and Rights Management Information

31. It was recognized, during the preparatory work, that it is not sufficient to provide for appropriate rights in respect of digital uses of works, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information necessary to license and monitor uses. There was agreement that the application of such measures and information should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures and information. Such provisions are included in Article 11 and 12 of the Treaty.

32. Under Article 11 of the Treaty, Contracting Parties must provide "adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

33. Article 12(1) of the Treaty obliges Contracting Parties to "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 or the Berne Convention: (i) to remove or alter any electronic rights management information without authority; (ii) to distribute, import for distribution, broadcast or communicate to the public, without authority, works or copies of works knowing that electronic rights management information has been removed or altered without authority." Article 12(2) defines "rights management information" as meaning "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public."

34. An Agreed Statement was adopted by the Diplomatic Conference concerning Article 12 of the Treaty which consists of two parts. The first part reads as follows: "It is understood that the reference to 'infringement of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration." The second part reads as follows: "It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty."

2. Other substantive provisions

a. Criteria of Eligibility for Protection; Country of Origin; National Treatment; Formality Free Protection; Possible Restriction of ("Backdoor") Protection in Respect of Works of Nationals of Certain Countries Not Party to the Treaty

35. The WCT settles the issues listed in the above-mentioned subtitle in a simple way: in Article 3, it provides for the *mutatis mutandis* application of Article 3 to 6 of the Berne Convention. (The reference to the Berne Convention also includes Articles 2 and 2*bis* of the Convention, but those provisions are not relevant in the present context; they are discussed below.)

36. In the *mutatis mutandis* application of those provisions, a number of issues may emerge; therefore, an Agreed Statement was also adopted by the Diplomatic Conference as guidance, which reads as follows: "It is understood that, in applying Article 3 of this Treaty, the expression 'country of the Union' will be read as if it were a reference to a Contracting Party to this Treaty in the application of those Berne Articles in respect of protection provided for in this Treaty. It is also understood that the expression 'country outside the Union' in those Articles in the Berne Convention will, in the same circumstances, be read as if it were a reference to a country that is not a Contracting Party to this Treaty, and that 'this Convention' in Articles 2(8), 2*bis*(2), 3, 4 and 5 of the Berne Convention will be read as if it were a reference to the Berne Convention and this Treaty. Finally, it is understood that a reference in Articles 3 to 6 of the Berne Convention to a 'national of one of the countries of the Union' will, when these Articles are applied to this Treaty, mean, in regard to an intergovernmental organization that is a Contracting Party to this Treaty, a national of one of the countries that is member of that organization."

b. Subject Matter and Scope of Protection; Computer Programs; Databases

37. The above-discussed Article 3 of the Treaty also prescribes the *mutatis mutandis* application of Articles 2 and 2*bis* of the Berne Convention. There was some hesitation at the Diplomatic Conference concerning whether a reference to those provisions is really needed, considering that Article 1(4) of the Treaty already obliges Contracting Parties to comply with Articles 1 to 21 of the Berne Convention, that is, also with Articles 2 and 2*bis* of the Convention. However, some delegations were of the view that Articles 2 and 2*bis* are similar in their nature to Articles 3 to 6 of the Convention in the sense that, they regulate a certain aspect of the scope of application of the Convention: the scope of the subject matter covered.

38. With these provisions of the Treaty, there is no doubt that the same concept of literary and artistic works, and to the same extent, is applicable under the Treaty as the concept and extent of such works under the Berne Convention.

39. The Treaty, also includes, however, some clarifications in this respect similar to those which are included in the TRIPS Agreement.

40. First, Article 2 of the Treaty clarifies that "[c]opyright protection extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such." This is virtually the same as the clarification included in Article 9.2 of the TRIPS Agreement. Nor is the principle reflected in Article 2 new in the context of the Berne Convention, since–as reflected in the records of the diplomatic conferences adopting and revising the Convention–countries party to the Convention have always understood the scope of protection under the Convention in that way.

41. Second, Articles 4 and 5 of the Treaty contain clarifications concerning the protection of computer programs as literary works and compilations of data (databases). With some changes in wording, those clarifications are similar to those included in Article 10 of the TRIPS Agreement. This is underlined by two Agreed Statements adopted by the Conference concerning the above-mentioned Articles. Those two Statements clarify that the scope of protection for computer programs under Article 4 of the Treaty and for compilations of data (databases) under Article 5 of the Treaty "is consistent with Article 2 of the Berne Convention and on par with the relevant provisions of the TRIPS Agreement."

42. The only substantive difference between Article 4 and 5 of the WCT, on the one hand, and Article 10 of the TRIPS Agreement, on the other, is that the provisions of the WCT use more general language. Article 10.1 of the TRIPS Agreement provides for the protection of computer programs "whether in source or object code," while Article 4 of the WCT does the same concerning computer programs "whatever may be the mode or form of their expression." It is understood that the scope of protection is the same under the two provisions, but the text of the WCT is less technology-specific. Similarly, Article 10.2 of the TRIPS Agreement speaks about "compilations of data or other material, whether in machine readable or other form," while Article 5 of the WCT refers, in general, to "compilations of data or other material, in any form."

c. Rights to be Protected; the Right of Distribution and the Right of Rental

43. Article 6(1) of the WCT provides an exclusive right to authorize the making available to the public of originals and copies of works through sale or other transfer of ownership, that is, an exclusive right of distribution. Under the Berne Convention, it is only in respect of cinematographic works that such a right is granted explicitly. According to certain views, such a right, surviving at least until the first sale of copies, may be deduced as an indispensable corollary to the right of reproduction, and, in some legal systems, the right of distribution is in fact recognized on this basis. Other experts are, however, of a different view and many national laws do not follow the solution based on the concept of implicit recognition of the right of distribution. Article 6(1) of the WCT should be considered, as a minimum, a useful clarification of the obligations under the Berne Convention (and also under the TRIPS Agreement which includes by reference the relevant provisions of the Convention). However, it is more justified to consider Article 6(1) as containing a Berne-*plus*-TRIPS-*plus* element.

44. Article 6(2) of the Treaty deals with the issue of the exhaustion of the right of distribution. It does not oblige Contracting States to choose national/regional exhaustion or international exhaustion–or to regulate at all the issue of exhaustion–of the right of distribution after the first sale or other first transfer of ownership of the original or a copy of the work (with the authorization of the author).

45. Article 7 of the Treaty provides an exclusive right of authorizing commercial rental to the public in respect of the same categories of works–namely, computer programs, cinematographic works, and works embodied in phonograms, as determined in the national laws of Contracting Parties as those covered by Articles 11 and 14.4 of the TRIPS Agreement, and with the same exceptions (namely, in respect of computer programs which are not themselves the essential objects of the rental; in respect of cinematographic works unless commercial rental leads to widespread copying of such works materially impairing the exclusive right of reproduction; and in the case where a Contracting Party, on April 15, 1994, had and continues to have in force a system of equitable remuneration for rental of copies of works included in phonograms, instead of an exclusive right (where that Contracting Party may maintain that system provided that commercial rental does not give rise to the material impairment of the exclusive right of authorization)).

46. An Agreed Statement was adopted by the Diplomatic Conference in respect of Articles 6 and 7 of the Treaty. It reads as follows: "As used in these Articles, the expressions 'copies' and 'original and copies,' being subject to the right of distribution and the right of rental under the said Articles, refer exclusively to fixed copies that can be put into circulation as tangible objects." The question may emerge whether this Agreed Statement conflicts with the "umbrella solution" for transmissions in interactive digital networks, and, particularly, whether or not it excludes application of the right of distribution to such transmissions. The answer to this question is obviously negative. The Agreed Statement determines only the minimum scope of application of the right of distribution; it does not create any obstacle for Contracting States to exceed that minimum.

d. Duration of Protection of Photographic Works

47. Article 9 of the WCT eliminates the unjustified discrimination against photographic works concerning the duration of protection; it obliges Contracting Parties not to apply Article 7(4) of the Berne Convention (which, as also for works of applied art, prescribes a shorter term–25 years for photographic works than the general 50 -year term).

e. Limitations and Exceptions

48. Article 10 of the Treaty contains two paragraphs. Paragraph(1) determines the types of limitations on, or exceptions to, the rights granted under the Treaty which may be applied, while paragraph (2) provides criteria for the application of limitations of, or exceptions to, the rights under the Berne Convention.

49. Both paragraphs use the three-step test included in Article 9(2) of the Berne Convention to determine the limitations and exceptions allowed (namely, exceptions or and limitations are only allowed (i) in certain special cases; (ii) provided that they do not conflict with a normal exploitation of the work: and further (iii) provided that they do not unreasonably prejudice the legitimate interests of the authors). Under Article 9(2) of the Berne Convention, this test

is applicable only to the right of reproduction, while both paragraphs of Article 10 of the Treaty cover all rights provided for by the Treaty and the Berne Convention, respectively. In that respect, the provisions of Article 10 are similar to Article 13 of the TRIPS Agreement which applies the same test for all rights provided for by the TRIPS Agreement either directly or through inclusion by reference of the substantive provisions of the Berne Convention.

f. Application in Time

50. Article 13 of the WCT refers simply to Article 18 of the Berne Convention to determine the works to which the Treaty applies at the moment of its entry into force for a given Contracting State, and provides that the provisions of that Article must be applied also to the Treaty.

g. Enforcement of Rights

51. Article 14 of the Treaty contains two paragraphs. Paragraph (1) is a *mutatis mutandis* version of Article 36(1) of the Berne Convention. It provides that "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the application of this Treaty."

52. Paragraph (2) is a *mutatis mutandis* version of the first sentence of Article 41.1 of the TRIPS Agreement. It reads as follows: "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."

IV. ADMINISTRATIVE PROVISIONS AND FINAL CLAUSES

53. Articles 15 to 25 of the WCT contain the administrative provisions and final clauses of the WCT which cover such issues as the Assembly of Contracting States, the International Bureau, eligibility for becoming party to the Treaty, signature of the Treaty, entry into force of the Treaty, effective date of becoming party to the Treaty, reservations (no reservations); denunciation of the Treaty, languages of the Treaty and depository.

54. These provisions, in general, are the same as or similar to the provisions of other WIPO treaties on the same issues. Only two specific features should be mentioned, namely the possibility of intergovernmental organizations becoming party to the Treaty and the number of instruments of ratification or accession needed for entry into force of the Treaty.

55. Article 17 of the Treaty provides for eligibility for becoming party to the Treaty. Under paragraph (1), any member State of WIPO may become party to the Treaty. Paragraph (2) provides that "[t]he 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." Paragraph (3) adds the following: "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."

56. The number of instruments of ratification or accession needed for the entry into force of the treaties administered by WIPO has been traditionally fixed quite low; five is the most frequent number. The WCT, in its Article 20, fixes this number much higher, namely at 30 instruments of ratification or accession by States.

V. CURRENT STATUS OF THE WCT

57. The WCT entered into force on March 6, 2002. Information on States that are party to this treaty can be obtained from the International Bureau of WIPO. The information is also available on WIPO's website at <http://www.wipo.int/treaties/ip/copyright/index.html>.

B. THE WIPO PERFORMANCES AND PHONOGRAMS TREATY

I. INTRODUCTION

58. The preparation of the WCT and the WPPT took place in two Committees of Experts. First, the Committee of Experts on a Possible Protocol to the Berne Convention was established in 1991, which prepared what eventually became the WCT. The original terms of reference of that Committee also included the rights of producers of phonograms. In 1992, however, those rights were carved out of the terms of reference of that Committee, and a new Committee, the Committee of Experts on a Possible Instrument for the Rights of Performers and Producers of Phonograms, was established. The said instrument was referred to during the preparatory work, in general, as the "New Instrument," and its terms of reference extended to all aspects of the protection of the rights of performers and producers of phonograms where the clarification of existing international norms or the establishment of new norms seemed desirable.

59. In respect of those rights, the existing international standards were included in the Rome Convention adopted in 1961. At the time of its adoption, the Rome Convention was recognized as a "pioneer convention," since it had established norms concerning the said two categories of rights and the rights of broadcasting organizations (jointly referred to as "neighboring rights") which, in the great majority of countries, did not yet exist.

60. In the 1970s and 1980s, however, a great number of important new technological developments took place (videotechnology, compact cassette systems facilitating "home taping," satellite broadcasting, cable television, computer-related uses, etc.). Those new developments were discussed in the Intergovernmental Committee of the Rome Convention and were also addressed in various WIPO meetings (of committees, working groups, symposiums) where the so-called "neighboring rights" were discussed.

61. As a result, guidance was offered to governments and legislators in the form of recommendations, guiding principles and model provisions.

62. At the end of the 1980s, as also in the field of copyright, it was recognized that mere guidance would no longer suffice; binding new norms were indispensable.

63. The preparation of new norms began in two forums. At WIPO, first, in the above-mentioned committees of experts and at GATT, in the framework of the Uruguay Round negotiations.

64. After the adoption of the TRIPS Agreement, the preparatory work of new copyright and neighboring rights norms in the WIPO committees was accelerated as noted above, and that led to the convocation of the WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions which took place in Geneva from December 2 to 20, 1996, and which adopted the two new treaties.

II. LEGAL NATURE OF THE WPPT AND ITS RELATIONSHIP WITH OTHER INTERNATIONAL TREATIES

65. In the early preparatory work of the WPPT–"the New Instrument"–the idea emerged that it should have the same relationship with the Rome Convention as the WCT–"the Berne Protocol"–was supposed to have with the Berne Convention; that is, it should be a special agreement under Article 22 of the Rome Convention (which determines the nature and conditions of such agreements, *mutatis mutandis*, the same way as Article 20 of the Berne Convention).

66. This idea, however, did not get sufficient support, and the relationship between the WPPT and the Rome Convention has been regulated in a way similar to the relationship between the TRIPS Agreement and the Rome Convention. This means that (i) in general, application of the substantive provisions of the Rome Convention is not an obligation of the Contracting Parties; (ii) only a few provisions of the Rome Convention are included by reference (those relating to the criteria of eligibility for protection); and (iii) Article 1(2) of the Treaty contains, *mutatis mutandis*, practically the same provision as Article 2.2 of the TRIPS Agreement, that is, that nothing in the Treaty derogates from obligations that Contracting Parties have to each other under the Rome Convention.

67. Article 1(3) of the Treaty, in respect of the relation to the other treaties, includes a provision similar to Article 1(2) of the WCT: "The Treaty shall not have any connection with, nor shall it prejudice any rights and obligations under, any other treaties."

68. The title of Article 1 of the WPPT is "Relation to Other Conventions," but paragraph (2) of the Article deals with a broader question, namely, the relationship between copyright, on the one hand, and the "neighboring rights" provided in the Treaty, on the other. This provision reproduces the text of Article 1 of the Rome Convention word by word: "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." It is well known that, in spite of the fact that, during the 1961 Diplomatic Conference adopting the Rome Convention, such attempts were resisted and this is clearly reflected in the records of the Conference, there have always been experts who tried to interpret that provision by suggesting that not only the protection but also the exercise of copyright should be left completely intact by the protection and exercise of neighboring rights; that is, if, for example, an author wishes to authorize the use of the sound recording of a performance of his work, neither the performer nor the producer of the recording should be able to prohibit that use on the basis of his neighboring rights. The Diplomatic Conference rejected this interpretation when it adopted an Agreed

Statement which reads as follows: "It is understood that Article 1(2) clarifies the relationship between rights in phonograms under this Treaty and copyright in works embodied in the phonograms. In cases where authorization is needed from both the author of a work embodied in the phonogram and a performer or producer owning rights in the phonogram, the need for the authorization of the author does not cease to exist because the authorization of the performer or producer is also required, and vice versa."

III. SUBSTANTIVE PROVISIONS OF THE WPPT

1. Provisions Relating to the So-Called "Digital Agenda"

69. The provisions of the WPPT relating to the "digital agenda" cover the following issues: certain definitions, rights applicable to storage and transmission of performances and phonograms in digital systems, limitations on and exceptions to rights in a digital environment, technological measures of protection and rights management information. As discussed below, the right of distribution may also be relevant in respect of transmissions in digital networks; its scope, however, is much broader. Therefore, and, also due to its relationship with the right of rental, the right of distribution is discussed separately below along with that right.

a. Definitions

70. The WPPT follows the structure of the Rome Convention, in the sense that it contains, in Article 2, a series of definitions. The definitions cover more or less the same terms as those which are defined in Article 3 of the Rome Convention: "performers," "phonogram," "producer of phonograms," "publication," "broadcasting;" more, in the sense that the WPPT also defines "fixation" and "communication to the public," and less, in the sense that it does not define "reproduction" and "rebroadcasting."

71. The impact of digital technology is present in the definitions, on the basis of the recognition that phonograms do not necessarily mean the fixation of sounds of a performance or other sounds any more; now they may also include fixations of (digital) representations of sounds that have never existed, but that have been directly generated by electronic means. The reference to such possible fixations appears in the definitions of "phonogram," "fixation," "producer of phonogram," "broadcasting" and "communication to the public." It should be stressed, however, that the reference to "representations of sounds" does not expand the relevant definitions as provided under existing treaties; it only reflects the desire to offer a clarification in the face of present technology.

b. Storage of Performances and Phonogramss in Digital Form in an Electronic Medium: the Scope of the Right of Reproduction

72. Although the draft of the WPPT contained certain provisions which were intended to clarify the application of the right of reproduction to storage of performances and phonogramss in digital form in an electronic medium, in the end, those provisions were not included in the text of the Treaty. The Diplomatic Conference, however, adopted an Agreed Statement which reads as follows: "The reproduction right, as set out in Articles 7 and 11 [of the WPPT], and the exceptions permitted thereunder through Article 16 [of the WPPT], fully apply in the digital environment, in particular to the use of performances and phonograms in

digital form. It is understood that the storage of a protected performance or phonogram in digital form in an electronic medium constitutes a reproduction within the meaning of these Articles."

73. As early as in June 1982, a WIPO/Unesco Committee of Governmental Experts clarified that storage of works and objects of neighboring rights in an electronic medium is reproduction, and since then no doubt has ever emerged concerning that principle. The second sentence of the agreed statement simply confirms this. It is another matter that the word "storage" may still be interpreted in somewhat differing ways.

74. As far as the first sentence is concerned, it states the obvious, namely, that the provisions of the Treaty on the rights of reproduction are fully applicable in a digital environment. The concept of reproduction must not be restricted merely because a reproduction is in digital form through storage in an electronic memory, or because a reproduction is of a temporary nature. At the same time, it also follows from the same first sentence that Article 16 of the Treaty is also fully applicable, which offers an appropriate basis to introduce any justified exceptions, such as in respect of certain transient and incidental reproductions, in national legislation, in harmony with the "three-step test" provided for in that provision of the Treaty (see below).

c. Transmission of Performances and Phonograms in Digital Networks; the So-Called "Umbrella Solution"

75. During the preparatory work, an agreement emerged in the WIPO committees that the transmission of works and objects of neighboring rights on the Internet and in similar networks should be subject to an exclusive right of authorization of the owners of rights, with appropriate exceptions, naturally.

76. There was, however, no agreement concerning the rights which might actually be applied. The right of communication to the public and the right of distribution were the two major options discussed.

77. The differences in the legal characterization of the acts of digital transmissions were partly due to the fact that such transmissions are of a complex nature, and that the various experts considered one aspect more relevant than another. There was, however, another–and more fundamental–reason, namely that the coverage of the above-mentioned two rights differs to a great extent in national laws. It was mainly for the latter reason that it became evident that it would be difficult to reach consensus on a solution which would be based on the application of one right over the other.

78. Therefore, a specific solution was worked out and proposed; namely, that the act of digital transmission should be described in a neutral way, free from specific legal characterization; that such a description should be technology-specific and, at the same time, it should express the interactive nature of digital transmissions; and that, in respect of the legal characterization of the exclusive right–that is, in respect of the actual choice of the right or rights to be applied–sufficient freedom should be left to national legislation. This solution was referred to as the "umbrella solution."

79. As far as the WPPT is concerned, the relevant provisions are Articles 10 and 14, under which performers and producers of phonograms, respectively, must enjoy "the exclusive right

of authorizing the making available to the public" of their performances fixed in phonograms and of their phonograms, respectively, "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." Taking into account the freedom of Contracting Parties to chose differing legal characterization of acts covered by certain rights provided for in the treaties, it is clear that, also in this case, Contracting Parties may implement the relevant provisions not only by applying such a specific right but also by applying some other rights such as the right of distribution or the right of communication to the public (as long as their obligations to grant an exclusive right of authorization concerning the acts described are fully respected).

80. In the case of the WCT, the relevant provisions are included in Article 8 which reads as follows: "Without prejudice to the provisions of Articles 11(1)(ii), 11*bis*(1)(i) and (ii), 11*ter*(1)(ii), 14(1)(ii) and 14*bis*(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." When this provision was discussed in Main Committee I of the Diplomatic Conference mentioned above, it was stated–and no Delegation opposed the statement–that Contracting Parties were free to implement the obligation to grant exclusive right to authorize such "making available to the public" also through the application of a right other than the right of communication to the public or through the combination of different rights. By the "other" right, of course, first of all, the right of distribution was meant. (This means that, in respect of digital transmissions, the "umbrella solution" was applied also in the case of the WCT.)

81. An Agreed Statement was adopted concerning the above-quoted Article 8 of the WCT. It reads as follows: "It is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention. It is further understood that nothing in Article 8 precludes a Contracting Party from applying Article 11*bis*(2)." On the basis of discussions in Main Committee I on this issue, it is clear that the Agreed Statement intends to clarify the issue of the liability of service and access providers in digital networks like the Internet. It is equally clear that, although this was not stated explicitly, the principle reflected in the Agreed Statement is also applicable, *mutatis mutandis*, to the above-mentioned provisions of Article 10 and 14 of the WPPT concerning "making available to the public."

82. The Agreed Statement actually states the obvious, since it has always been evident that, if a person engages in an act other than an act covered by a right provided for in the Convention (and in corresponding national laws), such person has no direct liability for the act covered by such a right. It is another matter, that, depending on the circumstances, he may still be liable on another basis, such as contributory or vicarious liability. Liability issues are, however, very complex; the knowledge of a very large body of statutory and case law is needed in each country so that a given case may be judged. Therefore, international treaties on intellectual property rights, understandably, do not cover such issues of liability. The WCT and the WPPT follow this tradition.

d. Limitations and Exceptions in the Digital Environment

83. In the case of the WCT, an Agreed Statement was adopted concerning limitations and exceptions, which reads as follows: "It is understood that the provisions of Article 10 [of the

Treaty] permit Contracting Parties to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) [of the Treaty] neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by the Berne Convention." The Diplomatic Conference stated that this Agreed Statement is applicable *mutatis mutandis* also to Article 16 of the WPPT on limitations and exceptions. That provision of the WPPT is discussed below. It is obvious that any limitations and exceptions–existing or new–in the digital environment are only applicableif they are acceptable under the "three-step test" indicated in Article 16(2) of the Treaty (see below).

e. Technological Measures of Protection and Rights Management Information

84. It was recognized, during the preparatory work, that it was not sufficient to provide appropriate rights in respect of digital uses of works and objects of neighboring rights, particularly uses on the Internet. In such an environment, no rights may be applied efficiently without the support of technological measures of protection and rights management information necessary to license and monitor uses. There was agreement that the application of such measures and information should be left to the interested rights owners, but also that appropriate legal provisions were needed to protect the use of such measures and information. Those provisions are included in Article 18 and 19 of the WPPT.

85. Under Article 18 of the Treaty, Contracting Parties must 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."

86. Article 19(1) of the Treaty obliges Contracting Parties to 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." Article 19(2) defines "rights management information" as meaning "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."

87. An Agreed Statement was adopted by the Diplomatic Conference concerning Article 12 of the WCT, which contains provisions similar to those of Article 19 of WPPT. The first part of the agreed statement reads as follows: "It is understood that the reference to 'infringement

of any right covered by this Treaty or the Berne Convention' includes both exclusive rights and rights of remuneration." The second part of the agreed statement reads as follows: "It is further understood that Contracting Parties will not rely on this Article to devise or implement rights management systems that would have the effect of imposing formalities which are not permitted under the Berne Convention or this Treaty, prohibiting the free movement of goods or impeding the enjoyment of rights under this Treaty." The Diplomatic Conference stated that the above-quoted two-part agreed statement was applicable *mutatis mutandis* also to Article 19 of the WPPT.

2. Other substantive provisions

a. Criteria for Eligibility

88. Article 3 provides for the application of the criteria under the Rome Convention (Articles 4, 5, 17 and 18).

b. National Treatment

89. Article 4 provides for the same kind of national treatment as that prescribed by Article 3.1 of the TRIPS Agreement in respect of "related" (neighboring) rights; that is, national treatment only extends to the rights granted under the Treaty.

c. Coverage of the Rights of Performers

90. The coverage of the moral right of performers extends only to live aural performances and performances fixed in phonograms, and the economic rights in the fixed performances covers only performances fixed in phonograms.

93. It is a question for interpretation whether the economic rights of performers in their unfixed performances under Article 6 extends to all performances or only to aural performances. The text of the provision may suggest a broader coverage; if, however, the definitions of "fixation" and "communication to the public" under Article 2(c) and (g) are also taken into account, it seems that a narrower interpretation is justified.

94. According to Article 2(c), "fixation" only means "the embodiment of *sounds, or the representation thereof*, from which they can be perceived, reproduced or communicated through a device" (emphasis added). Article 2(g) of the WPPT defines "communication to the public" as "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*" (emphasis added). However, Article 2(f) defines "broadcasting" as "the transmission by wireless means for public reception of *sounds or of images and sounds or of the representation thereof*" (emphasis added).

95. The wording of these definitions support the interpretation that the rights of communication to the public and fixation are limited to aural performances, whereas the right of broadcasting of unfixed performances covers both aural and audiovisual performances.

96. As far as Article 14.1 of the TRIPS Agreement is concerned, the possibility for performers of preventing fixation of their live performance and reproduction of such fixation

only extends to fixation on phonograms, whereas the possibility of preventing broadcasting and communication to the public of live performances extends to all kinds of live performances."

d. Moral Rights of Performers

97. Article 5(1) provides as follows: "Independently of a performer's economic rights, and even after the transfer of those rights, the performer shall, as regards his live aural performances or performances fixed in phonograms, 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." This provision, in its main lines, follows Article 6*bis* of the Berne Convention (on the moral rights of authors) but it requires a somewhat lower level of protection: in respect of the right to be identified as performer, the element of practicability is built in, and the scope of "the right to respect" is also narrower. Article 5(2) and (3), on the duration of protection of, and the means of redress for safeguarding, the rights, are *mutatis mutandis* versions of Article 6*bis*(2) and (3) of the Berne Convention.

e. Economic Rights of Performers

98. In addition to the "right of making available" discussed under the "digital agenda," above, and a right of distribution, discussed below, the WPPT provides for practically the same economic rights for performers–right of broadcasting and communication to the public of unfixed performances (but in Article 6(ii) it is added: "except where the performance is already a broadcast performance"), right of reproduction and right of rental (Articles 6, 7 and 9)–as the rights granted in the TRIPS Agreement (Article 14.1 and 4)–as the TRIPS Agreement. However, although the scope of the rights is practically the same, the nature of the rights (other than the right of rental) is different from the nature of such rights under the TRIPS Agreement, and under Article 7 of the Rome Convention. While the Agreement and the Convention provide for the "possibility of preventing" the acts in question, the Treaty grants exclusive rights to authorize those acts.

99. As far as the distribution right is concerned, Article 8(1) provides that performers have an 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 tansfer of ownership. Article 8(2) deals with the issue of the exhaustion of this right. It does not oblige Contracting States to choose national/regional exhaustion or international exhaustion, or to regulate at all the issue of exhaustion (after the first sale or other first transfer of ownership of the original or a copy concerned with the authorization of the owner of rights).

f. Rights of Producers of Phonograms

100. In addition to the right of "making available" discussed above under the "digital agenda" and a right of distribution, the WPPT provides the same rights for producers of phonograms–right of reproduction and right of rental (Articles 11 and 13)–as those granted under the TRIPS Agreement (Article 14.2 and 4).

101. Article 12 contains *mutatis mutandis* the same provisions concerning a right of distribution for producers of phonograms in respect of their phonograms as Article 8 does

concerning such a right for performers in respect of their performances fixed in phonograms (see above).

g. Right to Remuneration for Broadcasting and Communication to the Public

102. Article 15 provides practically the same kind of right to remuneration to performers and producers of phonograms as Article 12 of the Rome Convention (except that, while the latter leaves it to national legislation whether this right is granted to performers, to producers or to both, the former provides that this right must be granted to both, in the form of a single equitable remuneration) and with the same extent of possible reservations as under Article 16.1(a) of the Rome Convention.

103. A specific feature of Article 15 appears in paragraph (4) which provides as follows: "For the purposes of this Article, 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 shall be considered as if they had been published for commercial purposes."

104. The Diplomatic Conference adopted the following Agreed Statement concerning Article 15: "It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution." This statement is a reference to the position that, in the case of certain near-on-demand services, exclusive rights are justified.

h. Limitations and Exceptions

105. Under Article 16(1) of the WPPT, Contracting Parties may "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." This provision corresponds in substance to Article 15.2. of the Rome Convention. It is, however, an important difference that the Rome Convention, in its Article 15.1., also provides for specific limitations independent of those provided for in a given domestic law concerning copyright protection. Two of those specific limitations (use of short excerpts for reporting current events and ephemeral fixations by broadcasting organizations) are in harmony with the corresponding provisions of the Berne Convention; the third specific limitation, however, is not, since it provides for the possibility of limitations in respect of private use without any further conditions, while, in the Berne Convention, limitations for private use are also covered by the general provisions of Article 9(2) and, consequently, are subject to the "three-step test."

106. If a country adheres to both the WCT and the WPPT, which is desirable, on the basis of the above-quoted Article 16(1) of the WPPT, it is obliged to apply the "three-step test" also for any limitations and exception to the rights provided for in the WPPT. Article 16(2) of the WPPT, however, contains a provision which prescribes this directly also (and, thus, that test is applicable irrespective of whether or not a given country also adheres to the WCT); it reads as follows: "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 performance or phonogram and do not unreasonably prejudice the legitimate interests of the performer or of the producer of the phonogram."

i. Transferability of Rights

107. The question of whether or not the rights to be granted under what was first referred to as the "New Instrument" and what became then the WPPT, may be transferable was discussed several times. Finally, no provision was included into the WPPT on this issue. This, however, means that the Treaty–similarly to the Berne Convention and the WCT–does not contain any limitation on the transferability of economic rights. The transferability of economic rights is confirmed also by the introductory phrase of Article 5(1) on moral rights of performers which reads as follows: "Independently of a performer's economic rights and *even after the transfer of those rights...*" (emphasis added).

j. Term of Protection

108. Under Article 17 of the WPPT, the "term of protection to be granted to performers shall last, at least, until the end of a period of 50 years computed from the end of the year in which the performance was fixed in a phonogram." This term seems to differ from the term provided for in Article 14.5 of the TRIPS Agreement, which also refers to the year when the performance took place as an alternative starting point for the calculation of the term. In practice, however, there is no difference, since, in the case of an unfixed performance, the term of protection only has a theoretical importance.

109. The term of protection of phonograms differs also in substance from the term provided for in the TRIPS Agreement. Under Article 14.5 of the Agreement, the 50 year term is always computed from the end of the year in which the fixation was made, while under Article 17(2) of the WPPT, the term is calculated from the end of the year in which the phonogram was published, and it is only in case of absence of publication that it is calculated as under the TRIPS Agreement. Since publication normally takes place after fixation, the term under the Treaty, in general, is somewhat longer.

k. Formalities

110. Under Article 20 of the WPPT, the enjoyment and exercise of rights provided for in the Treaty must not be subject to any formality.

l. Application in Time

111. Article 22(1) of the WPPT, in general, provides for the *mutatis mutandis* application of Article 18 of the Berne Convention. Article 22(2), however, allows for Contracting Parties to limit the application of Article 5 on moral rights to performances which take place after the Treaty enters into force for them.

o. Enforcement of Rights

112. Article 20 contains two paragraphs. Paragraph (1) is a *mutatis mutandis* version of Article 36(1) of the Berne Convention. It provides that "Contracting Parties undertake to adopt, in accordance with their legal systems, the measures necessary to ensure the

application of this Treaty." Paragraph (2) is a *mutatis mutandis* version of the first sentence of Article 41.1 of the TRIPS Agreement. It reads as follows: "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."

IV. ADMINISTRATIVE PROVISIONS AND FINAL CLAUSES

113. Articles 24 to 33 of the WPPT contain administrative provisions and final clauses which cover such issues as the Assembly of Contracting States, the International Bureau, eligibility for becoming party to the Treaty, signature of the Treaty, entry into force of the Treaty, effective date of becoming party to the Treaty, denunciation of the Treaty, languages of the Treaty and depository.

114. These provisions, in general, are the same as, or similar to, the provisions of other WIPO treaties on the same issues. Only two specific features should be mentioned, namely the possibility of intergovernmental organizations becoming party to the Treaty and the number of instruments of ratification or accession needed for entry into force of the Treaty.

115. Article 26 of the Treaty provides for eligibility to become party to the Treaty. Under paragraph (1), any member State of WIPO may become party to the Treaty. Paragraph (2) provides that "[t]he 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." Paragraph (3) adds the following: "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."

116. The number of instruments of ratification or accession needed for the entry into force of the treaties administered by WIPO has been traditionally fixed quite low; five is the most frequent number. The WPPT, in its Article 29, fixes this number much higher, namely at 30 instruments of ratification or accession by States.

V. CURRENT STATUS OF THE WPPT

117. The WPPT entered into force on May 20, 2002. Information on States that are party to this treaty can be obtained from the International Bureau of WIPO. The information is also available on WIPO's website at <http://www.wipo.int/treaties/ip/wppt/index.html>.

C. CONCLUSIONS

118. As discussed above, the most important feature of the WCT and the WPPT is that it includes provisions necessary for the adaptation of international norms on the protection of

works, performances and phonograms to the situation created by the use of digital technology, particularly of global digital networks like the Internet.

119. The participation in, and the use of, the Global Information Infrastructure based on such technology and such networks is an obvious interest of all countries. The WCT and the WPPT establish the legal conditions for this.

120. For this reason, it is also a clear interest of all countries to adhere to the WCT as well as to the WPPT.

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